

2001

Louis L. Timm, John Neiuwland, and Floyd M. Childs, et al. v. T. Lamar Dewsnap and Aletha Dewsnap, et al. : Brief of Appellant

Utah Supreme Court

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Michael Z. Hayes, Todd J. Godfrey; Mauran and Hayes; Clark R. Nielson; Attorneys for Appellees. Russell A. Cline; Crippen and Cline; Attorney for Appellant.

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IN THE UTAH SUPREME COURT

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LOUIS L. TIMM, JOHN	:	
NEIUWLAND, and FLOYD M.	:	
CHILDS, et al.,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	No. 20010818
	:	
T. LAMAR DEWSNUP and ALETHA	:	Priority No. 15
DEWSNUP, et al.,	:	
	:	
Defendants.	:	
	:	

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APPELLANT BRIEF

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APPEAL FROM AN ORDER OF  
THE FOURTH JUDICIAL DISTRICT COURT  
OF MILLARD COUNTY, UTAH  
HONORABLE Judge Donald J. Eyre, Jr.  
DATE OF ORDER: September 24, 2001  
Case No. 800407191

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Michael Z. Hayes (1432)	Russell A. Cline (4298)
Todd J. Godfrey (6094)	Crippen & Cline
MUZURAN & HAYES	10 West 100 So., Suite 425
2118 E. 3900 So., Suite B-200	Salt Lake City, UT 84101
Salt Lake City, UT 84124	Telephone: (801) 539-1900
Telephone: (801) 484-6600	Attorney for Appellant
	Aletha Dewsnup

Clark R. Nielson  
576 E. South Temple Street  
Salt Lake City, UT 84102  
Telephone: (801) 531-8400

Attorneys for Appellees

**FILED**  
UTAH SUPREME COURT

JAN 25 2002

PAT BARTHOLOMEW  
CLERK OF THE COURT

IN THE UTAH SUPREME COURT

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LOUIS L. TIMM, JOHN	:	
NEIUWLAND, and FLOYD M.	:	
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PARTIES BELOW:

- A. LOUIS L. TIMM, JOHN NEIUWLAND, and FLOYD M. CHILDS,  
Trustees of the UNITED PRECISION MACHINE ENGINEERING  
COMPANY PROFIT SHARING TRUST
- B. ABCO INSURANCE AGENCY, INC., a Utah Corporation
- C. JOSEPH L. HENROID, Trustee for the ANNETTE JACOBS TRUST
- D. ALETHA DEWSNUP
- E. T. LAMAR DEWSNUP
- F. ARROW INVESTMENT CO., a limited partnership
- G. THE FEDERAL LAND BANK OF BERKELEY, IMPERIAL LAND TITLE,  
INC. as Trustee, and EUGENE L. CARSON and ELAINE CARSON  
as beneficiaries
- H. STRINGHAM, MAZURAN, LARSEN & SABIN, a professional  
corporation
- I. MINERAL FERTILIZER CO., INC.
- J. HARRY V. KAPS

The parties listed in F through J were defendants in the original complaint but are not parties to this appeal. Party E (T. LaMar Dewsnap) is now deceased.

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### JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this appeal pursuant to Article VIII, Section 3, of the Utah Constitution, Section 78-2-2(3)(j) of the Utah Code Annotated (1996), and Rules 3(a) and 4(a) of the Utah Rules of Appellate Procedure.

### ISSUES PRESERVED FOR APPEAL AND PRESENTED FOR REVIEW

The following issues have been preserved for appeal and are presented for review:

Issue #1: Did the trial court err in determining that on December 5, 1980, there was \$5,000 in costs and attorney fees due and owing on the Promissory Notes? This issue was preserved for appeal at the evidentiary hearings on attorney fees held on September 8, 2000 and November 13, 2000. (R. at 936-37.)

Issue #2: Did the trial court err in determining that on April 29, 1994, there were \$88,911.67 in costs and attorney fees secured by the Trust Deed? This issue was preserved for appeal at the evidentiary hearings on attorney fees held on September 8, 2000 and November 13, 2000. (R. at 936-37.)

Issue #3: Did the trial court err in denying Defendants' Motion for Partial Summary Judgment? This issue was preserved for appeal in Defendants' Motion for Partial Summary Judgment and

Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. (R. at 445-51, 452-68.)

Issue #4: Did the trial court err in granting Plaintiffs' Motion for Summary Judgment? This issue was preserved for appeal in Defendants' Motion for Partial Summary Judgment and Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. (R. at 445-51, 452-68.)

#### STANDARD OF REVIEW

Issue #1: A determination of whether \$5,000 in costs and attorney fees were owing on the Promissory Notes on December 5, 1980, involves a question of law, which this Court reviews for correction while affording no deference to the trial court. See Nova Cas. Co. v. Able Constr., Inc., 1999 UT 69, ¶6, 983 P.2d 575 ("Interpretation of the terms of a contract is a question of law. Thus, we accord the trial court's legal conclusions regarding the contract no deference and review them for correctness."

(Citations omitted)); see also Equitable Life & Cas. & Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah Ct. App. 1993) ("In Utah, attorney fees are awarded only if authorized by statute or contract. If provided for by contract, attorney fees are awarded in accordance with the terms of that contract." (Citations omitted)). In addition, the trial court's findings of fact as to the amount of attorney fees owed by the Dewsups will be set

aside if they are "clearly erroneous." Utah R. Civ. P. 52(a).

Issue #2: A determination of whether \$88,911.67 in costs and attorney fees were secured by the Trust Deed on April 29, 1994, involves a question of law, which this Court reviews for correction while affording no deference to the trial court. See Nova Cas. Co. v. Able Constr., Inc., 1999 UT 69, ¶6, 983 P.2d 575 ("Interpretation of the terms of a contract is a question of law. Thus, we accord the trial court's legal conclusions regarding the contract no deference and review them for correctness." (Citations omitted)); see also Equitable Life & Cas. & Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah Ct. App. 1993) ("In Utah, attorney fees are awarded only if authorized by statute or contract. If provided for by contract, attorney fees are awarded in accordance with the terms of that contract." (Citations omitted)). In addition, the trial court's findings of fact as to the amount of attorney fees secured by the Trust Deed will be set aside if they are "clearly erroneous." Utah R. Civ. P. 52(a).

Issue #3: A determination of whether the trial court erred in denying Defendants' Motion for Partial Summary Judgment involves a question of law, which this Court reviews for correction and accords no deference to the trial court's legal conclusions. See Utah R. Civ. P. 56(c); see also Utah Coal & Lumber Rest., Inc. v. Outdoor Endeavors Unlimited, 2001 UT 100,

¶9, 435 Utah Adv. Rep. 14 ("We review a trial court's summary judgment ruling for correctness and afford no deference to its legal conclusions." (Citations omitted)). Further, when reviewing a trial court's decision to grant or deny a party's motion for summary judgment, "[this Court] accept[s] the facts and inferences in the light most favorable to the [losing] party.'" SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., 2001 UT 54, ¶9, 28 P.3d 669 (quoting Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991)).

Issue #4: A determination of whether the trial court erred in granting Plaintiffs' Motion for Summary Judgment involves a question of law, which this Court reviews for correction and accords no deference to the trial court's legal conclusions. See Utah R. Civ. P. 56(c); see also Utah Coal & Lumber Rest., Inc. v. Outdoor Endeavors Unlimited, 2001 UT 100, ¶9, 435 Utah Adv. Rep. 14 ("We review a trial court's summary judgment ruling for correctness and afford no deference to its legal conclusions." (Citations omitted)). Further, when reviewing a trial court's decision to grant or deny a party's motion for summary judgment, "[this Court] accept[s] the facts and inferences in the light most favorable to the [losing] party.'" SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., 2001 UT 54, ¶9, 28 P.3d 669 (quoting Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah

1991)).

#### STATEMENT OF CASE

This case is before this Court for the fourth time. See Timm v. Dewsnap, 851 P.2d 1178 (Utah 1993) (Timm I); Timm v. Dewsnap, 921 P.2d 1381 (Utah 1996) (Timm II); Timm v. Dewsnap, 1999 UT 105, 990 P.2d 942 (Timm III).

In 1978, Defendants Aletha Dewsnap and her late husband, T. LaMar Dewsnap, (collectively, the Dewsnums), borrowed \$119,000 for a two-year period to purchase a motel. The Dewsnums executed three promissory notes (Promissory Notes) totaling \$119,000. In addition, the Dewsnums executed a trust deed and amended trust deed (collectively, the Trust Deed) in favor of Plaintiffs against the Dewsnums' 160-acre farm and 56.71 acres of land in Oak City, Utah (collectively, the Trust Deed Property).<sup>1</sup> On June 1, 1980, the balance of the debt came due and was not timely paid. By December 5, 1980, all the principal and interest due on the Promissory Notes was paid in full.

On June 7, 1980, Plaintiffs advanced \$49,966.21 on the Dewsnums' behalf under an "Assignment of Contract." The Assignment of Contract obligated the Dewsnums to reimburse

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<sup>1</sup>The Dewsnums also executed a document entitled "Assignment of Contract" assigning to Plaintiffs the Dewsnums' interest in a real estate purchase contract, and a document entitled "Security Agreement" securing the loan with certain water rights owned by the Dewsnums.

Plaintiffs for the advance. That debt, however, was not secured by the Trust Deed.

After all principal and interest due on the Promissory Notes had been paid in full, Plaintiffs continued to pursue the Dewsnums for collection of the \$49,966.21 advance. On April 29, 1994, Plaintiffs foreclosed on the Trust Deed for the \$49,966.21 (together with interest thereon in the amount of \$116,869.35), plus \$50,530.76 in attorney fees (together with interest thereon in the amount of \$5,488.30).

In Timm (III), this Court held that the \$49,966.21 debt was not secured by the Trust Deed and remanded for a determination of the costs and attorney fees due under the Promissory Notes at the time principal and interest on the Promissory Notes was paid in full (December 5, 1980) and at the time of the foreclosure sale (April 29, 1994). 1999 UT 105, ¶15, 990 P.2d 942. In so doing, this Court stated as follows:

We . . . remand this case to the trial court to determine what amount, if any, of attorney fees remained unpaid on the promissory notes when the sale was held. It was only for that amount that the foreclosure sale could have legally been held. For all amounts in excess of that amount, the sale was defective. Because any excess debt owing by Dewsnum was not secured by the trust deed property, it follows that the trial court erred in dismissing Dewsnum's counterclaim for wrongful foreclosure.

Id.

On remand, the trial court found that Plaintiffs had incurred \$5,000 in costs in attorney fees in collecting the Promissory Notes at the time the Promissory Notes were paid in full (December 5, 1980) and that \$88,911.67 in costs and attorney fees were secured by the Trust Deed at the time of the foreclosure sale (April 29, 1994). (R. at 779-84); see also Addendum A, attached hereto. After the trial court entered its findings, both the Dewsnums and Plaintiffs filed for summary judgment. (R. at 788-90; 832-48; 849-51). The Dewsnums' Motion for Summary Judgment alleged that the foreclosure sale was defective because it (1) was barred by the statute of limitations, (2) foreclosed on an unsecured debt, (3) violated the one-action rule, and (4) failed to comply with the statutory requirements for a foreclosure sale. (R. at 834-48). The trial court denied the Dewsnums' motion and granted Plaintiffs' motion. (R. at 925-27).

