

1999

Joy Pinckney v. John David Snideman : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

JOY PINCKNEY

PLAINTIFF/APPELLANT

VS.

JOHN DAVID SNIDEMAN

DEFENDANT/APPELLEE

OPENING BRIEF OF APPELLEE
SNIDEMAN, DEFENDANT

Appellate Court Case #990944-CA

Oral Argument Priority #15

On Appeal from a Judgment entered
in Case #980405816
In the Fourth Judicial District Court
In and for Utah County, State of Utah
by
Judge Merrill Hermansen

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FILED

Utah Court of Appeals

APR 28 2000

Julia D'Alessandro
Clerk of the Court

TABLE OF CONTENTS

TABLE OF CONTENTS	Page i
TABLE OF AUTHORITIES	Page iii
STATUTES	Page iii
CASE LAW	Page iv
JURISDICTIONAL STATEMENT	Page 1
RESPONSE TO ISSUES PRESENTED	Page 1
1. OBJECTION: The issues presented by Pinckney all fail to comply with the Rules of Appellate Procedure.	Page 1
2. Pinckney’s first issue (under her “Issues Presented”) was not determined by the trial court.	Page 1
3. Snideman does not need to be a party to a document to impose the reciprocal enforcement of attorney’s fees.	Page 2
4. Findings of Fact and Conclusions of Law are sufficient.	Page 2
PROVISIONS DETERMINATIVE OF APPEAL	Page 2
A. STATUTE OF FRAUDS, <i>Utah Code Annotated</i> 25-5-1	Page 2
B. <i>Utah Code Annotated</i> 78-27-56.5 Attorney’s Fees–Reciprocal rights to recover Attorney’s fees.	Page 2
C. <i>Utah Rules of Appellate Procedure</i> Rule 24(a)(5)	Page 2
D. <i>Utah Rules of Civil Procedure</i> Rule 17(a)	Page 3
E. <i>Utah Rules of Civil Procedure</i> Rule 17(d)	Page 3
STATEMENT OF THE CASE	Page 4
1. NATURE OF THE CASE, THE COURSE OF PROCEEDINGS, AND ITS DISPOSITION.	Page 4
2. PINCKNEY’S ORIGINAL CLAIM.	Page 4
3. SNIDEMAN’S POSITION.	Page 5
4. THE TRIAL COURT’S DETERMINATION.	Page 5
5. OTHER RELEVANT FINDINGS AND CONCLUSIONS.	Page 6
6. FACTS RELEVANT TO EXHIBIT 5,	Page 6
SUMMARY OF POINTS OF ARGUMENT	Page 8
ARGUMENTS	Page 9
1. PINCKNEY’S FIRST ISSUE ON APPEAL WAS NOT DECIDED NOR REACHED BY THE LOWER COURT	Page 9
2. PINCKNEY’S FAILURE TO FOLLOW PROCEDURE AND ATTEMPT TO FRAME HER ISSUE DOES NOT COMPORT WITH THE FACTS. ...	Page 10

