

1988

Gunnison Valley Bank vs. Darwin Jensen, Gwen Jensen, Charles F. Young and Dorothy Young : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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88-0137-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

GUNNISON VALLEY BANK,

Plaintiff-Appellant,

vs.

Case No. 860200

DARWIN and GWEN JENSEN,
husband and wife, CHARLES
F. YOUNG and DOROTHY YOUNG,
husband and wife,

Defendants-Respondents.

RESPONDENTS' BRIEF

Appeal from the Judgment of the
Sixth Judicial District Court, Sanpete County
Honorable Don v. Tibbs

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Clerk, Supreme Court, Utah

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RESPONDENTS' BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Was the verdict form utilized by the jury clear and unambiguous and, if it was not, was any error waived by Plaintiff?
2. Did the lower court commit error in dismissing Plaintiff's claim of fraudulent conveyance as a matter of law and in failing to allow Plaintiff to reopen its case; and, if so, was such error harmless?
3. Did the lower court commit error in directing a verdict as to Plaintiff's claim of a lost mortgage and, if so, was such error harmless?

STATEMENT OF THE CASE

This action was commenced by the plaintiff seeking to

foreclose on the residence of Defendants located in Gunnison, Utah. In addition, Plaintiff claimed that Darwin and Gwen Jensen had fraudulently conveyed title to their residence to defendants Charles F. Young and Dorothy Young. Plaintiff sought an order of the court allowing foreclosure on the alleged mortgage as well as setting aside the alleged fraudulent conveyance. (R. 106-110).

Defendants Darwin and Gwen Jensen denied that any mortgage had been executed as to their personal residence and denied that any fraudulent conveyance had been made. In addition, as affirmative defenses, they claimed that Plaintiff had breached a fiduciary duty to them by encouraging them to purchase a business in which the bank officers had a personal financial interest. They also claimed that the terms of the business had been materially misrepresented. In addition, Defendants counterclaimed against the Plaintiff claiming that a trust relationship existed between the defendants and the officers of the bank, that material misrepresentations were made concerning the sale of a service station-convenience store by the officers, that any note or mortgage given was obtained by fraud or breach of fiduciary duty, and that Defendants suffered both general and punitive damages as a result of the bank officers' conduct. (R. 128-136).

A jury trial commenced on February 13, 1986 with the Honorable Don V. Tibbs presiding. At the conclusion of Plaintiff's case the Court directed a verdict against the plaintiff as to the question of whether a mortgage had been

executed in conjunction with a promissory note for \$21,000. The Court also dismissed the question of fraudulent conveyance as a matter of law. (Tr. 217). The Court refused to reopen the case as to the claim of fraudulent conveyance. (Tr. 216).

Additional witnesses testified on behalf of Defendants. At the conclusion of the trial the Court met with counsel concerning the jury instructions and general verdict forms. No objections were made by either counsel as to the jury instructions or the verdict form. (Tr. 413). Three separate verdict forms were submitted to the jury. Verdict No. 3 was utilized by the jury (R. 170) and subsequently a judgment on the jury verdict was entered by the lower court. (R. 174-175). The lower court ordered that no recovery be allowed against the defendants on the promissory note of \$21,000 and that in addition Defendants be awarded \$13,500 against Plaintiff together with their costs. (R. 174-175). It is from this Judgment that the present appeal is taken. (R. 179-180).

STATEMENT OF FACTS

The Statement of Facts contained in Appellant's Brief (Appellant's Brief, pp. 4-7) is totally inadequate. The Statement concentrates solely upon the execution of the promissory note and alleged mortgage and completely fails to state the general background of this case and the circumstances giving rise to Defendants' Counterclaim. For these reasons, therefore, Defendants shall submit their own version of the Statement of Facts and shall, under the Rules of

Appellate Review, recite all evidence favorable to the lower court's decision and verdict.

Defendant Darwin Jensen testified that in 1960 he lived in Centerfield, Utah with his family. He started working part-time jobs for farmers and opened an account with the Gunnison Valley Bank when he was twelve years old. (Tr. 325). In 1970 he went into military service and upon leaving entered construction work. While working near Fillmore in 1972 he suffered an industrial accident in which he lost both of his arms. Shortly before the accident he had married Gwen Jensen. (Tr. 220). He completed two years of college at Snow College and attended two quarters at Utah State University. (Tr. 369-370).

