

1989

Kathleen M. Thomas; Elsie Merrill; Lewis J.  
Merrill; Stephen J. Merrill; Alvin S. Merrill; George  
A. Merrill; Margaret M. Durfee; and Annie M.  
Dutson v. Jamis M. Johnson : Brief of Appellant

Utah Court of Appeals

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Gary A. Weston; Nielsen & Senior; Attorney for Appellee.

A. Paul Schwenke; Attorney for Appellant.

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BRIEF

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DOCKET NO. 89 0385-CA

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IN THE UTAH COURT OF APPEALS  
STATE OF UTAH

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KATHLEEN M. THOMAS; ELSIE	)	
MERRILL; LEWIS J. MERRILL;	)	
STEPHEN J. MERRILL; ALVIN S.	)	APPELLANT'S BRIEF
MERRILL; GEORGE A. MERRILL;	)	
MARGARET M. DURFEE; and	)	
ANNIE M. DUTSON,	)	
	)	Civil No. C89-0385
Plaintiffs,	)	
	)	
vs.	)	
	)	
DENNIS M. JOHNSON,	)	
	)	
Defendant.	)	

---

Appeal from judgment granted in favor of Plaintiff by the  
Honorable J. Dennis Frederick.

---

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IN THE UTAH COURT OF APPEALS  
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MERRILL; LEWIS J. MERRILL;	)	
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ANNIE M. DUTSON,	)	
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Plaintiffs,	)	
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JAMIS M. JOHNSON,	)	
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Appeal from judgment granted in favor of Plaintiff by the  
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### JURISDICTION OF THE COURT

Jurisdiction of the Court to hear this appeal is conferred by Rule 3 of the Rules of the Utah Supreme Court and Section 78-2-2(3)(j), Utah Code Annotated, 1953, as amended. This appeal is from a judgment in favor of Plaintiff after a bench trial before the Honorable J. Dennis Frederick.

### STATEMENT OF THE ISSUES

Did the trial court err in its rulings at the trial refusing admission of prior independent evidence of the market value of the subject real property?

Was the trustee sale invalid as a matter of law for the trustee's failure to accept a bid for a sum certain at the time of sale?

Was the judgment establishing the fair market value at \$21,750 against the weight of the evidence?

### STATUTES AND RULES

The statutes considered herein are Utah Code Annotated Section 57-1-27, 28, and 32; and Utah Rules of Evidence - Rule 401.

### STATEMENT OF THE CASE

This is an action to recover a deficiency after a trust deed foreclosure. The matter was tried before the Honorable J. Dennis Frederick without a jury. The Honorable J. Dennis Frederick found for the Plaintiffs and awarded a deficiency judgment in the amount of \$7,872.62 and an award of attorney's fees in the sum of

\$4,980 for a total amount of \$12,852.62. The facts before the court are as follows:

On September 12, 1984, the Defendant purchased from the Plaintiffs the real property, that is the subject of this action, for the sum of \$33,000. There was an \$8,000 down-payment with the balance evidenced by a \$25,000 trust deed note secured by a deed of trust on the subject property. Complaint, District Court file, (hereafter "DCF") p. 6, and Trial Transcript (hereafter "TT"), p. 26. On November 20, 1984, the property was appraised for possible refinancing in behalf of a financial institution at \$39,000. This evidence was not allowed by the Court. TT p. 29 and p. 163-164. On September 5, 1985, the property was sold by Defendant to Mr. Robert B. Stonehocker. TT p. 156. Mr. Robert Stonehocker entered into a contract with the Defendant to purchase the property for \$45,000. This evidence was not allowed by the Court. TT p. 163.

The Defendant's purchaser, Mr. Robert Stonehocker, defaulted after February, 1987. TT p. 27 and p. 160, and the Plaintiffs proceeded to foreclose the trust deed. The trustee sale was set for November 24, 1987. TT p. 11. The sale took place as scheduled and the trustee deed was delivered to the Plaintiffs the same day. Kathleen M. Thomas appeared at the sale for herself and on behalf of the Plaintiffs. Ms. Kathleen Thomas did not make a bid of a sum certain at the sale. TT p. 25. As a matter of fact, the bid price of \$22,000 was not determined until after thirty (30) days later, after Plaintiffs' expert appraised

the property at \$21,750. TT p. 80. The Plaintiffs testified that they were prepared to bid \$26,000 at the trustee sale, but did not because no one else showed up at sale. TT p. 13. Within a week of the trustee sale, the Plaintiffs listed the property for approximately \$32,000 based on the recommendation of one of the Plaintiff's expert witness, Joan Ruston Carlson, a realtor. TT p. 30 and p. 43. Ms. Joan Carlson, after a market analysis, felt that the "condition justified the price (\$32,000) at that time (December 7, 1987)." TT p. 33 and 34.

The Plaintiffs reduced the listing price of the property from \$32,000 to \$22,000 on February 1, 1988. TT p. 47. The property was then immediately purchased by the neighbor who had expressed his willingness to so purchase the property at this price to Plaintiffs' realtor. On or about February 22, 1988, the Defendant was first advised of the deficiency and that was also the first notice that the Defendant was only receiving \$22,000 credit against the trust deed note obligation. DCF p. 1 and TT p. 168.

The Plaintiffs' expert appraiser, Mr. Paul H. Maritsas, concluded that the market value of the property as of December 23, 1987, thirty days after the trustee sale, was \$21,750. TT p. 80. Plaintiffs' offered no appraisal on expert testimony of the value as of the date of the sale. Mr. Maritsas' appraisal was conducted pursuant to FHA guidelines. TT p. 90. One such guideline is HUD regulation 408.02, dated March 3, 1986. TT p. 93 and Exhibit #4. This regulation required that the gross

adjustments can not exceed 25 percent of the comparables' sale price. Mr. Maritsas conceded that none of his three comparables were within the FHA guidelines. His comparable #1 has a 43 percent variance or 18 percent more than allowed by guidelines. Comparable #2 has a variance of 31 percent or 6 percent more than allowed by the guidelines. The last comparable was the closest to the limits set by the guidelines at 27 percent, but even it was outside of the recommended range of acceptable comparables. TT p. 97 to p 98.

Additionally, Mr. Maritsas' comparable #1 was a sale that did not occur until after the trustee sale. TT p. 89. Comparable #1 was actually sold for \$37,500, and Mr. Maritsas' comparables #2 and #3 were actually sold for \$32,860 and \$29,900 respectively.

Mr. Maritsas further conceded that the value of real properties in Salt Lake County during the time the Defendant was in possession of the subject property was decreasing at the rate of five or six percent or a decrease of a total of 20 percent to 24 percent over the four-year period. Mr. Maritsas further conceded that a decrease of 52 percent in value of the subject property, based on his appraisal, was somewhat unusual.

Mr. Richard Koplin, certified appraiser, performed an appraisal for the subject real property on behalf of the Defendant and placed the fair market value of the property at the time of the trustee sale at \$31,800. TT p. 139 and Exhibit #5.

Mr. Koplin's comparables were closer in size and configuration to the subject property and required far less adjustment.

#### SUMMARY OF THE ARGUMENTS

Point I. The Court erred in excluding relevant evidence as to valuation of the property. Utah case law allows evidence of prior valuation. In this case, over four appraisals or transactions of the property (two involving Plaintiff) were excluded, all of which set the value of the property at substantially higher than Plaintiffs' allegations.

Point II. The trustee sale is invalid as a matter of law for four reasons.

- (1) The statutory scheme contemplates the trustee to sell the trust property to the highest bidder. The trustee violated the statute by failing to accept a specific bid of a sum certain, and accordingly, the sale must be held invalid.
- (2) The unreasonable delay in setting a bid price until 30 days after the sale is tantamount to positioning the sale beyond 72 hours without re-noticing the sale as required by Section 57-1-34, UCA, (as amended 1953). The sale is, accordingly invalid.
- (3) The trustee violated the specific instructions of the trust deed that the purchase price must be "payable in lawful money of the United States at the time of the sale," and accordingly, the sale must be invalid.
- (4) The unreasonable delay in determining the bid price and just noticing the Defendant of the deficiency almost three months after the sale is an unfair impairment of the Defendant trustor's interest.

Point III. The court ignored the clear weight of the evidence and accepted only Plaintiffs' appraiser's estimate of value despite numerous mistakes in Plaintiffs' appraisal and despite the facts that (i) Plaintiff's expert realtor set the price higher than the Plaintiffs' appraiser; (ii) Plaintiff's appraisal contained comparables grossly out of proportion to Plaintiffs' appraiser's final estimation of value and in violation of Standard FHA guidelines, (iii) Defendant's appraisal was almost exactly what Plaintiffs' and Plaintiffs' realtor's market analysis of value of the property was; and, (iv) Defendant's appraiser's comparables were far closer to the

subject property in price and configuration and were in conformity with FHA guidelines.

#### ARGUMENT

Point I: THE COURT ERRED IN EXCLUDING EVIDENCE OF THE FAIR MARKET VALUE OF THE SUBJECT PROPERTY ON THE BASIS THAT SAID EVIDENCE WAS NOT RELEVANT.

The Defendant attempted to introduce the following evidence, but was not allowed by the Court on the basis that the evidence was not relevant on the issue of the fair market value at the time of the trustee sale, November 24, 1987:

- (1) An appraisal report by Jauffer Appraising had by Plaintiffs' setting the fair market value as of November 26, 1983 at \$45,000.
- (2) The sale of the property to the Defendant for the price of \$33,000 on September 21, 1984.
- (3) The appraisal by Paul J. Lund on behalf of Congressional Mortgage, Inc., setting the fair market value at \$39,000 as of November 20, 1984.
- (4) The sale from the Defendant to a Mr. Robert Stonehocker on September 1, 1985 for \$45,000.

The Court simply ruled in each instance that the evidence was not relevant. Rule 401 of the Utah Rules of Evidence defined "relevant evidence" to mean "...evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added). The critical factual issue before the District Court in this case was the determination of the fair market value of the subject property at the time of the trustee sale on November 24, 1984. Clearly, any valuation of the subject property has a tendency to

make the existence of a certain fair market value of the subject property more probable than it would be without it. The fact that one item of the offered evidence was a valuation made four years before the present valuation does not make it irrelevant. Please see Terry v. Zions Mercantile Inst., 605 p. 2nd 314 (Ut. 1979). Additionally, in the recent case of Christenson v. Jewkes, 761 p. 2nd 1375 (Ut. 1988), the District Court allowed evidence of a six-year old valuation, which the jury relied upon, despite the testimony of the expert witnesses. This Court acknowledged, without rejecting the old valuation as irrelevant, that the jury may very well have based the verdict on the six-year old valuation. Christenson, supra at 1378.

The District Court's error is not harmless since it excludes evidence that goes to the heart of the issue, the fair market value. Accordingly, the Court should reverse and set aside the erroneous judgment of the lower court.

Point II. THE TRUSTEE SALE IS INVALID AS A MATTER OF LAW.

The Defendant/Appellant contends that the trustee sale is invalid for the following reasons:

- (1) The statutory scheme contemplates the trustee to sell the trust property to the highest bidder. The trustee violated the statute by failing to accept a specific bid of a sum certain, and accordingly, the sale must be held invalid.
- (2) The unreasonable delay in setting a bid price until 30 days after the sale is tantamount to positioning the sale beyond 72 hours without re-noticing the sale as required by Section 57-1-34, UCA, (as amended 1953). The sale is, accordingly invalid.



- (3) The trustee violated the specific instructions of the trust deed that the purchase price must be "payable in lawful money of the United States at the time of the sale," and accordingly, the sale must be invalid.
- (4) The unreasonable delay in determining the bid price and just noticing the Defendant of the deficiency almost three months after the sale is an unfair impairment of the Defendant trustor's interest.

Each of the above reasons are discussed separately below.

A. THE TRUSTEE SALE IS INVALID BECAUSE THE TRUSTEE FAILED TO SELL THE PROPERTY TO THE HIGHEST BIDDER.

The relevant statute, in pertinent part, requires that the trustee shall sell the property at public auction to the highest bidder:

- (1) On the date of sale and at the time and place designated in the Notice of Sale, the trustee or the attorney for the trustee shall sell the property to the highest bidder...57-1-27 UCA (as amended 1953).

American Heritage Dictionary defines sell as "1. to exchange for money or its equivalent...." The statute clearly requires the trustee to exchange the trust property at the place, date and time of the sale for money or money equivalent. This did not happen.

Furthermore, the statute contemplates that bids were to be made and the trustee was required to accept the highest bid. Black's Law Dictionary defines "bid" as "an offer by an intending purchaser to pay a designated price for property which is about to be sold at auction." Ms. Kathleen Thomas, on behalf of the Plaintiffs and creditors, admitted that no bid of money or money

equivalent was made at the time of the sale. The trustee and the Plaintiffs/creditors, failed to comply with the strict requirement of the statute and the sale must, accordingly, be invalidated. The trustee, who is also the Plaintiffs' attorney, knew, at the time of sale, that the Plaintiffs were prepared to bid in \$26,000, but did not require that bid. Such bid would have wiped out any alleged deficiency against Defendant.

**B. THE TRUSTEE SALE WAS INVALID AS VIOLATIVE OF THE STATUTE REQUIRING RE-NOTICE OF THE SALE IF THE POSTPONEMENT IS MORE THAN 72 HOURS.**

The relevant statute, in pertinent part, requires that;

- (1) The person conducting the sale may, for any cause, he considers expedient, postpone the sale up to a period not to exceed 72 hours.... No other notice of the postponed sale is required, unless the sale is postponed for longer than 72 hours beyond the date designated in the Notice of Sale. In the event of a longer postponement, the sale shall be cancelled and re-noticed in the same manner as the original Notice of Sale is required to be given. UCA 57-1-27 (As amended 1953). (Emphasis added)

The evidence before the Court shows that the designated bid price of \$22,000 was not determined until after 30 days of the sale and the Defendant/trustor was not advised of the bid price until almost three months after the sale. The statute contemplates that the trustee would receive bids of designated price at the sale and the trustee was required to sell at the time of the sale to the highest bidder. The trustee did not receive a bid nor a designated price at the time of the sale. The statute requires that the trustee should then postpone the sale, and if the postponement is beyond 72 hours, the trustee

should have re-noticed the sale. The trustee failed to do this. The trustee sale is invalid as a matter of law for failure to comply with the statutory requirements of the conduct of the sale.

C. THE TRUSTEE VIOLATED THE SPECIFIC INSTRUCTIONS OF THE TRUST DEED.

The trustor, which is the grantor of the trustee's power to sell the property, is entitled to have his directions obeyed.

Fuller v. Q'Neal, 6 SW 181 (1887).

The grantor's right is absolute.

The right of a grantor of a deed of trust to have its provisions strictly complied with to effect a valid foreclosure sale is absolute. Harwarth v. Hudson, 654 SW 2nd 851 (Tex. App. 1983)

One of the trustor's instructions was that the purchase price must be "payable in lawful money of the United States at the time of sale." The trustee failed to follow the strict instruction of the power of sale by not accepting a bid payable in lawful money of the United States at the time of the sale. The trustee sale must be set aside for the foregoing reason.

D. THE UNREASONABLE DELAY ON DESIGNATING THE BID PRICE IS AN UNFAIR IMPAIRMENT OF DEFENDANT'S INTEREST.

The Defendant/Appellant received the notice of the trustee sale, but was confident that the fair market value of the property was sufficient to protect his interest, particularly since he had substantial equity of at least \$8,000 in the property. TT p. 171. No bid was made at the time of sale and the Defendant/Appellant was not advised of the bid price of

\$22,000 and the resulting deficiency until three months later, two days before the commencement of this action.

The Defendant/Appellant obtained an independent appraisal which concluded that the market value was \$31,800 at the time of the trustee sale. Since this appraisal was done seven months after the sale, the appraiser could not give an opinion as to the condition of the property at the time of the sale. The District Court was persuaded that the Defendant's expert was less accurate because his appraisal was completed at a later time and that he lacked knowledge of the condition of the premises at the time of the foreclosure sale. TT p. 179 and 180.

If the designated bid price of \$22,000 was made at the time of the sale, the Defendant could have immediately obtained an appraisal which would have been close to the time of the sale. The actions of the Plaintiffs and the failure of the trustee to comply with the statutory requirements and instructions of the deed of trust, placed Defendant/appellant in an unfair disadvantage, and this Court must correct the inequity here by setting aside the trustee sale.

Point III.        THE JUDGMENT ADOPTING THE FAIR MARKET VALUE  
                     DETERMINATION BY MR. PAUL H. MARITSAS IS  
                     AGAINST THE WEIGHT OF THE EVIDENCE.

The substantial weight of the evidence before the Court would clearly establish a fair market value in excess of \$30,000.

In a week after sale, the Plaintiffs' realtor conducted a market analysis and concluded that the price of \$32,000 was justified by the condition of the property at that time. All of

the evidence of fair market value excluded by the District Court established the fair market value of the property at well over \$30,000. Mr. Maritsas' testimony that properties in Salt Lake County declined in value by five to six percent a year, would also support a finding of a fair market value of at least \$35,000. Finally, appraiser, Richard Koplin, using comparables that closely resembles the subject property, found a market value, consistent with all other evidence, to be \$31,800.

Against all this evidence, the Court chose to adopt the valuation by Mr. Maritsas. Mr. Maritsas' valuation was made and established a value as of December 23, 1987, thirty days after the sale. One of the comparables used by Mr. Maritsas admittedly did not exist at the time of the sale. Mr. Maritsas conducted an FHA appraisal, but he admitted using all three comparables that were not within FHA guidelines.

The comparables used by Mr. Maritsas were sold for \$37,500, \$32,860, and \$29,900. Except for the arbitrary reduction by Mr. Maritsas of \$10,000 for condition, his comparables also support a fair market value of over \$30,000. Incidentally, every item identified by Mr. Maritsas that was the result of the poor condition and needed repair, were all listed as average. TT p. 104 and p. 105. Mr. Maritsas testified that this was a mistake or a typographical error. The error was, of course, repeated eight times.

Errors were not uncommon in Mr. Maritsas' appraisal report. The legal description of the subject property was in error. TT

P. 111. The site area was incorrect. TT p. 112, and the plat map was of a lot across the street. TT p. 113. All of the errors were blamed on Mr. Maritsas' leg man. TT p. 113. Incidentally, as soon as Mr. Maritsas' appraisal was concluded, Plaintiff's realtor was ordered to immediately sell the property to the neighbor for the price the neighbor had proposed, which was essentially the appraisal price.

The Defendant's expert inspected the property and developed his appraisal in conformity with accepted appraisal principles and obtained an appraisal price of \$31,800, which is almost exactly what Plaintiff's testified they thought the property was worth and what Plaintiff's witness, realtor, Joan Carlson, estimate of market value was for the property also. The only evidence of a lower price for the property is Plaintiff's appraiser and his appraisal is dramatically below six other indicia of value (four of which indicia were deemed irrelevant, i.e., an appraisal of Plaintiffs' four years earlier, the price of the sale to Defendant, and appraisal of a mortgage company, the sale by Defendant to Stonehocker) and the admitted evidence of the market analysis of Plaintiffs' realtor and Defendant's appraisers' estimate of value.

#### CONCLUSION

Thus, it is clear that Plaintiff's judgment should be overturned for the following reasons:

1. The trial court wrongfully excluded extensive relevant evidence on the valuation of the property, all tending to show a much higher value for this property.

2. The trustee sale is invalid because:

- A. There was no bid at the sale, even though Plaintiffs were prepared to bid in \$26,000, which would have removed any deficiency.
- B. The sale should either have been postponed for 72 hours as provided by statute or re-noticed, but was not.
- C. The trustee violated instructions that the sale must be in lawful money of the United States and the sale is invalid.
- D. The trustee effectively delayed establishing a price and thus a deficiency until several months after the sale, which impairs the ability of a trustor to obtain current relevant information.

3. The trial court disregarded the clear weight of the evidence and accepting, at face value, the appraisal of Plaintiffs' expert Paul Maritsas.

DATED this 12th day of January, 1990.

---

A. Paul Schwenke  
Attorney for Defendant/Appellant

ORIGINAL 14

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

KATHLEEN M. THOMAS, et al.,

Plaintiffs,

TRIAL

vs.

Civil No. CIV 880901121 PR

JAMIS M. JOHNSON,

Defendant.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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BEFORE THE HONORABLE J. DENNIS FREDERICK

on Friday, December 2, 1988

---

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FILED DISTRICT COURT  
Third Judicial District

NOV 08 1989

*Sharon Park*  
Deputy Clerk



# I N D E X

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\* \* \*

1                                    P R O C E E D I N G S

2                    THE COURT: This is the time set for trial in the  
3 matter of Kathleen Thomas, et al., v. Jamis Johnson, Case  
4 No. C881121.

5                    Counsel, state your appearances for the record.

6                    MR. WESTON: Gary A. Weston of Nielsen & Senior,  
7 your Honor, appearing for the Plaintiffs in the action.

8                    MR. SCHWENKE: A. Paul Schwenke appearing for the  
9 Defendant, Mr. Johnson.

10                   THE COURT: Mr. Schwenke, this matter was sched-  
11 uled for trial at 9 o'clock. It's 9:20. What's the reason  
12 for the delay?

13                   MR. SCHWENKE: My apologies to the Court, your  
14 Honor. We had a slight jam in Mr. Jamis's copy machine this  
15 morning as we were trying to get our exhibits together.

16                   THE COURT: We had a pretrial in this matter,  
17 Mr. Schwenke, on the 28th of November at which you didn't  
18 appear. What was your reason for not appearing?

19                   MR. SCHWENKE: That, I honestly state to the  
20 Court, I had no notice of that at all. I discovered after  
21 the fact that there was a pretrial scheduled.

22                   THE COURT: The notice did contain a mistake in  
23 the mailing address to you and it's your statement to me  
24 that you did not receive notice of that pretrial?

25                   MR. SCHWENKE: That's correct.

1           THE COURT: Very well. Mr. Weston, you may  
2 proceed.

3           MR. WESTON: Your Honor, thank you. The matter  
4 that is initially before the Court is our motion in limine  
5 that we were to address. I have not received any response  
6 from Mr. Schwenke or his office with regard to that motion  
7 and it addresses the testimony of their proposed expert,  
8 Mr. Philip Cook.

9           THE COURT: You've received the motion in limine  
10 and the memorandum of authorities in support of it, have you  
11 not, Mr. Schwenke?

12          MR. SCHWENKE: That's correct, your Honor. If I  
13 may respond to that, your Honor, we have discovered as of  
14 last night that we will not be calling Mr. Cook so --

15          THE COURT: It renders the motion, therefore,  
16 moot?

17          MR. SCHWENKE: Moot, yes, your Honor.

18          If I may, your Honor, I do have a motion I'd like  
19 to present to the Court before we proceed, if I may do so.  
20 It's in the nature of a dispositive motion, but the reason I  
21 would like to do so is so I can preserve the legal question  
22 that is presented in these matters, that I would like to  
23 preserve it in the event that I appeal this case, and if the  
24 Court allows, I will proceed in that.

25          THE COURT: It's a dispositive motion?

1 MR. SCHWENKE: It's in the nature, yes.

2 THE COURT: Have you filed a written motion with a  
3 memorandum?

4 MR. SCHWENKE: No, your Honor, but again, if I may  
5 restate, the whole purpose of it is so I can preserve a  
6 legal question that's presented by these pleadings in the  
7 papers in the file in this matter, that is a legal question  
8 I'd like to preserve if I could upon appeal, if I end up  
9 having to appeal this matter.

10 THE COURT: Well, do you have a response,  
11 Mr. Weston?

12 MR. WESTON: My response, your Honor, is I have  
13 received no notice of such a motion. I believe that the  
14 time for filing dispositive motions has expired. I don't --  
15 I'd have to look in the order to see.

16 Clearly, your Honor, irrespective of that matter,  
17 that motion will have no substance except it be predicted  
18 upon the evidence that's submitted during the trial and  
19 therefore, preferably it would be a motion that should be  
20 introduced at least at the closing of the Plaintiffs' case,  
21 if not in fact completion of the trial.

22 THE COURT: Counsel, Rule 4-501 of the Code of  
23 Judicial Administration, subdivision 10, provides that all  
24 motions for summary judgment or other dispositive motions  
25 shall be heard at least 30 days before the scheduled trial

1 date. No dispositive motion shall be heard after that date  
2 without leave of Court.

3 It is my assessment at this point, Mr. Schwenke,  
4 that given the fact that there's been no written motion  
5 filed and given the resulting prejudice that would occur to  
6 the Plaintiffs in this matter, that this is not a timely  
7 opportunity for hearing a dispositive motion. Your request,  
8 therefore, to be heard in that matter is denied.

9 Let's proceed, Mr. Weston.

10 MR. WESTON: Thank you, your Honor. If I might  
11 just again for clarification on the record, do I understand  
12 that Mr. Schwenke has withdrawn his request for permission  
13 to call Mr. Philip Cook as an expert in this case?

14 MR. SCHWENKE: That's correct.

15 THE COURT: Very well.

16 MR. WESTON: Very briefly, your Honor, by way of  
17 opening statement, this is an action which has been filed  
18 pursuant to Section 57-1-32, Utah Code Annotated, seeking  
19 judgment for a deficiency arising from a foreclosure of a  
20 trust deed against property at 448 North Grant Street in  
21 Salt Lake City, Utah. That trust deed was foreclosed  
22 pursuant to the power of sale provision in the document and  
23 in accordance with Chapter 1 of Title 78 of the Utah Code.

24 The Answer of the Defendant acknowledges and  
25 admits that the property was sold by the Plaintiffs to the

1 Defendant in September of 1984, that a promissory note and  
2 trust deed were then executed and delivered for part -- for  
3 the deferred portion of the purchase price, that principal  
4 balance thereby deferred being some \$25,000, that there was  
5 a default in the monthly installment payments owing under  
6 the promissory note, that the property went to foreclosure  
7 sale, and a trustee's sale was conducted on November 24,  
8 1987, at which time the Plaintiffs were the successful  
9 purchasers and bidders of the property.