3. DEFERENCE TO THE TRIAL COURT’S FACTUAL DETERMINATION SHOULD BE MADE UNLESS CLEARLY ERRONEOUS	Page 11
4. EXHIBIT “5” SHOULD BE DISREGARDED	Page 12
A. <i>Settlement Discussion is Inadmissible</i>	Page 12
B. <i>Facts can’t be “built” by subsequently created documents</i>	Page 12
C. <i>Presumptions go against its creator, Pinckney’s attorney</i>	Page 12
D. <i>Pinckney had an unfair advantage in its creation.</i>	Page 13
E. <i>Pinckney relied on Creator’s legal acumen to maintain security</i>	Page 13
F. <i>Snideman also received legal advice from Tretheway, its creator.</i>	Page 13
G. <i>Mr. Tretheway had a personal interest not disclosed in the</i> <i>document.</i>	Page 13
H. <i>Mr. Tretheway had a personal liability not disclosed in the</i> <i>document</i>	Page 13
I. <i>Mr. Tretheway was a participant in the underlying transaction.</i>	Page 13
J. <i>The document fails to reflect the understanding of the parties.</i>	Page 13
K. <i>The document has no basis in fact as to essential elements.</i>	Page 13
L. <i>Overreaching.</i>	Page 14
M. <i>The document misrepresented key-material facts.</i>	Page 14
5. THE AUTHORITY CITED BY PINCKNEY SUPPORTS, RATHER THAN DETRACTS FROM THE LOWER COURT’S FINDINGS.	Page 14
6. RESPONSE TO PINCKNEY’S SECOND ISSUE, MORE PROPERLY STATED AS, <i>CAN PINCKNEY AVOID THE RECIPROCAL IMPOSITION OF ATTORNEY’S</i> <i>FEES BY DISCLAIMING THE APPLICATION OF THE DOCUMENT UNDER</i> <i>WHICH HER COMPLAINT WAS BROUGHT AND UNDER WHICH SHE</i> <i>ORIGINALLY SOUGHT ATTORNEY’S FEES?</i>	Page 15
7. PINCKNEY, IN HER ARGUMENT OVER HER ISSUE #2 CLAIMS INSUFFICIENCY OF EVIDENCE AS TO ATTORNEY’S FEES, YET HAS FAILED TO PROPERLY RAISE SUCH ISSUE ON APPEAL.	Page 18
8. RESPONSE TO PINCKNEY’S THIRD ISSUE, <i>THE FINDINGS OF FACT AND</i> <i>CONCLUSIONS OF LAW AND ORDER PROVIDE FOR ATTORNEY’S FEES.</i>	Page 18
9. PINCKNEY’S APPEAL IS FRIVOLOUS AND JUST DAMAGES INCLUDING REASONABLE ATTORNEY FEES SHOULD BE AWARDED	Page 19
CONCLUSION	Page 19

TABLE OF AUTHORITIES

STATUTES

<i>Utah Code Annotated</i> 25-5-1	Page 2, Page 12
<i>Utah Code Annotated</i> 78-27-56.5	Page 2, Page 15-17, Page 19
<i>Utah Code Annotated</i> §25-5-1.	Page 12
<i>Utah Code Annotated</i> §25-5-1.	Page 12
<i>Utah Code Annotated</i> §57-1-31	Page 5, Page 9
<i>Utah Code Annotated</i> §78-2-2(3)(j)	Page 1
<i>Utah Code Annotated</i> §78-2-2(4)	Page 1
<i>Utah Rules of Appellate Procedure</i> Rule 10	Page 4
<i>Utah Rules of Appellate Procedure</i> Rule 10(d)	Page 4
<i>Utah Rules of Appellate Procedure</i> Rule 24(a)(11)	Page 21
<i>Utah Rules of Appellate Procedure</i> Rule 24(a)(5)	Page 1, Page 2, Page 8, Page 10
<i>Utah Rules of Appellate Procedure</i> Rule 33	Page 4, Page 19
<i>Utah Rules of Appellate Procedure</i> Rule 37	Page 4, Page 19
<i>Utah Rules of Civil Procedure</i> Rule 17(a)	Page 3, Page 12
<i>Utah Rules of Civil Procedure</i> Rule 17(a)	Page 12
<i>Utah Rules of Civil Procedure</i> Rule 17(d)	Page 3, Page 12
<i>Utah Rules of Civil Procedure</i> Rule 17(d)	Page 12
<i>Utah Rules of Civil Procedure</i> Rule 17(d)	Page 14

CASE LAW

<i>4447 Associates v. First Security Financial</i> , 973 P.2d 992 (Court of Appeals of Utah, January 22, 1999)	Page 17, Page 19
<i>Jones v. Johnson</i> , 761 P.2d 37 (Utah Ct. App. 1988)	Page 5, Page 9
<i>Maynard v. Wharton</i> , 912 P2d 446)	Page 17, Page 19
<i>Norman v. Murray First Thrift & Loan Co.</i> , 596 P.2d 1028 (Utah 1979)	Page 12
<i>Pearce v. Schurtz</i> , 270 P2d 442 (Utah 1954)	Page 14, Page 15, Page 20
<i>Wardley Corporation v. Welsh</i> , 962 P2d 86	Page 17

JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to *Utah Code Annotated* §78-2-2(3)(j). The appeal is of an order, judgment, or decree of a court of record over which the Court of Appeals does not have original appellate jurisdiction but is transferred by the Supreme Court to the Court of Appeals pursuant to *Utah Code Annotated* §78-2-2(4).