Events Surrounding the First Deposit of \$250,000

In October of 1979 he was notified by his attorney that a Federal Circuit Court had affirmed a decision in which he was awarded damages as a result of his industrial accident. Upon learning that he was to receive \$300,000 he immediately went to Mr. Keith Anderson, who was the vice president of Gunnison Valley Bank. (Tr. 326). Mr. Anderson had been with the bank for forty years and had known Darwin and his wife Gwen all of their lives. He was also acquainted with Darwin's father, Burns, who had been doing business with the Bank since 1960. (Tr. 71, 344).

Upon going to the bank, Darwin stated that he asked Mr. Anderson whether the money should be deposited with the Gunnison bank or put in a larger bank in Salt Lake City. Anderson,

according to Jensen's testimony, replied that the Gunnison Valley Bank could easily handle that amount of money and would make arrangements for him and help him with his money. He stated that Anderson said he would advise him and watch over the money and give him advice as to how to manage it. (Tr. 326). Gwen Jensen verified this conversation and added that she told Mr. Anderson that they had never had this kind of money before and did not know what to do with it. Mr. Anderson said that there would be no problem and that he would help them handle their money. (Tr. 220).

Both Darwin and Gwen stated that when he made these representations they believed him and trusted him, since they had dealt with this bank all their lives and had confidence in Anderson's desire to help them. (Tr. 221, 329-330).

In the first part of October of 1979 Gwen and Darwin deposited \$299,000 with the plaintiff Gunnison Valley Bank. After talking with Mr. Anderson, they decided that a 90-day certificate of deposit would be the best course of action for the money initially. Accordingly, a certificate was taken out for \$250,000 at 11.625% interest. (Tr. 105-106). The remaining \$49,000 went into a checking account to pay off existing obligations. (Tr. 373).

Darwin and Gwen decided to move back to Gunnison and began looking for a home. After they found a house that looked reasonable they discussed the price with the owners and with Mr. Anderson. Mr. Anderson told them that it seemed like a good investment and that the price of the home was right.

The home cost \$35,000. In January Darwin withdrew \$50,000 from the account in order to purchase the home and put the remaining \$200,000 in a second CD certificate at 13.25% for 180 days. (Tr. 330, 375, 136).

Later, when additional money was needed to remodel the home, Darwin was told by Mr. Anderson that it would be better to obtain a loan from the bank and to use the certificates of deposit as collateral rather than invading them and losing the interest. (Tr. 331). Between January of 1980 and July of 1980 some \$74,000 in loans was given to Darwin and Gwen using the CD's as collateral. (Ex. 10, 11, 12, 13, and 14; Tr. 152). When the \$200,000 certificate of deposit expired, Darwin and Gwen paid off the loan to the bank and took out another CD for \$120,000. (Tr. 154).

It is unnecessary for this appeal to go through the various financial dealings which occurred between 1980 and 1981. Darwin testified that he discussed with Mr. Anderson on numerous occasions the feasibility of putting money into a small motel-bar which his father had renovated and into a small hog farm operation. (Tr. 333-344). As a result of these various conversations Darwin continued to take out loans from the bank to invest in these ventures and to bail out his father, who was in financial trouble because of them. On one particular occasion, for example, he testified that Mr. Anderson approached him in the lobby of the bank as he was making a deposit and told him that his father was having problems making his own payments on the motel and perhaps

he should start making his father's payments for him. After discussing this with his father and Mr. Anderson, he started making payments on the previous loans taken by his father. (Tr. 341-342).

Mr. Anderson stated that during this period the bank made next to nothing on the money which was kept in the savings certificates (Tr. 397), since it was only able to make 1/8th of one percent on that money. On the other hand, the bank was making 2% for every dollar that was borrowed, based upon the certificates of deposit as collateral. (Tr. 149).

During this entire period Mr. Anderson did not seem concerned about the rapid expenditure of Darwin's funds and encouraged him to invest in his father's businesses, which had already been financed by the bank, and in new businesses where loans were taken out. (Tr. 345-350).

By August of 1981 all of the money obtained from the lawsuit had been spent and none was available in the bank account. Darwin testified that this loss of funds nearly destroyed his self-esteem and sense of worth, and that he learned that he was not capable of handling money, which had a devastating effect upon his ego. (Tr. 367).

The Purchase of the Husky Station

In the winter of 1980, while there were still funds in the bank, Darwin was approached one day as he was transacting business at the teller window by Paul Anderson, who is the son of Keith Anderson and is also Assistant Vice President and Loan Officer of the plaintiff bank. (Tr. 350, 165). Paul

Anderson told Darwin that he and Steven Buchanan, another officer of the bank, had bought a Husky service station-convenience store and that they were interested in selling it. They told him it would be a good business for him and that he should consider investing in it. Darwin told them that he would think about it. (Tr. 351). Gwen Jensen remembered this conversation also. (Tr. 239).