#### STATEMENT OF FACTS

1. On June 1, 1978, the Dewsnum executed the Promissory Notes totaling \$119,000 in favor of Plaintiffs. (R. at 465.)

2. On June 1, 1978, the Dewsnums also executed the Trust Deed to secure repayment of the Promissory Notes. The Trust Deed granted Plaintiffs a security interest in the Trust Deed



Property. (R. at 464-65.)

3. As additional security for repayment of the Promissory Notes, the Dewsnums also executed an Assignment of Contract (the "Assignment of Contract") and a Security Agreement (the "Security Agreement"). The Assignment of Contract assigned to Plaintiffs a security interest in a real estate purchase contract (the "Arrow Purchase Contract") through which the Dewsnums were purchasing additional farm land (the "Arrow Property") from Arrow Investment Company. The Security Agreement granted Plaintiffs a security interest in certain "Conk irrigation water rights." (R. at 464.)

4. On June 1, 1980, the Promissory Notes came due and the Dewsnums failed to pay off the loan at that time. (R. at 464.)

5. By June 1, 1980, the Dewsnums had also failed to pay the 1979 property taxes on the Arrow Property and had failed to make the January 2, 1980 annual installment payment on the Arrow Purchase Contract. (R. at 464.)

6. The Assignment of Contract provided that Plaintiffs could make the Dewsnums' payments under the Arrow Purchase Contract and then require the Dewsnums to reimburse Plaintiffs for those payments, to wit:

[The Dewsnums] agree that in the event they are in default [under the Arrow Purchase Contract] that [Plaintiffs] may make payments due under and pursuant to [the Arrow Purchase Contract] and will be reimbursed for the same

by [the Dewsnums].

(R. at 463-64.)

7. On June 2, 1980, Plaintiffs paid on behalf of the Dewsnums the January 2, 1980 Arrow Purchase Contract payment in the amount of \$47,880.50, and paid the delinquent 1979 property taxes owing on the Arrow Property in the amount of \$2085.71 (collectively, the "\$49,966.21 advance"). (R. at 463.)

8. On September 16, 1980, Plaintiffs filed a Complaint seeking judgment against the Dewsnums, foreclosure on the Arrow Contract (under the Assignment of Contract), and foreclosure on the Conk irrigation water rights (under the Security Agreement) to recover the principal and interest on the \$119,000 loan, the \$49,966.21 advance, and Plaintiffs' costs and attorney fees. (R. at 463.)

9. On December 3 and 5, 1980, the Dewsnums paid Plaintiffs all principal and interest due on the \$119,000 loan, but the Dewsnums neither reimbursed Plaintiffs for the \$49,966.21 advance nor for any costs and attorney fees incurred in collection of the Promissory Notes or the \$49,966.21 advance. (R. at 462-63, 598-600.)

10. On March 3, 1981, Plaintiffs filed a Motion for Summary Judgment for the \$49,966.21 advance, \$6,985 in attorney fees, and \$53.50 in costs. (R. at 462.)

11. On April 24, 1981, the trial court entered a Summary Judgment and Decree of Foreclosure (the "Judgment") awarding Plaintiffs judgment against the Dewsnums for the \$49,966.21 advance, \$6,985 in attorney fees, and \$53.50 in costs. (R. at 462.)

13. On August 29, 1988, Plaintiffs filed a Notice of Default on the Trust Deed. (R. at 461.)

14. Plaintiffs did not send a copy of the Notice of Default by certified or registered mail to the Dewsnums. (R. at 461.)

15. On or about March 24, 1994, Plaintiffs scheduled a nonjudicial trustee's sale of the Trust Deed Property for April 29, 1994. (R. at 461.)

16. Plaintiffs did not send the Dewsnums a copy of the Notice of Sale by certified or registered mail. (R. at 461.)

17. Paragraph 21 of the Trust Deed provides that "[t]he undersigned Trustor [the Dewsnums] requests a copy of any notice of default and of any notice of sale hereunder be mailed to [them]." (R. at 460-61.)

18. On March 28, 1994, the Dewsnums served their First Set of Interrogatories and Request for Document Production on Plaintiffs requesting "the entire amount [Plaintiffs] claim is due and owing under the terms of the trust deed on which [Plaintiffs] are now foreclosing." (R. at 460.)

19. In Plaintiffs' Response to Defendants' First Set of Interrogatories and Request for Production of Documents, Plaintiffs claimed that \$222,814.62 in debt "is due and owing under the terms of the trust deed":

\$166,835.56	-	The Judgment for \$49,966.21, plus \$116,869.35 in interest.
12,433.30	-	The Judgment for \$6,985 in costs and attorney fees, plus \$5,448.30 in interest.
<u>43,545.76</u>	-	Attorney fees and costs from March 1987 to April 21, 1994.
\$222,814.62		

(R. at 459); see also Addendum B, attached hereto.

20. On April 29, 1994, Plaintiffs foreclosed on the Trust Deed. (R. at 459.)

21. Of the \$222,814.62 of debt Plaintiffs claimed was secured by the Trust Deed, Plaintiffs bid and purchased the Trust Deed Property at the trustee's sale for \$115,000. (R. at 440; 459.)

22. In 1996, the Utah Supreme Court held that the \$49,966.21 advance was not secured by the Trust Deed:

An examination of the "Assignment of Contract" reveals that the Dewsnums were obligated to repay the lenders the \$49,966.21 paid under the Arrow contract. However, this debt was not secured by the trust deed . . .

Timm II, 921 P.2d 1381, 1387-88 (Utah 1996).

23. As to the award of \$6,985 in attorney fees and \$53.50 in costs, the Utah Supreme Court reversed and remanded three years later to determine "what amount, if any, of attorney fees remained unpaid on the promissory notes when the sale was held." Timm III, 1999 UT 105, ¶15, 990 P.2d 942.

24. The Promissory Notes provide for recovery of costs and attorney fees incurred in collection of principal and interest on the \$119,000 loan:

In case of default in the payment of any installment of principal or interest as herein stipulated, then it shall be optional with the legal holder of this note to declare the entire sum hereof due and payable; and proceedings may at once be instituted for the recovery of the same by law, with accrued interest and costs, including reasonable attorney's fees.

(R. at 469.)

25. The Assignment of Contracts does not contain an attorney fees clause. (R. at 222-23.) Nor does Utah law allow for attorney fees in the circumstances described herein. Accordingly, there is no contractual nor statutory basis for awarding Plaintiffs attorney fees for recovery of the \$49,966.21 advance or subsequent collection actions related thereto. See Equitable Life & Cas. & Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah Ct. App. 1993) ("In Utah, attorney fees are awarded only if authorized by statute or contract. If provided for by contract,

attorney fees are awarded in accordance with the terms of that contract." (Internal citations omitted)).

26. On September 8, 2000 and November 13, 2000, the trial court held evidentiary hearings to determine the amount of costs and attorney fees incurred in collection of principal and interest on the Promissory Notes at the time the principal and interest was paid in full (December 5, 1980) and to determine the amount of costs and attorney fees secured by the Trust Deed as of the date of the foreclosure sale (April 29, 1994). (R. at 936; 937.)

27. Plaintiffs claimed they had incurred a total of \$5,000 in costs and attorney fees related to collection of both the Promissory Notes and the \$49,966.21 advance as of December 5, 1980. (R. at 937, page 8, line 18-21.)

28. As to the \$5,000 in costs and attorneys fees claimed as of December 5, 1980, Plaintiffs did not distinguish between costs and attorney fees incurred in collection of principal and interest on the Promissory Note and costs and attorney fees incurred in collection of the \$49,966.21 advance. (R. at 937, pages 19-21.)<sup>2</sup>

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<sup>2</sup>Wendell Bennett (Plaintiffs' attorney as of December 5, 1980) testified at the November 13, 2000 hearing on attorney fees that plaintiffs had not asked him to make such an allocation and that he had not made such an allocation. (R. at 937, page 21, lines 5-8.) Although Mr. Bennett initially testified that he

29. The trial court allocated the entire \$5,000 to "costs and attorney fees expended by the Plaintiffs" "to collect the sums due under the Promissory Notes." (R. at 780.)

30. From December 5, 1980 through April 29, 1994, Plaintiffs claimed that they had incurred \$83,911.67 in costs and attorney fees in pursuing collection of the \$49,966.21 advance and other claims that plaintiffs had against the Dewsnups after December 5, 1980. (R. at 781; 936, pages 60-83; 937, pages 25-31; Exhibits 1, 2 and 6.)

31. As to the \$83,911.67 in costs and attorneys fees Plaintiffs claimed were incurred after December 5, 1980, Plaintiffs did not distinguish between costs and attorney fees incurred in collection of the \$49,966.21 advance or otherwise incurred. (R. 936, page 70, lines 12-15.)<sup>3</sup>

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didn't think he could allocate the \$5,000 in costs and attorneys fees incurred as of December 5, 1980 between those incurred in collection of the Promissory Notes and those incurred in collection of the \$49,966.21 advance, he later conceded that he "might be able to" do so. (Cf. R. at 937, page 20, line 4; R. at 937, page 21, lines 1-4.)

<sup>3</sup>Michael Hayes testified on behalf of plaintiffs, on both September 8, 2000 and November 13, 2000, regarding attorney fees and costs incurred by plaintiffs after December 5, 1980. At the September 8, 2000 hearing, Mr. Hayes testified that plaintiffs had made no allocation of the claimed \$83,911.67 in costs and attorney fees incurred after December 5, 1980 among the "various causes of action" that plaintiffs were pursuing against the Dewsnups after that date. (R. 936, page 70, lines 12-15.) On the November 18, 2000 hearing date, Mr. Hayes testified that plaintiffs still had made "no allocation on any basis." (R. 937,

32. The trial court found that the entire \$83,911.67 was secured by the Trust Deed and owed by the Dewsnums. (R. at 781.)

33. The trial court found that the amount secured by the Trust Deed at the time of April 29, 1994 trustee's sale was \$88,911.67, which equaled \$5,000 incurred prior to December 5, 1980 plus \$83,911.67 incurred between December 5, 1980 and April 29, 1994. (R. at 781.)

34. On December 20, 2000, the Dewsnums filed a Motion for Partial Summary Judgment on their claim of wrongful foreclosure, alleging that the April 29, 1994 nonjudicial trustee's sale was defective because it was (1) barred by the statute of limitations, (2) not secured by the Trust Deed, (3) barred by the one-action rule, and (4) procedurally defective because neither a notice of default nor a notice of sale had been mailed to the Dewsnums. (R. at 832-48.)

35. On February 12, 2001, Plaintiffs filed a Motion for Summary Judgment. (R. at 849-51.)

36. On September 24, 2001, the Court entered an Order granting Plaintiffs' Motion for Summary Judgment and denying the Dewsnums' Motion for Partial Summary Judgment. (R. at 925-27); see also Addendum C, attached hereto.

37. On April 24, 1992, the Dewsnums paid \$3,362.37 to

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page 27, lines 13-21.)



Plaintiffs through the United States District Court for the District of Utah. (R. at 448-49.) Plaintiffs did not give the Dewsnums credit for this payment against any costs and attorney fees that may have been owing.<sup>4</sup>

#### SUMMARY OF ARGUMENT

The trial court erred in failing to allocate the costs and attorney fees incurred by Plaintiffs. Only costs and attorney fees incurred in collecting the principal and interest due under the Promissory Notes prior to the date the principal and interest was paid in full (December 5, 1980) and costs and attorney fees incurred in conducting the trustees sale were either recoverable or secured by the Trust Deed.