10           There remains, therefore, three issues to be  
11 determined by the Court, the first one being the unpaid  
12 balance owing by the Defendant on the obligation as of the  
13 date of the trustee's sale, that being November 24, 1987.  
14 Secondly, the fair market value of the subject property as  
15 of that date, and thirdly, the amount and reasonableness of  
16 attorney's fees incurred by the Plaintiffs in prosecuting  
17 this action which the Plaintiffs request again under Section  
18 57-1-32.

19           Plaintiffs will call during the course of the  
20 trial four witnesses who will testify substantially as  
21 follows: First, that the unpaid balance owing on that  
22 obligation as of the trustee's sale was \$29,622.62;  
23 secondly, that the fair market value of the property as of  
24 the date of sale was \$22,000, giving rise to a deficiency of  
25 \$7,622.62; and finally that there are attorney fees that

1 have been incurred by these Plaintiffs in a reasonable  
2 amount and for which they will be requesting an order of  
3 judgment.

4 Thank you.

5 THE COURT: Very well. Mr. Schwenke?

6 MR. SCHWENKE: There's really no dispute basically  
7 as to most of the facts that have been laid out by  
8 Mr. Weston. However, I believe there are -- the issues as  
9 he set out are not exactly all the issues involved here. I  
10 believe, first of all, there is an issue of market value,  
11 that's correct. I believe the statute was quoted as the  
12 proper statute that under -- for which this case is brought  
13 under.

14 However, the statute requires a fair market value  
15 determination by this Court, fair market value at the time  
16 of this sale. We contend, of course, the fair market value  
17 was not \$22,000 as asserted by the Plaintiff, but was in the  
18 neighborhood of 31,000 or so, \$31,500.

19 Second factual issue before the Court, I believe  
20 it's a question of whether the sale itself was proper and  
21 was in full compliance with the statute, the statute which  
22 the case is brought, this matter is brought before the  
23 Court; and secondly, whether the sale was properly conducted  
24 pursuant to the terms of the trust deed.

25 In that respect we will show that the sale was



1 defective in two respects. Number one, the statute appears  
2 to show or to require that a bid of a designated price be  
3 made at the time of the sale, and the term of the trust deed  
4 also requires that a bid of -- and purchased with monies of  
5 the United States of America also be made at the date of the  
6 sale, that we will be able to show that both the statute and  
7 the terms of the trust deed were not complied with here and  
8 accordingly, the sale is void.

9           The third factual issue, your Honor, I believe,  
10 has to do with the conduct of the Plaintiffs after there was  
11 an assignment from the Defendant to a Mr. Stonehocker. We  
12 will show the Court that the conduct of the Defendant -- I  
13 mean of the Plaintiff clearly indicated a desire or the  
14 intention to look to the assignee Mr. Stonehocker for  
15 performance under the contract.

16           Third factual issue before the Court, your Honor,  
17 is the question of fact with respect to the purpose of the  
18 other statute that we relied on in our defense, 57-1-32,  
19 which is appropriately called the Antideficiency Statute,  
20 and there the issue, factual issue, is whether the Defendant  
21 here is the type of person or the buyer that is intended to  
22 be protected under that statute, and we will show this Court  
23 that in fact this Defendant has laid out substantial amount  
24 of monies and substantial equity in this property initially  
25 in the tune of \$8,000, and then subsequently for a period of

1 two and a half years making monthly payments on the note,  
2 that upon the sale of this property by the Plaintiff, the  
3 Defendant, of course, lost all of that equity that he built  
4 up in this property. That is the type of -- basically  
5 punishment and loss of equity that the legislature in  
6 enacting 57-1-32 intended that statute to protect citizens  
7 like the Defendant here from again, after incurring that  
8 loss, also end up having to defend a deficiency action.

9 And finally, your Honor, the last issue is, of  
10 course, attorney's fees, and that we will prepare -- I will  
11 prepare to offer testimony in that respect.

12 THE COURT: Very well. Mr. Weston, call your  
13 first witness.

14 MR. WESTON: Thank you, your Honor. I have marked  
15 and submitted to Mr. Schwenke, your Honor, copies of the  
16 three exhibits we propose to offer. I would offer them at  
17 this time and I don't know if Mr. Schwenke's had an oppor-  
18 tunity to look at those.

19 MR. SCHWENKE: I have no objection to the admis-  
20 sion of Exhibits 2 and 3. I will reserve objection on  
21 Exhibit 1. I'm not quite sure what Exhibit 1 represents,  
22 your Honor.

23 THE COURT: Very well. Exhibits 2 and 3 are  
24 received by stipulation.

25 MR. WESTON: And I have courtesy copies, your

1 Honor, for the Court.

2 THE COURT: Very well. Proceed.

3 MR. WESTON: Plaintiffs would call Mrs. Kathleen  
4 Thomas, your Honor.

5 THE COURT: Come forward, Mrs. Thomas, please, and  
6 be sworn.

7 KATHLEEN M. THOMAS,  
8 called as a witness by and on behalf of the Plaintiffs,  
9 having been first duly sworn, was examined and testified as  
10 follows:

11 DIRECT EXAMINATION

12 BY MR. WESTON:

13 Q Mrs. Thomas, would you tell us your name and where  
14 you reside?

15 A Kathleen Thomas, 2781 Danville Drive, Sandy, Utah.

16 Q Are you one of the Plaintiffs in this action?

17 A Yes, I am.

18 Q What is your relationship to the other Plaintiffs  
19 in the action?

20 A They're my brothers and sisters.

21 Q Are you married, Mrs. Thomas?

22 A Yes.

23 Q And to whom?

24 A Richard Thomas.

25 Q Are you employed outside the home?

1           A     Yes, I am.

2           Q     What is the name of your employment?

3           A     I work for my husband.

4           Q     What is that business?

5           A     At Village Sports Den, 6500 South 900 East, Salt  
6 Lake.

7           Q     What are the nature of your responsibilities there  
8 in that employment?

9           A     Secretary.

10          Q     Are you, Mrs. Thomas, acquainted with property at  
11 448 North Grant Street in Salt Lake City, Utah?

12          A     Yes.

13          Q     How did you first become acquainted with that  
14 property?

15          A     It was owned by my aunt.

16          Q     Her name?

17          A     Rose Jarvis.

18          Q     Did there come a time when you and the other  
19 Plaintiffs acquired an interest in that property?

20          A     Yes.

21          Q     How and when did you acquire that interest?

22          A     My aunt died on November 19, 1983, and we were her  
23 heirs.

24          Q     Was that property eventually sold by you and the  
25 other Plaintiffs?

1           A     Yes.

2           Q     When was it sold?

3           A     September 21st, 1984.

4           Q     And to whom?

5           A     Jamis Johnson.

6           Q     Did you later take the property back?

7           A     Yes.

8           Q     Why and under what circumstances?

9           A     No payments of the interest that was promised were  
10    given to us and so I contacted you to help us out with the  
11    payments, receiving the payments.

12          Q     Was a foreclosure action undertaken, a foreclosure  
13    of the trust deed?

14          A     Not to begin with, but it happened, yes.

15          Q     Directing your attention then to the date of  
16    November 24, 1987, do you recall being involved on that  
17    occasion in a trustee's sale?

18          A     Yes.

19          Q     Where did this sale take place?

20          A     On the steps of the courthouse here.

21          Q     Who was present?

22          A     I was, you were, and the tenant that was living at  
23    the -- at 448 Grant.

24          Q     Do you recall the reason for my being in attend-  
25    ance on that occasion?

1           A     For sale of the property. I had asked you to be  
2 my attorney.

3           Q     Okay, and trustee under the trust deed?

4           A     And trustee, right.

5           Q     Was the sale of the property, a trustee's sale,  
6 concluded on that day?

7           A     Yes.

8           Q     Were any bids made on that date for the property,  
9 do you know?

10          A     No, no, except I was under the impression that  
11 Mr. Johnson would probably be there and would buy the  
12 property back.

13                   MR. SCHWENKE: Objection, nonresponsive.

14                   THE COURT: Sustained.

15          Q     (By Mr. Weston) On that occasion at the time of  
16 the sale, was a bid made for the purchase of the property?

17          A     Yes.

18          Q     By whom?

19          A     By myself.

20          Q     And what was the amount that was bid, Mrs. Thomas?

21          A     We had bid the fair market value is what we had  
22 decided that we would bid.

23          Q     Do you know at that time, at the time of the sale,  
24 did you then know what the fair market value of the property  
25 was?

1           A     No.

2           Q     How much were you prepared to bid, assuming  
3     Mr. Johnson or someone else had been there bidding?

4           A     I was prepared to bid 26,000.

5           Q     Why had you prepared to bid that much?

6           A     Well, Mr. Johnson had signed a note for 25,000 and  
7     we were hoping that the property would still be at that  
8     value and that's why.

9           Q     Had you inspected the property as of the date of  
10    the sale? Had you been through the property or seen it?

11          A     No, I hadn't, and so we weren't really sure  
12    exactly what the fair market value would be.

13          Q     Do you recall what the amount was that was owing  
14    by Mr. Johnson as of the time of that trustee's sale again  
15    on November 24, 1987?

16          A     He had signed a note for 25,000 and was going to  
17    pay that in -- at the time that he bought the property and  
18    was going to pay that amount at the end of seven years, and  
19    up to that time he would pay interest on that amount  
20    monthly.

21          Q     Had some interest payments been made?

22          A     Some had.

23          Q     Had any amounts been paid against the \$25,000  
24    principal?

25          A     No.

1           Q     Do you know the amount, the total amount, that was  
2     owing as of the date of the trustee's sale?

3           A     I think it was approximately 29,000.

4           Q     Do you recall the interest rate that was accruing  
5     on that promissory note?

6           A     It was 12 percent right at that time.

7           Q     Mrs. Thomas, have you caused to be prepared a  
8     document reflecting the amount owing as of the date of the  
9     sale, trustee's sale?

10          A     Yes.

11          Q     Let me show you what has been marked as  
12     Plaintiffs' Exhibit 1 and ask you whether this is the  
13     document.

14          A     Yes, it is.

15                 MR. WESTON: We would offer Exhibit 1, your Honor.

16                 THE COURT: Counsel, any objection?

17                 MR. SCHWENKE: I'm sorry, your Honor. I wasn't  
18     quite clear as to this exhibit. This is a summary of the --

19                 MR. WESTON: Reflects the total amount on the  
20     obligation as of the date of the trustee's sale.

21                 MR. SCHWENKE: I have no objection, your Honor.

22                 THE COURT: One's received.

23                 MR. WESTON: Your Honor, I have a courtesy copy of  
24     that exhibit also.

25                 THE COURT: Very well.



1           Q       (By Mr. Weston) Mrs. Thompson, if I might direct  
2 your attention to two items on this exhibit. Number one,  
3 about half-way down the middle of the page it talks about  
4 real property taxes. Do you see where that appears?

5           A       Yes.

6           Q       Had you made any payment or had any of your  
7 brothers or sisters, to your knowledge, made any payment of  
8 real property taxes on that property after the date it had  
9 been sold to Mr. Johnson?

10          A       No.

11          Q       And what does this amount reflect then in the  
12 statement as to the '86 and '87 taxes? What did you under-  
13 stand that to be?

14          A       That no taxes had been paid by Mr. Johnson.

15          Q       Were those amounts that were due and owing then as  
16 of the date of the trustee's sale?

17          A       Yes.

18          Q       After the trustee's sale was concluded, what if  
19 anything did you do with regard to that property?

20          A       Well, we needed to sell the property.

21          Q       Why was that?

22          A       Well, there were eight of us involved and we  
23 couldn't get renters and take care of the property ourself.  
24 We needed to sell the property and get the cash for it.

25          Q       Was there anything then you did in that regard?

1           A     I contacted a real estate company.

2           Q     Who was that realtor?

3           A     Joan Rushton Carlson.

4           Q     And for what reason then did you contact

5 Mrs. Carlson?

6           A     To -- in order to sell, might have the opportunity

7 to sell the property.

8           Q     Is there anything else you did other than contact

9 Mrs. Carlson then in your efforts to find a buyer for the

10 property?

11          A     We talked and we decided on a sale price and

12 decided the first thing we needed to do was to get an

13 appraisal on the property.

14          Q     Was an appraisal obtained?

15          A     Yes.

16          Q     Did you obtain that appraisal, Mrs. Thomas?

17          A     No, I did not.

18          Q     Do you know who did obtain it?

19          A     Joan Rushton Carlson.

20          Q     Who paid for the appraisal?

21          A     I did.

22          Q     Did you have an opportunity to inspect the prop-

23 erty at any time?

24          A     Yes, I did.

25          Q     When would that have been?

1           A     That was -- it was after the sale.

2           Q     Do you know approximately when you did inspect it?

3           A     I went to the renter at the first of the month to  
4 collect the rent and she told me that she would move out  
5 rather than pay the rent and so I said fine, and after she  
6 moved out then I went through the house and looked at the  
7 property.

8           Q     Was this then before or after the trustee's sale?

9           A     This was after the sale.

10          Q     And what did you observe with regard to the prop-  
11 erty, the condition of the property, as you went through?

12          A     It was in very bad repair.

13          Q     What did you observe?

14          A     Going up the front steps, the stairs on the porch  
15 had had outdoor carpeting on it. The carpeting was torn  
16 off. Looked like there had been a fire built in the corner  
17 of the porch. The stair had -- one of the steps had been  
18 broken off, a big chunk was broken off of that. I went in  
19 the house. The walls were a disaster. The carpet had big  
20 holes in it. The linoleum had holes and was completely  
21 worn.

22                On the back porch there it's enclosed and there  
23 were closets there for clothing to be hung and there were  
24 huge holes in the back of the closet where the wall had been  
25 broken out. Windows were broken.

1           The stove was -- the clock on the stove was pulled  
2 out and broken and not repaired.

3           The home did have nice curtains in it. They were  
4 gone and there were old, beat up drapes that were barely  
5 hanging and it was just in really bad repair.

6           Q     Did you make any observation with regard to the  
7 exterior of the home, the paint on the home?

8           A     The paint -- the house had not been painted since  
9 it had been sold. The paint was all chipped and peeling  
10 off.

11          Q     Mrs. Thomas, prior to the time that the home had  
12 been sold to Mr. Johnson in 1984, had you gone through the  
13 home and inspected it?

14          A     Yes, I did. The home was in very good repair. My  
15 aunt had kept it up very nicely and myself and my two  
16 sisters went there.

17          Q     When did you go through?

18          A     The day -- a couple of days before Jamis Johnson  
19 took the property over and we personally cleaned the prop-  
20 erty and made it look very nice before we left.

21          Q     Did you receive any offer at any time from any  
22 prospective purchaser for the purchase of the property?

23          A     No, not for several months.

24          Q     How long was the property listed with the realtor?

25          A     Approximately seven months.

1           Q     Did there come a time when you did receive an  
2 offer?

3           A     Yes.

4           Q     When would that have been?

5           A     It was about June of 1988.

6           Q     And from whom was that offer received?

7           A     From Larry Hyde.

8           Q     Had you received any offer from any other prospec-  
9 tive purchaser before that time?

10          A     No, we had not.

11          Q     Had you received any contact or inquiry from a  
12 prospective purchaser before that time?

13          A     No.

14          Q     Did you sell the property eventually?

15          A     Yes, we did.

16          Q     And to whom did you sell it?

17          A     To Larry Hyde.

18          Q     When would that have been sold?

19          A     That was in July 1988.

20          Q     And what was the sales price of the property?

21          A     20,500.

22          Q     Let me show you if I may, Mrs. Thomas, what has  
23 been marked as Plaintiffs' Exhibit 2.

24                 THE COURT:  It's been received, Counsel.

25                 MR. WESTON:  Thank you, your Honor.

1           Q     (By Mr. Weston) This consists of a number of  
2 documents, Mrs. Thomas. First one is a earnest money  
3 agreement. Under that there is a document titled Seller's  
4 Settlement Statement. Then under that one another entitled  
5 Buyer's Settlement Statement, then a trust deed note and  
6 finally a warranty deed.

7                     Have you seen those documents before this morning?

8           A     Yes.

9           Q     Now, the first document in the exhibit, the one  
10 entitled Earnest Money Agreement, do you recall when you  
11 first saw that document?

12          A     Yes.

13          Q     When would that have been?

14          A     That was in June.

15          Q     Of what year?

16          A     1988.

17          Q     Directing your attention to the second page of  
18 that agreement, does your signature appear there?

19          A     Yes.

20          Q     And was this the agreement pursuant to which the  
21 property was sold by you and the other Plaintiffs?

22          A     Yes.

23          Q     Mrs. Thomas, why did you decide to accept \$20,500  
24 for that property?

25          A     Because we hadn't had no offers, other offers, and

1 we needed to sell the property and we needed -- and there  
2 was no other offer, so we decided that we had to lower that.

3 Q At the time you sold the property -- or at the  
4 time you received this offer from Mr. and Mrs. Hyde, what  
5 was the price of which you then were listing the property  
6 for sale with the realtor?

7 A To begin with?

8 Q No. At the time you received the offer, what was  
9 the price?

10 A I think it was 22,000.

11 Q Had you obtained an appraisal before that time of  
12 the property?

13 A Yes, and that's why we had gone with that price is  
14 because the appraisal was approximately that.

15 Q Do you know how long you'd had the property listed  
16 at the lower price then, approximately 22,000?

17 A About seven months.

18 Q Had you received any offers from anyone, anyone at  
19 all, during the time the property was listed for 22,000 or  
20 approximately 22,000?

21 A No, except Larry Hyde gave us this offer.

22 Q What was the down payment, the amount of the down  
23 payment, that had been paid by Mr. Hyde to buy the property?

24 A It was \$500, but we didn't -- I didn't see that  
25 money. That was money that went for other --

1           Q     Did you receive or any of the other Plaintiffs  
2 receive any money at the time this sale to Mr. Hyde was  
3 completed?

4           A     No, we did not.

5           Q     Did you have to pay any money?

6           A     Yes, we did.

7           Q     How much did you pay?

8           A     \$712 is listed on the Seller's Settlement  
9 Statement down where it says "balance due from seller."

10          Q     Directing your attention, Mrs. Thomas, again to  
11 the first page of the exhibit, this is the first page in the  
12 Earnest Money Agreement. I want you to go down, oh, about  
13 two inches up from the very bottom of the page. You notice  
14 the last line that's written in there, that's penned in  
15 there; do you see that?

16          A     Uh-huh (affirmative).

17          Q     Are you able to read that line?

18          A     Yeah, yes.

19          Q     Now, that reads, just immediately to the right of  
20 where it says "total purchase price," do you see that?

21          A     Yes.

22          Q     Now, that reads, "taxes when due and provide proof  
23 of payment to seller," and then it reads, "owner to cash out  
24 remaining balance and note seven years from -- " and I can't  
25 read the rest of that.



1           What did you understand that meant at the time you  
2 signed this document, the seven years?

3           A     That in seven years the balance would be paid.

4           Q     Then if you'd go over to the second page of that  
5 same agreement, I want to direct your attention to paragraph  
6 7. Do you have that in front of you?

7           A     Yes.

8           Q     There's some writing that's penned in there. Do  
9 you see that?

10          A     Yeah.

11          Q     That reads, "subject to seller allowing buyer  
12 immediate possession to begin repairs to prepare the prop-  
13 erty for rental. Buyer to begin monthly payments 90 days  
14 after closing to give buyer time to complete repairs." Is  
15 that the way that reads to you?

16          A     Yes, that's correct.

17          Q     Why were you willing at the time you signed this  
18 earnest money agreement to defer payments for 90 days under  
19 the note?

20          A     Because the buyer needed that time and that money  
21 in order to get the property ready so that he could rent it.

22          Q     Prior to the time that you accepted this offer  
23 from Mr. Hyde, had you or anyone else, to your knowledge,  
24 gone in and repaired the property or fixed it up or done  
25 anything with it?

1           A     No.

2           Q     So between the time of the trustee's sale on  
3 November 24, 1987, and the date this Earnest Money offer  
4 came in to you, as far as you know, there had not been any  
5 repairs done on the property?

6           A     No.

7           Q     You, Mrs. Thomas, retained an attorney to repre-  
8 sent you in prosecuting this particular action?

9           A     Yes.

10          Q     And who?

11          A     It was you.

12          Q     And have you agreed to pay me a fee, a reasonable  
13 fee, for my services?

14          A     Yes.

15               MR. WESTON: That's all I have, your Honor.

16               THE COURT: Very well. You may cross,  
17 Mr. Schwenke.

18               MR. SCHWENKE: Your Honor, if I could request the  
19 Court, I have a witness here, that if he could be excused  
20 for an hour or so, would that be good for the Court? He has  
21 a personal errand to run.

22               THE COURT: Any objection?

23               MR. WESTON: May I ask who the witness is, your  
24 Honor, and why?

25               MR. SCHWENKE: It's Mr. Copeland. He's my expert

1 witness, your Honor.

2 MR. WESTON: So apparently what Mr. Schwenke would  
3 like to do would be to call his expert and then continue his  
4 cross-examination?

5 THE COURT: No, no. He's merely asking that  
6 Mr. Copeland be allowed to leave for approximately an hour.

7 MR. WESTON: Oh, I have no objection.

8 THE COURT: Yes, you have no objection?

9 MR. WESTON: Of course not. I'm sorry.

10 THE COURT: Mr. Copeland, you're free to go.  
11 Thank you.

12 MR. SCHWENKE: Thank you, your Honor.

13 CROSS-EXAMINATION

14 BY MR. SCHWENKE:

15 Q You were present at the sale, is that correct, the  
16 trustee's sale --

17 A Yes.

18 Q -- of this property?

19 And you were present representing the Plaintiffs  
20 in this case; is that correct?

21 A Yes.

22 Q Isn't it a fact that at the sale you did not make  
23 a dollar amount bid; is that correct?

24 A That's correct.

25 Q You did not bid the \$22,000 at that sale; is that

1 correct?

2 A That's right.

3 Q As a matter of fact, there was no dollar amount  
4 bid made at that sale; is that correct?

5 A That's right.

6 Q You represented all the Plaintiffs in the transac-  
7 tion, the contract wherein you sold the property to the  
8 Defendant; is that correct?

9 A Would you repeat that question?

10 Q You represented yourself and also all of the  
11 Plaintiffs in this case when you sold the property to the  
12 Defendant; is that correct?

13 A That's correct.

14 Q And therefore, you're familiar with the circum-  
15 stances of that transaction; is that correct?

16 A Yes.

17 Q Isn't it a fact that you sold the property to  
18 Mr. Jamis, the Defendant here, and collected \$8,000 in down  
19 payment?

20 A That's correct.

21 Q Then you took a note back for \$25,000; is that  
22 correct?

23 A That's correct.

24 Q Then under that note you received payments for  
25 approximately two and a half years; is that correct?

1           A     Uh-huh (affirmative).

2           Q     Let me rephrase that.  You received payments every  
3 month from the date of that transaction, September 1984,  
4 until February 1987; is that correct?

5           A     Yes.

6           Q     Do you remember how much that total payment came  
7 to?

8           A     No, I can't.

9           Q     What was the monthly payment?

10          A     I can't remember the exact --

11          Q     What was the monthly payment?

12          A     Approximately \$220.

13          Q     \$250?

14          A     Approximately \$220.

15          Q     It was not \$250?

16          A     I don't think so.  I can't tell you the exact  
17 amount.

18          Q     But you in fact received those monies during that  
19 time; is that correct?

20          A     Sporadically, but it did add up to that amount of  
21 time.

22          Q     At the time you were preparing to sell Mr. Johnson  
23 this property, you were familiar with the value of the  
24 properties at the time, were you not?

25          A     Yes.

1           Q     And what would you put the value of the property  
2     to be at that time?

3           MR. WESTON:  Objection, your Honor.  I'm not sure  
4     I understand where we're going with this.  The Defendant has  
5     admitted he's in default on the note, number one, default on  
6     payments.  Number two, whatever value the property might  
7     have had at any time prior to the trustee's sale back in  
8     '84, '83, or whenever it would have been, is not at issue in  
9     this case, clearly is not at issue under 57-1-32, so I would  
10    object on that basis.

11          MR. SCHWENKE:  Your Honor, I'm merely establishing  
12    the knowledge of this witness as to market value during the  
13    time in question here, from the time she sold the property  
14    to the Defendant to the time that she sold it again at the  
15    trustee's sale.  I think her knowledge of the value at the  
16    time, the relevant time, is significant in this case,  
17    clearly relevant as well because it has a bearing on the  
18    value at the time of the sale as well.

19          THE COURT:  I think no, Counsel.  The objection is  
20    sustained.

21          MR. SCHWENKE:  I will ask the question then with  
22    respect to the appraisal at the time as well, and I don't  
23    know the scope of this objection, whether it goes to that,  
24    but maybe I'll ask the question and Counsel can object  
25    still, but in deference to the Court here, I don't want to

1 ask the question if my question is clearly covered by this  
2 objection.

3 THE COURT: Well, I'm sure, Mr. Schwenke, if you  
4 ask a question that Counsel finds objectionable, he will  
5 object, so go ahead.

6 MR. SCHWENKE: Thank you.

7 Q (By Mr. Schwenke) Prior to selling the property  
8 to Mr. Johnson, did you obtain an appraisal of the property?

9 MR. WESTON: Objection, your Honor, same  
10 objection.

11 THE COURT: I think, Mr. Schwenke, the objection's  
12 well taken as being irrelevant to what the value of the  
13 property was at the time of the transaction between the  
14 parties in this action was arrived at. The issue here is  
15 the value of the property the day of the sale. Objection  
16 sustained.

17 MR. SCHWENKE: Thank you, your Honor.

18 Q (By Mr. Schwenke) After you allegedly acquired  
19 the property at the sale, the trustee's sale -- let me make  
20 that clear -- what did you do with the property?