In the spring of 1981 Paul Anderson again approached Gwen and Darwin while they were at the bank. Paul Anderson stated that he still had the Husky business for sale and that he felt it would be a good move for Darwin and Gwen to buy it, since they would be able to work there with no problem. They again told him that they would think about it. (Tr. 240, 351).

In August of 1981 all of the \$250,000 was gone from the bank. Neither Darwin nor Gwen was employed. Darwin could not find a job and the bills were beginning to pile up. Darwin and Gwen talked it over and decided that the Husky convenience store might be the answer to their financial problems. (Tr. 242).

Accordingly, Darwin went to Paul Anderson's office and asked him if the business was still for sale. Anderson told him that the business had good potential and had been making a lot of money, and that Darwin and Gwen should be able to make a go of it. This first conversation occurred in June or July of 1981. (Tr. 352).

In August of 1981 Darwin had a second conversation with

Paul and Steve. He asked if he could see the books of the business and review them so that he could get a feel for the business. They told him the books weren't available, but would be made available to him shortly. In the meantime, they told him the business was paying all of their overhead and wages plus furnishing them both with approximately \$300 each of goods and services that they took out of the business each month. (Tr. 353).

He then asked them about the inventory of the store and they told him that it had "impulse" kinds of things like candy bars and automobile inventory, but that it had a good solid inventory of merchandise, had a good sales record, and everything was current and of good quality. He testified that he had no reason to doubt either of these bank officials, since he had dealt with them at the bank for years and had gone to school with them when he was younger. (Tr. 355).

Paul Anderson testified to a more gloomy conversation. He stated that, while the store was paying its way, it was not making much money. He said, however, that since he was paying \$1,000 in wages a month, Gwen and Darwin would be able to make at least that much if they did the labor themselves. He denied telling Darwin and his wife about taking \$300 a month out in groceries and gas and also could not remember if he told Darwin about the condition of the inventory. (Tr. 191).

He acknowledged that in his deposition he testified that the winter of 1980 was a bad one and that the station was losing money on every gallon of gas that was pumped. Darwin was not told this, however. He also admitted that

all the conversations regarding the Husky station occurred inside the bank and that Darwin and his wife trusted him as to the advice he was giving them. (Tr. 190).

Steve Buchanan admitted he had said in his deposition that the business at the time of sale was showing a loss over two years and this was without giving a value to the two hours of time that he and Mr. Anderson had to put into the store each day. He recalled that they told Darwin and his wife that they could easily clear \$1,000 a month if they provided their own labor in the operation. (Tr. 202-204).

Harold Jensen, a certified public accountant, testified that he had prepared the tax returns for the Gunnison Valley Husky from 1979 through 1982. He stated that, while the first year of operation of Anderson-Buchanan showed a profit of \$4,600, the next two years showed a loss of \$6,900 and \$13,688. (Tr. 278). In his opinion, the opening of a new competing store called the Double Quick Store was an event which affected the profitability of the Gunnison Husky station. (Tr. 279). The Double Quick station began operation during the winter of 1980. (Tr. 117).

Paul Anderson and Steve Buchanan had purchased the business for \$26,500. (Tr. 181). The value of the equipment when sold to Anderson and Buchanan was \$14,500.

After several more discussions it was decided that Darwin would buy the business from Anderson and Buchanan for \$16,500. The equipment was valued at \$10,000 (Tr. 201) and the inventory at \$6,500. (Tr. 268).

In order for Darwin to purchase the Husky service station, it was necessary that he take out a new loan from the bank. At the time of the loan the papers described in Appellant's Statement of Facts and contained in Appellant's Appendix were prepared. A promissory note for \$21,000 was signed by Gwen and Darwin Jensen. There is no question that the Jensens received \$21,000 from the bank at that time and applied this money to the purchase of the station. It was disputed, however, whether or not a mortgage had been executed at the time of the other documents. Mr. Anderson testified that a mortgage was prepared on the residence and was given to Darwin to take to the title insurance company for recording. The bank maintained copies of all the loan documents except the mortgage. Mr. Anderson testified that only an original of the mortgage was prepared and that was given to Darwin. (Tr. 76, 88). The Jensens denied that any mortgage on their residence was ever executed.

The Operation of the Husky Station

After taking possession of the service station and store, Gwen and Darwin immediately took an inventory of the items in the store. (Tr. 243). After taking this inventory, Darwin went back to Mr. Buchanan and told him that he thought he paid too much for the inventory considering what was in it. Mr. Buchanan said that they had already ordered and paid for a \$500 shipment of other items and that would make up any deficiency. The \$500 worth of items never arrived. (Tr. 355).