The April 29, 1994 trustee's sale (1) violated the "one action" rule, as set forth under Section 78-37-1 of the Utah Code Ann., because Plaintiffs already had a judgment against the Dewsnums for the same debt foreclosed on at the trustee's sale, (2) was barred by the applicable statute of limitations, as defined under Section 78-12-23 of the Utah Code Ann., because the trustee's sale was held more than six years after the default on the Promissory Notes, and (3) foreclosed on the Trust Deed for

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<sup>4</sup> Plaintiffs' claim for \$88,911.67 in costs and attorney fees did not give the Dewsnums credit for this payment. See Paragraphs 27, 30, 32 and 33 above, and citations to the record set forth therein.

debt not secured by the Trust Deed, and (4) the trustee's sale was procedurally defective because Plaintiffs did not send the Dewsnup a copy of either the notice of default or the notice of sale as required by statute.

The trial court erred in granting Plaintiffs' Motion for Summary Judgment, thereby dismissing all of the Dewsnups' counterclaims, including wrongful foreclosure, breach of the implied covenant/duty of good faith and fair dealing, intentional and/or reckless infliction of emotional distress, failure to reconvey trust deed, and punitive damages.

#### ARGUMENT

I. THE TRIAL COURT'S AWARD OF \$5,000 IN COSTS AND ATTORNEY FEES INCURRED PRIOR TO DECEMBER 5, 1980 SHOULD BE REVERSED.

As a matter of law, Plaintiffs and the trial court should have but failed to properly allocate costs and attorney fees.

An award of attorney fees must be based on the evidence and supported by findings of fact. . . .[A] party seeking fees must allocate its fee request according to its underlying claims. . . .The trial court . . . must make an independent evaluation of the reasonableness of the requested fees in light of the parties' evidentiary submissions. . . .The trial court should also document its evaluation of the requested fees' reasonableness through findings of fact. These findings should mirror the requesting party's allocation of fees per claims and parties and should support any award issued. [Proper findings, i.e., those that mirror the

requesting party's allocation of fees] enable the reviewing court to make an independent review of the fee award, and [to determine] whether the findings are sufficient to support the award. . . .The findings of fact, furthermore, should detail the factors considered dispositive by the trial court in calculating the award.

Footte v. Clark, 962 P.2d 52, 55 (Utah 1998) (citations omitted) (emphasis added); accord Pack v. Case, 2001 UT App. 232, ¶37, 30 P.3d 436 (quoting Footte, 962 P.2d at 55). Because both Plaintiffs and the trial court failed to properly allocate costs and attorney fees, the award of attorney fees cannot stand. See Footte, 962 P.2d at 55 (reviewing trial court's findings on award of fees for correctness).

A. Plaintiffs Failed to Allocate Costs and Attorney Fees

As previously stated, "a party seeking fees must allocate its fee request according to its underlying claims." Id. at 55.

Indeed, the party must categorize the time and fees expended for "(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." Claims must also be categorized according to the various opposing parties.

Id. (internal citations omitted). Plaintiffs failed to meet this burden when they claimed they had incurred a total of \$5,000 in costs and attorney fees related to collection of both the

Promissory Notes and the \$49,966.21 advance as of December 5, 1980, but failed to allocate (or otherwise distinguish between) costs and attorney fees incurred in collection of principal and interest on the Promissory Note and costs and attorney fees incurred in collection of the \$49,966.21 advance. Accordingly, the trial court's decision to allocate the entire \$5,000 to "costs and attorney fees expended by the Plaintiffs" "to collect the sums due under the Promissory Notes" is error and cannot stand. (R. at 780); see also Addendum A, attached hereto.

B. The Trial Court Failed to Properly Allocate Costs and Attorney Fees

As previously mentioned, "[t]he trial court . . . must make an independent evaluation of the reasonableness of the requested fees in light of the parties' evidentiary submissions." Foote, 962 P.2d at 55 (citation omitted). In addition,

[t]he trial court should . . . document its evaluation of the requested fees' reasonableness through findings of fact. These findings should mirror the requesting party's allocation of fees per claims and parties and should support any award issued. [Proper findings, i.e., those that mirror the requesting party's allocation of fees] enable the reviewing court to make an independent review of the fee award, and [to determine] whether the findings are sufficient to support the award. . . . The findings of fact, furthermore, should detail the factors considered dispositive by the trial court in calculating the award.

Id. (citations omitted). The trial court's findings fail to acknowledge that Plaintiffs were attempting to collect under two separate debts -- \$119,000 owed under the Promissory Notes and \$49,966.21 owed under the Assignment of Contract.<sup>5</sup> The record provides ample evidence that some (if not most) of the costs and attorney's fees incurred by plaintiffs prior to December 5, 1980 were incurred in an attempt to recover the \$49,966.21 advance. (See, e.g., Complaint, filed September 16, 1980, setting forth a claim for recovery of the \$49,966.21 advance, R. 001.) Accordingly, the trial court's decision to allocate all \$5,000 to collection of the Promissory Notes was error as a matter of law (by failing to apply the applicable legal standard which requires allocation) as well as a "clearly erroneous" finding of fact.

II. THE TRIAL COURT'S AWARD OF \$83,911.67 IN COSTS AND ATTORNEY FEES INCURRED AFTER DECEMBER 5, 1980 SHOULD BE REVERSED.

As a matter of law, the trial court erred in concluding that the \$83,911.67 in attorney fees incurred after December 5, 1980,

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<sup>5</sup>The Assignment of Contract does not provide an attorney fees provision; therefore, Plaintiffs are not entitled to recover attorney fees incurred in collection of the \$49,966.21 debt. See Foote, 962 P.2d at 54 ("Fees provided for by contract . . . are allowed only in strict accordance with the terms of the contract." (Citations omitted)). In addition, the Assignment of Contract was not secured by the Trust Deed; thus, the trial court's conclusion that the \$5,000 in costs and attorney fees was "secured by Plaintiffs['] Trust Deed" is clear error. (R. at 783).

were secured by the Trust Deed. (See R. at 781; 783); see also Addendum A, attached hereto. In Utah, attorney fees are awardable only if authorized by statute or contract. See Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 734 (Utah 1985). "Fees provided for by contract . . . are allowed only in strict accordance with the terms of the contract." Foote, 962 P.2d at 54 (citations omitted). Further, when reviewing a contract, this Court will resolve any ambiguity against the drafter, which in this case is Plaintiffs. See Culbertson v. Bd. of County Comm'rs, 2001 UT 108, ¶15, Nos. 981279, 981659, 2001 Utah LEXIS 196, at \*¶15, \*\*13 ("constru[ing] any ambiguities in the [contract] against the prevailing parties who drafted [the contract]").

A. The Promissory Notes do not Allow for Recovery of Costs and Attorney Fees after December 5, 1980.

The Promissory Notes provide the following clause:

In case of default in the payment of any installment of principal or interest as herein stipulated, then it shall be optional with the legal holder of the note to declare the entire principal sum hereof due and payable; and proceedings may at once be instituted for recovery of the same [i.e., recovery of principal and interest] by law, with accrued interest and costs, including reasonable attorney's fees.

(R. at 469) (emphasis added). Once the Promissory Notes were paid in full on December 5, 1980, there was no contractual basis

under the Promissory Notes to recover costs and attorney's fees incurred thereafter. The Promissory Notes only allow for a recovery of costs and attorneys fees where there has been "a default" in the payment of principal and interest and only for recovery of "the same" (i.e., only for the recovery of the unpaid principal and interest.) As of December 5, 1980, there was no principal and interest to recover under the Promissory Notes, since all principal and interest had been paid in full. Accordingly, after December 5, 1980 no costs and attorney's fees could have been incurred for recovery of "the same" (i.e., for recovery of unpaid principal and interest.)

Furthermore, there was no "default" in the payment of principal and interest after December 5, 1980. A "default" is defined as "[t]he omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." Black's Law Dictionary 428 (7th ed. 1999). Because all the principal and interest due on the Promissory Notes were paid in full by December 5, 1980, the Dewsnums were no longer in "default" in the payment of principal and interest as of December 5, 1980 and could not be held liable under the Promissory Notes for costs and attorney fees incurred by plaintiffs after December 5, 1980.

Even though some costs and attorney fees were owing under the Promissory Notes which had been incurred prior to December 5, 1980 in collecting unpaid principal and interest due under the Promissory Notes, the Promissory Notes do not allow for recovery of any attorney fees that may have been incurred in collection of those attorney fees. Once all principal and interest on the Promissory Notes was paid in full on December 5, 1980, there was no further contractual basis under the Promissory Notes for Plaintiffs to recover any costs and attorney fees thereafter incurred by plaintiffs for any reason. See Softsolutions, Inc. v. Brigham Young Univ., 2000 UT 46, ¶41, 1 P.3d 1095 ("If a contract provides for attorney fees, the award 'is allowed only in accordance with the terms of the contract.'" (Citation omitted)).

B. The Trust Deeds Provide only for Recovery of Costs Associated with Conducting the Nonjudicial Trustee's Sale

If the August 29, 1994 nonjudicial trustee's sale was not void (for the reasons hereafter discussed), the Dewsnums acknowledge that Plaintiffs are entitled to recover costs and attorney fees incurred in conducting the August 29, 1994 nonjudicial trustee's sale under Paragraph 16 of the Trust Deed:

Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and



payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

(R. at 116); see also Addendum D, attached hereto. However, no other costs and attorney fees incurred after December 5, 1980 could have been either recoverable or secured by the Trust Deed.

C. Costs and Attorney Fees are not Recoverable for Collecting the \$49,966.21 Advance

After the Promissory Notes were paid in full in December 1980, no costs and attorney fees could have been incurred in collection of the Promissory Notes. See Section II (A). The \$83,911.67 in costs and attorney fees incurred between March, 1987 and April 29, 1994 therefore had to be incurred in collecting the \$49,966.21 due under the Assignment of Contract, or the costs and attorney fees incurred in collecting the costs and attorney fees incurred in collecting the Promissory Notes and the \$49,966.21 advance incurred prior to December 5, 1980.<sup>6</sup> Attorney fees incurred in collecting the \$49,966.21 due under the Assignment of Contract are irrelevant because that debt was not

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<sup>6</sup>As previously indicated, both Plaintiffs and the trial court failed to make a proper allocation of costs and attorney fees incurred in connection with this case. See Section I (A) and (B) of this brief.

secured by the Trust Deed. See Timm II, 921 P.2d at 1388 (stating that "the Dewsnums were obligated to repay [Plaintiffs] the \$49,966.21 . . . . However, this debt was not secured by the trust deed") In addition, the Assignment of Contract had no attorney fees provision; thus, there is no contractual basis for recovery of the costs and attorney fees related to the \$49,966.21 advance. See Golden Key Realty, Inc, 699 P.2d at 734. Accordingly, the trial court's finding that the Dewsnums were responsible for \$83,911.67 in costs and attorney fees incurred after December 5, 1980 and that such amount was secured by the Trust Deed should be set aside. (R. at 781); see also Addendum A, attached hereto; Utah R. Civ. P. 52(a).