21 A I contacted a realtor in order to sell it.

22 Q And when did you do that?

23 A It was less than a week later.

24 Q A week later after November 24th?

25 A After the trustee's sale.

1           Q     When did you finally -- let me rephrase that.  
2                     Isn't it a fact after 30 days from this sale you  
3 finally determined a price for this sale, for your bid; is  
4 that correct?  
5           A     We listed the house at one price and after the  
6 appraisal came back, we changed our price.  
7           Q     And that price that you listed at was \$20,000?  
8           A     Close to -- it was around 22. I can't remember  
9 the exact. I think it was 22.  
10          Q     But let me get this correct. Your testimony is  
11 you listed it for \$22,000 before you got the appraisal?  
12          A     No.  
13          Q     You want to change your testimony?  
14          A     No. That was after the appraisal that we listed  
15 it at 22.  
16          Q     But you listed it before the appraisal as well; is  
17 that correct?  
18          A     That's correct.  
19          Q     And you listed it at what, \$20,000?  
20          A     No, we listed it at -- I think it was 31,090 or  
21 close to that.  
22          Q     Isn't it a fact that you listed it for 32,750 at  
23 the recommendation of your broker?  
24          A     I'm not sure on the amount, but it's close.  
25 Around 32, 31.



1           Q     Now, why would you list the price of the house for  
2 sale at 32 and you have not even bid the price for the house  
3 yet; is that correct?

4           A     Well, we wanted to get it on the market and we  
5 thought that we would start out with that since that was  
6 close to the price that we had sold it to Mr. Johnson for  
7 and we would see how that went and we wanted to get as high  
8 as we could for it, and we had no action, and when the  
9 appraisal came back, what it was, then we decided that the  
10 only thing that we could do was to go with the appraisal.

11          Q     So you listed this property for 32,000 or there-  
12 abouts at the recommendation of your broker for what,  
13 approximately a month?

14          A     That's right.

15          Q     Then you changed the listing to \$22,000 on or  
16 about the end of December --

17          A     That's right.

18          Q     -- '87?

19          A     1987.

20          Q     So for some time there then you had a belief that  
21 this property had a value of \$32,000; isn't that correct?

22          A     Well, the reason why we listed it for that was  
23 because --

24          Q     Just answer the question. You had a belief that  
25 the value of this property --

1           A     No.

2           Q     -- was \$32,000?

3           A     We didn't know. We just made a stab at it.

4           Q     You stated that the house was in disrepair. Could

5     you list for me what was in disrepair at the property at the

6     time you acquired it?

7           A     After the --

8           Q     After the sale.

9           A     -- sale?

10                Well, I can tell you the same thing that I told

11     Mr. Weston.

12          Q     Could you do that, please?

13          A     The stairs going up the front steps --

14          Q     If I can --

15          A     -- one of the steps was broken.

16          Q     Hold on. Let me take it one at a time. I think

17     that will be helpful here.

18                You testified that the floor was in disrepair; is

19     that correct?

20          A     That's right.

21          Q     In your estimation from your inspection, how much

22     would it have taken to repair the floor?

23          A     How much what? Money?

24          Q     That's correct.

25          A     I don't know. I would have to get a bid on that

1 to tell ya how much it would cost.

2 Q Will it cost a thousand dollars?

3 A I can't tell you that. I'm not a carpet or a  
4 linoleum expert.

5 Q You also testified that the walls were in dis-  
6 repair. Does that mean they needed painting?

7 A Well, the wall in the closet needed a lot more  
8 than painting. It would have had to have been torn out and  
9 redone. The walls in the living room, there was hardly any  
10 paper left on them, it was worn so badly.

11 Q So in your opinion, when you inspected the prop-  
12 erty, the walls inside needed to be torn down; is that  
13 correct?

14 A Needed to be repaired in some way, yes.

15 Q Well, I asked if the repair is the paint and you  
16 said no, they've got to be torn -- that means the wall's got  
17 to go; is that correct?

18 A The wall in the closet would have to go. The  
19 wall --

20 Q Just the closet?

21 A In the closet. It was quite a big closet. The  
22 back of the wall had big holes torn in it, okay?

23 Q Just the closet?

24 A Just the closet. The walls in --

25 Q What is the rest -- I'm sorry. I don't want to be

1     rude here. I thought you were through.

2             What was your estimate of what it would take to

3     repair these walls?

4             A     I don't know. I don't know.

5             Q     \$500?

6             A     I don't know that.

7             Q     Rough estimate.

8             A     I can't tell you.

9             Q     You testified that there was broken cement. Was

10     that the sidewalk into the house?

11            A     The step.

12            Q     The steps in front? Back of the house?

13            A     Front of the house.

14            Q     What would have been your estimate at the time of

15     the repair cost to do that, to repair that broken cement?

16            A     I can't tell you that.

17            Q     Isn't it a fact that at the time you sold the

18     property, that that cement was in that condition?

19            A     Sold the property to who?

20            Q     To Mr. Johnson. I'm sorry. Mr. Johnson.

21            A     No.

22            Q     Would you agree with me that this home is a brick

23     home?

24            A     Yes.

25            Q     Older construction?

1           A     Yes.

2           Q     But solid?

3           A     Yes.

4           Q     And when you testified about the need for repair,  
5 painting repair, were you talking about the outside, too?

6           A     Yes. The back of the house has -- is basically --  
7 or was a porch that's enclosed and that part of it was wood.

8           Q     And that needed painting?

9           A     Right, plus the painting around.

10          Q     Would you agree with me that substantially most of  
11 the house was brick except for this porch in the back.

12          A     Probably three-fourths of it, maybe more, maybe  
13 less.

14          Q     And there was no need for painting there; is that  
15 correct?

16          A     Not on the brick.

17          Q     Do you know Mr. and Mrs. Hyde?

18          A     Yes, I do.

19          Q     Did you know them before the sale?

20                Let me back up. Is Mr. and Mrs. Hyde the pur-  
21 chaser from you after the trustee's sale?

22          A     Yes.

23          Q     Did you know them before the sale?

24          A     No. I had seen them, but I did not know -- I  
25 didn't talk to them.

1           Q     You're not friends with them or anything like  
2     that?

3           A     No.

4           MR. WESTON: Your Honor, if I might, I think we  
5     need some clarification on the record. I don't know if  
6     Mr. Schwenke is talking about the trustee's sale or the sale  
7     of the property, and I'm not sure if the witness's response  
8     would indicate whether they're on track.

9           MR. SCHWENKE: Your Honor, I believe I have made  
10    that very clear. I said the sale to the Hydes, were the  
11    Hydes the purchaser after the trustee's sale, and I don't  
12    think the witness was --

13          THE WITNESS: That's what I thought.

14          Q     (By Mr. Schwenke) When you listed the property  
15    for 32,000 or so for 30 days or so, earlier you stated that  
16    it was just a crack at it. Does that mean that you didn't  
17    really feel it was worth 32,000?

18          A     Well, I knew that that's approximately what we  
19    sold to Jamis Johnson for and so we thought we would try  
20    that to see if we could get that price.

21          Q     But you didn't feel that that's how much -- that's  
22    not the true value of the property; is that correct?

23          A     Well, I knew that it wasn't in -- that it wasn't  
24    the value that Mr. Johnson had when he bought it.

25          Q     I'm a little confused. You said that you didn't

1 feel that the 32,000 you listed at was the true fair market  
2 value of the property; isn't that correct, you made that  
3 statement earlier?

4           You listed it at 32 but you did not really feel  
5 that that was --

6           A     We listed it at 32 because that's what it was sold  
7 for before and we had not had our appraisal and so we didn't  
8 know what -- really what to list it for.

9           Q     So you didn't -- so you believed then that it  
10 should be worth 32,000?

11          A     I can't say that I believed that.

12          Q     Did you believe it was worth less than 32,000?

13          A     I wasn't sure of what it was worth because I  
14 didn't know, but we needed to sell the property and so we  
15 put that price on it to begin with.

16          Q     You testified that you had this house on the  
17 market for approximately seven months; is that correct?

18          A     That's right.

19          Q     And you were actually involved in trying to sell  
20 this property for seven months; is that correct?

21          A     I was involved with the realtor, yes.

22          Q     That's correct. Then is it true then that you  
23 were quite familiar with the market condition at the time  
24 that you were trying to sell the house after the trustee's  
25 sale?

1           If you were familiar with the market conditions --  
2           MR. WESTON: Objection, your Honor. This witness  
3 is not an expert. I'm not so sure she knows what  
4 Mr. Schwenke means by not familiar with market conditions.  
5 It's too broad.

6           THE COURT: Well, Counsel, if the witness is  
7 unable to answer the question, she can say so.

8           THE WITNESS: I can't say that I was familiar with  
9 it. I just trusted my realtor and we did what we felt that  
10 we needed to do.

11          Q     (By Mr. Schwenke) But your realtor recommended  
12 32,000?

13          A     And then after the appraisal came back, she -- we  
14 both agreed, she talked to me about the appraisal, we both  
15 agreed that we could not sell the house at 32. We had not  
16 had anyone even call about it, and we needed to make a  
17 change.

18          Q     That's correct, so when you decided that you  
19 couldn't sell at 32, obviously you had a reason for deciding  
20 you can't sell it for 32; isn't that correct?

21          A     That's right.

22          Q     And that reason was based on your familiarity so  
23 far for seven months with the conditions as you tried to  
24 sell it; is that correct?

25          A     Well, we had no one calling at that price. We had



1 no one calling at 22,000.

2 Q If I may direct your attention to Plaintiffs'  
3 Exhibit No. 2, I don't know -- you have it there?

4 A Uh-huh (affirmative), I have it.

5 Q If I can invite the Court's attention as well to  
6 the page that's entitled Trust Deed Note, and if I may  
7 clarify, this is the Plaintiffs' documents of the sale  
8 between the Plaintiff and Larry and Kathleen Hyde.

9 At the time you sold this property it looks like  
10 it was July 15th, '88. You were quite comfortable with the  
11 sale price at \$20,500; is that correct?

12 A Well, that's the only offer we had.

13 Q You felt like that that was fair value?

14 A We felt like that was the only offer we were going  
15 to get and we needed to get rid of the property.

16 Q Isn't it a fact from this transaction that you  
17 kind of went a little bit overboard in trying to make this  
18 sale?

19 A Well, we waited for seven months. We didn't do it  
20 in haste. We tried for seven months.

21 Q That's right, but in this particular sale it looks  
22 like you gave them 90 days without any payments; is that  
23 correct?

24 A They needed that time in order to repair the  
25 property.

1           Q     And also it looks like you gave them a contract  
2 here, this trust deed note, at six percent; is that correct?  
3           A     That's right.  
4           Q     Isn't that quite unusual given the interest rate?  
5 This is '88. Interest rate's around 11 percent; is that  
6 correct? I mean --  
7           A     We needed --  
8           Q     Isn't that quite unusual?  
9           A     It is, but we needed to sell the property and we  
10 needed to get our money and that's the only offer that we  
11 had.  
12          Q     And that's correct, so in your need to sell this  
13 property, you're willing to concede just about anything;  
14 isn't that correct? Yes or no?  
15          A     No.  
16          Q     Not allowing the party to move in for 90 days,  
17 giving them six percent interest when the prevailing inter-  
18 est is 11, that's not conceding a lot; is that correct?  
19          A     I'm sorry, but --  
20          Q     You wanted to sell the property; that's correct?  
21          A     Can I ask you a question?  
22                THE COURT: Well, ma'am, you can certainly finish  
23 your answer if you wish to answer the question that he's  
24 asked you.  
25                THE WITNESS: We would have sold the property if

1 it was a higher price. We tried to get a higher price. We  
2 would have sold it at a higher price. We did not want to  
3 sell it at a lower price.

4 Q (By Mr. Schwenke) But you did.

5 A We had no other alternative.

6 MR. SCHWENKE: Thank you.

7 THE COURT: Is there anything further, Mr. Weston?

8 MR. WESTON: There is not, your Honor.

9 THE COURT: All right. Ms. Thomas, you may step  
10 down.

11 Let's take a brief recess before you call your  
12 next witness, Counsel.

13 MR. WESTON: Thank you.

14 (Whereupon, a recess was taken.)

15 THE COURT: Parties and counsel are present.  
16 Mr. Weston, you may call your next witness.

17 MR. WESTON: Thank you. Plaintiffs would call  
18 Mrs. Joan Carlson, your Honor.

19 JOAN RUSHTON CARLSON,  
20 called as a witness by and on behalf of the Plaintiffs,  
21 having been first duly sworn, was examined and testified as  
22 follows:

23 DIRECT EXAMINATION

24 BY MR. WESTON:

25 Q Mrs. Carlson, would you state your name and

1 address, please?

2 A My home address or my office address?

3 Q Home address.

4 A Joan Rushton Carlson, 5705 Lolene Way, Salt Lake  
5 City, Utah.

6 Q And are you here today appearing by subpoena  
7 issued by the Court?

8 A Yes, I am.

9 Q What is your occupation?

10 A I'm a realtor.

11 Q A licensed realtor?

12 A I am.

13 Q And is your license issued by what state?

14 A Utah.

15 Q Are you a salesman or broker?

16 A I'm an associate broker.

17 Q How long have you held that designation?

18 A About three years. I've been a realtor for about  
19 11 years.

20 Q And with what agency, brokerage company, is your  
21 license now held?

22 A Realty World of Salt Lake.

23 Q Directing your attention to December of 1987, with  
24 what agency were you then affiliated?

25 A ERA Vista Realtors.

1 Q And when did your association or affiliation with  
2 ERA Vista terminate?  
3 A First of June.  
4 Q Of what year?  
5 A Of 1988.  
6 Q Are you acquainted with the property at 448 North  
7 Grant Street in Salt Lake City?  
8 A Yes.  
9 Q And how did you first become acquainted with it?  
10 A I was contacted to do a market analysis on the  
11 property to market it for Mrs. Thomas and her family.  
12 Q Who contacted you?  
13 A Mrs. Thomas.  
14 Q And when would that contact have been made?  
15 A It was late November of '87 or the first of  
16 December of '87.  
17 Q Is that the first time you ever had any acquaint-  
18 ance with Mrs. Thomas?  
19 A Yes, it is.  
20 Q Did you eventually accept a listing on this  
21 particular property?  
22 A Yes, we listed the property on December 7th of  
23 1987.  
24 Q What was the listing price?  
25 A 32,000.

1 Q Who determined the listing price?

2 A We did a market analysis that showed other proper-  
3 ties and the homes that sold in that price range. However,  
4 they were in much better condition. We determined, that  
5 price range, if someone were willing to do some work for the  
6 down payment, we thought that might be a marketable price.  
7 The condition justifies the price at that time, however.

8 Q What if anything did you then do in response to  
9 that listing?

10 A We marketed the listing. It had been advertised  
11 continuously in the Homes Illustrated magazine which is a  
12 biweekly magazine. We advertised continuously for seven  
13 months. We never missed an issue. We had it on realtors'  
14 open. We had it on office inspection. We had it on the  
15 realtors' bus tour. All of the normal marketing procedures.  
16 It was advertised in the paper as a fix-up special, as a  
17 handyman special. We did extensive marketing on the  
18 property.

19 Q Did it ever go over Multiple Listing?

20 A Yes, it was across Multiple Listing from the day  
21 it was listed.

22 Q You used a couple of terms that I'm not familiar  
23 with. You told us about a bus tour and then something else.

24 A We have a realtors' bus tour where we pay to put  
25 our listings on a bus. There's about a dozen buses that go

1 out once a week into various areas of the city and we -- it  
2 allows us to expose our listings to other realtors who have  
3 listings in the same area.

4 Q Was such a tour used with regard to this property?

5 A Yes, it was.

6 Q On how many occasions?

7 A Two.

8 Q I think you mentioned something called a realtor's  
9 open house.

10 A A realtor's open house. That's on another day  
11 where we caravan in cars to inspect properties in a given  
12 area.

13 Q Was that process used with this property?

14 A Yes, it was.

15 Q On how many occasions?

16 A Twice.

17 Q Did you know if an appraisal was ever obtained on  
18 this property?

19 A Yes. When I listed the property, I suggested to  
20 Mrs. Thomas -- they had a very bad experience with a sale  
21 from the trustee's sale that I was listing it from and they  
22 did not want to sell it on terms if they could possibly  
23 avoid it again, and so I suggested to her there were some  
24 questions whether or not the house would appraise for  
25 refinancing. However, it was an area where the Utah Housing

1 Finance Agency was providing special low interest rate funds  
2 for homes who could qualify in that target area, so I had  
3 suggested to her that we have an appraisal done, had some  
4 questions about the home that needed the expertise of an  
5 appraiser, primarily the substructure of the floor and the  
6 roof as well as the other things. I did not know whether it  
7 would qualify for a refinance, so I suggested to her to find  
8 out all the things that did need to be done to the property  
9 that we have an appraisal ordered, and so she gave me a  
10 check to give to Crossland Mortgage and we had their staff  
11 appraiser do an appraisal on the property.

12 Q Why did you go to Crossland Mortgage?

13 A I do quite a bit of business with Crossland. I'm  
14 familiar with their loan officers there and I just -- it was  
15 just standard procedure to order an appraisal through a  
16 lender.

17 Q Was there any adjustment made during the time of  
18 the listing, any adjustment made as to the listing price?

19 A Yes. We started out at 32,000. That was the  
20 price approximately they had sold it for before and that was  
21 on the 7th of December.

22 We got the appraisal in and debated about whether  
23 or not to drop it at that time. We did drop it almost two  
24 months later on the 1st of February. The appraisal came in  
25 at 21,750 and so we dropped it to the appraised price. It's



1 difficult to sell a home for more than it appraises for.

2 Q And so once again, what would have been the date,  
3 approximate date, when this property would have first gone  
4 over the Multiple Listing Service from your office at the  
5 price \$21,750?

6 A February 1st.

7 Q Was the price ever adjusted again on the listing  
8 after that date?

9 A No, it wasn't. We decided -- originally she had  
10 considered the possibility of doing some fix-up to try and  
11 get closer to the 32,000 price.

12 Q I'm sorry. You say she who. Who do you mean?

13 A Mrs. Thomas, and as we got into it, she decided  
14 that she just couldn't afford to put any more money into it  
15 to fix it up, that it would have to be sold as is, so we let  
16 the price at the appraised value.

17 Q And what efforts did you make in trying to find a  
18 buyer for that property after the reduced price, listing  
19 price, was implemented?

20 A The same. It was listed continuously across  
21 Multiple Listing. It was advertised continually in the  
22 Homes Illustrated. We ran a number of ads in the Newspaper  
23 Agency Corporation section as a fix-up special or handyman  
24 special, and did the realtors' open and the bus tour and the  
25 office inspection at the reduced price, as well.

1           Q     Mrs. Carlson, did you ever receive any offer from  
2 a prospective purchaser for this property?

3           A     No, other than the Hydes. None other than that.

4           Q     Now, the Hydes, who are the Hydes?

5           A     The Hydes I became acquainted with in the neigh-  
6 borhood where the property is. Their son we contacted to  
7 take care of the lawn during the summer when it needed  
8 mowing and watering, and so Mr. and Mrs. Hyde are the ones  
9 who did eventually buy the property.

10          Q     Did they contact you or did you contact them, that  
11 is, the Hydes?

12          A     I became acquainted with them at one time when I  
13 was showing the property, he was outside and he asked a few  
14 questions about the house, and so that was how I first  
15 became acquainted with him was just -- I was at the house  
16 showing it, waiting for a prospective buyer to come look at  
17 it, and Mr. Hyde was out in front, and so we just struck up  
18 a conversation. That was how I became acquainted with him.

19          Q     Did you eventually receive an offer from Mr. Hyde  
20 for the purchase of the property?

21          A     Yes.

22          Q     Approximately when?

23          A     June of 1988.

24          Q     Had you ever received any offer from anyone else  
25 or any inquiry from anyone else about the property, other

1     than the Hydes?

2           A     I had received an inquiry from Mr. Johnson saying  
3     that he would like to show the property or thought he had  
4     someone he could show it to, and so I did advise him that it  
5     was key boxed through our Multiple Listing key box system  
6     and it would be easy for him to show if he had someone -- I  
7     don't know that he ever showed it. I had several buyers  
8     that I showed it to and I had one couple that was quite  
9     interested in it, but they decided that the amount of  
10    repairs that were required were beyond their expertise.

11          Q     Let me show you what we've marked and has been  
12    received as Exhibit 2, Plaintiffs' Exhibit 2, Mrs. Carlson.  
13    I want to direct your attention to the first two pages of  
14    the exhibit. They purport to be earnest money sales agree-  
15    ments. Do you recognize this document?

16          A     Yes, I do.

17          Q     Do you recognize the handwriting on it?

18          A     Yes, I do.

19          Q     And whose is that?

20          A     It's mine.

21          Q     When would you have prepared that document, filled  
22    in the writing in it?

23          A     By the date that it's dated, June 9th, 1988.

24          Q     And for what reason did you complete this document  
25    on that occasion?

1           A     I had talked to Mr. and Mrs. Hyde several times.  
2     He had indicated an interest in maybe purchasing some rental  
3     properties and he kept asking me, you know, what the price  
4     was and what kind of terms it could be purchased on and we  
5     had talked several times, and finally we -- he said he came  
6     up with a set of terms that he would be willing to purchase  
7     it under because it did need a lot of work. His son had  
8     been taking care of the property. He was very familiar at  
9     that time with what needed to be done in it, and he said  
10    that he would make an offer on it, but this would have to be  
11    the terms of the offer because of the condition of the  
12    property.

13           Q     Now, directing your attention to the second page  
14    of that document, immediately under line 12, paragraph  
15    number 12, there are two signatures that appear. Do you  
16    know who those signatures are?

17           A     Yes, Larry and Kathleen Hyde.

18           Q     And how do you know that?

19           A     They signed that in my presence in their living  
20    room on that date.

21           Q     Was the property eventually sold to Mr. and  
22    Mrs. Hyde?

23           A     Yes, it was.

24           Q     Were you in attendance at the time the closing  
25    documents were signed?

1           A     Yes.

2           Q     Directing your attention to the remaining docu-  
3           ments that comprise the exhibit, next one is a Seller's  
4           Settlement Statement. Under that one is a Buyer's Settle-  
5           ment Statement, then a Trust Deed Note and a Warranty Deed.  
6           Do you see all those there?

7           A     Yes.

8           Q     Do you recognize those documents?

9           A     Yes.

10          Q     Were you there at the time those documents were  
11       signed?

12          A     Yes, I was.

13          Q     Was the property sold in accordance with the terms  
14       of the Earnest Money Agreement, do you recall?

15          A     Yes, it was.

16          Q     Again, what was the sales price?

17          A     \$20,500.

18          Q     Did you consider that to be at that time, in your  
19       opinion, a fair price for that property --

20          A     Yes.

21          Q     -- in its then condition?

22          A     Yes.

23          Q     What was the down payment paid by the Hydes?

24          A     \$500.

25          Q     In your opinion, was this offer from Mr. and

1 Mrs. Hyde a good offer for the Plaintiffs, for Mrs. Thomas  
2 and her brothers and sisters?

3 A It was the best we'd been able to come up with.  
4 It was not anywhere near the kind of an offer they had hoped  
5 for, but they were behind in the taxes. The taxes had been  
6 left unpaid on the property for several years while  
7 Mr. Johnson had it. We were looking at another year's taxes  
8 and they were in a financial position that they needed to  
9 have someone making income payments on the property. It was  
10 not suitable for rent in its present condition.

11 MR. WESTON: That's all I have on direct, your  
12 Honor.

13 THE COURT: Any cross-examination?

14 MR. SCHWENKE: Yes, your Honor.

15 CROSS-EXAMINATION

16 BY MR. SCHWENKE:

17 Q I'm sorry. I didn't get your name.

18 A Joan Rushton Carlson.

19 Q And you're here today as an expert?

20 A No, I'm not here as an expert.

21 Q You're not an expert in the real estate market  
22 transaction, that type of thing?

23 A Yes, I am, but I was not called as an expert  
24 witness.

25 Q You're here only to testify then as to the

1 transaction you were involved in?

2 A That's correct.

3 Q You testified that originally the property was  
4 listed for \$32,000; is that correct?

5 A That's correct.

6 Q At that time you felt it was a fair price for this  
7 property?

8 A Not in its present condition, no.

9 Q What do you mean by that?

10 A We felt that we could obtain a sales price of  
11 32,000 if the property were upgraded to the condition of the  
12 other homes in the area that had sold for that price.

13 Q And to the best of your recollection, what would  
14 those upgrades have been?

15 A Well, as I mentioned before, the roof was ques-  
16 tionable, the substructure of the floor was questionable,  
17 the wallboard was coming off the wall in the living room.  
18 There were holes in the --

19 Q I'm sorry, just slow down a little bit here.

20 A Okay.

21 Q After the floor, what was the other one?

22 A The roof, the floor, exterior painting, broken  
23 step, wallboard was coming off the walls in the living room.  
24 It had some damage to the wallboard in the closet as  
25 Mrs. Thomas had indicated, needed to be replaced, needed to

1 be painted inside. Floor coverings needed to be replaced.

2 Q I think you're repeating yourself now.

3 A No, I said the --

4 THE COURT: Well, Counsel, just ask the questions.  
5 Let's not comment on what she says. Just ask her questions.

6 MR. SCHWENKE: Well then, I object to it being  
7 unresponsive.

8 Q (By Mr. Schwenke) In your opinion then, if these  
9 things that you listed were then corrected or repaired, then  
10 the value would have been \$32,000?

11 A The value of the neighborhood indicated that could  
12 have been the sales price had it been in the same condition  
13 as other like homes that sold.

14 Q If you were to repair this roof that you observed  
15 and determined was in disrepair, what's your estimate of the  
16 cost to do that?

17 A I did not make a cost analysis of that. The  
18 appraiser did. He was the one that -- I didn't climb down  
19 in the cellar to see what the substructure was and I didn't  
20 climb up on the roof to see what the structure of the roof  
21 was. That was why we ordered the appraisal.

22 Q You didn't have any idea what the floor would have  
23 cost to repair?

24 A I knew it needed some work done on it. I didn't  
25 know how extensively on either the floor or the roof. That



1 was the purpose for ordering the appraisal, part of the  
2 purpose.

3 Q But you've been in this business for 11 years.  
4 You correct me if I'm wrong, but that would give you some  
5 indication of what the cost of some of these things would  
6 be, wouldn't it?

7 A Oh, I could tell you what the cost probably of the  
8 replacement of the floor covering is, but there was also  
9 some question because of the movement in the floor whether  
10 the subfloor was in good repair and that's what I'm refer-  
11 ring to as not knowing how extensively those repairs were  
12 going to be in both the substructure of the roof and the  
13 floor.