Darwin testified that he later discovered that the

inventory was actually appraised at 100% over its true value. He stated that the jewelry that was left was not saleable and had essentially no value at all. The tapes were either old or unpopular and would not sell. At least half of the grocery items were out of date or unsaleable. He estimated the market value of the inventory to be closer to \$3,500. (Tr. 358-359). Likewise, he discovered that the equipment was largely out of date or not functional. He estimated that its value was approximately \$3,000, as opposed to the \$10,000 that he paid for it. (Tr. 360).

Darwin stated that he assumed that he and his wife could look forward to an income of around \$1,500 a month if they performed their own labor, based upon the representations of Anderson and Buchanan. (Tr. 361). They both stated that for the first several months during the hunting and fishing seasons, sales were good, but not of the magnitude they had expected. (Tr. 244, 361). Darwin obtained another job at a dairy and began to work at both jobs between 5:00 in the morning and 10:00 at night. His wife worked between eight and ten hours a day and also took care of the family. (Tr. 363).

As winter approached and the hunting season ended, the sales dropped to almost nothing since only local customers continued to buy gas and none of the inventory inside the store was sold. (Tr. 362). During this time Gwen's blood pressure started to go up and she began failing in health. As the business continued to go downhill more and more pressure was put on both of them, until she had to go into the hospital. (Tr. 362).

Towards the middle of 1982, when Gwen was having considerable medical problems, Darwin decided he needed to expand the business and hire help. He went to the bank to talk to Paul Anderson about refinancing or bringing part of the bills together under one roof and getting operating capital. Paul and the other officers told him that they did not make those kinds of loans. (Tr. 363).

In August of 1982 Gwen stated that she had gone in to pay a partial payment to the bank and Mr. Keith Anderson said that if she did not have a full payment not to bother paying anything. She stated this was very embarrassing to her and this was the final blow. In September of 1982 they closed the doors of the station. At that point they were behind on their gasoline payments and on their rent payment. (Tr. 264-247).

Juan Larson had been the owner of the store prior to Anderson and Buchanan. He stated that after the Jensens took over the store it was not in as good condition as when the six employees were running it for Anderson and Buchanan. He characterized the store as a high-maintenance type of building which required a lot of upkeep. (Tr. 161). He readily acknowledged it would be much more difficult for a man who had no arms to keep a high-level maintenance building functioning than someone who had normal functions. (Tr. 165).

Mr. Anderson stated that even though Darwin was in default under the terms of the promissory note, he did not check to see if a mortgage was recorded until March of 1983.

It was then that he discovered that no record of the mortgage existed. (Tr. 124). Subsequently, this lawsuit was commenced in April of 1983, seeking enforcement of the promissory note and foreclosure on the missing mortgage. (R. 1-6).

SUMMARY OF ARGUMENT

The Appellant has claimed three errors in its Brief: (1) that the lower court erred in directing a verdict as to the question of the existence of a mortgage; (2) that the lower court erred in concluding as a matter of law that there was no fraudulent conveyance and in failing to reopen the case to introduce the deed; and (3) in entering a judgment on a jury verdict form which was incorrect. (Appellant's Brief, pp. 7-9).

Respondents believe that these arguments should be addressed in reverse. If the jury verdict was correct and in fact the plaintiff now owes the defendants \$13,000 on the counterclaim, then the questions concerning validity of the mortgage and the fraudulent conveyance are moot and become harmless errors. Argument, therefore, will be presented in reverse order.

First, the verdict of the jury was proper and the entry of that verdict as a judgment was also proper. A conference was held with the attorneys for both parties concerning the jury instructions and the verdict forms. No objections were entered by either. The jury was given three distinct verdict forms from which to choose. The first one

would have awarded the plaintiff a judgment for the entire sum of the note plus interest with no award being made to Defendants. The second would have awarded the plaintiff the entire sum of the note with an offset being awarded to Defendants. The third denied the plaintiff any recovery on the note, and in fact assessed damages against it based upon Defendants' Counterclaim. It was this third verdict form which the jury chose to utilize, and the plaintiff cannot now claim error simply because the jury decided to award Defendants damages which were in excess of the amount Defendants owed to the plaintiff pursuant to the promissory note.

Second, the lower court properly dismissed the claim as to the fraudulent conveyance and properly refused to reopen the case. Plaintiff failed to prove any of the essential elements required in a fraudulent conveyance case during their case in chief, and the mere introduction of the deed between the Jensens and the Youngs would not have established sufficient evidence even if the lower court had allowed that deed to be introduced. The lower court exercised its discretion in electing not to allow the plaintiff to introduce additional evidence regarding the alleged fraudulent conveyance when it had ample opportunity to develop its case but failed to do so.