D. Plaintiffs Failed to Allocate Costs and Attorney Fees.

As previously discussed in connection with costs and attorney fees due prior to December 5, 1980 (Section I(A)), "a party seeking fees must allocate its fee request according to its underlying claims." See Foote, 962 P.2d at 55. Plaintiffs' also failed to meet this burden in connection with the \$83,911.67 in costs and attorney fees incurred after December 5, 1980, by failing to allocate (or otherwise distinguish between) costs and attorney fees that were recoverable under Paragraph 16 of the Trust Deed and all other costs and attorneys fees that were not

recoverable.

E. The Trial Court Failed to Properly Allocate Costs and Attorney Fees.

As also previously discussed in connection with costs and attorney fees due prior to December 5, 1980 (Section I(B)), "[t]he trial court . . . must make an independent evaluation of the reasonableness of the requested fees in light of the parties' evidentiary submissions." Footte, 962 P.2d at 55 (citation omitted). The trial court also failed to meet this burden in connection with the \$83,911.67 in costs and attorney fees incurred after December 5, 1980, by failing to allocate (or otherwise distinguish between) costs and attorney fees that were recoverable under Paragraph 16 of the Trust Deed and all other costs and attorneys fees that were not recoverable.

F. Plaintiffs are Estopped from Claiming Additional Costs and Attorney Fees.

As a matter of equity, Plaintiffs are estopped from claiming additional costs and attorney fees associated with the foreclosure sale. Equitable estoppel is applicable when the following three elements are present:

(I) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that

would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶34, 989 P.2d 1077 (citation omitted). "The doctrine of equitable estoppel is based upon fundamental notions of justice and fair dealing." Smotherman v. Columbus Hotel Co., 741 So.2d 259, 265 (internal quotations and citation omitted). Because all three elements are satisfied in the present case, the doctrine of equitable estoppel prevents Plaintiffs from claiming additional costs and attorney fees.

i. Plaintiffs made inconsistent statements

In 1994, at the time of the foreclosure sale, Plaintiffs claimed that the debt for which the Trust Deed was foreclosed included \$6,985 in costs and attorney fees awarded under the judgment, plus interest, and \$43,545.76 in costs and attorney fees incurred between March 1987 and April 21, 1994. (See R. at 425); see also Addendum B, attached hereto, at 2. Six years later, however, at evidentiary hearings held in September and November 2000, Plaintiffs' figure jumped from \$50,530.76 (\$6,985 plus \$43,545.76) to \$88,911.67. (See R. at 936:30.) Plaintiffs' inconsistent statements satisfy the first element under Nunley.

ii. The Dewsnums acted reasonably after Plaintiffs' initial statement

Under Sections 57-1-31 and 57-1-40 of the Utah Code Ann., the Dewsnums are entitled to rely on a representation as to the payoff at the time of the foreclosure sale. See Utah Code Ann. § 57-1-31(1) (Supp. 2001) (allowing debtor to "cure the existing default" by "pay[ing] . . . the beneficiary . . . the entire amount then due under the terms of [the] trust deed"); see id. § 57-1-40(1)(a) (2000) (allowing reconveyance of the trust deed if "obligation secured by the trust deed . . . has been fully paid"). Under these circumstances, the Dewsnums' actions are reasonable, and therefore the second element under Nunley is satisfied.

iii. Allowing Plaintiffs to repudiate their initial statement will injure the Dewsnums

If this Court allows Plaintiffs to repudiate their initial statement, the Dewsnums will be injured in the amount of \$38,380.91, which equals the difference between \$50,530.76 and \$88,911.67. Accordingly, all three elements of equitable estoppel are met, and therefore Plaintiffs should not be allowed to claim additional costs and attorney fees.

G. Failure to Give Credit for \$3,362.37 Payment.

On April 24, 1992, the Dewsnums paid \$3,362.37 to plaintiffs. It is undisputed that Plaintiffs did not give the

Dewsnups credit for this payment against the costs and attorney fees claimed due. (See Paragraph 30, Statement of Facts.) It is the Dewsnups' position that this payment would have more that covered the portion of the \$5,000 in costs and attorney fees allocable to collection of the Promissory Notes and the Trust Deed should have been released at that time.

III. THE TRIAL COURT ERRED IN DENYING THE DEWSNUPS' MOTION FOR PARTIAL SUMMARY JUDGMENT

As a matter of law, the trial court erred in denying the Dewsnups' Motion for Partial Summary Judgment. Summary judgment is appropriate when there are no disputes as to any material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). The Dewsnups' Motion for Partial Summary Judgment should have been granted because there are no disputes as to any material facts and the Dewsnups were entitled to judgment as a matter of law.

A. The Dewsnups Are Entitled to Summary Judgment Because the Nonjudicial Foreclosure Sale Violated the "One-Action" Rule

Under Section 78-37-1 of the Utah Code Ann., Plaintiffs can bring only "one action" for the recovery of debt secured by a mortgage on real property. Utah Code Ann. § 78-37-1 (1996). More specifically, Section 78-1-37 provides that "[t]here can be but one action for the recovery of any debt or the enforcement of

any right secured solely by mortgage upon real estate . . . ."

Id. This Court has long recognized that the one-action rule requires that "[a] creditor must foreclose and have a deficiency determined by the court before proceeding against the debtor personally." City Consumer Servs., Inc. v. Peters, 815 P.2d 234, 235 (Utah 1991) (citation omitted). Further, "[t]he [one-action] rule obviously applies to a creditor whose loan is in default to bar it from suing the debtor personally on the note until it first forecloses against the real property." Id. at 236. When a secured creditor sues on an underlying debt without first foreclosing on the trust deed, the creditor makes an election of remedies, electing the single action of the judicial proceeding, and thereby waives its right to sell the security under a power of sale. As stated in Walker v. Community Bank, 518 P.2d 329 (Cal. 1974),

since . . . "[there] can be but one form of action for the recovery of any debt" secured by a mortgage or deed of trust on real property, where the creditor sues on the obligation . . . against the debtor without seeking therein foreclosure of such mortgage or trust deed, he [or she] makes an election of remedies, electing the single remedy of a personal action, and thereby waives his [or her] right to foreclose on the security or to sell the security under a power of sale.

Id. at 331 (first alteration in original) (citations omitted);

see also City Consumer Servs., Inc., 815 P.2d at 236 (noting that

California's one-action rule "is virtually identical to Utah's one-action rule").

Plaintiffs violated the "one-action" rule when they conducted the nonjudicial foreclosure sale after having had already sued the Dewsnums on the underlying debt. Plaintiffs filed a Complaint and obtained a judgment against the Dewsnums personally without first foreclosing on the Trust Deed. The resulting Summary Judgment and Foreclosure Decree granted Plaintiffs a judgment against the Dewsnums personally for the \$49,966.21 advance, together with interest thereon, \$6,985 for attorney fees and \$33.50 in costs:

[T]here is now due and owing to the plaintiffs from the [the Dewsnums], the principal sum of \$47,880.50, which is accruing interest at the rate of \$23.61 per day from and after June 2, 1980, and the principal sum of \$2,085.71, which is accruing interest at the rate of \$1.02 per day from and after June 7, 1980, which accrual of interest shall continue until paid, together with \$53.50 for court costs, and \$6,985.00 for the costs of collection, including attorney's fees, and plaintiffs are granted judgment against the . . . Dewsnum[s] in said amount.

(R. at 426.) As stated herein, however, once Plaintiffs made their "election of remedies" to collect the debt judicially, Plaintiffs waived their right, under the "one-action" rule, to non-judicially foreclose on the Trust Deed for the same debt.



Walker, 518 P.2d at 331. Nevertheless, the trial court allowed Plaintiffs to foreclose on the Trust Deed under a nonjudicial power of sale for the same debt for which Plaintiffs had obtained the earlier judgment against the Dewsnums, i.e., the \$49,966.21 advance, \$6,985 in attorney fees, \$53.50 in costs and post-judgment interest.<sup>7</sup> Accordingly, the nonjudicial foreclosure sale violated the "one-action" rule, and therefore the nonjudicial foreclosure sale is void as a matter of law.

B. The Dewsnums Are Entitled to Summary Judgment Because the Nonjudicial Foreclosure Sale was Barred by the Statute of Limitations

Under Section 57-1-34 of the Utah Code Ann., "[t]he trustee's sale of property under a trust deed shall be made . . . within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed." Utah Code Ann. § 57-1-34 (2000) (emphasis added). In the present case, the "the obligation secured by the trust deed" is the Promissory Notes. Id. In Utah, the statutory period for bringing a claim under a promissory note is six years. See id. § 78-12-23(2) (1996) ("An action may be brought within six years . . . upon any

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<sup>7</sup>In addition to foreclosing on the Dewsnums' property for the \$49,966.21 advance, \$6,985 in attorney fees, \$53.50 in costs and post-judgment interest, Plaintiffs also foreclosed on the Trust Deed for \$43,545.76 in attorney fees and costs incurred by Plaintiffs from March, 1987 to April 21, 1994. The Judgment did not award Plaintiffs post judgment attorney fees.

contract, obligation, or liability founded upon an instrument in writing"). Because Plaintiffs brought their claim under the Promissory Notes after six years, the nonjudicial foreclosure sale was barred by the statute of limitations, and therefore the resulting judgment is void as a matter of law.

Nevertheless, the trial court denied the Dewsups' Motion for Partial Summary Judgment on this issue, relying on 11 U.S.C. § 362(a)<sup>8</sup> and Utah Code Ann. § 78-12-41,<sup>9</sup> and found that the Dewsups' bankruptcy tolled the running of the statute of limitations. (See R. at 916-17.) In so doing, the trial court ignored the fact that Plaintiffs filed a Notice of Default on August 29, 1988, during the same time Plaintiffs now claim the statute of limitations was tolled because 11 U.S.C. § 362(a) stayed Plaintiffs from "the commencement . . . of a[n] . . . action or proceeding against the [Dewsups] . . . ." 11 U.S.C.A. § 362(a)(1) (1993).

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<sup>8</sup>Title 11, Section 362(a), of the United States Code states that "a petition filed . . . operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under th[e] [Bankruptcy Code]." 11 U.S.C.A. § 362(a)(1) (1993).

<sup>9</sup>Section 78-12-41 of the Utah Code Ann. provides: "When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." Utah Code Ann. § 78-12-41 (1996).

Plaintiffs are estopped from applying 11 U.S.C. 362(a) when it is convenient for them. Cf. Strichting Mayflower Mountain Fonds v. Jordanelle Special Serv. Dist., 2001 UT App. 257, ¶25, 429 Utah Adv. Rep. 28 (Thorne, J., dissenting) ("Th[e] doctrine [of judicial estoppel] prevents parties from "playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation." Further, judicial estoppel 'seeks to prevent a litigant from asserting a position [that is] inconsistent, conflicts with, or is contrary to one that [he or] she has previously asserted in the same or in a previous proceeding.'" (Citations omitted) (third and fourth alterations in original)). If 11 U.S.C. 362(a) tolls the statute of limitations on the trustee's sale as Plaintiffs now claims, then the August 29, 1988 Notice of Default is void because it was recorded in violation of the automatic stay.

In short, Plaintiffs cannot have it both ways. If the Notice of Default was not recorded in violation of the automatic stay, then the automatic stay did not toll the statute of limitations beyond August 29, 1988. The trustee's sale was held on April 29, 1994 (5 years and 8 months after the Notice of Default was recorded). The statute of limitations on the Promissory Notes began to run on June 1, 1980, and as of April 16, 1981, the date the trial court entered its Summary Judgment,

the running of the statute of limitations was not tolled by the Dewsnums' bankruptcy. The period of time between August 29, 1988 and April 29, 1994, together with the time between June 1, 1980 and April 16, 1981, exceeds the six-year statute of limitations. Accordingly, the trial court erred in concluding that the trustee's sale was not barred by the statute of limitations.