14 Q To the best of your estimate, what would it be?  
15 \$500 to repair the floors?

16 MR. WESTON: Objection, your Honor. She's not  
17 qualified. He has not qualified her to respond.

18 THE COURT: Foundation?

19 MR. WESTON: No foundation.

20 THE COURT: Sustained.

21 Q (By Mr. Schwenke) The exterior painting, do you  
22 mean by that then there's no paint on the exterior walls?

23 A The home is brick, as has been established  
24 earlier, but there is frame trim that was in desperate need  
25 of painting and scraping, needed to be scraped and primed

1 and repainted, and also the wooden part of the back porch  
2 that had been closed in.

3 Q And you don't have an idea what the cost --

4 A Yes, we did have an estimate of what it would cost  
5 to paint and it was \$450 for the exterior painting only.

6 Q You mentioned the broken steps. Are you talking  
7 about the concrete?

8 A No, the step, broken concrete step needed to be  
9 replaced. It was a very dangerous situation. I don't know  
10 whether someone had backed into it or what, but the step was  
11 broken and crumbling and it would be so easy to slide all  
12 the way down from the porch on that step. It was the front  
13 step.

14 Q Do you have any idea what it would be to repair  
15 that?

16 A No, I don't. I don't know whether the whole steps  
17 would have had to be taken out, jackhammered out and  
18 replaced, or whether it could be one step. I'm not a  
19 construction estimator, so I don't know what that would be.

20 Q You stated that the buyer came about, the Hydes  
21 came about, because of a relationship you had with them or  
22 their son caring for the property.

23 A No. I met them prior to that. I met them right  
24 after I listed the property. When I was showing it,  
25 Mr. Hyde was out putting some garbage out or something and

1 we stopped to pass the time of day. He wanted to know what  
2 the house was listed for and we talked about the lady who  
3 had lived there previously, and so it was a social -- just a  
4 social conversation at our first meeting, and then when I  
5 was there on other occasions, I saw him and I noticed that  
6 he had a son, teenage son, that appeared to be a teenage  
7 son, so I inquired whether they would be interested in  
8 watching over the property.

9 Q Isn't it a fact that when you listed -- when you  
10 took the listing contract -- or let me rephrase.

11 When you took the Earnest Money Agreement from the  
12 Hydes, that you were in fact representing the Hydes?

13 A No, I was not, and I had them sign a disclosure  
14 statement to that effect. I was representing Mrs. Thomas.

15 Q So if this Earnest Money Agreement, Plaintiffs'  
16 Exhibit No. 2, were to show on there that you represented  
17 both buyer and seller, the exhibit would be incorrect?

18 A It shows that I represented the seller and it's on  
19 the Earnest Money and they both initialed that, and there's  
20 a separate document called an Agency Disclosure which the  
21 Hydes signed acknowledging that I was representing  
22 Mrs. Thomas in this transaction.

23 Q You are quite familiar with the market conditions,  
24 however, being in the business?

25 A I am.

1 Q And would you agree with me that generally the  
2 market condition at this time was somewhat slow?

3 A Well, it's been slow for the past year. However,  
4 there are properties selling in every area.

5 Q And you will agree with me that it's not uncommon  
6 for properties to be on the market then for five months?

7 A No, that's not uncommon.

8 Q Seven months?

9 A That's not uncommon.

10 Q Twelve months?

11 A Some.

12 Q You have closed probably several sales in your  
13 career; is that correct?

14 A Correct.

15 Q And probably during this period of time here you  
16 closed some sales as well?

17 A Correct.

18 Q And isn't it a fact that the interest rate is  
19 generally around 11 percent, 10, 11 percent during this  
20 time?

21 A Nine and a half and ten.

22 Q For long-term mortgages?

23 A Yes. We had Utah Housing issues out that were in  
24 the eight percent range at that time and that's what we were  
25 striving to effect a sale on if we could have, if the

1 property had appraised for it.

2 Q But the fact is you did not have any offer under  
3 the Utah Housing?

4 A Right.

5 Q And as a matter of fact --

6 A And the Hydes were purchasing it as an investing  
7 property, so they did not qualify for Utah Housing Finance.

8 Q You stated that the reason for the listing at  
9 \$22,000 was partially because of the hope to get a refinanc-  
10 ing; is that correct?

11 A No, we knew at that point in time the property  
12 would not qualify for refinancing.

13 Q But you made a statement earlier in your direct  
14 testimony that you discussed the matter and you recommended  
15 to Ms. Thomas that they've had problems with contract sales,  
16 trustee sales, that they are better off getting a refinance  
17 sale; is that correct?

18 A That's correct, and that's why we had the  
19 appraiser come in, to see if the property would qualify, and  
20 it did not without approximately \$10,000 in repairs being  
21 done to it.

22 Q And who made that approximation?

23 A In my discussion with the appraiser, in talking to  
24 him about all the things that needed to be done, he said  
25 probably \$10,000 in repairs.

1           Q     But the sale that you eventually consummated on  
2 this property between the Hydes and the Plaintiffs here was  
3 a contract sale, is it not?

4           A     Well, you have no alternative when it doesn't  
5 qualify for refinancing.

6           MR. SCHWENKE:  Objection, nonresponsive.

7           THE COURT:  Yes.  Ma'am, just answer the question,  
8 if you will.

9           THE WITNESS:  Yes, it was a contract sale.

10          Q     (By Mr. Schwenke)  And correct me if I'm wrong,  
11 but I believe this contract is giving quite a bit of conces-  
12 sion to the buyer; isn't that correct?

13          A     We see concessions like that, yes, and not only  
14 that, but also refinancing where there's buy-downs available  
15 on interest rates, and I don't know if you're aware of it,  
16 but on a new FML or HUD's new housing loan a buyer can get  
17 in with \$300 down.

18          MR. SCHWENKE:  Totally unresponsive.  I just  
19 merely asked for --

20          THE COURT:  Well, Ms. Carlson, while you may feel  
21 the urge to make explanations, I'll ask you please to just  
22 answer the question.

23          THE WITNESS:  Okay.

24          Q     (By Mr. Schwenke)  And one of those concessions  
25 under this contract was 90 days free, no interest, no

1     payments, no principal payments; is that correct?

2             A     That's true.

3             Q     And one of those concessions is a six percent

4     interest; is that correct?

5             A     That's true.

6             Q     Do you find that quite unusual?

7             A     No.

8             Q     You stated in your direct testimony that there was

9     one couple interested; is that correct?

10            A     That's correct.

11            Q     Was that couple interested before or after the

12     sale to the Hydes?

13            A     Before.

14            Q     And isn't it a fact that that couple was inter-

15     ested when the listing price was at \$32,000?

16            A     No. That was after the price had been reduced.

17            MR. SCHWENKE: No further questions.

18            THE COURT: All right. Anything further?

19            MR. WESTON: Nothing on redirect.

20            THE COURT: All right, Ms. Carlson, you may step

21     down. Thank you.

22            MR. WESTON: May Mrs. Carlson be excused?

23            THE COURT: Any objection?

24            MR. SCHWENKE: No objection.

25            THE COURT: You're free to go, ma'am.

1           Call your next witness.

2           THE WITNESS:   Should I leave this here?

3           THE COURT:   Yes, they're exhibits.   Yes, leave  
4   them right there on the table.

5           MR. WESTON:   Your Honor, we call Mr. Paul H.  
6   Maritsas.

7                               PAUL H. MARITSAS,  
8   called as a witness by and on behalf of the Plaintiffs,  
9   having been first duly sworn, was examined and testified as  
10   follows:

11                              DIRECT EXAMINATION

12   BY MR. WESTON:

13           Q     Mr. Maritsas, would you please tell us your full  
14   name and where you reside?

15           A     My name is Paul Herman Maritsas and I reside at  
16   1620 South Tenth East, Salt Lake City, Utah.

17           Q     Your age, Mr. Maritsas?

18           A     27.

19           Q     Married?

20           A     No.

21           Q     What is your business or occupation?

22           A     I am a real estate appraiser.

23           Q     Are you currently employed?

24           A     Yes, I am.

25           Q     With whom?



1           A     With Crossland as a staff appraiser and also as an  
2 independent contractor through Valley International.

3           Q     How long have you been employed with Crossland?

4           A     With Crossland for approximately two years.

5           Q     And with Valley International?

6           A     Approximately six.

7           Q     Prior to your employment with Crossland, what was  
8 your business or occupation?

9           A     I was directly involved in real estate appraising  
10 through Valley International on a full-time basis.

11          Q     What are your responsibilities with Crossland?

12          A     With Crossland, a staff appraiser.

13          Q     And what do those duties entail?

14          A     Those duties entail appraising properties mainly  
15 for FHA through the direct endorsement program for which I  
16 was hired and then also doing conventional work for  
17 Crossland.

18          Q     How long have you been involved in the profession  
19 of appraising real estate?

20          A     Approximately six years.

21          Q     Approximately how many appraisals have you made  
22 during that period of time?

23          A     Somewhat over 3,000.

24          Q     Do you have an estimate as to how many you've made  
25 during the last 12 months?

1           A     In the neighborhood of 1,000.

2           Q     What portion of your time is spent in that at  
3 present?

4           A     Full-time.

5           Q     Would that be the case during the last 12 months  
6 also?

7           A     Yes, it would.

8           Q     What kind of properties have you appraised?

9           A     I have appraised mostly residential, vacant land,  
10 income-producing properties such as apartment buildings,  
11 four-plexes, duplexes, also some commercial property and  
12 commercial land.

13          Q     Are there any particular companies for whom you  
14 have made real estate appraisals?

15          A     Several. Richards-Woodbury, Gibraltar Mortgage  
16 Center, Sandy Mortgage, Crossland, and various others.

17          Q     Do you know whether there have been properties  
18 sold or purchased based upon appraisals which you have made?

19          A     Yes, several.

20          Q     Do you know whether money has ever been lent by  
21 lenders based on appraisals which you have made?

22          A     Yes.

23          Q     What's your educational background, Mr. Maritsas?

24          A     I went to the University of Utah for a few years  
25 and decided to become a real estate appraiser. At that

1 decision I decided not to take a designation or a diploma  
2 from the university but to become an appraiser.

3 From there I became acquainted with the American  
4 Institute of Real Estate Appraisers. I went to two courses  
5 to start with, basic evaluation and the appraisal princi-  
6 ples, and then I became an appraiser, and then I went back  
7 to school for residential appraisal and standards of profes-  
8 sional practice. I've also been to several seminars on real  
9 estate appraising.

10 Q Have you had occasion to do any review work?

11 A Yes, I have.

12 Q What is commonly meant by review work in the real  
13 estate appraisal industry?

14 A Review work is reviewing appraisals. I would be  
15 sent appraisals made by other individuals and then I would  
16 go over the appraisal and give my comments and reasons why I  
17 agreed or disagreed with the value and conclusions drawn by  
18 that appraisal.

19 Q Do you hold any license or certification with  
20 regard to real estate appraising?

21 A No, sir, I am a candidate for the RM designation  
22 and have applied for the designation, but as of yet not have  
23 received the designation.

24 Q In order to qualify for that designation, what is  
25 required?

1           A     You must be through several courses and also  
2 obtain at least three years of experience directly related  
3 to real estate and perform a demonstration report and then  
4 apply for the designation.

5           Q     Now, what if any portions of those elements or  
6 requirements have you now complied with?

7           A     I've completed all of them and after application,  
8 it takes approximately six months to receive an answer on  
9 your designation, and I'm waiting for the final two months  
10 of my six.

11          Q     Have you ever testified in a courtroom before?

12          A     No, sir, I have not.

13          Q     Have you ever testified as an expert witness?

14          A     No, sir.

15          Q     Mr. Maritsas, are you acquainted with the property  
16 commonly known as 448 North Grant Street in Salt Lake City?

17          A     Yes, I am.

18          Q     And when and under what circumstances did you  
19 first become acquainted with it?

20          A     I received an appraisal assignment through  
21 Crossland for an FHA appraisal on the property on December  
22 10th, 1987.

23          Q     And as of that date, December 10, 1987, had you  
24 ever met or had any communication or discussion with the  
25 Plaintiff, Kathleen Thomas?

1           A     No, I had not.

2           Q     Have you met her before?

3           A     Briefly outside your office yesterday on my way  
4 out, yes.

5           Q     Have you ever talked to her about the property?

6           A     No, I have not.

7           Q     Have you had conversations, any communication,  
8 with any of the other Plaintiffs named in this case?

9           A     No.

10          Q     Once you received then the commission or request  
11 to do this appraisal, what if anything did you do in that  
12 regard?

13          A     After receiving the request for appraisal, I then  
14 called the agent to discuss entry into the property for  
15 inspection.

16          Q     Who would you have called?

17          A     Joan, the agent, Joan Rushton, on the assignment.

18          Q     Were you in the courtroom a few moments ago as  
19 Mrs. Carlson testified?

20          A     Yes.

21          Q     And is she the one with whom you --

22          A     She is the one, yes.

23          Q     For whom did you make the appraisal, conduct this  
24 appraisal?

25          A     The appraisal was ordered through Crossland. It

1 was through a direct endorsement program for FHA and so the  
2 appraisal ended up with FHA if the loan was to go through or  
3 be completed.

4 Q Did you receive a fee for the services you  
5 rendered?

6 A Yes, I did.

7 Q Who paid your fee?

8 A Crossland paid me.

9 Q When did you first undertake the appraisal work on  
10 the property?

11 A Approximately three days after receiving the  
12 order.

13 Q Have you, Mr. Maritsas, been employed as an expert  
14 witness in this case?

15 A Yes, I have.

16 Q And who has employed you in that regard?

17 A You have, Nielsen & Senior.

18 Q And have you agreed to charge a fee for your  
19 services?

20 A Yes, I have.

21 Q Is your fee in any dependent upon the outcome of  
22 the case?

23 A No.

24 Q Did you complete your appraisal work on the  
25 property?

1           A     Yes.

2           Q     Was that completed before or after you were  
3 retained as an expert in this case?

4           A     Before.

5           Q     Approximately when were you retained as an expert  
6 in the case?

7           A     The middle of September I would assume, the 12th  
8 of September, 1988.

9           Q     What was your purpose in appraising the Grant  
10 Street property?

11          A     Purpose was to determine fair market value.

12          Q     And how do you define fair market value?

13          A     Fair market value is the most probable selling  
14 price of a property that has been placed on the market for a  
15 reasonable amount of time, having a knowledgeable and  
16 willing buyer and a knowledgeable and willing seller.

17          Q     Are there different approaches which are used in  
18 fixing, determining or estimating fair market value of  
19 property?

20          A     Yes.

21          Q     How many different approaches are there?

22          A     Three.

23          Q     Could you tell us what those are?

24          A     For valuing a residential property the standards  
25 are three. The market approach or the market data analysis,

1 the cost approach, and the income approach.

2 Q What is the cost approach?

3 A The cost approach basically is the cost to repro-  
4 duce the dwelling, include the land and then deduct the  
5 depreciation.

6 Q What is the market or market data approach?

7 A The market data or the market approach basically  
8 is selecting the comparables or recent sales within the  
9 subject neighborhood, comparing them to the subject, making  
10 adjustments, and determining value from the adjustments.

11 Q Then finally the income approach.

12 A The income approach is based on a capitalization  
13 rate, or a gross rent multiplier, taking the income from  
14 the property and applying that to the sale price.

15 Q How do you determine the multiplier?

16 A The gross rent multiplier?

17 Q Yes.

18 A Well, to determine the gross rent multiplier you  
19 select sales, the sales price is divided by the gross  
20 monthly rent, and that is basically the gross rent  
21 multiplier.

22 Q When you say you select sales, sales of what? The  
23 property or other property?

24 A Of similar properties basically. Since the  
25 subject hasn't sold, you can't use that as a factor. You



1 are trying to develop an opinion of value for the subject,  
2 so you must use comparable properties, and when I say  
3 comparable properties, I mean properties similar to the  
4 subject, within the same area, similar in size and use.

5 Q What approach or approaches did you use in valuing  
6 this property?

7 A I used the market approach and the income  
8 approach.

9 Q Why not the cost approach?

10 A Cost approach was not required by FHA.

11 Q As you were involved in the evaluation, did you  
12 consider the highest and best use of this property?

13 A Yes, I did.

14 Q And tell us what you would define as highest and  
15 best use.

16 A Highest and best use is the most feasible use that  
17 would give the highest value back to the land.

18 Q The land, you mean just the land itself or a --

19 A The property.

20 Q Is the highest and best use, a determination of  
21 that, important in arriving at your valuation for the  
22 property?

23 A It's a factor. It's not the main factor.

24 Q Did you consider that in determining the valuation  
25 of this property?

1           A     Yes, I did. In valuing the property you must  
2 first determine if it is feasible or reasonable that the  
3 property remain in its present use. If the highest and best  
4 use would be different, then obviously you'd want to change  
5 use and therefore, the value of the structure or the  
6 improvement would have no value.

7           Q     What did you determine with regard to the issue of  
8 highest and best use for this particular property?

9           A     I determined that through the zoning and the state  
10 of the property or the neighborhood, since it was located in  
11 a residential subdivision, to be residential.

12          Q     Why?

13          A     Because it was located in a residential subdivi-  
14 sion and the zoning was R2 which would allow residential  
15 dwellings, two-family units.

16          Q     What were the properties immediately adjacent to  
17 the property, do you know?

18          A     They were both residential dwellings.

19          Q     What did you do when you commenced your appraisal  
20 of the property? Would you take us through some of the  
21 procedures that you implemented?

22          A     Okay. First would be the inspection of the  
23 property. I drove to the house and my first attempt would  
24 be to inspect the interior which would be to gain access to  
25 the property. Had to do that through the back door.

1 Q Why was that important, if it was?

2 A First of all, to develop an idea of the condition,  
3 the design and the interior design of the property, and  
4 basically to see exactly what the property was, what condi-  
5 tion. I'm getting familiar with the property when I do an  
6 inspection.

7 Q Tell us approximately the date that you went into  
8 the property and inspected it.

9 A The date, I'm assuming, would be the 15th of  
10 December, 1987.

11 Q Why do you assume that?

12 A It has been quite some time and I'm not exactly  
13 sure what date I walked in. I know what date I've done the  
14 appraisal, but I do not know exactly the date I inspect the  
15 property.

16 Q Could it have been later than December 1987?

17 A No. It was mid December 1987.

18 Q What did you do there at the property?

19 A Okay. In inspecting the property, first of all, I  
20 walked through the house drawing a floor plan, observing the  
21 deferred maintenance, inspected for installation for ade-  
22 quacy in wiring, the basement size, access. Then I walked  
23 around the property doing the same thing, checking condi-  
24 tion, taping the property, measuring the property basically,  
25 checking the ground, seeing if there were any problems that

1 I felt, that drainage would be one thing that I would look  
2 for, and then I took my pictures basically and that was it.

3 Q Did you make any observations with regard to  
4 condition or state of repair of the property?

5 A Oh, yes, I did.

6 Q What did you observe in that regard?

7 A Well, the subject had extreme deferred amount of  
8 depreciation. First of all, I noticed in the living room  
9 and as a matter of fact, throughout the house the floor  
10 coverings were depreciated showing signs of wear such as  
11 wearing through to the flooring, pulling up at the seams.  
12 In my opinion, the floor coverings would have been -- would  
13 need to be replaced throughout, also were the walls.  
14 Partial lath and plaster was the interior. It had been  
15 repaired with some masonite style wallboard. In the areas  
16 where the masonite style wallboard was used, the seaming had  
17 buckled in some areas, and in a major area in the living  
18 room it buckled and was ripped down, so you could see right  
19 through to the wall studs.

20 Painting or wall coverings needed -- were needed  
21 throughout. The paint was chipping and paper was peeling  
22 all over the house. The linoleum in the kitchen was also  
23 damaged.

24 In checking insulation, I climbed to the roof. I  
25 went through the scuttle to access the attic and I inspected

1 the attic and in inspecting the attic I did notice that  
2 there was insulation and also that the roof joists had split  
3 and cracked. There had been in the past -- an attempt had  
4 been made anyway to repair those cracking roof joists.

5 However --

6 Q Mr. Maritsas, how do you know an attempt had been  
7 made to repair them?

8 A Okay. Because they'd been supported by an addi-  
9 tional -- I can only do this visually, but the roof rafter  
10 is at this angle and it had split someplace in the middle  
11 and there had been another two by four placed along here at  
12 a 90 degree angle to support that structure.

13 Now, the rafters that had been supported had held.  
14 However, that added additional weight to the rafters that  
15 had not been supported and they had in turn cracked and were  
16 showing the same signs.

17 Because an attempt had been made, I felt that the  
18 roof needed to be fully replaced, including the trusses or  
19 the rafters.

20 From there, that basically was what I could  
21 develop from the interior except for in the bathroom, I'll  
22 state this. Around the sink and toilet the linoleum had  
23 buckled, which showed me that there had been an extreme  
24 amount of water on the bathroom floor, so when I went into  
25 the cellar, which was accessed by a door from the exterior,

1 I paid special note to look at the plumbing area in the  
2 bathroom. I noticed that there was some deterioration in  
3 the wood, but I felt that if the floor coverings were  
4 replaced, it should hold it, should be substantial for use.

5 On the basement, that's when I became apparent of  
6 the old style tube and knob wiring. It had not been  
7 replaced.

8 Q Pardon me, Mr. Maritsas. What is tube --

9 A Knob and tube --

10 Q Knob and tube wiring?

11 A -- wiring.

12 It's the old style wiring where you have a thin  
13 insulated piece of wire that is wrapped around an insulated  
14 post that is connected to the floor stud or the wall stud or  
15 the roof joist. The reason why they discontinued the use of  
16 it is obviously because it is dangerous. When you wrap a  
17 single insulated wire around the post, deterioration factors  
18 basically increase the wear and you can have the wire touch  
19 the wood and then can start a fire, and so they moved the  
20 code to use Romex or positive and negative and ground  
21 wrapped individually insulated and then altogether insulated  
22 with one plastic cover or coat, and so the old style knob  
23 and tube was a single wire and I felt that it needed to be  
24 inspected. However, it still is used today.

25 Q Did you observe anything further about the

1 property other than what you have now reiterated?

2 A Yes. Just to displace the amount of deferred  
3 maintenance in the basement itself or the cellar was scat-  
4 tered with trash.

5 The front steps -- I'll take the exterior now.  
6 The front steps had deteriorated so that instead of being a  
7 step, it was more a mound. The angle of the step had  
8 rounded off. The gutters and downspouts along the house had  
9 come off from the walls, hanging and not allowing proper  
10 drainage from the roof water, and so I assume that as the  
11 main cause of the stairs because the gutter right over the  
12 porch was hanging down and allowed a majority of the water  
13 to freeze right over the roof structure there.

14 The exterior needed to be painted. Now, there is  
15 a wood area around the rear which is the enclosed porch.  
16 The exterior paint was cracked and in some areas peeling  
17 off, and to conform to FHA codes it would have to be scraped  
18 and repainted. Also along the soffits and trim where the  
19 roof meet the brick walls is also wood, the soffits, and  
20 also wood trim in that likely exterior porch had cracked and  
21 peeling paint. It needed to be repainted.

22 Q Did you make any inspection or observe anything  
23 with regard to wood bearing members?

24 A Yes, I did. To conform with FHA guidelines, which  
25 is one other reason why I rejected the property, all wood

1 supports underneath the dwelling must be placed on concrete  
2 piers. This provides a difficulty or an obstacle for  
3 termites to transact from the earth to the wood, and a  
4 requirement of FHA is all wood weightbearing members under-  
5 neath a dwelling be based on concrete piers, and they  
6 weren't in the subject.

7 Q Is there anything further you did in determining  
8 market value of the property other than the inspection?

9 A Yes. From there I searched the market for compa-  
10 rable sales to start the market approach. What I did was I  
11 researched into the market to find similar sales, sales of  
12 homes similar in utilities, in location and design as the  
13 subject and age, and through selecting the sales I applied  
14 them to a standard UREA grid -- pardon me -- appraisal form  
15 and placed them on the grid and made adjustments, plusing  
16 comparables or minusing the comparables as they differed on  
17 the subject.

18 Q How did you go about determining what properties  
19 were comparable for your evaluation purpose?

20 A The main objectives I was looking at when I looked  
21 for comparables was location and utility and age.

22 Q Did you give any consideration to the income  
23 approach to valuing this property?

24 A I used the income approach, but I felt that it was  
25 unsupportive because -- I'll explain the income approach.



1           First of all, it's a single family residence and  
2 most single family residences aren't purchased as an income-  
3 producing property. Therefore, it's difficult to derive a  
4 gross rent multiplier.

5           I was informed that the rental of the property was  
6 \$350 per month, so I used that as the gross monthly rent in  
7 selecting the other sales and including going to different  
8 sources like Rental Data, which is a rental management firm  
9 here in Salt Lake and asking them for rental properties in  
10 the subject's location or area. What that did was that gave  
11 me approximately what rentals were in that area and through  
12 there, I tried to find sales and apply the rentals to the  
13 sales and come up with the GRM.

14           In using that GRM I found that it did not take  
15 into account subject's deferred maintenance. Because of the  
16 fact I felt that the subject was unlivable, I felt that  
17 \$350 would be too high, but had nothing to justify a lower  
18 rental.

19           Q     What approach did you finally determine to be the  
20 one valuation approach to be used?

21           A     The market approach.

22           Q     In applying that approach, did you come up with an  
23 opinion as to the fair market value of the property?

24           A     Yes, I did.

25           Q     What was the value you determined for the

1 property?

2 A \$21,750 as is.

3 Q Did you prepare a written report, valuation  
4 report, of the property?

5 A Yes, I did.

6 Q When did you complete that report?

7 A On December 23rd, 1987.

8 Q I'll show you what has been marked and received as  
9 Plaintiffs' Exhibit 3. Mr. Maritsas, do you recognize that  
10 document?

11 A Yes, I do.

12 Q Is that the report of which you've just testified?

13 A Yes, it is.

14 Q Is this the report which you prepared with regard  
15 to the subject property?

16 A Yes, it is.

17 Q I might ask you some questions with regard to it,  
18 Mr. Maritsas. First page, bottom right-hand corner, there's  
19 a box entitled Improvement Analysis. Do you see that? The  
20 bottom right-hand corner.