Finally, the question of the missing mortgage was also properly directed by the lower court. Plaintiff had not sought an action in equity seeking the declaration of the mortgage, as is required. Instead, Plaintiff initiated an action of foreclosure based upon a mortgage which it could

not prove existed. It was incumbent upon the plaintiff to bring an independent action rather than to bootstrap the question of the deed's validity into a foreclosure action and attempt to use rules of evidence relating to best evidence and secondary evidence.

In any event, as noted earlier, the question regarding the alleged fraudulent conveyance and the existence of the mortgage is of no relevance at this point, since the jury found that the defendants did not owe the plaintiff bank any money and therefore the bank can neither foreclose on a mortgage (assuming it exists) nor complain about a fraudulent conveyance (assuming that all the elements are met).

These arguments will now be examined.

ARGUMENT

POINT I

THE VERDICT RETURNED BY THE JURY WAS
CLEAR AND UNEQUIVOCABLE AND, TO THE
EXTENT IT WAS NOT, SUCH ERROR WAS
WAIVED BY PLAINTIFF.

As noted by the appellant, Instruction No. 8 informed the jury about the amount owing and the claims of the parties. It said:

You are instructed that defendants Darwin Jensen and Gwen Jensen admit that they signed a note in favor of the Gunnison Valley Bank in the amount of \$21,000, with interest at the rate of 16% per annum. Plaintiff Gunnison Valley Bank claims that defendants Darwin and Gwen Jensen owe it \$19,902.94 together with \$11,405.76 interest to and including February 18, 1986, for a total of \$13,308.70.

Defendants Darwin and Gwen Jensen, while admitting they signed the note and received the

money initially, claim that they do not owe the said bank the full amount because of repayments and offsets. (Tr. 413-414).

The jury was given three verdict forms from which they could choose to return their verdict. Form 1 (R. 172) found the issues in favor of the plaintiff and against the defendants "on the promissory note in the sum of \$19,902.94 together with interest as provided by the note." This form obviously would have been used by the jury had they concluded that the defendants had no valid counterclaim and that there was no offset available to the defendants as to the amount of the note.

Verdict No. 2 provided that the jury found that Darwin and Gwen Jensen had executed a promissory note in the sum of \$21,000 together with interest, but that they were entitled to an offset against the said note and the balance due "the Plaintiff Bank, if any, is the sum of \$ _____, as of this date." (R. 173). This verdict would have been used by the jury had they believed that the defendants were entitled to receive credit for certain offsets urged by them, such as the offer to make partial payment to the bank or the waiver of interest during portions of the time because of the bank's conduct. This verdict form was therefore designed to give Plaintiff complete relief on the note less any offset the jury found the defendants were entitled to receive.

The third verdict form, and the one ultimately used by the jury, states:

We the jurors in the above-entitled action,
find for defendants Darwin Jensen and Gwen Jensen

after taking into consideration the Promissory Note a balance of:

1. Damages sustained in connection with the Gunnison Husky business, if any, in the sum of (\$3,500).

2. Damages from loss of deposit in Gunnison Valley Bank, if any, in the sum of (\$---).

Darwin Jensen:

3. General damages for emotional distress, if any \$ --_____.

4. Punitive damages, if any, (\$5,000).

Gwen Jensen:

5. General damages, for emotional distress, if any \$ --_____.

6. Punitive damages, if any (\$5,000). (R. 170).

Appellant contends that it failed by inadvertence to include a line on the instruction which would once again allow the jury to fill in the amount owing to it on the note, and therefore, before the \$13,500 can be assessed against it, it is necessary to offset this award with the amount of the principal and the interest on the note. (Appellant's Brief, pp. 19-20).

The argument of Appellant ignores the clear language of the instruction. It informs the jury to "take into consideration the promissory note" which includes the undisputed principal and interest as instructed in Instruction No. 8 and referred to in the other two verdict forms. It then refers to the term "balance" and asks the jury to proceed at that point. It is fundamental that the term "balance" means "the amount still owed after a partial settlement or

whatever is left over; remainder." Webster's New World Dictionary, 2 Ed. (1980). This verdict form clearly told the jury that if they found damages in excess of the amount owing on the promissory note they were to fill in these various blanks, which would be the balance owing to the Jensens by the bank. In other words, this verdict form only was activated when the jury was convinced that the Jensens' damages on their counterclaim were in excess of the claim of the plaintiff in its initial complaint.