In fact, the bankruptcy court's opinion in the Dewsnums' adversary action filed in 1987 is consistent with the Dewsnums' position that the Trust Deed property was abandoned and therefore was no longer subject to the automatic stay:

There is no evidence before the Court as to whether this real property has been abandoned to the debtors or whether the trustee intends to do so. However, this adversary proceeding only states a cause of action if the property is abandoned. [The Dewsnums'] request can only make analytical sense in conjunction with an abandonment from the trustee, either pursuant to Section 554(a) or (b) upon the filing and granting of an appropriate motion for abandonment), or as a result of the operation of Section 554 ( c) (deeming property "not otherwise administered" to be abandoned at the time of the closing of the case). . . . Therefore, for the purpose of this opinion, the Court will assume that the real property has been or will be abandoned to the debtors.

Memorandum Opinion, issued June 15, 1988, Judge Glen E. Clark, Adversary Proceeding No. 87PC-0116; In re: LaMar Dewsnum and Aletha Dewsnum, Bankruptcy No. 84C-01746, footnote 1. (R. 21.) See R. at 21.) As set forth therein, the Bankruptcy Court found that "this adversary proceeding only states a cause of action if

the property is abandoned" (and therefore no longer subject to the automatic bankruptcy stay). On August 29, 1988, 2½ months after that opinion had been issued, Plaintiffs filed a Notice of Default against the Property. Plaintiffs clearly understood from that opinion that the Bankruptcy Court deemed the Property "abandoned" and the automatic bankruptcy stay was no longer in effect.

C. The Dewsnums Are Entitled to Summary Judgment Because the Foreclosed Debt was Not Secured by the Trust Deed

In Utah, a creditor can only foreclose on a secured debt. See, e.g., Timm II, 921 P.2d at 1388 (stating that creditor cannot collect on an unsecured debt).; Timm III, 1999 UT 105, ¶13 ("[A] 'trust property may be sold . . . after a breach of an obligation for which the trust property is conveyed as security.' It cannot be sold for other amounts." (Citation omitted)); see also Utah Code Ann. § 57-1-23 (Supp. 2001). According to Plaintiffs' answers to interrogatories, the Trust Deed secured \$222,814.62 in debt, which is broken down as follows:

\$166,835.56	--	for the \$49,966.21 advance plus \$116,869.35 in post-judgment interest thereon
\$ 43,545.30	--	in costs and attorney fees incurred between March 1987 and April 21, 1994
\$ 12,433.30	--	for \$6,985 in costs and attorney fees awarded under the judgment, plus \$5,448.30 in post-judgment interest
<hr/>		
\$222,814.62		

(See R. at 425.) On April 29, 1994, Plaintiffs held a trustee's sale on the Trust Deed property and purchased the property by bidding \$115,000 of the \$222,814.62 in debt Plaintiffs claimed was secured by the Trust Deed. (See R. at 440.) The Trustee's Deed, which conveyed the Trust Deed property to Plaintiffs, states that the trustee sold the property to Plaintiffs for "\$115,000.00 . . . in partial satisfaction of the indebtedness then secured by the Deed of Trust." (R. at 440).

However, the only debt that was secured by the Trust Deed was that portion of the \$5,000 in costs and attorney fees incurred as of December 5, 1980 that was allocable to collection of the Promissory Notes and the costs and attorney fees incurred in connection with the trustee's sale. The Dewsnums had the right to obtain a reconveyance of the Trust Deed upon payment of that amount. See Utah Code Ann. § 57-1-31(1) (Supp. 2001); see also 57-1-40(1)(a) (2000). Nevertheless, Plaintiffs represented to the Dewsnums that \$222,814.62 in debt was secured by the Trust Deed, (see R. at 425), and then Plaintiffs purchased the Trust Deed property at the trustee's sale by bidding \$115,000 of the \$222,814.62 debt allegedly owed. (See R. at 440).

The trial court concluded that because an earlier summary judgment entered in Plaintiffs' favor, (in which Plaintiffs

erroneously asserted that the \$49,966.21 debt was secured by the Trust Deed), had not been overturned by this Court when the April 29, 1994 trustee's sale was held, "Plaintiffs were acting under a valid summary judgment" at the time they conducted the trustee's sale. (R. at 917). In light of this Court's decision in Timm III, the trial court's ruling is clear error and should be reversed.

Where the issue of whether a debt is secured by a trust deed is being litigated, the creditor holds a foreclosure sale on that debt at its own risk. The Utah Supreme Court acknowledged this point in its previous rulings in this case:

The lenders were on notice that [Mrs.] Dewsnap contested the amount, secured by the trust deed, that they claimed she owed. Before that issue was resolved, the lender proceeded with the foreclosure sale for the full amount claimed by them which amount we found to be excessive in Timm II. While [Mrs.] Dewsnap's failure to stay the sale may prevent her from recovering the property if it was sold to a bonafide purchaser, see Timm II, she may pursue her claim for damages. See Richards v. Baum, 914 P.2d 719 (Utah 1996).

We must therefore again remand this case to the trial court to determine what amount, if any, of attorneys fees remained unpaid on the promissory notes when the sale was held. It was only for that amount that the foreclosure sale could have legally been held. For all amounts in excess of that amount, the sale was defective.

Timm III, 1999 UT 105, ¶¶14-15 (emphasis added). Accordingly,

Plaintiffs may not "hide behind" a judgment that has since been reversed.

The trial court also concluded that under Utah Code Ann., Section 57-1-29, the trustee was allowed to hold a foreclosure sale and to credit bid unsecured debt held by the beneficiary of the Trust Deed which was being foreclosed. Specifically, the trial court stated:

Utah Code allows a trustee to apply the proceeds of a sale to those legally entitled to the proceeds. Defendants owed \$88,911.67 in attorneys fees. The plaintiffs bid in \$115,000 of the debt. After applying this to the \$88,911.67 the excess proceeds were applied to the \$49,966.21 judgment lien on the Arrow Contract.

(R. at 919). The trial court, however, failed to recognize that at the time of the foreclosure sale, Plaintiffs did not "apply" the difference between \$88,911.67 and \$115,000 to the unsecured debt. In fact, according to the Trustee's Deed, Plaintiffs purchased the Trust Deed property at the foreclosure sale for "\$115,000.00 . . . in partial satisfaction of the indebtedness then secured by the Deed of Trust." (R. at 440.) As previously discussed, this Court has already determined that the \$49,966.21 debt was not secured by the Trust Deed. See Timm II, 921 P.2d at 1388 (stating that "the \$49,966.21 . . . debt was not secured by the trust deed").



Furthermore, to allow a creditor to foreclose on property and to credit bid unsecured debt at the foreclosure sale as part of the purchase price is just like allowing the creditor to foreclose on the property for unsecured debt. Under Utah law, a trust deed cannot be foreclosed for a debt that is not secured by the trust deed. See Utah Code Ann. § 57-1-23 (Supp. 2001); see also Timm III, 1999 UT 105, ¶13, 990 P.2d 942 (“[A trust property] cannot be sold for other amounts.”). This Court recognized this principle in First Security Bank of Utah v. Shiew, 609 P.2d 952 (Utah 1980), stating that “to attempt to foreclose . . . on the mortgager’s home for debts incurred in operating a business and which debts are not specifically covered by the mortgage would be unconscionable and contrary to public policy.” Id. at 955-56 (internal quotations omitted).

D. The Dewsnums Are Entitled to Summary Judgment Because Plaintiffs Failed to Mail the Dewsnums a Notice of Default or a Notice of Sale

Under Section 57-1-26 of the Utah Code, Plaintiffs are required to mail both a notice of default and a notice of sale to any person requesting such notices. Specifically, Section 57-1-26 states<sup>10</sup>:

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<sup>10</sup>The Dewsnums cite to the most recent version of Section 57-1-26, which does not differ materially from the versions which were in place at the time of the default and trustee’s sale. Compare Utah Code Ann. § 57-1-26(2) (Supp. 2001), with id. § 57-1-26(2) (Supp. 1981), and id. § 57-1-26(2) (1994).

Not later than ten days after recordation of a notice of default, the trustee or beneficiary shall mail, by certified or registered mail, with postage prepaid, a copy of the notice of default with the recording date shown, addressed to each person whose name and address are set forth in a request that has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request. At least 20 days before the date of sale, the trustee shall mail, by certified or registered mail, return receipt requested with postage prepaid, a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request that has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request.

Utah Code Ann. § 57-1-26(2) (Supp. 2001). The Dewsnups requested through the Trust Deed that both the notice of default and the notice of sale be mailed to them as trustor. See Addendum D at ¶21 (stating that "[t]he undersigned Trustor requests that a copy of any notice and default and . . . any notice of sale hereunder be mailed to him [or her]") Plaintiffs, however, failed to send the Dewsnups a copy of either the notice of default or the notice of sale, and thereby failed to comply with the statutory requirements of conducting a trustee's sale. As such, the foreclosure sale is defective and therefore should be set aside as a matter of law.

The trial court, nevertheless, concluded that Plaintiffs' failure to provide the Dewsnups with statutory notice of default

and sale was "[im]material" to its decision to deny the Dewsnums' Motion for Partial Summary Judgment. (R. at 921.) Further, the trial court concluded that because the Dewsnums had "actual notice" of the foreclosure sale,<sup>11</sup> Plaintiffs were relieved of their statutory duty to mail both the notice of default and the notice of sale to the Dewsnums under Section 57-1-26. (R. at 921-22.) In so doing, the trial court relied on Concepts, Inc. v. First Security Realty Services, Inc., 743 P.2d 1158 (Utah 1987) (per curiam), which is inapposite because the debtors therein were served with a notice of sale, albeit technically flawed, and a notice of default was posted on the property to be sold, see id. at 1159; whereas the debtors in the present case (the Dewsnums) received neither a notice of default nor a notice of sale. Accordingly, the sale should be set aside to avoid the "unjust extremes" of the Dewsnums not being notified of the default and sale. Id. at 1159, 1160.

In addition, the sale should be set aside because the trial court's ruling renders the debtors' statutory rights in foreclosure a dead letter. A notice of default is intended to give the debtor 90 days to cure the default before a sale is

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<sup>11</sup>Although the trial court's memorandum decision is not entirely clear, the trial court apparently believed that because the Dewsnums became aware of the foreclosure sale through the newspaper, Plaintiffs were relieved of their statutory duty under Section 57-1-26(2).

scheduled. See Utah Code Ann. § 57-1-31(1) (Supp. 2001) (stating that debtor may "cure the existing default" by tendering the amount due "within three months of the filing for record of notice of default"). In this case, because the notice of default was not sent to the Dewsnums, they did not have the opportunity to "cure the existing default." Id. Further, because the Dewsnums did not receive notice of default, they were not able to have their Motion to Stay decided before the foreclosure sale was held. As such, if the property has been sold to a bonafide purchaser, the Dewsnums have lost their right to recover the property. Similarly, the Dewsnums did not have 90 days to challenge Plaintiffs' allegation as to attorney fees and other debt alleged to be secured by the Trust Deed. By having to wait to read about the foreclosure sale in the newspaper, the Dewsnums were deprived of the time to adequately protect their interests. Accordingly, for the reasons stated herein, the foreclosure sale was defective, and therefore it should be set aside.