21 A Yes, I do.

22 Q The very last line there indicates estimated  
23 remaining physical life; is that right?

24 A Yes.

25 Q And did you make an estimate as to the remaining

1 physical life?

2 A Yes, I did.

3 Q How long was that?

4 A Twenty years.

5 Q How did you arrive at that figure?

6 A Basically it's a judgment figure based on the  
7 condition of the improvements. I felt that the roof struc-  
8 ture and what I saw on the interior such as the wall would  
9 not permit the subject to remain standing for more than 20  
10 years.

11 Q Did you make an observation as you were there at  
12 the property as to the relative age of the residences in the  
13 surrounding area in the neighborhood?

14 A Yes, I did.

15 Q Would you say that this is a relatively new  
16 neighborhood? An older neighborhood?

17 A It's an older neighborhood.

18 Q Are you able to give any estimate as to the  
19 approximate age of most of the homes in that area?

20 A Forty to sixty years.

21 Q I might direct your attention to the second page.  
22 It's the reverse side of the page you've just been referring  
23 to in the exhibit.

24 Now, I note at the bottom right-hand corner of  
25 this page, Mr. Maritsas, the block line that says, "Review

1 appraiser's signature," do you see that?

2 A Yes, I do.

3 Q This document does not appear to be signed.

4 A It is signed by my signature but not by the review

5 appraiser.

6 Q The document I have, I don't see a signature on

7 there. I'm sorry.

8 Does your signature appear anywhere on there?

9 A Yes, it does, on the bottom left-hand side.

10 Here's my signature, Paul H. Maritsas.

11 Q Your name is typed in; is that right?

12 A Yes.

13 Q But I don't see your signature above that. That

14 was my question.

15 A On my file copy, which I assume this would be, I

16 do not sign.

17 Q All right. But on the original?

18 A I would sign the original, yes, I would.

19 Q Is it your testimony, though, that this is in fact

20 the appraisal that you prepared?

21 A This is the appraisal I prepared, yes.

22 Q If I might again direct your attention to this

23 particular page, there are columns in the center of the page

24 that make reference to comparable properties; is that

25 correct?

1           A     Yes.

2           Q     And when you told us a few moments ago with regard  
3     to selecting the comparable properties and determining the  
4     market data approach, were you referring to the properties  
5     that are listed in here?

6           A     Yes.

7           Q     Now, I don't have the ability, Mr. Maritsas, to  
8     interpret all that you have on this particular document, but  
9     I would like to direct your attention if I might to about  
10    exactly the middle of the page under comparable one, two and  
11    three. There appears to be a bracketed number, 10,000. Do  
12    you see that?

13          A     Yes, I do.

14          Q     What does that refer to?

15          A     That refers to the estimate of deferred mainte-  
16    nance value, anyway the dollar figure that I placed that it  
17    would cost to repair the subject property to meet the same  
18    conditions as the comparables that I've used.

19          Q     All right. Now, I note here that you have  
20    deducted that amount apparently in referring to the three  
21    comparables; is that right?

22          A     Yes.

23          Q     And so what does that mean? Does that mean that  
24    the comparables were in a better, the same, or a less  
25    desirable condition of repair than the property we're

1 talking about?

2 A They were in superior condition to the subject.

3 Q So the purpose of the 10,000 is what, to try to  
4 bring them down to what the --

5 A Correct. It was basically applying the same  
6 amount of depreciation to the comparables as what the  
7 subject has.

8 Q Directing your attention to the second full page  
9 then of the exhibit, it's an 8 by 11 page entitled Addendum  
10 to Appraisal Report. Do you see that?

11 A Yes.

12 Q Was this a part of the report as originally  
13 prepared, or added later on?

14 A It was part of the original report.

15 Q What is the purpose of this document?

16 A This document basically outlines and discusses the  
17 deferred maintenance necessary to bring the subject to  
18 standard codes, FHA guidelines.

19 Q Now, would you tell us again about FHA guidelines?

20 A Yes.

21 Q What was your concern with regard to FHA guide-  
22 lines?

23 A FHA requires certain factors be present in a  
24 property to accept a loan. Some lending institutions or  
25 conventional mortgage lenders wouldn't require the same

1 factors as the FHA would, and so I was staying within FHA  
2 guidelines.

3 Q Have you ever done appraisals that were not FHA  
4 appraisals?

5 A Yes, I have.

6 Q That were not for FHA financing?

7 A Yes.

8 Q And doing those kinds of appraisals, do you do  
9 anything differently than you do with regard to the FHA  
10 appraisal?

11 A No, nothing.

12 Q What about the procedures used in valuing the  
13 property, the three you've told us about, do they in any way  
14 vary --

15 A No.

16 Q -- if you are not doing an FHA appraisal?

17 A No, they do not.

18 Q Had you been doing this appraisal not pursuant to  
19 FHA guidelines, not with regard to the possibility of FHA  
20 financing, would you have done anything differently?

21 A No, I would not.

22 Q The next page, Mr. Maritsas, is the one titled HUD  
23 FHA Office Evaluation Condition. Do you see that?

24 A Yes.

25 Q What's the purpose of this document?

1           A     This basically outlines that FHA would need to  
2 bring the property up to standards or conform to their  
3 guidelines.

4           Q     So apparently the second page you've just referred  
5 to, as well as this one now before you, are documents that  
6 you use peculiar to an FHA appraisal; is that right?

7           A     Correct. The first document states all deferred  
8 maintenance and the second page refers specifically to FHA  
9 guidelines.

10          Q     If you had not taken into account the problems  
11 with regard -- well, let me rephrase that.

12                The purpose of these two pages then, the addendum  
13 and the valuation of specific conditions document, is that  
14 for the purpose of identifying what you're saying would have  
15 to be done to the property to qualify it for FHA financing?

16          A     The second page is -- or pardon me, the third page  
17 which would be the HUD FHA Office Valuation Specific Condi-  
18 tions Addendum, that form refers specifically to the FHA  
19 guidelines.

20                The second page, which is the addendum to the  
21 report, basically outlines deferred maintenance in the  
22 subject property.

23          Q     So then if someone wanted to obtain FHA financing  
24 specifically with regard to this property, would they have  
25 to comply with the terms of this document then?



1           A     Yes.

2           Q     And make those repairs?

3           A     Yes, they would.

4           Q     What if they didn't want to get FHA financing,  
5 they wanted conventional financing and you were making the  
6 appraisal just for that reason, the conventional non-FHA  
7 financing, would you then have required the repairs to have  
8 been made?

9           A     I would require all repairs except for one.  
10 However, I'm not requiring repairs to value the subject  
11 property. I'm deducting the repairs necessary for the  
12 subject property so if a conventional mortgage lender were  
13 to loan on the property, it would -- I would not require  
14 specific deferred maintenance to be corrected. I would just  
15 indicate the deferred maintenance and deduct that from the  
16 appraisal.

17          Q     The absence of requiring, then, your retracting  
18 the requirement for deferred maintenance to be corrected,  
19 would that then have affected your valuation of the property  
20 for the purpose of non-FHA financing?

21          A     No, it wouldn't affect the value.

22          Q     Turning about another three or four pages over,  
23 there's a document entitled Photograph Addendum. Do you see  
24 that?

25          A     Yes.

1 Q And what do these represent?

2 THE COURT: Mr. Weston, I would like to remind you  
3 at this point Exhibit 3 has been received without objection  
4 and it is in large part self-explanatory and particularly  
5 it's self-explanatory when it comes to the photos, so let's  
6 move this matter along.

7 MR. WESTON: All right. I understand, your Honor.

8 THE COURT: All right.

9 Q (By Mr. Weston) As of what date did you assign  
10 the value to the property that you have just given us?

11 A December 23rd, 1987.

12 Q Do you have an opinion as to what would have been  
13 the value of the property approximately a month earlier on  
14 November 24, 1987?

15 MR. SCHWENKE: Objection, no foundation, your  
16 Honor. We haven't had any testimony as to the value on the  
17 date of the sale. The witness just testified that his  
18 valuation is as of the date of December 23rd, '87.

19 THE COURT: I would need further foundation,  
20 Counsel. The objection's sustained.

21 Q (By Mr. Weston) In making the valuation and the  
22 appraisal which you have conducted on this particular  
23 property, Mr. Maritsas, is there anything you came across in  
24 your investigation, in your evaluation processes, that would  
25 have caused you to believe that the valuation of the

1 property one month earlier than December 23, 1987, would be  
2 in any way different than the value you have now testified  
3 to?

4 A No.

5 Q If you had been requested to value the property as  
6 of November 24, 1987, rather than December 23, 1987, would  
7 you have done anything differently?

8 A No.

9 Q Would you have accepted different comparables?  
10 Would you have looked at different comparables?

11 A I would have looked at different comparables, yes.

12 Q For what reason?

13 A The time frame. One of the comparables that I  
14 have used was sold on December 1st, 1987.

15 Q Pardon me?

16 A One of the comparables that I had used sold  
17 December 1st of 1987. If I were to value the subject  
18 property on November 24th, that sale would not have occurred  
19 and therefore, I would have looked or searched for one  
20 additional comparable.

21 Q Okay. Based on the comparables that you did in  
22 fact use them, if you had been requested to value the  
23 property as of November 24, 1987, would your valuation be  
24 any different from the value you've now assigned?

25 A No, it would not.

1 MR. WESTON: That's all I have on direct.

2 THE COURT: Very well. You may cross,  
3 Mr. Schwenke.

4 MR. SCHWENKE: Thank you, your Honor.

5 CROSS-EXAMINATION

6 BY MR. SCHWENKE:

7 Q Mr. Maritsa --

8 A Maritsas.

9 Q Maritsas. You are here today to testify as an  
10 expert; is that correct?

11 A Yes.

12 Q And more particularly, as an expert of FHA  
13 appraisals; is that correct?

14 A Just as an expert here, sir.

15 Q The appraisal that you performed on the subject  
16 property was an FHA appraisal; is that correct?

17 A Yes, it was.

18 Q Isn't it generally accepted that the FHA apprais-  
19 als are a little bit more stringent than regular conven-  
20 tional appraisals?

21 A The appraisal itself is not. The guidelines or  
22 requirements to conform and be accepted by FHA would be a  
23 little bit more constrictive, yes.

24 Q In your direct testimony as to your qualifications  
25 you mentioned that you're a member. What do you mean?

1           A     I'm a candidate.

2           Q     A candidate?

3           A     A candidate of the American Institute of Real

4     Estate Appraisers. I'm applying for the residential member

5     designation.

6           Q     But you're not a member yet?

7           A     I am not a member.

8           Q     You're not a member now?

9           A     I'm not a member now, no.

10          Q     And you weren't a member at the time that you --

11          A     I was not a member then.

12          Q     You've testified that it generally would not have

13     made any difference if you were appraising under FHA stand-

14     ards and conventional standards in this particular case; is

15     that correct?

16          A     That's correct.

17          Q     However, if you were to appraise other than FHA,

18     you would not be using this form, Valuation Specific Condi-

19     tions; is that correct?

20          A     Correct.

21          Q     So therefore, you probably would not then have

22     required that the items that you have listed on that form

23     that needed to be repaired; is that correct?

24          A     Again, I'm not requiring the items to be repaired

25     as per the appraisal. I'm requiring the deferred

1 maintenance listed on the specific conditions to be conform  
2 to FHA guidelines. If I may add, the conditions that I've  
3 required to be met to conform with FHA guidelines.

4 Q Also affect your valuation?

5 A No, they don't affect the valuation because they  
6 are considered as being deferred maintenance that needs to  
7 be corrected.

8 Q You testified you performed 30 residential  
9 appraisals?

10 A More than 3,000.

11 Q Oh, more than 3,000. Excuse me.

12 Is it fair to say that all of those 3,000 or so  
13 appraisals were primarily FHA?

14 A No.

15 Q Half FHA?

16 A I -- no. I would say FHA is somewhere in the  
17 neighborhood of -- well, it could reach -- it could reach  
18 half. I've been an FHA appraiser since my employment with  
19 Crossland which has been two years.

20 Q And you have completed how many in that two years?

21 A In that two years? I'd have to estimate and guess  
22 and I would say somewhere in the neighborhood of fifteen to  
23 seventeen hundred.

24 Q And of those 1,500 appraisals to 1,700 appraisals,  
25 about half of those were FHA?

1           A     I would agree to that.

2           Q     Then you agree with me that you would consider  
3 yourself very familiar with FHA and HUD requirements?

4           A     Yes.

5           Q     Then you would be familiar with the HUD regulation  
6 408.02 dated March 3rd, 1986, concerning using comparables;  
7 is that correct?

8           A     Yes. I'm not familiar with the actual statements  
9 made, but I am familiar with the requirements.

10          Q     Can you tell us what that regulation is about?

11          A     I can not directly quote, no.

12               MR. SCHWENKE: Your Honor, I move to admit  
13 Defendant's Exhibit D13 here on the basis of judicial  
14 notice. This is a federal regulation.

15               THE COURT: Well, is the exhibit marked, Counsel?

16               MR. SCHWENKE: It has not been marked.

17               THE COURT: All right. Let's have it marked and  
18 let's provide a copy to Mr. Weston.

19               During the noon recess I would appreciate it if  
20 you would furthermore have the rest of your exhibits marked.

21               MR. SCHWENKE: Yes, your Honor.

22               THE COURT: Mr. Weston, is there any objection to  
23 -- what is it, Exhibit 4? Thirteen.

24               MR. SCHWENKE: I'm sorry. We could mark that  
25 Exhibit 1. I'm sorry.

1 THE COURT: Oh, no. If it's going to be anything,  
2 it will be either 13 or No. 4, unless you have further  
3 exhibits.

4 MR. WESTON: Well, I don't.

5 MR. SCHWENKE: All right, No. 4 then.

6 THE COURT: We'll take up and follow with the same  
7 sequence of numbering so it will be known as Exhibit No. 4,  
8 Counsel.

9 Is there objection to it?

10 MR. WESTON: Your Honor, might I voir dire the  
11 witness on it?

12 THE COURT: You may.

13 MR. WESTON: Thank you.

14 VOIR DIRE EXAMINATION

15 BY MR. WESTON:

16 Q Mr. Maritsas, let me show you what has been marked  
17 as Defendant's Exhibit 4. Can you look at that and tell us  
18 whether in your opinion that is a document issued by the  
19 Housing and Urban Development Administration of the federal  
20 government?

21 A I am familiar with the guidelines but I have not  
22 seen this document, no.

23 Q Does that appear to you to be a document which  
24 you'd expect to see issued by HUD with regard to parameters  
25 of appraising real estate properties with regard to FHA



1 loan financing?

2 A These are guidelines and specific factors could  
3 take one outside the standard guidelines.

4 Q I'm just trying to determine whether as you look  
5 at that and as you see the printed document it appears to be  
6 something which by its appearance was issued by HUD. Do you  
7 have any question about that?

8 A This isn't their standard form, but yes, it could.

9 MR. WESTON: I have no objection then, your Honor.

10 THE COURT: Very well. Four is received.

11 Go ahead, Mr. Schwenke.

12 CROSS-EXAMINATION RESUMED

13 BY MR. SCHWENKE:

14 Q If I may invite your attention to the middle of  
15 the page, there's a paragraph there and it starts with the  
16 net adjusted total.

17 A Yes.

18 Q Can you read the last sentence of that paragraph,  
19 sir?

20 A Yes. The last sentence of the paragraph?

21 Q That's correct.

22 A "If the total adjustment appears excessive in  
23 relation to the sales price as outlined in the box above,  
24 the appraiser would be well advised to re-examine the  
25 comparability of the sale -- compatibility," pardon me, "of

1     that sale."

2           Q     Would you then also read the sentence in the box?

3           A     It says, "If the net adjustments exceed 15 percent  
4     of the gross adjustments or the gross adjustments exceed 25  
5     percent of the comparables' sales price, the appraiser  
6     should reconsider whether the sale is in fact truly  
7     comparable."

8           Q     Go ahead.

9           A     "If it is not, it should be replaced by another,  
10    more indicative sale."

11          Q     Thank you. Let me direct your attention to your  
12    appraisal that you made in this property, more particularly  
13    the second page of that appraisal, center page where you  
14    list comparable one, comparable two, and comparable three.

15          A     Yes.

16          Q     Now, would it be fair to say then based on these  
17    regulations, which is HUD regulations that you were to  
18    operate under when doing this appraisal, that the net  
19    adjusted total would be the total -- let's take comparable  
20    one. The net adjusted total would be the total of \$16,050?

21          A     Five hundred -- yeah, and fifty dollars, correct.

22          Q     Under this guideline for you to use this for HUD  
23    appraisals, that amount cannot be more than 25 percent of  
24    the gross value of the property; is that correct?

25          A     No, it cannot.

1 Q Under this guideline you need to --

2 A Under this guideline it can be. It states should.

3 Q That's correct. Well, let's take the net adjusted

4 then that you arrived at in comparable one and divide that

5 by the sales price of comparable one. Wouldn't it be fair

6 to say that that would come to 43 percent?

7 A Yes.

8 Q And isn't that substantially higher than the

9 guideline?

10 A Yes.

11 Q But you still felt that this was a fair comparable

12 in this case?

13 A Yes, I did.

14 Q Let's take comparable two, sir. Let's do the same

15 thing with comparable two. Let's take the net adjustment of

16 \$10,250; is that correct?

17 A Yes.

18 Q If we were to then also divide that by the total

19 sale price of comparable two which is \$32,860, am I correct

20 to say that that amounts to 31 percent?

21 A Yes.

22 Q And that again is also greater than the guideline?

23 A Yes.

24 Q But you still felt it was --

25 A Comparable.

1 Q -- still a good comparable?  
2 A Uh-huh (affirmative).  
3 Q The final comparable, net adjustment of \$21,750,  
4 sale price of \$29,900, that's a 27 percent ratio?  
5 A Yes.  
6 Q That's greater than the guideline?  
7 A Yes.  
8 Q And in all these cases you felt comfortable that  
9 these were very good comparables?  
10 A Yes.  
11 Q And the guideline says you need to look at other  
12 comparables and you chose not to?  
13 A I did look at other comparables.  
14 Q Your explanation of the three methods of apprais-  
15 ing the properties, you stated the market approach, cost  
16 approach, and income approach; am I correct?  
17 A Yes.  
18 Q And you chose market approach in this case, based  
19 on your market analysis which are these comparables we just  
20 discussed?  
21 A Correct, uh-huh.  
22 Q And is it fair to say then that if the comparables  
23 used are outside of what is acceptable, then the -- your  
24 market approach value would be off?  
25 A No.

1 Q It will not?

2 A No.

3 Q The income approach on your appraisal, you stated  
4 that based on the income approach this property was worth  
5 29,000, is it not?

6 A The income approach states that, yes.

7 Q And you rejected that value?

8 A Correct, I did reject that value.

9 Q And you rejected that value because this property  
10 was not an income property?

11 A No, I rejected that value because the income  
12 approach did not take into account the amount of deferred  
13 maintenance within the subject property. The gross rent  
14 multiplier was developed from comparables in the market that  
15 were of good repair and had not the structural or the  
16 physical inadequacies apparent in the subject.

17 Q Isn't it a fact that the income approach, as I  
18 recall your testimony earlier, is based on the income and  
19 the multiplier on that income, has not to do with other  
20 factors here; isn't that correct? Maybe I misunderstood  
21 your testimony.

22 A That is correct.

23 Q So if there is a history of the property of making  
24 income, wasn't that relevant then in using the income  
25 valuation method?

1           A     If the income was in line with market, yes.

2           Q     So if the income was, let's say, for three years  
3     \$450 a month at this property, that would surely be relevant  
4     in your using the income approach evaluation; is that  
5     correct?

6           A     Yes.

7           Q     Back on your appraisal report again, if I may,  
8     please, let's look at the comparables one, two and three  
9     again. The item for condition, you stated right across the  
10    board a \$10,000 adjustment; is that correct?

11          A     Yes.

12          Q     And your explanation earlier, that is \$10,000 you  
13    need to deduct from the subject property to arrive at the  
14    market value; is that correct?

15          A     No, \$10,000 I need to deduct from the comparables  
16    to lower them or equal them to the same condition as the  
17    subject.

18          Q     Now, could you tell us what exactly constitutes  
19    that \$10,000?

20          A     The deferred maintenance on the subject. I  
21    estimated the cost to cure --

22          Q     Is that the list that you've prepared?

23          A     Yes.

24          Q     The addendum to the appraisal report?

25          A     Yes.

1           Q     So it is your testimony then that this list of  
2 repairs, if they were in fact made, that they appraisal here  
3 would not have been adjusted for \$10,000; is that correct?

4           A     Correct.

5           Q     And then the appraisal would have been higher?

6           A     Correct.

7           Q     And in that respect then, the market value arrived  
8 at was somehow also affected by the cost of these repairs;  
9 is that correct?

10          A     Yes.

11          Q     Do you have that in front of you, sir, your  
12 addendum? I want to walk you through the items you've  
13 listed as repairs.

14          A     Okay.

15          Q     Again I want you to keep in mind that we have  
16 \$10,000 for these repairs.

17                 Item number one, can you tell us here how much it  
18 would have taken to repair the finished -- or to repair the  
19 walls, interior walls?

20          A     To repair the damaged areas, to repaint and to re-  
21 wall cover?

22          Q     Whatever repairs that you meant by this.

23          A     Okay, that's what I meant by that. We're estimat-  
24 ing \$2,000.

25          Q     And number two, what was your estimate of repairs

1 to the floor?

2 A In the neighborhood of \$1,500.

3 Q The broken window?

4 A One hundred and fifty, and there were a few --

5 Q The concrete front steps?

6 A \$500.

7 Q Repair the front entry gutter and downspout.

8 A \$50.

9 Q Scrape and paint the exterior wood of the house.

10 A 500.

11 Q Plus all the wood bearing members on concrete or

12 masonry piers.

13 A This was listed on the list of repairs but was not

14 included in the estimate or cost to cure.

15 Q Why not?

16 A Because that was an FHA guideline or requirement

17 and not a general condition or requirement of the property

18 to be inhabited by humans.

19 Q All right. Number eight, the old style knob and

20 tube --

21 A That was to be inspected. That is not a require-

22 ment or a condition.

23 Q Well, correct me if I'm wrong, but if I were to

24 add up these repairs that you required, they come out to

25 \$4,700.



1           A     Yes, they do, and if you would read at the top of  
2 the page, you would note -- I do state that structural  
3 inadequacies are apparent in the roof and that is the major  
4 -- or 50 percent of the cost.

5           Q     So another \$5,000 for the roof, even though you  
6 did not list it on this list of repairs?

7           A     Well, I did list it but I isolated it from the  
8 list.

9           Q     Now, you testified about that earlier, the rafters  
10 specifically.

11          A     Yes.

12          Q     And you noted that the rafters, there was some  
13 attempt to repair the rafters.

14          A     Yes.

15          Q     Are we talking the rafters as the ones that hold  
16 the -- what, the roof up?

17          A     The roof decking, yes.

18          Q     Was there any indication when those attempted  
19 repairs were made?

20          A     No.

21          Q     And there's no way you could tell?

22          A     No.

23          Q     You couldn't tell that those were attempted prior  
24 to 1984?

25          A     No.

1           Q     Is there any way on your report here that you  
2     could take those list of repairs that you listed and find  
3     where the comparables were -- had better conditions than  
4     those listed in the subject?

5           A     Yes, I exteriorly inspected the comparables I  
6     used. I also took advice from the listing and if I could,  
7     contacted the agents on each of the sales.

8           Q     So with these repairs that you listed in particu-  
9     lar, the comparables that you used were far superior?

10          A     Yes, they'd all been remodeled.

11          Q     Could I direct your attention, sir, to the first  
12     page of your appraisal under the little box toward the  
13     bottom where it says Surfaces. Now, isn't it a fact that  
14     you're listing there the carpet as being average; is that  
15     correct?

16          A     Yes, that's what it says here.

17          Q     It also says that those need to be replaced. Now,  
18     which was it?

19          A     I would assume -- if you would give me time, I  
20     will check into my notes and see if that was a typographical  
21     error. I have my file right here and there are occasions  
22     where typos do occur in appraisals. However, there's also a  
23     chance that it may not be a typo and I could have written  
24     average.

25          Q     It could be an error?

1           A     Yes, it could be an error.

2           Q     All right, let's take the walls.

3           A     All right.

4           Q     Again you're saying as far as the walls, as being

5 average. At the same time in your addendum list you list

6 the walls as the walls needing repair.

7           A     Uh-huh (affirmative).

8           Q     Again, which is it? Either average or they have

9 to be repaired?

10          A     They have to be repaired.

11          Q     But that's also a mistake?

12          A     If you will, everything listed in the interior

13 where it says average, should be fair.

14          Q     So you're changing the report now?

15          A     I'm not changing the report. The report is what

16 it says it is.

17          Q     But it's correct?

18          A     It could be, yes.

19          Q     You used the market approach to arrive at the

20 value; isn't that correct?

21          A     Yes.

22          Q     In your report you stated that there's no unfavor-

23 able factors in the neighborhood; is that correct?

24          A     Right.

25          Q     You also state that the market conditions are

1     stable; is that correct?

2           A     They appear stable, yes.

3           Q     And there were no buy-downs in this area; is that  
4     correct?

5           A     Well, I'm not saying that there are no buy-downs.  
6     I'm stating that that isn't a standard.

7           Q     Sir, I would like to direct your attention --

8           A     Please do.

9           Q     -- to your report on the very bottom of the first  
10    page at the last sentence. It says, "There are no buy-downs  
11    known to the other appraiser in connection with the subject  
12    property."

13          A     That is correct.

14                THE COURT: Mr. Schwenke, how much longer do you  
15    anticipate with this witness?

16                MR. SCHWENKE: At least another 20, 30 minutes,  
17    your Honor.

18                THE COURT: All right. We're going to continue it  
19    this afternoon at 1:30. We're going to take our noon break  
20    at this point. We'll reconvene at 1:30 this afternoon.

21                (Whereupon, a recess was taken.)