It is interesting to note that the appellant has quoted this Court's decision of Cook Associates, Inc. v. Warnick, 664 P.2d 1161 (Utah 1983) to support its argument. In that case the sole question before the court was whether the award of punitive damages was proper, since two distinct theories of recovery, one in contract and one in tort, had been submitted to the jury. Under the breach of contract claim punitive damages would not be proper, while under the misrepresentation tort claim punitive damages would be allowed. There was no question in that case concerning the language contained in the verdict form itself. This Court stated, "General verdicts are to be construed with a view to sustaining the verdict and effectuating the intention of the jury if possible." 664 P.2d at 1164. Thus, the Cook case actually supports the position of Defendants that the verdict form should be read consistently with the intention of the jury to award damages to the defendants on their counterclaim in excess of the amount claimed by the plaintiff in its Complaint. See also, Bennion

v. LeGrand Construction Co., 701 P.2d 1078 (Utah 1985)

where this Court noted a similar rule in reconciling jury interrogatories and special verdict forms.

The record is clear that no objection to this jury form was ever made either before it was submitted to the jury or after the verdict was returned. It was not until the form of the judgment was submitted to the lower court that any question was raised. Even here no formal motion was ever made by the plaintiff for relief, and the only effort made by Plaintiff is contained in a letter to the judge together with a proposed judgment form of the version Plaintiff claims to be correct. These documents are not even included as part of the official court file, but are merely attached to the cover of the file as correspondence. Even so, the lower court rejected Plaintiff's proposed judgment form and signed the judgment submitted by Defendants. (R. 174-175).

It is fundamental that, in the absence of timely objection to the form or to the answers of a verdict, any error is waived by the complaining party on appeal. Smith v. Schreeve, 551 P.2d 1261 (Utah 1976). A party cannot allow a jury to be excused without requesting correction of an error and then claim an irregularity on appeal. Lish v. Utah Power & Light Co., 493 P.2d 611 (Utah 1972).

In Nagle v. Conger, 456 P.2d 411 (Ariz. App. 1969) the parents of a child injured by a city garbage truck complained on appeal that the verdict form submitted to the jury did not make a distinction between the parents as plaintiffs and the

child as plaintiff and requested the appellate court to reverse the verdict. The court held that since the parents had failed to utilize the opportunity in submitting their own form of verdict to the court and had further failed to object to the form of the verdict submitted, they had waived any claimed error in the language of the verdict form. This same scenario applies to the instant case.

Finally, while it is true, as Appellant notes, that Rule 51 allows an appellate court in certain instances to review jury instructions even when no objections are made, such discretion is very limited. This Court in E. A. Strout Western Realty Agency, Inc. v. W. C. Foy & Sons, Inc., 665 P.2d 1320 (Utah 1983) noted that while an appellate court in its discretion and in the interest of justice may review the giving or failure to give an instruction, it is incumbent upon the aggrieved party to present a persuasive reason to invoke such discretion. Here, there were certainly no circumstances involved which would excuse the failure to object to the form of the verdict or to object to the verdict's return while the jury was still impaneled.

For these reasons, therefore, the lower court was correct in entering its judgment based upon the verdict finding that the obligation of Defendants to Plaintiff upon the promissory note had been extinguished and, in addition, that the plaintiff bank owed the defendants \$13,500 for its wrongful conduct.

POINT II

THE LOWER COURT WAS CORRECT IN DISMISSING PLAINTIFF'S CLAIM OF FRAUDULENT CONVEYANCE AS A MATTER OF LAW AND IN REFUSING TO ALLOW PLAINTIFF TO REOPEN ITS CASE AND IF ANY ERROR WAS COMMITTED, IT WAS HARMLESS.

Appellnat has contended that the lower court should not have found in favor of the defendants as a matter of law relating to the fraudulent conveyance claim and should have allowed the appellant the opportunity to reopen its case. (Appellant's Brief, pp. 17-19). This argument must fail for the following reasons: (1) since the jury found that Defendants did not owe Plaintiff any money on the promissory note, Plaintiff cannot claim the status of a creditor and cannot complain as to any disbursal of assets by the defendants; (2) the plaintiff substantially failed to prove elements necessary for a fraudulent conveyance case and the lower court was correct in dismissing it; (3) the lower court did not abuse its discretion in failing to reopen. These contentions will now be addressed in serium.