E. Measure of Damages.

In her Motion for Partial Summary Judgment, Mrs. Dewsnums had requested damages for wrongful foreclosure in the amount of \$115,000 (the amount plaintiffs' bid for the Property at the foreclosure sale), together with pre-judgment interest at the statutory rate set forth in Section 15-1-1(2) (10% per annum)

since the date of the foreclosure sale (April 29, 1994.) Accordingly, this Court should reverse the trial courts' denial of Mrs. Dewsnums' Motion for Partial Summary Judgment, with directions to enter judgment in Mrs. Dewsnum's favor in the amount set forth above.

IV. TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Because issues of material fact were in dispute, the trial court should not have granted Plaintiffs' Motion for Summary Judgment. Summary judgment should be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56<sup>o</sup> (emphasis added). "The presence of a dispute as to material facts disallows the granting of a summary judgment" in the present case, and therefore the trial court's decision to grant Plaintiffs' Motion for Summary Judgment should be reversed. Bill Brown Realty, Inc. v. Abbott, 562 P.2d 238, 239 (Utah 1977).

The primary issue of disputed fact in the present case involves Plaintiffs' failure to reconvey the Trust Deed Property in a timely manner after the Dewsnums made numerous attempts to resolve the issue of any remaining costs and attorney fees that may have been due under the Promissory Notes. In fact, from the time the principal and interest on the Promissory Notes secured by the Trust Deed were paid in full in December 1980 until the

trustee's sale occurred on April 29, 1994, Plaintiffs have continually and erroneously asserted that the \$49,966.21 advance and the corresponding attorney fees must first be paid before Plaintiffs would reconvey the Trust Deed Property to the Dewsnums.<sup>12</sup> As the following paragraphs explain, Plaintiffs' actions constitute unfair business practices, and the Dewsnums, at the very least, should be allowed to pursue their claim against Plaintiffs for breach of the implied covenant of good faith and fair dealing.

At the evidentiary hearing, Wendall Bennett (Plaintiffs' lawyer at the time the principal and interest on the Promissory Notes were paid in full on December 5, 1980) freely admitted that even though Mr. Fillerup, the Dewsnums' attorney at the time, wanted that trust deed released after all principal and interest has been paid, he would not release the trust deed until all attorney fees had been paid and until the \$49,966.21 unsecured debt was paid:

A: I wasn't dividing them out, because as I recall, Mr. Fillerup wanted us to give him a release of the mortgages and I declined to do that, because my view on this thing was it was all tied into one bundle, and I wasn't going to allocate it out, and I would protect my client's

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<sup>12</sup>As explained in this brief, Plaintiffs' attempt to tie the \$49,966.21 advance and the corresponding attorney fees to Plaintiffs' failure to reconvey the Trust Deed Property to the Dewsnums is flawed as a matter of law.

interest in getting this thing paid. It was secured by all of that property.

. . . .

Q: So it was your position that the [\$49,966.21 debt] was secured by all of that property and you weren't going to release that [Trust Deed] until the [\$49,966.21 debt] had been paid?

A: That's correct.

(R. at 937:17, 19) (emphasis added).

Despite Plaintiffs' flawed attempt to tie an unsecured debt with no attorney fees provision to its decision not to reconvey the Trust Deed Property to the Dewsnums, the Dewsnums have been trying to obtain a release on the Trust Deed Property since December 5, 1980. The most notable attempts made by the Dewsnums are as follows:

10. On or about November 28, 1984, the Department of Agriculture approved a loan to the Dewsnums in the amount of \$40,000 to try to get the trust deed reconveyed.  
. . . [P]laintiffs rejected [the Dewsnums' offer].

11. On or about August 26, 1988, Associated Credit Union approved a loan for \$10,000[.] [T]his and other moneys were used to . . . try to get the trust deed reconveyed.  
. . . [P]laintiffs rejected [the Dewsnums' offer].

12. On April 24, 1992, \$3,362.37 was paid by Aletha Dewsnum to plaintiffs through the United States District Court. Plaintiffs still refused to release the trust deed.

(R. at 448-49.) Plaintiffs have also refused to credit the Dewsnums' \$3,362.37 payment against the amount owed at the April 29, 1994 trustee's sale. Similarly, when the trustee's sale was scheduled for April 29, 1994, the Dewsnums' attorney requested a payoff of the amount required to recover the debt under the Trust Deed, together with the entire unsecured debt of \$49,966.21 and all corresponding costs and attorney fees.

In short, Plaintiffs have refused to accept money or otherwise negotiate release of the Trust Deed, but instead have held the Trust Deed Property hostage as leverage to force the Dewsnums to pay an unsecured debt, i.e., the \$49,966.21 advance. A creditor who holds a trust deed property hostage as leverage to force payment of an unsecured debt does not act in "good faith by any reckoning." Hector, Inc. v. United Savs. & Loan Ass'n, 741 P.2d 542, 545 (Utah 1987). Further, when one contracting party withholds performance under a contract in order to compel another contracting party to act under a different contract, he or she "can hardly insist that he [or she] acted in good faith." Swaner v. Union Mortgage Co., 99 Utah 298, 105 P.2d 342, 346 (1940). Accordingly, the trial court erred in granting Plaintiffs' Motion for Summary Judgment, which thereby prevented the Dewsnums from pursuing their claim against Plaintiffs for breach of the implied covenant of good faith and fair dealing.



#### V. COSTS ON APPEAL

Under Rule 34 of the Utah Rules of Appellate Procedure, the Dewsnums respectfully request costs incurred in this appeal. See Utah R. App. P. 34(a) (allowing appellant costs if judgment or order is reversed, or if judgment or order is affirmed, reversed in part, or vacated).

#### VI. CONCLUSION

As a matter of law, the trial court's findings of fact and conclusions of law regarding the amount of costs and attorney fees owed by the Dewsnums should be reversed because both Plaintiffs and the trial court failed to properly allocate the costs and attorney fees claimed or otherwise adjudged owed.

In addition, the trial court's award of \$83,911.67 in attorney fees should be reversed because those fees are not secured by the Trust Deed and they are neither allowed under the Promissory Notes nor under the \$49,966.21 advance. With respect to the \$5,000 awarded in costs and attorney fees, this Court should once again remand this case for a determination of "what amount, if any, of attorney fees remained unpaid on the promissory notes when the sale was held." Timm III, 1999 UT 105, ¶15, 990 P.2d 942.

Under the doctrine of equitable estoppel, Plaintiffs should be prevented from claiming additional costs and attorney fees

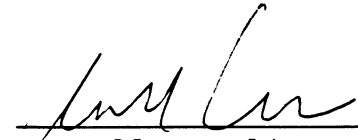
because: (i) Plaintiffs made inconsistent statements, (ii) the Dewsnums acted reasonably on the basis of Plaintiffs' initial statement, and (iii) the Dewsnums will be injured if Plaintiffs are allowed to repudiate their initial statement regarding the amount of costs and attorney fees owed in conjunction with the foreclosure sale.

The trial court's order granting Plaintiffs' Motion for Summary Judgment and denying the Dewsnums' Motion for Partial Summary Judgment should be reversed. As a matter of law, the Dewsnums are entitled to summary judgment because the foreclosure sale violated the "one action" rule and was barred by the statute of limitations. The Dewsnums are also entitled to summary judgment because the foreclosed debt in the foreclosure was not secured by the Trust Deed and because Plaintiffs failed to mail the Dewsnums a notice of default and a notice of sale as Utah law requires. Judgment should be entered in Mrs. Dewsnum's favor and against plaintiffs for \$115,000 (the amount plaintiffs bid for the property at the foreclosure sale), together with interest at the statutory pre-judgment rate of 10% per annum from April 29, 1994 (the foreclosure date) through the date judgment is entered. In addition, the trial court erred in granting Plaintiffs' Motion for Summary Judgment because a dispute of material fact exists regarding Plaintiffs' bad faith and unfair dealing throughout

this case and specifically with reference to the Dewsnums' attempt to have the Trust Deed Property reconveyed. As stated herein, the Dewsnums have a claim against Plaintiffs for breach of the implied covenant of good faith and fair dealing, and the trial court's decision to grant Plaintiffs' Motion for Summary Judgment incorrectly cut off the Dewsnums' opportunity to pursue Plaintiffs for bad faith and unfair dealing. For the reasons stated herein, trial court's decision to grant Plaintiffs' Motion for Summary Judgment should therefore be reversed.

In closing, the Dewsnums request costs incurred in this appeal.

DATED this 25<sup>th</sup> day of January, 2002.

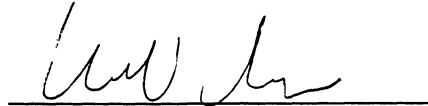
  
\_\_\_\_\_  
Russell A. Cline  
Attorney for Appellant

MAILING CERTIFICATE

This is to certify that on this 25<sup>th</sup> day of January, 2002, two (2) true and correct copies of the foregoing Appellant's Brief were mailed first class postage prepaid to:

Michael Z. Hayes  
Todd J. Godfrey  
MAZURAN & HAYES  
2118 E. 3900 S., Suite B-300  
Salt Lake City, UT 84124

Clark R. Nielsen  
576 E. South Temple Street  
Salt Lake City, UT 84102

A handwritten signature in dark ink, appearing to read "Clark R. Nielsen", is written over a horizontal line.

ADDENDA

- Addendum A: Findings of Fact and Conclusions of Law as to Attorney's Fees and Costs dated December 13, 2000.
- Addendum B: Plaintiffs' Response to Defendants' First Set of Interrogatories and Request for Production of Documents
- Addendum C: Order dated September 24, 2001
- Addendum D: Amended Trust Deed

## Addendum A

FILED  
Fourth Judicial District Court  
of Utah County, State of Utah

Michael Z. Hayes (#1432)  
Todd J. Godfrey (#6094)  
**MAZURAN & HAYES, P.C.**  
2118 East 3900 South, Suite 300  
Salt Lake City, UT 84124-1725  
Telephone: (801) 272-8998  
Fax: (801) 272-1551

12/13/00 *not* Deputy

*Attorneys for Plaintiffs*

**IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR MILLARD COUNTY, STATE OF UTAH**

---0000000---

LOUIS L. TIMM, JOHN NEIUWLAND,  
and FLOYD M. CHILDS, Trustees of the  
UNITED PRECISION MACHINE AND  
ENGINEERING COMPANY PROFIT  
SHARING TRUST; ABCO  
INSURANCE AGENCY, INC., a Utah  
corporation; and JOSEPH L. HENRIOD,  
Trustee for the ANNETTE JACOB  
TRUST,

Plaintiffs,

vs.

T. LAMAR DEWSNUP and ALETHA  
DEWSNUP ARROW INVESTMENT  
CO., a limited partnership, THE  
FEDERAL LAND BANK OF  
BERKELEY; IMPERIAL LAND TITLE,  
INC., as Trustee and EUGENE L.  
CARSON and ELAINE CARSON as  
Beneficiaries; STRINGHAM,  
MAZURAN, LARSEN & SABIN, a  
Professional Corporation; MINERAL  
FERTILIZER CO., INC., and HARRY  
V. KAPS,

Defendants.