22                THE COURT: Parties and counsel are present.

23                Mr. Schwenke, you may continue with your cross-  
24    examination of Mr. Maritsas.

25                MR. SCHWENKE: Thank you, your Honor.

1           Q     (By Mr. Schwenke) If I may, Mr. Maritsas, let me  
2 just review where we left off last time. I was asking you  
3 with respect to some of the matters in your report, more  
4 particularly your conclusion report of no unfavorable  
5 factors in the neighborhood and secondly, also asking you of  
6 your other conclusion that the market conditions were  
7 stable, and also that you've made a conclusion that there  
8 were no buy-downs. Do you remember now where we were?

9           A     Yes.

10          Q     We can proceed from here. You were quite familiar  
11 with the general market condition; is that correct?

12          A     Yes, I feel I was.

13          Q     And am I correct then if I were to conclude that  
14 the price of 20,000 or the value of 20,500 you assessed to  
15 the property was somewhat depressed, considering the market?

16          A     Please restate the question, if you would.

17          Q     You were familiar with the market conditions, and  
18 I want to know if the price or value that you assessed to  
19 this property was somewhat depressed, considering the market  
20 conditions.

21          A     It's difficult to really know what you're asking  
22 me, but the value that I placed on the house was in line  
23 with the market and in line with the condition of the  
24 property.

25          Q     And so the \$20,000 then, the value then you took

1 into effect, the fact that there was also favorable factors  
2 in the community, also your conclusion the market conditions  
3 were stable and also that there were no buy-downs; is that  
4 correct?

5 A No buy-downs that I was aware of, and yes, that  
6 the market in the area was stable.

7 Q You testified that you have been doing this work  
8 for six years; is that correct?

9 A Correct.

10 Q When you were first entering the field back in  
11 1982; is that correct?

12 A Actually it was January of '83.

13 Q Then you could have been aware then that there  
14 were properties sold between '82 and the time you were doing  
15 this appraisal?

16 A Oh, yes.

17 Q Were you not aware that there was an appraisal  
18 done on this property in '83?

19 A I was not aware.

20 Q If you were aware of that appraisal, would that  
21 affect your decision?

22 A No, it would not.

23 Q Would you be surprised if I tell you that that  
24 appraisal was for \$45,000?

25 A There are a lot of factors in five years of time

1 that would affect market value of the subject property, so I  
2 would feel -- my gut feeling, it would be high, but I would  
3 have no basis for that.

4 Q Okay, so if there was one for 45, you wouldn't  
5 dispute it as not correct; is that correct?

6 A Just on the basis of suggestion that the subject  
7 might have appraised for 45,000 five years ago, just on that  
8 basis I wouldn't dismiss it.

9 Q Well, let me correct this. It's actually four  
10 years, I believe, between --

11 A Okay.

12 Q With your knowledge of the market conditions then  
13 at the time, if a property is decreasing in value for  
14 whatever reasons, what would be an average decrease in value  
15 of a piece of property?

16 A Well, you've just asked me for whatever reason and  
17 it depends on the reasons. The reason would tell me what  
18 the decrease or an increase in value would be, and if we're  
19 saying that it's of any reason, then it can be any percent-  
20 age of decrease.

21 Q In the market generally was there any decrease in  
22 value of properties in our market here generally?

23 A Generally the market over the past -- are we  
24 talking past four years?

25 Q That's correct.

1           A     The market has been, yes, generally decreasing.

2           Q     And in your opinion, what is the average decrease,  
3 let's say, on an annual basis?

4           A     Over -- we're talking now all of Salt Lake County?

5           Q     That's correct.

6           A     I would say in the neighborhood of five percent,  
7 six percent.

8           Q     A year?

9           A     Yes.

10          Q     Then you would agree with me that a decrease of  
11 this property by 52 percent in four years would be somewhat  
12 unusual?

13          A     Yes.

14          Q     And in fact, that's what happened to this prop-  
15 erty; is that correct?

16          A     I'm not aware of what it appraised for five or  
17 four years ago.

18          Q     All right, but if in fact it was appraised for  
19 45,000 --

20          A     If it was in fact and that was in line with true  
21 market value, then yes, I would feel that there were some  
22 extenuating circumstances to bring the property down to that  
23 level.

24          Q     Would you have any explanation for what could  
25 cause such a drastic reduction in price or in value?



1           A     Well, it sounds like it would be a combination of  
2 things. One, it could be that in four years that some  
3 reduction would be due to market, but the majority of that  
4 decrease or a decrease would be due to the deterioration of  
5 subject property.

6           Q     Let me ask you a few questions again on your  
7 appraisal report. On the first page at the top it gives a  
8 legal description; is that correct?

9           A     Yes.

10          Q     Is that a correct legal description of the subject  
11 property?

12          A     As far as I know, yes.

13          Q     Then if you were given permission to perform this  
14 appraisal, will you then go to this property with this legal  
15 description?

16          A     I would go to the property at the address and the  
17 legal description basically would help me locate the plat as  
18 from the county records, but I would not go to the property  
19 from the legal description. I would go from the address.

20          Q     Is there a possibility that this could be a  
21 mistake? Is this a mistake in this?

22          A     There's a possibility that there could be an error  
23 in the legal description.

24          Q     And so if there's error in the legal description,  
25 how would that affect your appraisal?

1           A     It would not affect my appraisal.

2           Q     Would not affect it at all?

3           A     At all.

4           Q     You stated on this appraisal as far as the site  
5     that this property has 7,000 square feet, did you not?

6           A     Yes, I did.

7           Q     Do you know for a fact that it has that much  
8     square footage?

9           A     I know for a fact it does not.

10          Q     It does not?

11          A     It does not.

12          Q     And yet you represent that it has that?

13          A     On the report, yes. After the report was handed  
14     in or turned in, I was made aware that the property, that  
15     the plat map that I had selected or I had someone select for  
16     me was a incorrect plat, an incorrect lot displayed on the  
17     plat.

18          Q     So you're saying then you had some other people  
19     helping you with this report?

20          A     I had a leg man, yes, help me with the general  
21     information that would make up the report.

22          Q     And did he have any input to your report?

23          A     No. He collected the information such as the plat  
24     and such as the census track number and the flood map  
25     number.

1           Q     Is your opinion that this report is fairly  
2 accurate?

3           A     Yes, it is.

4           Q     Except for maybe the errors that you've admitted  
5 to earlier that might be in error?

6           A     Yes.

7           Q     Is there any other error that you can think of in  
8 this report?

9           A     No.

10          Q     Let me direct your attention to the plat map that  
11 is part of your report. Am I correct in assuming that this  
12 plat map represents the property then that you were doing  
13 the appraisal?

14          A     It should represent the property, yes. Actually,  
15 this plat is of the lot across the street.

16          Q     How is that?

17          A     That is due to the leg man who I hired to acquire  
18 the map, to get the map for me, and his error was in the  
19 block. The legal description should say block 1, plat C.  
20 Obviously it says block 83. That is the error.

21          Q     So you prepared the report then representing that  
22 this had 7,000 square feet or whatnot, you were relying on  
23 this plat?

24          A     The 7,000 square feet is a typical lot size that  
25 yes, I was stating the fact that I was assuming or I was

1 taking into account that this was the lot and the lot was of  
2 typical size.

3 Q But this error then is not your error, it was  
4 somebody else's?

5 A Right. However, it was included in the report and  
6 it is a typical lot size.

7 Q But let me state again, this that you represented  
8 in your report as the lot of the subject property is totally  
9 incorrect?

10 A Correct.

11 Q It shows the property on the west side of Grant  
12 Street?

13 A Correct.

14 Q When in fact the subject property's on the east  
15 side?

16 A Correct.

17 Q Do you typically make that kind of mistake, sir?

18 A No, sir, I don't.

19 Q You don't personally?

20 A Personally, no, I don't. As a matter of fact, if  
21 you want to know, the gentleman who did this no longer works  
22 for me.

23 Q Just one more matter. On your direct you were  
24 talking about the roof. Let me review that a little bit.

25 A Okay.

1           Q     You mentioned the rafter problem. I asked you  
2 about that but I'm a little confused. Could you explain  
3 what the problem was with the roof?

4           A     Okay. The roof supports or the rafters supporting  
5 the roof decking, they were cracked and split. In other  
6 words, I have to do this visually because I'm not exactly  
7 sure of the angles, but the roof rafters sit at this style  
8 of an angle supporting the roof. Approximately in the  
9 middle of some number of the rafters the stress from, I  
10 would assume, snow and just general age had caused the  
11 rafters to slowly bend and then crack, breaking the rafters  
12 or the supports in the middle of the beam.

13          Q     And how were you able to observe this?

14          A     I climbed into the attic and I checked.

15          Q     Is that normal?

16          A     Yes, it is for me. The reason why I checked was  
17 for insulation mainly, but I also had concern for the roof  
18 because I noticed the sagging of the roof from the exterior  
19 inspection.

20          Q     And it was your opinion then that the roof has to  
21 be replaced?

22          A     Yes.

23          Q     Do you know if it was replaced?

24          A     I do not know if it was replaced.

25               MR. SCHWENKE: I have no further questions.

1 THE COURT: Anything further, Mr. Weston?

2 REDIRECT EXAMINATION

3 BY MR. WESTON:

4 Q Mr. Maritsas, if I might ask you to turn to the  
5 page in the exhibit of your report that's Exhibit 3, turn to  
6 the page that has the photos of the property. I think that  
7 is the fourth page. Do you have that in front of you?

8 A Yes, I do.

9 Q Fifth page, I guess that is. Are these photos  
10 which you have taken?

11 A Yes, they are.

12 Q Are those photos of the property which you  
13 inspected?

14 A Yes.

15 Q Are these photos of the property that you entered?

16 A Yes.

17 Q Do you know what the actual square footage is of  
18 this lot on which this building is situated?

19 A The actual square footage I do not know.

20 Q But at the time you made the appraisal, you  
21 estimated it at 7,000?

22 A Right. I know the percent of acre but I do not  
23 know the square footage.

24 Q If the square footage of the lot were less, was  
25 less than 7,000 that you have indicated, would that suggest

1 to you that your appraised value was high, low, or about the  
2 same?

3 A It depends on the amount of decrease or increase  
4 in the lot size from the appraised value.

5 Q Assume it was like a thousand less.

6 A No, a typical lot size -- a general statement or a  
7 general term is the subject's lot is 12-hundredths of an  
8 acre. The lot across the street is slightly larger than  
9 that. Both lots are typical to the area and would add no  
10 advantage or disadvantage in the marketplace.

11 Q Let me direct your attention then to the top of  
12 the second page. That's the reverse side of page 1 of the  
13 exhibit. In the top right-hand corner there's a box  
14 entitled Estimated Reproduction Costs. Do you see that?

15 A Yes.

16 Q Down towards the bottom of that box there's a  
17 phrase in capital letters, Estimated Site Value, and after  
18 that off to the right is \$8,000. Do you see that?

19 A Correct.

20 Q What does that represent?

21 A That represents the estimate of lot value which  
22 would be the typical lot size in subject subdivision.

23 Q How did you go about determining that?

24 A I searched the area for vacant lot sales. It was  
25 difficult in finding recent sales so I had to expand the

1 guidelines and reach a little further back into the market-  
2 place to find similar lot sales, similar in size and loca-  
3 tion to subject, and deduct or deduce the square foot value  
4 and then apply that to the subject.

5 Q So did you deduce a square foot value?

6 A Yes, I did.

7 Q And you applied that to the subject? Do you apply  
8 that on a per square foot basis or on a fraction of an acre  
9 or --

10 A Fraction of an acre.

11 Q And so what was the fraction of acre that you  
12 applied to the factor you deduced?

13 A Okay. Well, in determining the lot value I was  
14 met with several obstacles. One is because it is a mostly  
15 developed area, that individual lot sales were hard to  
16 obtain, and when I did obtain individual lot sales, they  
17 varied in size and they also varied in value, and so in  
18 determining a lot value I had to use some judgment. How-  
19 ever, what I found in the marketplace per square foot ranged  
20 from 60 cents a square foot to -- up to about a dollar fifty  
21 a square foot, and so I picked a factor somewhere in between  
22 that, which was around a dollar ten a square foot.

23 Q On that same page, directing your attention down  
24 below, the -- what is designated Sales Comparison Analysis,  
25 do you see that?



1           A     Yes.

2           Q     Underneath that there's some typed-in provisions  
3 in the area titled Comments on Sales Comparisons.

4           A     Correct.

5           Q     Do you see that?

6                 Now, you make a reference in there to, "Comp  
7 number one has a high net adjustment which is mostly due to  
8 basement size and finish." Do you see that?

9           A     Correct.

10          Q     And then, "All comps are given equal weight."

11          A     Correct.

12          Q     What do you mean by that qualification or  
13 explanation?

14          A     I'm pointing basically to the guidelines that were  
15 mentioned earlier, FHA guidelines and standard appraisal  
16 guidelines whereas the net adjustment or the net adjustment  
17 does not exceed 15 percent and the gross adjustment should  
18 not exceed 25 percent. In finding sales I found it diffi-  
19 cult to achieve accuracy or narrow adjustments. Most of the  
20 adjustments were large like subject's. What I'm referring  
21 to comparable number one having high net adjustments, I'm  
22 taking into account that the reader understands that the  
23 \$10,000 is for needed upgrades or deferred maintenance  
24 repairs, and so I'm not considering that as being an odd  
25 adjustment. It's a standard adjustment because of the

1 deferred maintenance inside of the subject.

2           However, the basement adjustment is considered  
3 large and due to the fact that I could not find any other  
4 reasonable sales, I used that sale and then let the reader  
5 know that I was aware that that sale was a little out of  
6 line, however it was still usable, and the only -- or what I  
7 would consider comparable to the subject.

8           Q     The factors that you used in this sales comparison  
9 analysis with regard to the three comparables --

10          A     Uh-huh (affirmative).

11          Q     -- there are a number of factors there, but  
12 generally how did you go about arriving at those?

13          A     Well, I -- most of my adjustments were based on  
14 comparables or by market extraction method. What I tried to  
15 achieve was to depict the market in my adjustments and so I  
16 would find sales that were within subject's area and similar  
17 in age to subject that were similar to each other, except  
18 for the item that I was looking to make the adjustment.  
19 Let's say the garage, for example. I found two sales within  
20 subject's neighborhood that were different than the subject,  
21 however similar to each other. A major difference was the  
22 garage. One factor of one of the comparables was a finished  
23 -- some finish in the basement. After deducting the finish  
24 in the basement, I was able to determine that the only  
25 difference between the two houses was the fact of the garage

1 and the difference in the sale price is -- after minusing  
2 the finish in the basement, was the amount that I would give  
3 for the garage which was a thousand dollars, so by the  
4 market extraction method is how I determined the  
5 adjustments.

6 MR. WESTON: That's all I have. Thank you, your  
7 Honor.

8 THE COURT: All right.

9 MR. SCHWENKE: I have a few, your Honor, if I may.

10 RECROSS-EXAMINATION

11 BY MR. SCHWENKE:

12 Q In response to opposing counsel, you said the  
13 acreage was .12; do you recall that?

14 A Yes.

15 Q And in your record you showed an acreage of point  
16 one --

17 A Six.

18 Q .16?

19 A Correct.

20 Q Have you changed then your mind as far as this  
21 report from .16 to .12?

22 A The .16 is considered, in my opinion, a typical  
23 lot size for the area. If you notice the comparables used,  
24 they range from .17, .12 and .10, so an acre or a parcel of  
25 land comprised of a tenth of an acre to somewhere in the

1 neighborhood of two-tenths of an acre would be considered  
2 typical and would have the same lot value as another lot  
3 having, say, a smaller square footage of .12 versus .16 of  
4 an acre.

5 Q Correct me if I'm wrong, but isn't the .04 here,  
6 the difference in what you stated earlier as the acreage and  
7 what you're stating now, doesn't that translate to --

8 A Just over 1,200 square feet.

9 Q That many square feet?

10 A Uh-huh (affirmative).

11 Q And --

12 A It's like a very small house or -- a small house.

13 Q And it's your testimony that 1,200 square foot is  
14 not going to affect the value?

15 A In the land, no. If it did, it would decrease the  
16 value, but my research in trying to determine a lot value  
17 for the subject, I could not find a discrepancy or a large  
18 difference in values between a smaller lot as opposed to a  
19 larger lot, unless it was an excessively larger lot like a  
20 one-third of an acre.

21 Q And of course, the neighborhood has something to  
22 do with the value.

23 A Of the lot, yes, it does.

24 Q Of the lot. And isn't it a fact that in least the  
25 neighborhood there was right across the street a park, a

1 nice maintained park; is that correct?

2 A Right.

3 Q And that has nothing to do with the value, or did  
4 that affect the value as well here?

5 A No, it did not.

6 Q You didn't consider that as important in deciding  
7 the value?

8 A Well, it's inherent in the comparables that are  
9 selected.

10 Q In the comparables, you stated that these compa-  
11 rables are not the only ones you looked at.

12 A Right.

13 Q Do you recall that?

14 These you felt were the best representative --

15 A Correct.

16 Q -- of what was available at the time?

17 A Correct.

18 Q At the time you were doing the appraisal?

19 A Correct.

20 Q Let me direct your attention to comparable number  
21 one.

22 A Okay.

23 Q There you used a comparable that has a basement  
24 versus a subject that does not have a basement.

25 A Correct.

1           Q     Isn't it true that if there was one that was a  
2 comparable to the subject but has no basement, that you  
3 should select that over the one with the basement?  
4           A     Not necessarily, but it was, but should be consid-  
5 ered, yes.  
6           Q     But in using the basement, though, I mean a  
7 comparable with a basement --  
8           A     Correct.  
9           Q     -- that gives you some latitude to also make the  
10 adjustments, to make an adjustment.  
11          A     And adjustments, correct.  
12          Q     And in fact, in this case you made a \$5,900  
13 adjustment for that basement.  
14          A     Correct.  
15          Q     As a matter of fact, you chose two comparables  
16 that have basements; is that correct?  
17          A     Correct.  
18          Q     And there were no other comparables that didn't  
19 have a basement any closer to this property?  
20          A     When I appraise, I'm looking for consistency in  
21 the marketplace, and in using comparables I found in the  
22 marketplace within subject's area that had no basement, I  
23 could not find consistency without making unnecessary  
24 adjustments.  
25          Q     But this resulted in adjustments that put you

1 outside of the guidelines, the HUD guidelines; is that  
2 correct?

3 A Any comparable that I would have selected would  
4 have taken me outside of the HUD guidelines.

5 Q Well outside, by 47 percent.

6 A Yes.

7 MR. SCHWENKE: No further questions.

8 MR. WESTON: Nothing, your Honor.

9 THE COURT: All right, Mr. Maritsas, you may step  
10 down.

11 Call your next witness.

12 MR. WESTON: That would be me, your Honor. Thank  
13 you.

14 GARY A. WESTON,  
15 called as a witness by and on behalf of the Plaintiffs,  
16 having been first duly sworn, testified as follows:

17 DIRECT TESTIMONY

18 THE WITNESS: My name is Gary A. Weston. I'm an  
19 attorney licensed to practice law in the state of Utah, have  
20 been so licensed since October of 1964, practice as a member  
21 of the law firm of Nielsen & Senior and have been retained  
22 by the Plaintiffs in this case to represent them relative to  
23 this action.

24 There have been two aspects of the case in which  
25 our office has provided legal services and for which we have

1 charged fees. Initially I served as the substitute trustee  
2 relative to the foreclosure of the deed of trust given by  
3 the Defendant to the Plaintiff in this action.

4 Relative to my services as trustee, I rendered a  
5 total of 9.7 hours. I should say of that total time about  
6 eight and five-tenths hours, four-tenths hours, are provided  
7 by me, another one and three-tenths hours by a member of our  
8 office. We generated a total fee of \$1,059 for those  
9 services which was a reasonable fee for the services ren-  
10 dered to the Plaintiffs in the action.

11 After the foreclosure sale had been completed, it  
12 became necessary to initiate this action for the deficiency  
13 judgment and in regard to that, in filing the complaint and  
14 proceeding with the discovery in the case and preparation  
15 for and involvement in the trial, I have spent through today  
16 a total of 35 and nine-tenths hours. Of that, 2.3-tenths  
17 hours was billed at the rate of \$120 an hour. That was my  
18 billing rate prior to April 1, 1988. The balance of the  
19 time has been billed at the rate of \$140 an hour. I've  
20 billed a total fee through today for those services with  
21 regard to this litigation in the amount of \$4,980, which is  
22 a fair and reasonable fee for the services rendered to the  
23 Plaintiff in this particular action.

24 THE COURT: Do you have any cross-examination?

25 MR. SCHWENKE: Just one question.



1 CROSS-EXAMINATION

2 BY MR. SCHWENKE:

3 Q You stated that the fees also included the fees  
4 that you charged at the time you were a substitute trustee.

5 A No, I broke it out, Mr. Schwenke. I said the  
6 1,059 were the fees charged for the trustee's fees and  
7 billed to the clients up to and including the trustee's  
8 sale.

9 The other fees of \$4,980 are for attorney's fees  
10 with regard to handling the deficiency action.

11 Q The first fee, the group fees then are part of the  
12 deficiency, were part of the deficiency?

13 A Yes, they are included in the Exhibit 1 in the  
14 testimony Mrs. Thomas gave with regard to the amount owing  
15 as of the time of the trustee's sale.

16 MR. SCHWENKE: Thank you.

17 THE COURT: Very well, Mr. Weston, you may step  
18 down.

19 You now rest?

20 MR. WESTON: Plaintiff does rest, your Honor.  
21 Thank you.

22 THE COURT: Very well. Mr. Schwenke, you may call  
23 your first witness.

24 MR. SCHWENKE: Your Honor, if I may, I'd like to  
25 move for a directed verdict. I'd like to argue that.

1           THE COURT: Well, I'll entertain brief argument if  
2 you wish to present oral argument.

3           MR. SCHWENKE: Yes, your Honor. Move the Court to  
4 dismiss the action on a couple of grounds, your Honor.  
5 First of all, I contend that this sale is void for the  
6 following reasons.

7           Number one, the statute sets forth some strict  
8 guidelines as to what -- as to the conduct of the trustee at  
9 the time of the sale; and secondly, the trust deed before  
10 the Court also has set out the terms of guidelines of what  
11 the trustee needs to do at the time of foreclosure sale.

12           If I may invite the Court's attention to -- may I  
13 approach the bench, your Honor?

14           THE COURT: You may.

15           MR. SCHWENKE: This is the copy of the trust deed  
16 between the Defendant and the Plaintiff and I've highlighted  
17 the provision in there.

18           THE COURT: I see your highlight, Counsel.

19           MR. SCHWENKE: "Wherein the -- at the public  
20 auction the trustees were to sell to the highest bidder, the  
21 purchase price payable in lawful monies of the United  
22 States."

23           It's clear from the language of this deed itself  
24 that more than just a promise was necessary at the time of  
25 the trustee's sale, that a bid of a designated dollar amount

1 was needed to be made at the time of the sale and in fact,  
2 that didn't happen. As a matter of fact, what happened, the  
3 designated price was not determined until December 23rd when  
4 the appraisal allegedly was then ordered and obtained.

5 I contend -- or Defendant contends that the  
6 situation here is tantamount to a postponement of the sale  
7 until that price was finally determined. We contend that  
8 trustee both under the relevant statute here, 57-1-27, and  
9 also under the terms of the trust deed, did not comply fully  
10 with that, and if I may invite the Court's attention to the  
11 statute, it does give some restrictions, in paragraph 2,  
12 some restrictions as to the conduct of the trustee. Para-  
13 graph 2 states that the person conducting the sale may, for  
14 any cause he considers expedient, postpone the sale for up  
15 to a period of not to exceed 72 hours, that beyond 72 hours  
16 that sale has to be renoticed.

17 It is our contention that the manner in which the  
18 sale was conducted here was in effect a postponement of the  
19 sale. There was no fixed price determined at the time of  
20 the sale and there was no fixed price until 30 days later,  
21 and the 30 days way far exceed the 72 hours that the statute  
22 requires, and this sale should have been renoticed and given  
23 that the sale, we contend, is void and accordingly, the  
24 action before the Court is premature.

25 Secondly, on the merits, I contend that there's no

1    prima facie case has been made here on the following  
2    grounds. Number one, the Plaintiffs relied upon the only  
3    expert, Mr. Maritsas' testimony. We heard from his testi-  
4    mony that he admitted that the appraisal was ordered as of  
5    December 23rd, 1987. That is 30 days outside of the date of  
6    the sale. The statute requires that the sale, that fair  
7    market value must be determined at the time of the sale.  
8    True, upon questioning Mr. Maritsas about that, yeah, the  
9    value didn't really change but the fact of the matter is he  
10   didn't make a determination as to the value until the 23rd.  
11   At least one of the comparables that he used was a sale in  
12   December. The value that he arrived at here, your Honor, is  
13   not -- it's not representative of the value that was  
14   required by the statute determination of the value at the  
15   time of the sale.

16               Secondly, the appraisal, it's clearly not convinc-  
17   ing of the market value. Number one, we heard quite a few  
18   inconsistencies in the report itself. One, he said that  
19   several other --

20               THE COURT: Well, Counsel, don't reiterate to me  
21   the testimony of the witness. I heard the testimony.  
22   You're disagreeing with the witness's testimony because you  
23   believe it's not credible. Isn't that the sum of the  
24   opposition of the testimony of Mr. Maritsas?

25               MR. SCHWENKE: Your Honor, I just merely said what

1 I believe came out from the --

2 THE COURT: All right, I understand, but what I'm  
3 trying to get you to do is not reiterate to me the testimony  
4 of Mr. Maritsas who's been on the stand for approximately  
5 two hours or three hours. I heard the testimony, and if you  
6 disagree with that, certainly that's a basis upon which you  
7 can make your motion for directed verdict, but let's not at  
8 this juncture have you reiterate to me what the witness  
9 testified to.

10 MR. SCHWENKE: That's fine. I apologize to the  
11 Court. I will submit it on that basis, your Honor.

12 THE COURT: All right. Thank you, Counsel.  
13 Do you wish to respond, Mr. Weston?

14 MR. WESTON: Briefly, your Honor. I must admit  
15 it's amazing Mr. Schwenke is concerned about testimony as to  
16 the value of the property 30 days after the trustee's sale  
17 when for his examination he would have the Court address  
18 valuation and appraisals made three or four years earlier.  
19 The point, your Honor, is clearly this. The testimony from  
20 Mrs. Thomas has been that at the time of the trustee's sale  
21 she recognized that they were going to bid and did bid what  
22 was a fair market value. They did not know at that time  
23 what the fair market value was.