RESPONSE TO ISSUES PRESENTED

1. OBJECTION: The issues presented by Pinckney all fail to comply with the Rules of Appellate Procedure. *Utah Rules of Appellate Procedure* Rule 24(a)(5) requires either (A) a citation to the record showing that the issue was preserved in the trial court; or (B) a statement of grounds for seeking review of an issue not preserved in the trial court. The statement of the issues provided by Pinckney contain neither one.

2. Pinckney's first issue (under her "Issues Presented") was not determined by the trial court. Pinckney failed to prove that Snideman was a tenant, so the court never arrived at the issue of whether under such circumstances he would be a proper party. Rather, the court, unconvinced that Snideman was a tenant, viewed the action as a disguised attempt to obtain a more expeditious and favorable remedy than that provided under a trust deed foreclosure, finding that the trustor, a corporation, was the real party in interest. Pinckney attempts to convert the lower court's Finding of Fact #1¹ and related factual determinations into an over-generalized and inapplicable question of law. Pinckney's first issue, if purely a matter of law, would be more properly stated, *As an assignee under a trust deed, can a plaintiff force a more*

¹Findings of Fact #1 states, "The real party in interest in this matter, rather than Defendant John David Snideman is a corporation named Prodigy Enterprises, Inc." See Statement of the Case and Statement of Facts for more detail.

speedy favorable remedy for default by alleging a fictitious, oral lease between a corporate trustor and its officer and thus avail itself of the use of the more expeditious remedies under the unlawful detainer statutes.

3. Snideman does not need to be a party to a document to impose the reciprocal enforcement of attorney's fees.

4. Findings of Fact and Conclusions of Law are sufficient.

PROVISIONS DETERMINATIVE OF APPEAL

A. STATUTE OF FRAUDS, *Utah Code Annotated* 25-5-1

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

B. *Utah Code Annotated* 78-27-56.5 Attorney's Fees—Reciprocal rights to recover Attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

C. *Utah Rules of Appellate Procedure* Rule 24(a)(5)

(a) *Brief of the appellant.* The brief of the appellant shall contain under appropriate headings and in the order indicated:

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

D. *Utah Rules of Civil Procedure* Rule 17(a)

Rule 17. Parties plaintiff and defendant.

(a) *Real party in interest.* Every action shall be prosecuted in the name of the real party in interest.

E. *Utah Rules of Civil Procedure* Rule 17(d)

Associates may sue or be sued by common name. When two or more persons associated in any business either as a joint-stock company, a partnership or other association, not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may sue or be sued by such common name.

STATEMENT OF THE CASE

1. NATURE OF THE CASE, THE COURSE OF PROCEEDINGS, AND ITS

DISPOSITION. The trial court denied an unlawful detainer claim filed by Pinckney and awarded Snideman his costs and a reasonable attorney's fee (Record at 111). After two hearings (Record at 44, 107) on Pinckney's objections to the order, including, among other things, the reciprocal imposition of attorney's fees, and after considering Pinckney's alternative proposed findings and conclusions, the lower court entered its Findings of Fact and Conclusions of Law and Order (Record at 111). Pinckney appealed to the Utah Supreme Court (Record at 112) and filed a Motion for Summary Disposition. Snideman filed his Response in Opposition along with a *Utah Rules of Appellate Procedure* Rule 10 Motion for Summary Affirmation; Request for *Utah Rules of Appellate Procedure* Rule 33 Damages and *Utah Rules of Appellate Procedure* Rule 37 Suggestion of Mootness along with a Supporting Memorandum. On December 22, 1999, the Supreme Court deferred ruling on the motions and suspended *Utah Rules of Appellate Procedure* Rule 10(d). On January 12, 2000, the Supreme Court ordered the transfer of the matter to the Utah Court of Appeals for disposition. Pursuant to order, a pre-hearing mediation conference was held February 14, 2000. Pinckney's Brief was filed March 31, 2000.