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**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AS TO  
ATTORNEY'S FEES AND COSTS**

80040  
Civil No. 7191

Judge Fred D. Howard

This matter came before the Court for hearing initially on September 8, 2000, at 9:00 a.m., and was concluded on November 13, 2000, the Honorable Fred D. Howard presiding. Plaintiffs were represented by Michael Z. Hayes and Todd J. Godfrey. Defendant, Aletha Dewsnup, was represented by Russell A. Cline. The Court took evidence presented by Plaintiffs and also heard argument from the parties. The hearing was called for the purpose of determining the amount of costs and attorneys fees owing at the time the sale of the property at issue in this matter was conducted.

### **FINDINGS OF FACT**

The Court, having considered all the evidence submitted and the arguments of the parties, and being duly advised in the premises, hereby finds as follows:

1. Defendants T. Lamar Dewsnup and Aletha Dewsnup originally executed 3 Promissory Note in favor of the Plaintiffs. These Notes, state, in part:

In case of default in the payment of any installment of principal or interest as herein stipulated, then it shall be optional for the legal holder of this Note to declare the entire principal sum hereof due and payable; and proceedings may at once be instituted for the recovery of the same by law, with accrued interests and costs, including reasonable attorney's fees.

2. From the inception of this matter to December 5, 1980, Plaintiffs were required to expend Five Thousand Dollars (\$5,000) in costs and attorneys fees in an attempt to collect amounts due under the Promissory Notes executed by Defendants.

3. The Five Thousand Dollars (\$5,000) in costs and attorneys fees expended by the Plaintiffs were expended in an effort to collect the sums due under the Promissory Notes. The Five Thousand Dollars (\$5,000) was paid for costs actually incurred and for legal work actually



performed and the expenditures and the legal work performed were reasonably necessary to adequately prosecute the matter.

4. From December 5, 1980, to April 29, 1994, Plaintiffs were required to expend Eighty-three Thousand Nine Hundred Eleven Dollars and 67/100 (\$83,911.67) in costs and attorneys fees in an attempt to collect amounts due under the Promissory Notes executed by Defendants, and to protect Plaintiff's security for the payment of said notes.

5. The Eighty-three Thousand Nine Hundred Eleven Dollars and 67/100 (\$83,911.67) was paid for costs actually incurred and for legal work actually performed and the expenditures and the legal work performed were reasonably necessary to adequately prosecute the matter and to preserve Plaintiffs' interest in the property which secured payment of all sums due under the Promissory Notes.

6. Of the Eighty-eight Thousand Nine Hundred Eleven Dollars and 67/100 (\$88,911.67) paid by Plaintiffs between the inception of this case and April 29, 1994, Eleven Thousand Eight Hundred Ninety-six Dollars and 07/100 (\$11,896.07) were taxes on the property which served as security for payment of the Promissory Notes. The taxes were paid to avoid a tax sale of the property and in order to preserve the Plaintiffs' security interest.

7. The Court finds that between December 5, 1980, and the award of Summary Judgment by the District Court on April 14, 1981, work was performed to collect sums due under the Promissory Notes and to collect sums due for an advance paid by Plaintiffs under an Assignment of Contract, which Assignment of Contract also served as security for the payment of sums due under the Promissory Notes.

8. The Court finds that the attorneys fees expended for legal work during the time between December 5, 1980 and April 14, 1981 are not segregable and not allocable to separate causes of action, as pursuit of both causes of action was necessary to collect amounts due under the Promissory Notes and to preserve Plaintiff's security interest in the property.

9. The Court finds that all fees and costs were reasonable under the circumstances of this case. The Court further finds that Defendant's repeated bankruptcy filings and efforts to prevent non-judicial sales of the property securing payment of sums due under the Promissory Notes created significant cost and legal expense for the Plaintiffs.

10. The Court finds that all costs and fees incurred in bankruptcy proceedings between 1981 and 1994 were necessary to preserve Plaintiff's security interest in the property and were incurred in an effort to recover amounts due for costs and attorneys fees under the Promissory Notes and Trust Deed.

11. Section 506 of the Bankruptcy Code (11 U.S.C. § 506) authorizes Plaintiffs to recover costs and attorneys fees expended in protecting their security interest in the property of Defendant Aletha Dewsnap.

12. The Trust Deed which gave Plaintiffs a security interest in Aletha Dewsnap's property authorizes recover of costs and attorneys fees expended by Plaintiffs in conducting the non-judicial sale of the property.

### CONCLUSIONS OF LAW

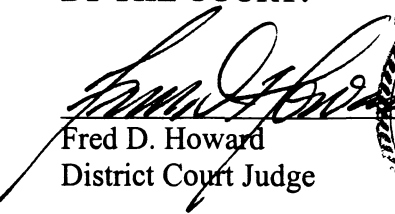
Based upon the foregoing FINDINGS OF FACT, and in consideration of the relevant law, the Court concludes as follows:

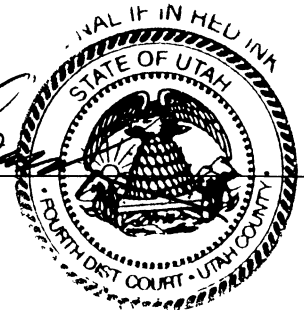
1. On December 5, 1980, there were Five Thousand Dollars (\$5,000) in costs and attorneys fees due and owing on the Promissory Notes which amounts were secured by Plaintiffs Trust Deed on the property..

2. On April 29, 1994, there were Eighty-eight Thousand Nine Hundred Eleven Dollars and 67/100 (\$88,911.67) in costs and attorneys fees due and owing on the Promissory Notes which amounts were secured by Plaintiff's Trust Deed on the property.

DATED this 13<sup>th</sup> ~~day of November~~ <sup>December</sup>, 2000.

BY THE COURT:

  
Fred D. Howard  
District Court Judge



APPROVED AS TO FORM:

CRIPPEN & CLINE

\_\_\_\_\_  
Russell A. Cline  
Attorneys for Defendant

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of November, 2000, I caused to be served a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO ATTORNEY'S FEES AND COSTS** by mailing, postage prepaid, first class United States mail, to the following:

Russell A. Cline  
CRIPPEN & CLINE, L.C.  
10 West 100 South, Suite 425  
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to read "Todd G. Cline", written over a horizontal line.

## Addendum B

MICHAEL Z. HAYES - 1432  
MAZURAN & HAYES P.C.  
1245 East Brickyard Road, Suite 250  
Salt Lake City, UT 84106  
Telephone (801) 484-6600

IN THE DISTRICT COURT  
MILLARD COUNTY, STATE OF UTAH

---ooo0ooo---

LOUIS L. TIMM, JOHN NEIUWLAND, :  
and FLOYD M. CHILDS, Trustees :  
of United Precision Machine :  
and Engineering Company Profit :  
Sharing Trust; ABCO Insurance :  
Agency, Inc., a Utah :  
Corporation; and JOSEPH L. :  
HENRIOD, Trustee for the :  
ANNETTE JACOB TRUST, :

Plaintiffs, :

vs. :

T. LAMAR DEWSNUP and ALETHA :  
DEWSNUP, ARROW INVESTMENT CO., :  
a Limited Partnership, et al. :

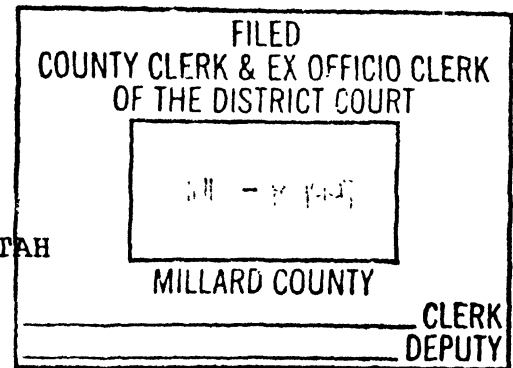
Defendants. :

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Pursuant to Rules 33 and 34 of Utah Rules of Civil Procedure,  
Plaintiffs submit the following responses to Defendants'  
Interrogatories and Requests for Production of Documents.

INTERROGATORIES

INTERROGATORY NO. 1: With respect to the trustee sale  
scheduled for April 29, 1994, on the Dewsnup Trust Deed, please  
itemize the entire amount you claim is due and owing under the  
terms of the Trust Deed. Please show how you arrived at each  
calculation.




ANSWER: The amount due under the Trust Deed as of April 29, 1994, is \$222,814.62. The above figure is arrived at by taking the partial summary judgment of \$47,880.50 together with interest at \$23.61 per day for thirteen (13) years, which totals \$112,029.45; the taxes awarded in the judgment of \$2,085.71 plus \$1.02 per day interest, totaling \$4,839.90 in interest; the attorney's fees awarded in the judgment of \$6,985.00 plus six percent (6%) interest for thirteen (13) years, which totals \$5,448.30. The above figures give you a total partial summary judgment and interest to April 29, 1994, of \$179,268.86. To this figure is added attorney's fees and costs incurred from the date of the judgment in 1981 to April, 1994, which totals \$34,811.00 in attorney's fees and \$8,734.76 in costs. All of the above figures total \$222,814.62. This figure does not include attorney's fees and costs incurred after April 1, 1994, nor does it include attorney's fees expended by the Plaintiffs between April 29, 1981 and March of 1987, which is the date that the Plaintiffs hired Michael Z. Hayes to represent them in this case.

#### REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: Produce all documents and support the figures set forth in your answer to Interrogatory No. 1.


RESPONSE: Attached to these requests are the copies of the calculations used to determine the figures set forth in Plaintiffs' answer to Interrogatory No. 1.

DATED this 29<sup>th</sup> day of April, 1994.

  
MICHAEL Z. HAYES  
Attorney for Plaintiffs

STATE OF UTAH            )  
                                  : ss.  
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this \_\_\_\_\_ day of April, 1994.

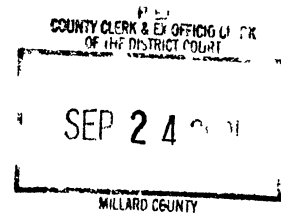
  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:  
\_\_\_\_\_

Residing at:  
\_\_\_\_\_



## Addendum C



Michael Z. Hayes (#1432)  
Todd J. Godfrey (#6094)  
**MAZURAN & HAYES, P.C.**  
2118 East 3900 South, Suite 300  
Salt Lake City, UT 84124-1725  
Telephone: (801) 272-8998  
Fax: (801) 272-1551

*Attorneys for Plaintiffs*

**IN THE FOURTH JUDICIAL DISTRICT COURT**  
**IN AND FOR MILLARD COUNTY, STATE OF UTAH**

---0000000---

LOUIS L. TIMM, JOHN NEIUWLAND,  
and FLOYD M. CHILDS, Trustees of the  
UNITED PRECISION MACHINE AND  
ENGINEERING COMPANY PROFIT  
SHARING TRUST; ABCO  
INSURANCE AGENCY, INC., a Utah  
corporation; and JOSEPH L. HENRIOD,  
Trustee for the ANNETTE JACOB  
TRUST,

Plaintiffs,

vs.

T. LAMAR DEWSNUP and ALETHA  
DEWSNUP ARROW INVESTMENT  
CO., a limited partnership, THE  
FEDERAL LAND BANK OF  
BERKELEY; IMPERIAL LAND TITLE,  
INC., as Trustee and EUGENE L.  
CARSON and ELAINE CARSON as  
Beneficiaries; STRINGHAM,  
MAZURAN, LARSEN & SABIN, a  
Professional Corporation; MINERAL  
FERTILIZER CO., INC., and HARRY  
V. KAPS,

Defendants.