In order to have standing to assert a fraudulent conveyance claim it is essential that the complaining party be a creditor of the defendant who is claimed to have fraudulently conveyed property. Even if it is assumed for purposes of argument that the lower court erred in dismissing this claim or in failing to reopen Plaintiff's case, such error at most was harmless. Before a judgment can be reversed there must be a showing of a reasonable likelihood of a different result. Rigtrup v. Strawberry Water Users Assn., 563 P.2d 1247 (Utah

1977); Harris v. Utah Transit Authority, 671 P.2d 217 (Utah 1983).

Even if the jury had concluded that a fraudulent conveyance did occur it would make no difference to the result of this case, since Plaintiff would still be precluded from asserting an interest in the family residence because it was determined by the jury that any debt between the defendants and the plaintiff had been extinguished by the claims asserted in Defendants' Counterclaim.

Numerous cases hold that error as to an issue in a trial which ultimately has no effect on the outcome of the case is harmless and does not justify reversal of the remainder of the judgment. In Short v. Day, 708 P.2d 488 (Colo. App. 1985) the court there ruled that the failure to conduct a hearing on a vendor's application for payment from a real estate recovery fund was harmless error where the vendor was not entitled to recovery under any circumstances.

In Way v. Hayes, 513 P.2d 1222 (Nev. 1973) the Supreme Court of Nevada held that where the jury had returned a verdict for the defendant without reaching the question of damages, it was harmless error to permit a defense witness who had not been named as a witness in response to interrogatories to testify on the question of damages.

In Payne v. McDonald, 528 P.2d 552 (Ore. 1974) a jury made a special finding that a motorist who was turning into her driveway when she struck the plaintiff motorcyclist was not guilty of negligence in any of the particulars alleged

by the plaintiff. The Supreme Court of Oregon held that this finding established conclusively the motorist's non-responsibility for the accident and any alleged error concerning contributory negligence of the motorcyclist was rendered harmless by the jury's special findings.

Applying this principle, since there is no debt owing because of the verdict returned by the jury, the claims of Plaintiff relating to the fraudulent conveyance and to the mortgage, to be discussed infra, have become moot and any errors relating to the conduct of the lower court becomes harmless and not subject to reversal.

Even if it were assumed arguendo that this issue is still ripe for adjudication, the actions of the lower court were correct. This Court in Furniture Manufacturers Sales, Inc. v. Deamer, 680 P.2d 398 (Utah 1984) held that in order to prove a claim of fraudulent conveyance it is incumbent upon the plaintiff to show by clear and convincing evidence (1) that plaintiff is a creditor of the defendant; (2) that the defendant is insolvent or would become insolvent by reason of the conveyance, and (3) that the conveyance was made without fair consideration. A review of Plaintiff's evidence as seen at the conclusion of its case (Tr. 1-206) shows that the plaintiff completely failed in showing the second and third elements of the cause of action and, as a matter of law, the lower court properly dismissed the claim.

This was not a case, as asserted by Appellant, where merely introducing the deed of conveyance between the Jensens

and the Youngs would establish the elements necessary for their claim. Rather, it is a case where extensive testimony would have had to be elicited to establish both the financial conditions of the Jensens at the time of the conveyance as well as the particulars of the arrangement between the Jensens and the Youngs. No doubt oral as well as documentary evidence would have had to have been submitted regarding both of these elements.

The right to reopen a case after a party has rested is vested in the discretion of the lower court. In Tangaro v. Marrento, 373 P.2d 390 (Utah 1962) this Court affirmed the lower court's refusal to reopen a case to permit a party to introduce additional evidence when the party had listed the claim in the pretrial order and had every opportunity to present evidence respecting that claim during the presentation of its case. After a party rests its case without proving the facts necessary to support a claim, the trial court does not abuse its discretion in refusing to reopen the case and take additional evidence. In re Marriage of Jackson, 534 P.2d 644 (Colo. App. 1975).

For these reasons, therefore, the question now raised by the appellant is moot and any error is harmless, the lower court was correct in concluding that the appellant had not met the elements necessary in its case, and did not abuse its discretion in failing to reopen Plaintiff's case.

POINT III

THE LOWER COURT DID NOT ERR IN DIRECTING A VERDICT AS TO APPELLANT'S CLAIM OF A LOST MORTGAGE AND, EVEN IF IT DID, SUCH ERROR WAS HARMLESS.

For the same reasons discussed previously in Point II of this Brief, any failure of the lower court to address the mortgage question is harmless error. It is fundamental that in order for a mortgage or trust deed to be foreclosed a legal debt or obligation with a specific amount owing must be established. Bangerter v. Poulton, 663 P.2d 100 (Utah 1983). Since the jury concluded that any amount owing to Plaintiff on the promissory note was eliminated and that in fact Plaintiff now owes Defendants damages for its tortious conduct, the existence or non-existence of a mortgage is immaterial. Obviously, Plaintiff cannot foreclose on a mortgage if there is no underlying debt upon which the mortgage is based.