24 In the Answer the Defendant admits the property  
25 was in fact sold to the Plaintiffs as a result of that bid

1 at the time of that sale. Now, Section 57-1-32 says only  
2 one thing, that in order to protect the trustor it is  
3 necessary, it is inherent that the fair market value of the  
4 property be determined because clearly, whatever that value  
5 was, whatever it was is the amount to which the trustor is  
6 to be given credit on his obligation to the beneficiary.

7 Mrs. Thomas's testimony is at that time whatever  
8 that fair market value was was what they understood that  
9 they were bidding for the property. They didn't know what  
10 it was at that particular time and I think the evidence has  
11 clearly shown that no one would have known unless an  
12 appraisal had been obtained, and even, interestingly enough,  
13 if ten appraisers had been obtained before that time, until  
14 -- in the course of this action as required by 57-1-32, and  
15 until there was a finding by this Court based on the evi-  
16 dence as to actually what was a fair market value, no living  
17 soul on earth would ever have known what was the fair market  
18 value of that property on the date of that sale. We'll rest  
19 on that.

20 THE COURT: All right, Counsel, thank you.

21 The motion for directed verdict is denied.

22 Mr. Schwenke, call your first witness.

23 MR. SCHWENKE: The Defense would call Mr. Richard  
24 Copeland, your Honor.

25 THE COURT: Very well.

1                                RICHARD COPELAND,  
2       called as a witness by and on behalf of the Defendant,  
3       having been first duly sworn, was examined and testified as  
4       follows:

5                                DIRECT EXAMINATION

6       BY MR. SCHWENKE:

7                Q       Please state your name and address for the record.

8                A       My name is Richard Copeland.    The address is 1774  
9       East Laird Avenue, Salt Lake City.

10              Q       Are you familiar with the property being referred  
11       to here as the Grant property?

12              A       Yes, I am.

13              Q       How did you come to be familiar with that  
14       property?

15              A       I was asked to do an appraisal on that property by  
16       Mr. Johnson.

17              Q       And did you perform such an appraisal?

18              A       Yes, I did.

19              Q       I want to ask you a few questions about your  
20       qualifications to be an appraiser.    Can you tell us what  
21       your training was to perform appraisals?

22              A       In 1975 I was employed in the construction  
23       industry here in Salt Lake City for a firm called PM  
24       Contractors.    At that point in time we were developing large  
25       commercial office developments as well as individual office

1 buildings throughout the valley here. That experience gave  
2 me the opportunity to learn of construction of buildings and  
3 an idea of how the building process went along and how to  
4 read blueprints, et cetera, things like that.

5 In 1980 I elected to pursue a real estate salesman  
6 position. I took the required course, passed the exam in  
7 June of 1980. I then went to work for a couple of real  
8 estate firms here in the valley selling both commercial and  
9 residential real estate and gained experience about the  
10 market and about real estate through that experience.  
11 During that experience I became interested in the valuation  
12 of homes by appraisers -- or properties, let's say, by  
13 appraisers, and submitted for information from appraisal  
14 organizations. At that time I had received that informa-  
15 tion, decided that that was the course that I chose to do.

16 One of the requirements by one of the organiza-  
17 tions was a college education, and at that point I went back  
18 and enrolled at the University of Utah and pursued a  
19 Bachelor of Arts which I received in December of 1984. From  
20 then on I actively solicited an employment position through  
21 the various appraisal firms here in the valley, and by March  
22 of 1986 I had secured a position with a prominent firm here  
23 in town and I worked for them doing commercial reports, the  
24 acquiring of information, putting together reports, being  
25 responsible for the entire reports on commercial projects



1 that varied quite extensively.

2 There was a member of the firm who had been  
3 involved in residential appraisals and that I took an inter-  
4 est in that and subsequently hired on with a firm that did  
5 exclusively residential work.

6 Q What firm is that?

7 A The Terra Firm. They're located out in Murray.

8 Q Did you take any special courses to qualify as an  
9 appraiser?

10 A Yes, I did. I am a candidate member of the  
11 American Institute of Real Estate Appraisers. I received  
12 notification of candidacy in about April of 1986. I com-  
13 pleted the basic course work required for the residential  
14 member designation through that institution. I have com-  
15 pleted the appraisal principles, basic valuation, residen-  
16 tial valuation, standards of professional practice, attended  
17 seminars on residential form report filings, et cetera, as  
18 well as course work up at the University of Utah, and I am  
19 also a designated member of the National Association of Real  
20 Estate Appraisers and Mortgage Underwriters, and I am a  
21 certified review appraiser through their organization.

22 Q Now, can you tell us what that is?

23 A A certified review appraiser is a person who has  
24 specialized training or more extensive training in the  
25 review of appraisal reports. It is conjunction with the

1 National Association of Mortgage Underwriters and allows  
2 those in the underwriting end of the business to properly  
3 evaluate an appraisal report to determine the accuracy, to  
4 determine whether it is a solid report that they can loan  
5 money on.

6 Q Can you perform appraisals pursuant to that  
7 certification?

8 A Yes, I can.

9 Q Approximately how many appraisals have you per-  
10 formed in your career?

11 A Commercial reports, in excess of 20, which doesn't  
12 sound like a lot but they require sometimes a month to six  
13 weeks to complete, and residential reports in excess of  
14 about 500. That is an estimation.

15 Q Do you know Mr. Johnson who is the Defendant in  
16 this case?

17 A I am familiar with him because of our business  
18 associations, yes.

19 Q Do you mean you know him then? When did you start  
20 to know him?

21 A I was contacted by an associate of mine and asked  
22 if I would be willing to discuss doing an appraisal for  
23 Mr. Johnson, at which time I called up Mr. Johnson on the  
24 phone and subsequently visited him at his office, whereupon  
25 he asked me to do an appraisal on Grant Street.

1           Q     Prior to that time, did you have any affiliation  
2 with Mr. Johnson?

3           A     I did not know him from Adam.

4           Q     At the time, too, Mr. Johnson had several  
5 appraisals. Did you have an occasion to see any of those  
6 appraisals?

7           A     No.

8           Q     Did you see any before you made your own  
9 appraisal?

10          A     No, I make it a policy never to do that.

11          Q     I hand you what's been admitted as Defendant's  
12 Exhibit No. 5. Do you recognize that?

13          A     Yes, I do.

14          Q     Can you tell us what it is?

15          A     It's the appraisal report I did on the property  
16 located at 448 North Grant Street.

17          Q     When did you perform this appraisal?

18          A     I was contacted -- or I received the assignment to  
19 do the appraisal on July 6th, 1988, completed the appraisal  
20 that day, and submitted the final report to Mr. Johnson on  
21 July 7th.

22          Q     Now, is that '88?

23          A     1988, yes.

24          Q     Was this report then reflecting the value at that  
25 time?

1           A     No, it was not. Mr. Johnson in his instructions  
2     for doing the appraisal mentioned only that he requested  
3     that the appraisal be done as if valued on November 27th of  
4     1987, which I did.

5           Q     Is that possible to do?

6           A     Yes, it is. It is not as accurate, but yes, it is  
7     possible.

8           Q     Can you tell us the different methods that are  
9     used to arrive at the valuation?

10          A     There are three basic methods that appraisers use,  
11     the market comparable approach, the income approach, and the  
12     cost approach.

13          Q     And can you explain what those are?

14                THE COURT: Well, Counsel, I'm not sure it's going  
15     to help me to go through again what the three approaches  
16     are. I would suggest that I'm more interested in what  
17     Mr. Copeland determined was the appropriate approach and  
18     why, and what he arrived at in his conclusion.

19                MR. SCHWENKE: That's fine, your Honor.

20                THE COURT: All right.

21          Q     (By Mr. Schwenke) Let me direct your attention to  
22     page -- the third page of your appraisal.

23                MR. WESTON: Pardon me, Mr. Schwenke, you have not  
24     offered that nor do I have a copy of that.

25                I don't believe, your Honor, it has been offered.

1           THE COURT: It has not been offered. There is  
2 attached to a pleading in the file a copy of the appraisal,  
3 but let's have it offered and received before we testify.

4           MR. SCHWENKE: I've neglected to offer exhibits  
5 here. I discussed with Mr. Weston and he consented to  
6 admission of all my exhibits except for the two appraisals  
7 from '83 and '84.

8           THE COURT: Well, let's deal with Exhibit 5 right  
9 now. Is there any objection to the receipt of Exhibit 5,  
10 Mr. Weston? Have you seen it?

11          MR. WESTON: I don't believe so. Let me see, just  
12 check two pages here. I want to make sure that -- no, your  
13 Honor, it is intact and I have no objection at all.

14          THE COURT: Five's received.

15          Q     (By Mr. Schwenke) Let me direct your attention  
16 then, Mr. Copeland, to your report on the fourth page where  
17 you estimated the market value. What did you estimate the  
18 market value at?

19          A     \$31,800.

20          Q     And how did you arrive at that? One of the  
21 methods that we asked you about?

22          A     I arrived at that by the market comparable  
23 approach to value.

24          Q     And that is the analysis you performed here on  
25 that same page showing the comparables?

1           A     Yes, uh-huh.

2           Q     Let's take comparable one. Why did you select  
3     that?

4           A     In selecting comparable properties, I select those  
5     that are most like the subject property that can be found  
6     and that has to do with age, with square footage, with  
7     basement or a lack of basement, with amenities such as a  
8     garage, anything I can do to narrow the field of possible  
9     comparable sales down to a select that are most like the  
10    subject property.

11          Q     And under those conditions you selected comparable  
12    one; is that correct?

13          A     Uh-huh (affirmative).

14          Q     Did you make any adjustments to that comparable?

15          A     Yes, I did.

16          Q     Can you tell us what those were?

17          A     Would you like me to list each one?

18          Q     Go ahead.

19          A     Okay. There were adjustments made for gross  
20    living area because comparable number one had less square  
21    feet than the subject property. There is an adjustment made  
22    for the cellar area of the subject. Comparable one did not  
23    have that. Comparable one had a crawl space. A slight  
24    adjustment for that.

25                Functional utility was an adjustment. The fact

1 that comparable number one had a garage, the subject did  
2 not, and comparable number one was partially fenced, whereas  
3 the subject property was fenced.

4 Q Let me direct your attention to the line that says  
5 Condition. You didn't make an adjustment for that?

6 A No.

7 Q And can you tell us why you did not make an  
8 adjustment for that?

9 A The reason I did not make an adjustment for  
10 condition was because I had no idea of the exact condition  
11 of the property as of November 27th, 1987. I only could  
12 observe the condition of the property as of July 6th, 1988,  
13 and as a rule, I did not feel that I could make adjustments  
14 on something that I was not aware of in that section.  
15 Adjustments for condition were made in the cost approach and  
16 as you could see, there was a significant adjustment made  
17 for that and the condition is included in the cost approach  
18 to value.

19 Q And is that the calculation you have in the top  
20 right-hand corner?

21 A Yes, that is.

22 Q You also put for age 60-plus years.

23 A Uh-huh (affirmative).

24 Q What exactly do you mean by that?

25 A In researching comparable sales through the Salt

1 Lake Board of Realtors, they have a means whereby they  
2 determine -- or if the age of a property's undeterminable,  
3 they will put a code 888 or 999 and in that particular case  
4 an 888 or a 999 is a property that is in excess of 50 or 60  
5 years old, depending on which one, but no one knows the  
6 exact age of that property, so I don't have -- I can't  
7 determine the exact dates, so I put 60-plus years, which is  
8 the best information available.

9 Q Again you were selecting this comparable to  
10 determine a value as of November '87; is that correct?

11 A That's correct.

12 Q Now, why would you select this for that to deter-  
13 mine value back on that date? Why would you select compa-  
14 rable one to arrive at a value on that date?

15 A Well, comparable number one conforms to a set of  
16 guidelines. We don't require but we prefer to have property  
17 that's located within a 15-block area of the subject. This  
18 happens to be within one block. The age is comparable with  
19 the subject property. The square footage is relatively  
20 comparable with an unfinished basement. The fact that there  
21 is a garage is an addition that somebody had done later on.  
22 I selected that property because of those criteria and also  
23 the fact that the property was sold September 17th, 1987.  
24 That is within a reasonable period. Usually under six  
25 months is the guideline that we try to use to the sale of



1 the property, or the valuation of the property as of  
2 November 27th.

3 Q Let me make sure I got this correct. You selected  
4 this because it was a sale before the date that you had to  
5 determine the market value?

6 A That's right. We only can use comparable sales  
7 that have actually been sold and are on record and before  
8 the valuation date of the appraisal.

9 Q Have you done any HUD appraisals?

10 A Yes, I have.

11 Q And you're familiar with the regulation, the HUD  
12 regulation 408?

13 A Yes.

14 Q And under that regulation, can you tell me if  
15 comparable one would be within that guideline?

16 A I don't have the exact figures on the gross  
17 adjustment. The net adjustment certainly would. It's less  
18 than one percent. It would conform to the HUD guideline and  
19 I don't recall exactly, I have it in my file copy, the exact  
20 percentage, and so I can't answer right now. I don't  
21 remember.

22 Q Did you perform this appraisal under HUD guide-  
23 lines?

24 A No, I did not, but that was not the request. This  
25 was not going for that type of financing.

1           Q     But even if it was under HUD guidelines, this  
2 appraisal would have met the guidelines?

3           A     I am assuming so, yes. There are some gross  
4 adjustments on comparables number two and three that I  
5 believe do exceed that 25 percent, but not by much.

6           Q     Briefly then, also on comparable two, why did you  
7 select that?

8           A     Well, for the same reasons. It's within three and  
9 a half blocks of the subject. It sold August 7th which was  
10 relatively close to the time period of the valuation. The  
11 age certainly fits in. It's very close square footage-wise  
12 to the subject, no basement, and it fit the majority of the  
13 criteria that we were looking for.

14          Q     And again number three?

15          A     Same thing. This was a little bit older sale. It  
16 was sold on July 7th of 1987. The site acreage is close.  
17 The age is within, you know, 60-plus years which is similar,  
18 similar construction being brick, square footage is within  
19 242 square feet, no basement, and then this also has the  
20 exception of the one-car garage and things for that.

21          Q     You show on here two methods, am I correct?

22          A     Yes.

23          Q     Can you tell us what the values under those  
24 methods --

25          A     The value arrived at by using the cost approach,

1 40,975. The value of the market approach, 31,800.

2 Q Did you use the income approach at all?

3 A No, I did not.

4 Q Can you tell us why not?

5 A The availability of accurate information to  
6 develop the income approach is not -- does not exist. In  
7 order to produce an income approach, you need a significant  
8 amount of sales information, rental information which just  
9 does not exist within the time frame that we're allowed, and  
10 the fact of the matter that this is a single family resi-  
11 dence, it's in a residential neighborhood, I had no knowl-  
12 edge that it was to be used as an income producing property.  
13 Therefore, in my estimation, the income approach was not  
14 applicable in this particular case.

15 Q If you had known that this was an income producing  
16 property, it was a rental, would that have made a difference  
17 in --

18 A It might have, had you been able to produce  
19 significant information to support the use of the income  
20 approach, but by taking just a couple of -- by taking the  
21 gross rents of the property and adjusting that and saying  
22 yes, that is a valid approach, it is not as valid because of  
23 the lack of information.

24 MR. SCHWENKE: I have no further questions.

25 THE COURT: Very well. Mr. Weston?

1 CROSS-EXAMINATION

2 BY MR. WESTON:

3 Q Mr. Copeland, apparently you were retained by the  
4 Defendant, Mr. Johnson, on July the 6th of '88 to perform  
5 the appraisal service; is that right?

6 A Yes.

7 Q You concluded your service one day later on July  
8 the 7th?

9 A That's correct.

10 Q So you completed the whole thing within just a  
11 matter of hours?

12 A The inspection was done by about 10:00 that  
13 morning. I worked on it the balance of the day, finished  
14 typing it up the following morning, and presented it to  
15 Mr. Johnson early in the afternoon.

16 Q When did you inspect the property?

17 A The property was inspected -- it's hard to remem-  
18 ber. I'm estimating right around 10 o'clock, 11, 12 o'clock  
19 in the morning.

20 Q Okay. I did not mean a time, the hour of the day.  
21 I meant the day. Would that have been on the 6th?

22 A That would have been on the 6th, yes.

23 Q Who accompanied you during that inspection?

24 A I accompanied -- I initially went there by myself.  
25 I received the key to the property from you or from your

1 office and I went down to the property and in the process of  
2 doing my inspection of the property, a Mr. Hyde stopped by,  
3 said that he was the owner of the property and asked if I  
4 would mind if he accompanied me through the property. I  
5 said no, and he in essence gave me a -- not a guided --  
6 well, kind of a guided tour through the home.

7 Q As you went through the home, did there appear to  
8 be any renovation, remodeling work going on there?

9 A No that I was aware of.

10 Q Any cleaning?

11 A No.

12 Q What was the general appearance of the property as  
13 you were in it?

14 A The general appearance of the property was one  
15 that needed some minor repair, cosmetic repair, obviously  
16 needed cleaning. I found no structural problems with the  
17 house itself. It seemed to be a good solid house, you know,  
18 no real problems with that.

19 Q But you did not go up in the attic?

20 A No, I didn't. It had, if I remember, something  
21 like a nine-foot ceiling. The house was vacant. Basically  
22 there was no way. I don't carry a ladder with me. No way I  
23 could crawl up there and see what the condition of the attic  
24 was.

25 Q Did you go into the basement or the cellar?

1           A     Yes, I did.

2           Q     Now, you told us that you had talked directly with  
3 Mr. Johnson at the time you were retained to do the  
4 appraisal; is that right?

5           A     Yes, uh-huh.

6           Q     You knew at that time or Mr. Johnson told you he  
7 was involved in litigation?

8           A     He mentioned that this was an appraisal that might  
9 go to court, but he wasn't sure. It was one of those things  
10 that was uncertain at that point in time.

11          Q     But he told you he was involved in litigation over  
12 the property at that time?

13          A     Yes.

14          Q     So when you did the report, you knew that he was  
15 being sued over the property?

16          A     Litigation, yes. If that means sue, I wasn't sure  
17 on that part.

18          Q     You knew at the time you did the report he was  
19 trying to get the value as high as he could; that was the  
20 purpose of his having that report done?

21          A     He approached me and asked me to do the appraisal  
22 on 449 -- 448 Grant Street. He says, "This may be something  
23 that possibly will go to court. I would like you to esti-  
24 mate the value as of November 27th, 1987," and that's it.

25          Q     At the time you did the report, you estimated the

1 value as of May 3, 1988, didn't you?

2 A That was a typographical error on my sheet -- I  
3 mean, on the final report that Mr. Johnson has. I did write  
4 over that when I delivered to him November 27th, 1987, and  
5 also on the cover sheet it describes the appraisal report of  
6 the single family residence located for Mr. Johnson as of  
7 November 27th, 1987.

8 Q So directing your attention then to the second  
9 page of the exhibit, then the letter from Appraisal  
10 Consultants, that apparently was you; is that right?

11 A Yes, uh-huh.

12 Q To Mr. Johnson. Then where you reflect the  
13 estimated value as of May '88, May 3, '88, you say that's a  
14 typing error; is that right?

15 A That is a typographical error and when I presented  
16 that copy to Mr. Johnson, I have written over that and it  
17 shows up on my copy here.

18 Q You've told us that it was difficult trying, by  
19 virtue of what you implemented in July 1988, to determine  
20 the fair market value of the property in November 1987.  
21 That was your testimony, I believe, was it not?

22 A It was difficult in the sense of determining  
23 actual condition of the property as far as whether there's  
24 paint peeling or things like that at that point in time, but  
25 the basic facts of determining the market value was no

1 different than at any other time because we do have access  
2 of the sales information through the Salt Lake Board of  
3 Realtors which can be accessed readily for that period of  
4 time.

5 Q Directing your attention to the first page of the  
6 report, so that would be the fourth page of the exhibit,  
7 towards the bottom right-hand corner, Mr. Copeland, in the  
8 box it says, "Improvement Analysis." Do you see that?

9 A Uh-huh, yes.

10 Q Last line in that box indicates, "Estimated  
11 remaining physical life," and apparently you've estimated it  
12 at 50 to 60 years; is that right?

13 A Yes.

14 Q And above that, "Economic life" at 40 and 50  
15 years; is that correct?

16 A Uh-huh, that's correct.

17 Q What did you intend as the difference between  
18 economic and physical life?

19 A Physical life is the amount of time that the  
20 structure is able to stand and produce its intent, to  
21 perform its intended use.

22 Q Economic life?

23 A And economic life is the amount of time that the  
24 value of the improvements will contribute to -- like the  
25 structure will contribute to the land and things.



1           Q     Now, at the time you conducted your appraisal, did  
2 you know what the age of the building was then?

3           A     No, I did not.

4           Q     But you perceived that it was one of the older  
5 homes in the area?

6           A     That is correct, and I assumed that because it was  
7 built at approximately the same time as the surrounding  
8 homes and could determine their various ages as being at  
9 least 60 years old.

10          Q     So you'd have thought this property was then about  
11 60 years?

12          A     Approximately, yes.

13          Q     So you thought it had an economic life of some-  
14 where between a hundred and a hundred and ten years total?

15          A     Yes.

16          Q     Directing your attention to the reverse side then  
17 of your appraisal report, it might be -- I guess it's the  
18 second page.

19          A     Okay.

20          Q     It's the very next page, I guess.

21          A     Uh-huh (affirmative).

22          Q     Directing your attention down in the middle of the  
23 page to a sales comparison analysis, do you see that?

24          A     Yes, uh-huh.

25          Q     Over to the second column from the left, the one

1     entitled Subject, going down to about four or five blanks or  
2     spaces from the bottom of that grid, there is an item  
3     entitled Special Energy Efficient Items. Do you see that?

4             A     Yeah, I do.

5             Q     And with regard to the subject you have put in the  
6     word average; is that right?

7             A     That's correct.

8             Q     What did you observe in this property that was an  
9     average energy efficient item?

10            A     Storm windows.

11            Q     So that's what you're referring to?

12            A     Yeah.

13            Q     Were the storm windows broken, any windows broken?

14            A     There was at least, maybe there were two. I  
15     cannot remember, but at least there were one window and  
16     screen that was broken on the property, yes.

17            Q     Front steps were still in disrepair?

18            A     They were worn, yes, but I don't recall there  
19     being the state of disrepair as was explained earlier.

20            Q     You're just not sure?

21            A     They were well worn, yes, but the state of repair  
22     or the extent of damage that was explained earlier, I don't  
23     recall that at all.

24            Q     Next we see a couple of blanks under that one,  
25     typed in "RO" and then "average finish." Do you see that?

1           A     Right.

2           Q     What do you mean by that?

3           A     RO stands for range and oven which is a part of  
4 the property, and average finish was the finish that's in  
5 the kitchen area. Basically it has, you know, a solid  
6 floor. They've got cabinets. It's average basically to  
7 what other homes will have in a kitchen environment.

8           Q     At the time you were appraising the property -- or  
9 pardon me, going through the property, you were accompanied  
10 by Mr. Hyde, right?

11          A     Yes.

12          Q     Mr. Hyde told you that he is the owner of the  
13 property or that he was buying the property? Which did he  
14 tell you?

15          A     Both.

16          Q     Did you ask him what he was paying for the  
17 property?

18          A     No, I did not.

19          Q     Were you interested in knowing?

20          A     No, because that might possibly affect what my  
21 value would be. I didn't want to be biased.

22               MR. WESTON: That's all I have, your Honor.

23               THE COURT: All right.

24                               \*

25                               \*

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1 subject property as of November 27, 1987.

2 Q And you were able to do that by using the sales  
3 that occurred prior to that date?

4 A That is correct.

5 Q Sir, could you tell us a little bit more about  
6 that certification you mentioned earlier?

7 THE COURT: What certification? On his  
8 qualifications?

9 MR. SCHWENKE: Yes.

10 THE COURT: That was not a matter inquired into on  
11 cross-examination, I don't think, Counsel. It's beyond the  
12 scope of cross-examination.

13 MR. SCHWENKE: Withdraw the question, your Honor.

14 THE COURT: All right.

15 MR. SCHWENKE: That's all.

16 THE COURT: All right.

17 MR. WESTON: I have nothing further.

18 THE COURT: All right. You may step down,  
19 Mr. Copeland.

20 Let's take a 10-minute recess, Counsel.

21 (Whereupon, a recess was taken.)

22 THE COURT: Parties and counsel are present. You  
23 may call your next witness.

24 MR. SCHWENKE: Defense would call Mr. Robert  
25 Stonehocker.

1                                 ROBERT B. STONEHOCKER,  
2     called as a witness by and on behalf of the Defendant,  
3     having been first duly sworn, was examined and testified as  
4     follows:

5                                 DIRECT EXAMINATION

6     BY MR. SCHWENKE:

7                 Q     Please state your name and address for the record.

8                 A     I'm Robert B. Stonehocker. My office of business  
9     is at 145 East Ninth South, No. 3, Salt Lake City.

10                Q     What's your residence address?

11                A     3737 McCall Street, No. F.

12                Q     Salt Lake City?

13                A     Yes.

14                Q     Are you acquainted with the property that is the  
15     subject matter of this litigation?

16                A     I am.

17                Q     Can you tell us how you became acquainted with  
18     that property?

19                A     On September the 5th, 1985, I closed on that piece  
20     of property with Mr. Johnson and received that piece of  
21     property as a trade in a real estate transaction.

22                Q     What do you mean by closed?

23                A     That was the day of closing upon our agreement.

24                Q     That's the date you took over the property?

25                A     Yes.

1           Q     Tell me what did you do after you acquired the  
2     property.

3           A     I took it over and collected rents from it --  
4     there was a renter in the property -- and obtained rent from  
5     it, repaired the property, paid the payments on it.