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**ORDER**

Civil No. 7191

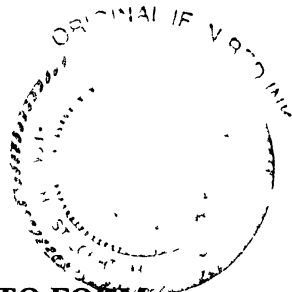
800407191

Judge Donald J. Eyre, Jr.

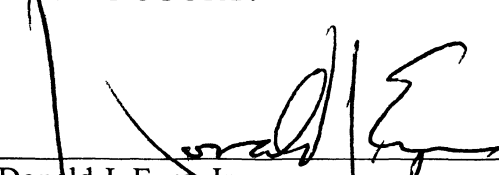
This matter came before the Court on the parties' cross Motions for Summary Judgment. The Court, having considered the respective Briefs of the parties, on August 29, 2001, issued a Memorandum Decision on the parties' cross Motions, denying Defendant's Motion for Partial Summary Judgment, granting Plaintiffs' Motion for Summary Judgment, and dismissing Defendant's Counterclaim, in its entirety, with prejudice. In consideration of the above-referenced Memorandum Decision of the Court, it is hereby

**ORDERED, ADJUDGED AND DECREED** that the Memorandum Decision on the parties' cross Motions for Summary Judgment is hereby adopted as the Order of the Court and Plaintiffs' Motion for Summary Judgment is hereby granted and Defendant's Counterclaim is dismissed, in its entirety, with prejudice.

DATED this 24<sup>th</sup> day of September, 2001.



**BY THE COURT:**

  
\_\_\_\_\_  
Donald J. Eyre, Jr.  
District Court Judge

**APPROVED AS TO FORM:**

**CRIPPEN & CLINE**

\_\_\_\_\_  
Russell A. Cline  
Attorney for Defendant Aletha Dewsnup

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of September, 2001, I caused to be served a true and correct copy of the foregoing **ORDER** by mailing, postage prepaid, first class United States mail, to the following:

Russell A. Cline  
CRIPPEN & CLINE, L.C.  
10 West 100 South, Suite 425  
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to read "Heidi Gordon", is written over a horizontal line.

## Addendum D

116

EARL JAY PECK  
 NIELSEN, HENRIOD, GOTTFREDSON & PECK  
 410 Newhouse Building  
 Salt Lake City, Utah 84111  
 521-3350

Space Above This Line For Recorder's Use

A M E N D E D  
**TRUST DEED**

With Assignment of Rents

THIS TRUST DEED, made this 1st day of June, 19 78  
 between T. LaMAR DEWSNUP and ALETHA DEWSNUP

....., as TRUSTOR,

whose address is ..... DESERET UTAH  
 (Street and number) (City) (State)

EARL JAY PECK ..... as TRUSTEE,\* and  
 UNITED PRECISION MACHINE & ENGINEERING COMPANY PROFIT SHARING TRUST,  
~~ABCO INSURANCE AGENCY, INC. and JOSEPH L. HENRIOD,~~ as trustee for  
 the Annette Jacob Trust  
 ..... as BENEFICIARY,

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,  
 WITH POWER OF SALE, the following described property, situated in Millard  
 County, State of Utah:

PARCEL ONE: See Exhibit 'A' hereto

PARCEL TWO: See Exhibit 'B' hereto

REC-25008  
 RECORDED AT REQUEST OF  
*Nielsen, Henriod, Gottfredson & Peck*  
 DATE June 9, 1978 TIME 2:30 P.M.  
 BOOK 128 OF REC. PAGE 161 FEE \$ 12.00  
*John Martin*  
 RECORDER OF MILLARD COUNTY, UTAH  
 By *Terrence Staples* Deputy

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by ~~a~~ promissory notes of even date herewith, in the principal sum of \$33,000; \$56,000 & \$30,000, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

\*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

TO PROTECT THE SECURITY OF THIS TRUST DEED TRUSTOR AGREES

1 To keep said property in good condition and repair not to remove or demolish any building thereon to complete or restore promptly and in good and workmanlike manner any building which may be constructed damaged or destroyed thereon to comply with all laws covenants and restrictions affecting said property not to commit or permit waste thereof not to commit suffer or permit any act upon said property in violation of law to do all other acts which from the character or use of said property may be reasonably necessary the specific enumerations herein not excluding the general and if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property Trustor further agrees

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary and

(b) To allow Beneficiary to inspect said property at all times during construction

Trustee upon presentation to it of an affidavit signed by Beneficiary setting forth facts showing a default by Trustor under this numbered paragraph is authorized to accept as true and conclusive all facts and statements therein and to act thereon hereunder

2 To provide and maintain insurance of such type or types and amounts as Beneficiary may require on the improvements now existing or hereafter erected or placed on said property Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary In event of loss Trustor shall give immediate notice to Beneficiary who may make proof of loss and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly and the insurance proceeds or any part thereof may be applied by Beneficiary at its option to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged

3 To deliver to pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full such evidence of title as Beneficiary may require including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto

4 To appear in and defend any action or proceeding purporting to affect the security hereof the title to said property or the rights or powers of Beneficiary or Trustee and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding to pay all costs and expenses including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee

5 To pay at least 10 days before delinquency all taxes and assessments affecting said property including all assessments upon water company stock and all rents assessments and charges for water appurtenant to or used in connection with said property to pay when due all encumbrances charges and liens with interest on said property or any part thereof which at any time appear to be prior or superior hereto to pay all costs fees and expenses of this Trust

6 Should Trustor fail to make any payment or to do any act as herein provided then Beneficiary or Trustee but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof may Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof Beneficiary or Trustee being authorized to enter upon said property for such purposes commence appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee pay purchase contest or compromise any encumbrance charge or lien which in the judgment of either appears to be prior or superior hereto and in exercising any such powers incur any liability expend whatever amounts in its absolute discretion it may deem necessary therefor including cost of evidence of title employ counsel and pay his reasonable fees

7 To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid and the repayment thereof shall be secured hereby

IT IS MUTUALLY AGREED THAT

8 Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding or damaged by fire or earthquake or in any other manner Beneficiary shall be entitled to all compensation awards and other payments or relief therefor and shall be entitled at its option to commence appear in and prosecute in its own name any action or proceedings or to make any compromise or settlement in connection with such taking or damage All such compensation awards damages rights of action and proceeds including the proceeds of any policies of fire and other insurance affecting said property are hereby assigned to Beneficiary who may after deducting therefrom all its expenses including attorney's fees apply the same on any indebtedness secured hereby Trustor agrees to execute such further assignments of any compensation award damages and rights of action and proceeds as Beneficiary or Trustee may require

9 At any time and from time to time upon written request of Beneficiary payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance for cancellation and retention) without affecting the liability of any person for the payment of the indebtedness secured hereby Trustee may (a) consent to the making of any map or plat of said property (b) join in granting any easement or creating any restriction thereon (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof (d) reconvey without warranty all or any part of said property The grantee in any reconveyance may be described as the person or persons entitled thereto and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof Trustor agrees to pay reasonable Trustee fees for any of the services mentioned in this paragraph

10 As additional security Trustor hereby assigns Beneficiary during the continuance of these trusts all rents issues royalties and profits of the property affected by this Trust Deed and of any personal property located thereon Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder Trustor shall have the right to collect all such rents issues royalties and profits earned prior to default as they become due and payable If Trustor shall default as aforesaid Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right with or without taking possession of the property affected hereby to collect all rents royalties issues and profits Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right power and authority to collect the same Nothing contained herein nor the exercise of the right by Beneficiary to collect shall be or be construed to be an affirmation by Beneficiary of any tenancy lease or option nor an assumption of liability under nor a subordination of the lien or charge of this Trust Deed to any such tenancy lease or option

11 Upon any default by Trustor hereunder Beneficiary may at any time without notice either in person by agent or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver) and without regard to the adequacy of any security for the indebtedness hereby secured enter upon and take possession of said property or any part thereof in its own name sue for or otherwise collect said rents issues and profits including those past due and unpaid and apply the same less costs and expenses of operation and collection including reasonable attorney's fees upon any indebtedness secured hereby and in such order as Beneficiary may determine

12 The entering upon and taking possession of said property the collection of such rents issues and profits or the proceeds of fire and other insurance policies or compensation or awards for in taking or damage of said property and the application or release thereof as aforesaid shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice

13 The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default

14 Time is of the essence hereof Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder all sums secured hereby shall immediately become due and payable at the option of Beneficiary In the event of such default Beneficiary may execute from Trustor to execute a written notice of default and of election to cause said property to be sold to satisfy its claims hereof and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated Beneficiary also shall deposit with Trustee the note and all documents evidencing expenditures secured hereby

on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

16. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

17. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

18. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

19. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

20. This Trust Deed shall be construed according to the laws of the State of Utah

21. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

Signature of Trustor

*L. La Mar Dewsnap*  
*Altha Dewsnap*

(If Trustor an Individual)

STATE OF UTAH  
COUNTY OF ss.

On the 1<sup>st</sup> day of June, A.D. 1978, personally  
appeared before me L. La Mar Dewsnap & Altha Dewsnap,  
the signer(s) of the above instrument, who duly acknowledged to me that they executed the  
same.

My Commission Expires:

Nov. 4, 1980

Notary Public residing at:

(If Trustor a Corporation)

STATE OF UTAH  
COUNTY OF ss.

On the ..... day of ....., A.D. 19....., personally  
appeared before me ....., who being by me duly sworn,  
says that he is the ..... of .....  
the corporation that executed the above and foregoing instrument and that said instrument was  
signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution  
of its board of directors) and said ..... acknowledged  
to me that said corporation executed the same.

Notary Public residing at:

My Commission Expires:



REQUEST FOR FULL RECONVEYANCE

(To be used only when indebtedness secured hereby has been paid in full)

TO: TRUSTEE.

The undersigned is the legal owner and holder of the note and all other indebtedness secured by the within Trust Deed. Said note, together with all other indebtedness secured by said Trust Deed has been fully paid and satisfied; and you are hereby requested and directed, on payment to you of any sums owing to you under the terms of said Trust Deed, to cancel said note above mentioned, and all other evidences of indebtedness secured by said Trust Deed delivered to you herewith, together with the said Trust Deed, and to reconvey, without warranty, to the parties designated by the terms of said Trust Deed, all the estate now held by you thereunder.

Dated....., 19.....

Mail reconveyance to .....

TRUST DEED  
With Assignment of Rents

TO

AS TRUSTEE FOR

Dated ....., 19.....

**120**

**25008**

BEGINNING 980 feet West of the Southeast Corner of the Southwest 1/4 of Section 4, Township 17 South, Range 4 West, Salt Lake Base & Meridian; thence North 1320 feet; thence West 1264 feet; thence South 625 feet; thence Southeasterly along the roadway 541 feet; thence South 470 feet; thence East 840 feet to beginning. More or less 35 Acres

BEGINNING 980 feet West of the Northeast Corner of the Northwest 1/4 of Section 9, Township 17 South, Range 4 West, Salt Lake Base & Meridian; thence South 1320 feet; thence West 840 feet; thence North 1320 feet; thence East 840 feet to beginning. More or less 25 Acres.

EXHIBIT 'A'