Even if it is assumed arguendo that a viable controversy still exists regarding this argument, the lower court was nevertheless correct in its ruling. Respondents do not disagree with the authorities cited by Appellant in its Brief concerning lost documents. (Appellant's Brief, pp. 10-17). The rules of evidence clearly allow a party to utilize secondary evidence in proving the terms of a document which has been lost or destroyed. These authorities allow such evidence at the discretion of the lower court to be introduced when the various rules have been satisfied for their introduction.

In the cases cited by Appellant no claim was made as to the original existence of the document, but merely as to its whereabouts. In the Scott case cited by Appellant, for example, (Appellant's Brief, p. 13) this Court in an early decision noted that it would be proper to prove a lost and unrecorded deed through parole evidence after the parties to the transaction were dead and after the lapse of many years without anyone complaining or claiming any interest in the property. Likewise, in the Bingham Livery & Transfer case and in the Nelson case, all decided by this Court at the turn of the century, no claim was ever made that the document did not exist.

None of the cases relied upon by Plaintiff involved an action in which the instrument which is claimed to be lost is the subject of the lawsuit and in which a claim is asserted by the opposing party that the document was never executed. Here, the question of the mortgage was not a collateral issue of evidence to prove a portion of Plaintiff's case, but was in fact the sole basis of Plaintiff's First Cause of Action. Plaintiff was seeking a foreclosure in equity of the mortgage interest.

In these types of situations, where the document itself is the basis of a claim, it is incumbent upon a party to bring a separate suit in equity seeking a declaration of the existence of the document. See 52 Am. Jur.2d, Lost and Destroyed Instruments, §29; 54 C.J.S., Lost Instruments, §11. An action to foreclose a mortgage is equitable and is not

properly before a jury in any event. An action to declare the existence of a document required for foreclosure is also equitable and requires a declaration by the court that the claimed instrument did in fact exist and is entitled to enforcement.

The pleadings in this case are barren of any request by the plaintiff to declare the existence of the mortgage. Rather, the pleadings assume the mortgage exists and is in the custody of the defendants. (R. 2, 108). Nearly two years prior to trial Plaintiff was put on notice that Defendants were denying the existence of a mortgage. (R. 93-94). No effort was made to amend the pleadings to put the existence of the mortgage at issue, or to seek an independent adjudication.

The lower court, after listening to the evidence presented, correctly decided that this was not a jury question and ruled in favor of the defendants. To have allowed the issue to proceed otherwise would have been beyond the scope of the pleadings and would have clearly violated the requirement of a separate equitable proceeding to determine the existence of the document.

In summary, since there is no underlying debt now owing to the plaintiff by the defendants, the question of the existence or non-existence of the mortgage is moot. Any error committed regarding the mortgage issue is harmless. Defendants deny that any error occurred in that the plaintiff failed to seek the correct relief in a claim of a missing mortgage where enforcement is sought.

CONCLUSION

The trial in this court consumed nearly two days of testimony. It remained basically undisputed that the underlying basis for the note upon which Plaintiff's Complaint is based concerns the business transaction of bank employees with the defendants. The jury had ample evidence to conclude that this fiduciary self-dealing was improper and that the claims made by the bank officers to the defendants were false, causing Defendants to suffer severe financial loss as well as mental and emotional strain.

The verdict forms submitted by the parties allowed the jury three alternatives in their decision. Either Plaintiff recovered everything and Defendants nothing, Plaintiff and Defendants recovered something, or Plaintiff recovered nothing and Defendants recovered on their Counterclaim. Because the jury chose the last option does not now give the plaintiff the right to appeal the form of the verdict. The language contained in the verdict form is clear and unequivocal. In addition, any alleged error in the wording of the form or in the return of the verdict by the jury has been waived by the conspicuous silence of Plaintiff in the lower court proceeding.

Because no debt has been found to exist by the jury, the question as to the alleged fraudulent conveyance and mortgage are now moot. Even if errors were committed regarding these two issues, such errors are harmless and do not justify reversal since these issues have no effect upon the outcome

of the case.

For these reasons, therefore, the judgment of the lower court should be affirmed.

DATED this 27th day of March, 1987.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing Respondents' Brief to Dale M. Dorius, Attorney for Plaintiff-Appellant, P. O. Box 8, 29 South Main Street, Brigham City, Utah 84302 this 30th day of March, 1987.

W. Eugene Hansen