6           Q     How long did you have this property?

7           A     I was in possession of the property until sometime  
8     during 1987.

9           Q     While you were in possession, can you tell us what  
10    the condition of the property was?

11          A     The last time that I was through that piece of  
12    property was in the summer of 1987. I believe it was July.  
13    It was in the summer of 1987. Condition of the property was  
14    not -- it was not run down. It was -- the paint on the  
15    outside needed painting. It had been weathered. The inside  
16    of the property was not -- the walls were in good condition.  
17    The utilities were working, and one of the reasons that I  
18    went through the piece of property at that time is that I  
19    had a leak in the front repaired. The water was leaking in  
20    the front.

21          Q     Do you remember observing the staircase, the  
22    cement staircase?

23          A     I do, I remember that.

24          Q     Can you describe the condition?

25          A     It was starting to deteriorate, yes, it was

1 weatherized and was cracked. The carpet was worn on the  
2 front steps and it probably should have been replaced at  
3 that time.

4 Q And how about the inside of the --

5 A The inside of the property was not nearly like  
6 what has been described.

7 Q Just describe what you saw.

8 A The walls were in good shape. It was a glance  
9 through the house, just rechecking out the house and talking  
10 with the tenant and asking her what she needed to get done  
11 and things like that.

12 Q Did you receive any complaints from the tenant as  
13 to the condition of the house?

14 A No.

15 Q Was the carpet -- can you describe the condition  
16 of the carpet inside the house?

17 A It was threadworn. It was getting old. It had  
18 been used.

19 Q After you took over the property, who did you make  
20 the payments to?

21 A I made it to a trust fund at Draper Bank. The  
22 trust fund was in Miss Thomas's and family trust.

23 Q Did you have any contact with Ms. Thomas?

24 A Yes.

25 Q After you took over the property?



1           A     Yes, I have had.

2           Q     Can you recall some of those contacts?

3           A     Yes, I got behind on the payments and Kathleen and  
4 I discussed over the telephone of how to bring up the  
5 payments current, and also I met with her at one time up in  
6 the offices of E. L. Sperry.

7           Q     What was the purpose of that meeting?

8           A     To bring up the payments.

9           Q     Any other contacts with Ms. Thomas?

10          A     Not for a long time, no.

11          Q     Were you aware that Ms. Thomas was also contacting  
12 Mr. Johnson for the payments?

13          A     There was a period of time that there was a  
14 discrepancy about a payment before I took over the payments,  
15 and Kathleen was trying to get the -- Ms. Thomas was trying  
16 to get the payments out of Mr. Johnson.

17          Q     From Mr. Johnson?

18          A     Yes.

19          Q     Was she able to get that payment?

20          A     I have no idea whether that was ever settled or  
21 not.

22          Q     Have you had any contact with the Plaintiffs'  
23 attorney in this case?

24          A     It seems to me -- and I don't have my records  
25 currently with me nor have I been able to get to the records

1     since I heard about this. It seems like I did receive a  
2     letter from Mr. Weston at one time and that was concerning  
3     being behind on the payments, and it's coming from my memory  
4     and I really don't know exactly what it said, but it seems  
5     to me like that there was a letter that was sent to me by  
6     Mr. Weston.

7           Q     Would you remember the approximate time that you  
8     received that letter?

9           A     It seems to me like I received it in 1986, early  
10    part of 1986, January, February.

11           MR. SCHWENKE: May I approach the witness, your  
12    Honor?

13           THE COURT: You may.

14           Q     (By Mr. Schwenke) I show you what's been marked  
15    for identification as Defendant's Exhibit No. D -- I'm  
16    sorry. What is the number on that?

17           A     Uh-huh (affirmative).

18           Q     D-13.

19           A     D-13.

20           Q     Do you recognize that?

21           A     No, I don't.

22           Q     That couldn't be the letter that you were refer-  
23    ring to earlier?

24           A     No, I no longer lived at 2916 La Jolla Drive at  
25    that time and I don't believe that I have received this

1 letter.

2 MR. SCHWENKE: I have no further questions.

3 THE COURT: Is there any examination of this  
4 witness, Mr. Weston?

5 MR. WESTON: May I have just a moment, your Honor?

6 No, your Honor, there is not.

7 THE COURT: All right. Mr. Stonehocker, thank  
8 you.

9 THE WITNESS: Thank you.

10 THE COURT: You may call your next witness,  
11 Mr. Schwenke.

12 MR. SCHWENKE: Thank you, sir. Defense calls  
13 Mr. Jamis Johnson.

14 JAMIS M. JOHNSON,  
15 called as a witness by and on behalf of the Defendant,  
16 having been first duly sworn, was examined and testified as  
17 follows:

18 DIRECT EXAMINATION

19 BY MR. SCHWENKE:

20 Q Please state your name and address.

21 A My name is Jamis Johnson. I live at 1436 Yale  
22 Avenue in Salt Lake, 84105.

23 Q You're the Defendant in this case?

24 A Yes.

25 Q And you're familiar then with the transaction

1 involving the property at Grant?

2 A I'm familiar with the transaction, yes, where I  
3 bought the property and sold it.

4 Q Can you tell us when that happened?

5 A I believe it was purchased in about September of  
6 '84 and it was sold about a year later, and the date of the  
7 sale was September 5th, 1985.

8 Q Do you recall what you paid for the property?

9 MR. WESTON: Objection, your Honor, that's  
10 irrelevant.

11 THE COURT: What relevance is it, Mr. Schwenke?

12 MR. SCHWENKE: The statute that we're relying on,  
13 your Honor, clearly protects the purchaser who has lost  
14 equity as well in the sale.

15 THE COURT: Cite your statute.

16 Talking about 57-1-32?

17 MR. SCHWENKE: Thirty-two, and Mr. Johnson, I wish  
18 to present evidence where in fact he has put up substantial  
19 equity in this property and upon the sale, trustee's sale,  
20 that he has lost all his equity.

21 THE COURT: Well, Mr. Weston, you wish to respond?

22 MR. WESTON: I do, your Honor. I don't know where  
23 Mr. Schwenke reads all of that into 57-1-32. Clearly  
24 Chapter 57 is designed to protect both the beneficiary and  
25 the trustor under the trust deed. The benefit and

1 protection that's afforded to the trustor is the three-month  
2 waiting period for the 30-day sale period since the right of  
3 redemption is not available to the trustor under the trust  
4 deed foreclosure, and then 57-1-32 just says to make sure  
5 that the property will not be bid in at a price that is so  
6 low as to permit the foreclosing beneficiary then to seek an  
7 inordinate deficiency against the trustor. It requires the  
8 Court to determine the fair market value of the property and  
9 everything over and above the fair market value that's still  
10 owing on the obligation is to be recovered and less than  
11 that is not, and I don't see how Mr. Schwenke can read more  
12 than that in there.

13 THE COURT: Counsel, I am persuaded that the  
14 objection is well taken and is sustained.

15 MR. SCHWENKE: Thank you.

16 Q (By Mr. Schwenke) Did you then have occasion to  
17 sell this property, Mr. Johnson?

18 A I did.

19 Q When did you do that?

20 A September 5, 1985.

21 Q And do you recall what you sold the property for?

22 MR. WESTON: Same objection, your Honor,  
23 relevancy.

24 THE COURT: I take it, Mr. Schwenke, your reason  
25 for inquiring is the same as your reason for inquiring as to

1 what it was on the previous question.

2 MR. SCHWENKE: This is the price that my client  
3 sold the property for. That's not the same as the price  
4 that he bought it for, your Honor.

5 THE COURT: Neither one of which, however, were  
6 determinative of the fair market value on the date of the  
7 foreclosure sale, correct?

8 MR. SCHWENKE: Not necessarily, your Honor. I  
9 think that second sale occurred in '85.

10 THE COURT: Objection is sustained.

11 Q (By Mr. Schwenke) After you sold the property,  
12 Mr. Johnson, did you make any -- give any notice to the  
13 Plaintiffs of your sale?

14 A Before I sold the property, I wrote -- it's either  
15 Draper -- or the title company. I prepared some forms to  
16 get the outstanding balances, told them there was a sale, we  
17 needed the balances and needed the current interest rate,  
18 and afterwards -- if I can recall your question, your  
19 question was did I --

20 Q Did you give any notice to the Plaintiffs of your  
21 sale to Mr. Stonehocker?

22 A Yes, and then --

23 THE COURT: Well, you answered the question.  
24 Let's proceed in question and answer fashion rather than  
25 narration, Counsel. Go ahead.

1           Q     (By Mr. Schwenke) And when did you give that  
2 notice?

3           A     At the time of closing, we thought we had allo-  
4 cated the payments correctly and a few weeks afterward there  
5 was a question of a payment. There was a dispute as to a  
6 payment, how it was applied, and I had a conversation with  
7 Mrs. Thomas and explained -- I thought I explained how it  
8 was applied, and she said well, there's one, well, owing, so  
9 I wrote her a letter and said if there is one owing, we'll  
10 check on it. I think the letter is in our pile of exhibits  
11 but -- and told her that that would be my responsibility for  
12 the closing date, Mr. Stonehocker would be making those  
13 payments after that date, and this discrepancy prior to the  
14 closing date, I'd have to look into.

15          Q     On your notice then you informed that  
16 Mr. Stonehocker would be responsible?

17          A     Yes, talked to Draper Bank, talked with  
18 Mrs. Thomas, wrote a letter.

19          Q     Did you receive any type of response to that  
20 notice?

21          A     Not that I recall.

22          Q     Did you continue making payments to the Plaintiffs  
23 after your sale to Stonehocker?

24          A     No, Mr. Stonehocker made the payments.

25          Q     Directly to the Plaintiffs?

1           A     Yes, yes, didn't go through me. I made no further  
2 payments.

3           Q     Were you ever contacted after you sold to  
4 Stonehocker about any delinquent payments?

5           A     I got a notice of default and I know I talked with  
6 Bob once about catching up payments but --

7           Q     Let me ask --

8           A     -- I don't recall.

9           Q     The question again. Were there any demands made  
10 on you after you sold and after this notice to make payments  
11 on this contract?

12          A     No.

13          Q     What was your first contact you had from the  
14 Plaintiff?

15          A     My recollection is a notice of default.

16          Q     And when was that?

17          A     It's hard to remember. Let's see. I guess  
18 whenever they started the foreclosure, would have been over  
19 a year ago.

20          Q     If there was any deficiency or any problems with  
21 the payments, you were never at any time demanded to make  
22 those payments; is that correct?

23          A     No.

24          Q     And did you know if those demands were made to  
25 Mr. Stonehocker?



1           A     Well, I spoke with him a couple of times and he --

2           MR. WESTON:  Objection, your Honor, to the extent  
3     this witness is going to answer as to what he was told by  
4     Mr. Stonehocker.  That is hearsay.

5           MR. SCHWENKE:  I withdraw it.

6           THE COURT:  Sustained.

7           Q     (By Mr. Schwenke)  Were you served with the notice  
8     of default?

9           A     Yes, I got -- I recall getting, I think, a notice  
10    of default, but I got notice of the foreclosure was  
11    commencing.

12          Q     And did you do anything?

13          A     I don't recall doing anything.  I may have spoken  
14    to Bob.  I did not -- no, not -- I did not file an action or  
15    take any overt action.

16          Q     Were you served with a notice of the sale?

17          A     I believe I was, yes.

18          Q     And did you do anything with --

19          A     No, I didn't, no.  You know, I knew that the  
20    foreclosure would commence.  I didn't take action.

21          Q     Were you contacted after the sale?

22          A     I think I was contacted by Mr. Weston prior to the  
23    sale, shortly, a few weeks prior to the sale, in saying that  
24    he'd had a hard time getting a hold of Mr. Stonehocker,  
25    could I get him into the property or did I want -- I guess

1 it was -- there was a leak that the tenant was complaining  
2 of, needed to be fixed, and I says, "Well, I'll, you know,  
3 try and do something about that." You know, I believe -- I  
4 was going to try and get Bob to see if he wanted to get it  
5 fixed or -- but the leak didn't -- I didn't repair the leak,  
6 but I was called at that point just prior to the sale about  
7 a leak and I believe Mr. Stonehocker could not be located at  
8 that time.

9 Q Were you present at the sale?

10 A I was not.

11 Q After the sale, were there any contacts made?

12 A Well, this Complaint was filed. There was a  
13 letter sent to me from Mr. Weston notifying me that the  
14 deficiency action was going to be served on me and I agreed  
15 to accept service.

16 Q And you had this property for how long?

17 A I owned it for a year.

18 Q You're familiar with the condition of this  
19 property?

20 A I was at the time.

21 Q At what time?

22 A When I bought it.

23 Q At the time you owned it?

24 A When I bought it, when I sold it.

25 Q Can you describe for us the condition of the

1 property?

2 A Yes. It's a -- was kind of an attractive brick,  
3 kind of a cute brick house, high ceilings, and it was in  
4 relative good condition, habitable. I think we left the  
5 original carpets on. In the kitchen, original linoleum,  
6 tidy, and older appliances. I think there were some felt  
7 wallpaper on parts of the wall but it was just a -- it was  
8 an older -- one of the older Victorian type homes inside.

9 Q Did you make any repairs on this property?

10 A I don't drive. I'm legally blind, and so at the  
11 time I had a buddy that has since moved to Sacramento. His  
12 wife was a nurse, got a job there, but he was going to make  
13 -- he made the sort of -- first got it, the sort of spiffing  
14 up a little bit that was done to the property, but we didn't  
15 need to make any repairs really. It was in pretty good  
16 shape and I think the carpet was cleaned and he may have got  
17 an appliance running but, you know, not -- no extensive  
18 renovation.

19 Q With your familiarity with the property, did you  
20 have an idea what the value would be of this property?

21 A Yes, I had an idea and thought I was getting it  
22 for a very good price.

23 Q And at the time of the sale, did you have an idea  
24 what the --

25 A When I sold it to Mr. Stonehocker?

1           Q     No, at the time of the trustee's sale, did you  
2     have an idea --

3           A     I had an opinion of what, you know, it was worth  
4     and what property out there was worth.

5           Q     And what was that opinion?

6           MR. WESTON:  Objection, no foundation to qualify  
7     Mr. Johnson as an appraiser.

8           THE COURT:  Well, I think, Counsel, Mr. Johnson is  
9     apparently the record purchaser of the home and was at the  
10    time, that is, at least of the foreclosure sale.  That,  
11    seems to me, would entitle him to render an opinion as the  
12    owner as to what he felt the value of the property was.

13          MR. WESTON:  I think, your Honor, the testimony  
14    has now demonstrated that prior to the time of the sale, two  
15    years before the sale, he had sold the property to  
16    Mr. Robert Stonehocker and Mr. Johnson, although still  
17    remaining obligated on the note and trust deed, was no  
18    longer the record owner of the property.

19          THE COURT:  Well, I'm going to hear his opinion in  
20    any event, Mr. Weston.

21          You may give your opinion, Mr. Johnson.

22          THE WITNESS:  Well, I was wondering if I was going  
23    to take it back to the realtor who had sold it to me.  At  
24    the time I thought it was between thirty and thirty-five  
25    thousand dollars and I wouldn't have a concern about a

1 deficiency.

2 Q (By Mr. Schwenke) What did you use this property  
3 for primarily?

4 A It was rented to tenants.

5 Q Was it rented the whole time you had it?

6 A Yeah, it was right across from a nice park and it  
7 was a home and it was a good little property for a small  
8 family.

9 Q What did you rent this property for?

10 A I rented it for \$450. That was a Section 8 tenant  
11 for awhile, and seemed to me we dropped that to \$400 the  
12 last four months. I forget exactly. It was always occupied  
13 and it was a good situation for us.

14 Q When this action was filed, did you hire an  
15 attorney to represent you?

16 A I engaged you.

17 Q When did you engage me?

18 A I commenced talking to you about the lawsuit  
19 relatively early on and I did much of the initial responsive  
20 work myself on my own time. You became actively involved  
21 probably a month ago and I prepared much of the discovery  
22 responses myself, so I tried to handle much of this ini-  
23 tially myself.

24 Q Are you qualified as an attorney?

25 A I'm an attorney licensed to practice law in the

1 state of Utah and have been since 1982.

2 Q Initially then you represented yourself?

3 A I did.

4 Q Do you have an accounting of the time you spent  
5 representing yourself?

6 A Yes, I set up a file number and kept an accounting  
7 of my time. I have that on a computer printout. I do not  
8 have that here.

9 Q Are you prepared to tell the Court here how much  
10 time that was spent in this case and the equivalent fees?

11 A I can only say that the last time I looked at it  
12 was in excess of \$3,000. The last two weeks have been quite  
13 involved and my printout for the month of November, I have  
14 not had time to look at.

15 Q But you would believe it's at least \$3,000?

16 A Yes. My billing rate is a hundred dollars an hour  
17 and that's calculated on my billing rate at a hundred  
18 dollars an hour.

19 Q After you transferred the property, after you gave  
20 notice, did you feel at that time you were still responsible  
21 for this note?

22 A No, I did not. All communication with Kathleen  
23 Thomas ceased and Bob was taking over the property and they  
24 were dealing with one another.

25 MR. SCHWENKE: I have no further questions.

1           THE COURT: All right. You may cross-examine,  
2 Mr. Weston.

3                           CROSS-EXAMINATION

4 BY MR. WESTON:

5           Q     Mr. Johnson, as an attorney you recognize, don't  
6 you, that once you sign a promissory note evidencing an  
7 obligation to pay on that note, you continue obligated under  
8 that note until such time as you are released by the payee;  
9 you know that, don't you?

10          A     On a promissory note, yes.

11          Q     All right, and you knew back in September 1985  
12 when you sold this property to Mr. Stonehocker that you  
13 continued obligated on that note to the Plaintiffs and if  
14 Mr. Stonehocker didn't make the payments, you remained  
15 obligated; you knew that, didn't you?

16          A     I believe I did. I did not do a lot of real  
17 estate then, but at the time I know there was this big issue  
18 about banks and assumptions and due on sale clauses, but my  
19 presumption is that real estate laws are similar to the laws  
20 in other states where I had been, and one can take over  
21 property without a due on sale clause and one can assume  
22 responsibility. It was unclear and that was not an issue at  
23 the time.

24                 In retrospect, I know it now, obviously, that I  
25 can be held responsible. I'd been a member of the Utah bar

1 for about a year.

2 Q And when you sold the property to Mr. Stonehocker,  
3 you, I think, have testified in response to your attorney's  
4 questions that after that time, you never made any further  
5 payments to the Plaintiffs; that was your testimony, wasn't  
6 it?

7 A Yes, my recollection is I did not make any further  
8 payments or wasn't making monthly payments to anybody.

9 Q It is true, is it not, that at the time you sold  
10 the property, the April 1985 payment had still been unpaid,  
11 was delinquent by you, and after your completion of the  
12 sale, you sometime in November of 1985 finally made that  
13 payment; that's true, isn't it?

14 A I don't recall the date. I recall trying to find  
15 out if the payment had been misapplied by Draper Bank or if  
16 the accounting was correct. The deal had closed and there  
17 had been some that hadn't gotten paid or there had been some  
18 confusion and I -- I may have made it after the fact,  
19 according to the letter or whatever I sent.

20 Q And that it was by your letter of October 30,  
21 1985, addressed in the letterhead of Fabian & Clendenin,  
22 addressed to Kathleen Thomas, that you advised her that the  
23 property had been sold to Mr. Robert Stonehocker and you  
24 felt there had been some mix-up in the payments that had  
25 been made at that time; that is true, isn't it?



1           A     Yeah, yeah.

2           Q     And you have not been in the property at all since  
3 the time you sold it to Mr. Stonehocker?

4           A     I have not. I had a -- there was a family that  
5 was interested in buying the property and I think they  
6 looked briefly through it.

7           Q     But you have not been --

8           A     But I have not been through it, no.

9           MR. WESTON: That's all I have, your Honor. Thank  
10 you.

11          THE COURT: All right. Is there anything further?

12          MR. SCHWENKE: Nothing further.

13          THE COURT: All right, Mr. Johnson, you may step  
14 down.

15          THE WITNESS: Thank you, your Honor.

16          THE COURT: You now rest, Mr. Schwenke?

17          MR. SCHWENKE: I just have one more. I'd like to  
18 testify as to fees.

19          THE COURT: Pardon me?

20          MR. SCHWENKE: I'd like to testify as to attor-  
21 ney's fees.

22          THE COURT: Very well. Take the oath, please.

23                   A. PAUL SCHWENKE,

24 called as a witness by and on behalf of the Defendant,  
25 having been first duly sworn, testified as follows:

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1 point while I consider my decision. If you wish to say  
2 something briefly in closing, I will not prohibit you from  
3 doing so, but I believe having reviewed the file, seen the  
4 exhibits and heard the testimony, I understand the issues.  
5 Mr. Weston?

6 MR. WESTON: I would agree that the issues are not  
7 complex, your Honor. I think that your Honor has fully  
8 delved into what the testimony has been and therefore, I  
9 will waive the right for closing argument at this time.

10 THE COURT: Very well. Mr. Schwenke?

11 MR. SCHWENKE: Well, same here, your Honor. We'll  
12 waive the --

13 THE COURT: All right, Counsel. Let's stand in  
14 recess. I will notify you when I'm ready to return to  
15 court. Stay in the area.

16 Court will be in recess.

17 (Whereupon, a recess was taken.)

18 THE COURT: Parties and counsel are present. The  
19 Court, having now further reviewed the exhibits received,  
20 having heard the testimony of the witnesses and reviewed the  
21 files, is prepared to rule.

22 The Plaintiffs in this matter seek a deficiency  
23 judgment pursuant to Title 57-1-32, Utah Code Annotated,  
24 after a trust deed foreclosure sale conducted on the 24th of  
25 November of 1987 on the trust deed and trust deed note

1 executed by the Defendant, Mr. Johnson, on September 21st,  
2 1984, seeking the deficiency set forth on Exhibit 1.

3 The Defendant in his pro se answer has admitted  
4 all of the allegations of the Complaint, except those which  
5 relate, inter alia, to the Plaintiffs' claims of bidding the  
6 fair market value of the property at the sale, the amount of  
7 the deficiency and the attorney's fees claimed, and further-  
8 more alleges various affirmative defenses including waiver,  
9 estoppel, release, laches, and that the fair market value  
10 of the sale exceeded any balance owing as of the 24th of  
11 November of 1987.

12 The evidence has established to this Court's  
13 satisfaction that the Defendant knew the foreclosure was  
14 proceeding and did nothing, knew that the sale was to be  
15 conducted after either the Defendant or his purchaser was  
16 admittedly delinquent in the sums owing on the trust deed  
17 note, that the Defendant, though he had the opportunity to  
18 do so, failed to attend the sale and protect his interest,  
19 that after the sale the Plaintiffs listed the realty at the  
20 price of \$32,000 with a realtor and subsequently determined  
21 that the property was in a state of such disrepair that the  
22 property was rendered unrentable, and furthermore, that  
23 there were delinquent taxes, seriously delinquent taxes,  
24 owing on the property.

25 When the Plaintiffs determined that no offers were

1 forthcoming with regard to the sale on the home, they  
2 obtained on the 23rd of December of 1987 an appraisal which  
3 reflected that given the state of disrepair, the property  
4 had a fair market value at or about the time of foreclosure  
5 of \$21,750, Exhibit 3. The Plaintiffs reduced the listing  
6 price to the sum of \$22,000 and after approximately seven  
7 months of having the property listed and marketed, received  
8 only one offer which was ultimately in a bona fide fashion  
9 accepted in July of 1988, and the property was sold for  
10 \$20,500 which Plaintiffs accepted reluctantly, not having  
11 the considerable sum, approximately \$10,000, to upgrade the  
12 property to potentially receive a higher sale price.

13           The Defendant, after the suit for deficiency was  
14 filed, obtained an after-the-fact appraisal conducted on  
15 July 7th of 1988, reflecting the property had at the time of  
16 the foreclosure sale a fair market value of \$31,800. The  
17 two appraisers used only one common comparable, number  
18 three, as compared by examining Exhibits 3 and 6 which  
19 varied on the indicated value of subject property category  
20 on a sales price of some \$29,900, in the sum of \$10,850.  
21 The Defendant's expert admitted attempting to appraise value  
22 at a previous date is not as accurate as an appraisal done  
23 at or near the subject date, and the Defendant expert  
24 further stated in his testimony that he made no adjustment  
25 for the condition category based upon an admitted lack of

1 knowledge of the condition of the premises at the time of  
2 the foreclosure sale, nor did he examine the interior of the  
3 attic.

4           The Defendant sold the property to Mr. Robert  
5 Stonehocker on September the 5th of 1985 but was not  
6 released by the Plaintiffs on his liability on the trust  
7 deed note. That liability therefore continued. The  
8 Defendant knew or should have known that his liability would  
9 continue pending any deficiency action.

10           This Court finds that the Plaintiffs have estab-  
11 lished by a preponderance of the evidence their entitlement  
12 to a deficiency judgment against the Defendant for sums set  
13 forth in Exhibit 1 which this Court hereby adopts as being  
14 reflective of the evidence elicited during the course of  
15 this trial and furthermore awards attorney's fees pursuant  
16 to Title 57-1-32 in the sum of \$4,980 plus costs of this  
17 action.

18           Mr. Weston, you prepare the Findings of Fact,  
19 Conclusions of Law and Judgment, submit those to Counsel for  
20 approval as to form.

21           MR. WESTON: Your Honor, might I have one bit of  
22 clarification? I didn't hear in the Court's ruling what the  
23 specific determination was as to fair market value of the  
24 property at the time of sale. I know that needs to be made  
25 with the Court.

1           THE COURT: That determination is that the prop-  
2 erty had a fair market value in accord with the appraisal  
3 rendered by the Plaintiffs' appraiser, Mr. Maritsas, of  
4 \$21,750.

5           MR. WESTON: Thank you, your Honor.

6           THE COURT: Very well. Thank you, Counsel. Court  
7 will be in recess.

8           (Whereupon, the proceedings were concluded.)

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C E R T I F I C A T E

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

I, ANNA M. BENNETT, a Certified Shorthand Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein, and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision.

That the foregoing 181 pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this 4th day of November, 1989.

*Anna M. Bennett, CSR*  
ANNA M. BENNETT, C.S.R.  
Notary Public, State of Utah