2. PINCKNEY'S ORIGINAL CLAIM. Based on an assigned trust deed, Pinckney had fashioned her complaint as an unlawful detainer of real property, seeking damages for non-payment on an alleged oral lease, along with costs and attorney's fees and possession from Snideman, a named officer of a corporation, Prodigy Enterprises, Inc. Her claim, however, was based on a note and deed of trust with Prodigy Enterprises, Inc. as the real party in interest. (Record at 3, 4). At the same time, Pinckney was pursuing a trust deed foreclosure against the

same property (Record 120, Transcript pg. 45, line 17-19). Prodigy Enterprises, Inc. alone was the signatory to the Trust Deed. (Record, Exhibit #3)

3. SNIDEMAN'S POSITION. Snideman denied the existence of an oral lease or any such tenancy. Snideman claimed that Pinckney's action in unlawful detainer was a disguised attempt to obtain a more expeditious and favorable remedy by avoiding the statutory protections² provided by a statutory trust deed foreclosure (Record 9, 120 *transcript*, pages 5-8). Pinckney admitted that indeed, she would have no claim in unlawful detainer against the owner of the real property, the real party in interest³. On appeal, Pinckney continues her pursuit of the fiction that Snideman is a "renter" or a "tenant" even though its own drafted proposed findings of fact and conclusions of law states the opposite (Record at 53). Similarly inconsistent, to fashion the facts to support her appeal, and caught in her argument over the issue of attorney's fees, Pinckney abandoned the fiction of an oral lease, asserting instead that "at the time of the unlawful detainer action being filed, Pinckney's attorney thought there was a written lease (Record, page 72). Contrary to such position, the complaint refers only to an oral lease in the context of the Trust Deed. The complaint sought reasonable attorney's fees under the unlawful detainer statute (Record 2-4).

4. THE TRIAL COURT'S DETERMINATION. The trial court refrained from making a

²Under *Utah Code Annotated* §57-1-31, a trustor has the right to cure within three months of the filing of a notice of default and is entitled to notice of the Trustee's sale and may bid thereon. The detailed procedural requirements for a trustee's sale of real property are intended to protect the debtor/trustor, and provide protections that substitute for the six-month right of redemption guaranteed in judicial mortgage foreclosures, *Jones v. Johnson*, 761 P.2d 37 (Utah Ct. App. 1988).

³"If they have a deed showing that he bought it, we are dead."Record 120, *transcript*, pages 9-10).

finding of an oral or written lease or that Snideman was a tenant. By doing so, Pinckney's fashioned claim of unlawful detainer was denied. After a bench trial, the trial court found that the real party in interest, rather than Defendant Snideman was the then owner of the real property, the corporation named Prodigy Enterprises, Inc. (Record, 109) The trial court denied the unlawful detainer claim, and awarded Snideman its costs and a reasonable attorney's fee. (Record, 111) Pinckney appealed. (Record, 113) Judge Hermansen, for the Trial Court, who heard opening statements, testimony and cross examination of six different witnesses, and closing arguments, succinctly stated:

The Court finds from the documentary evidence received, that the real party in interest is the corporation (Record, 22).

Except Exhibit "5" (discussed later), no documentary evidence even closely identifies Snideman as a Tenant.

5. OTHER RELEVANT FINDINGS AND CONCLUSIONS. The court also found that (finding #6) a non-judicial foreclosure of the subject trust deed is proceeding outside of the present action and concludes (Conclusion #2) that issues about obligations owed, if any, is more properly resolved in the foreclosure action. The court also made findings and conclusions as to the basis and amount of attorney's fees⁴ to be awarded Snideman. (Record 22, 108, 109)

6. FACTS RELEVANT TO EXHIBIT 5, Pinckney's only claimed evidence of a lease

⁴The record would show that the attorney's affidavit submitted after the first hearing was voluntarily reduced by over \$1,000.00 for the time spent on negotiations regarding the default under the trust deed outside of the unlawful detainer action (Record 56-59). At the final hearing on objections, buy interlineation, the Court reduced the award of attorney fees by an additional \$1,000.00 to \$3,418.03 as reasonable attorney's fees for that matter (Record 107). Snideman would contend that he should be entitled to the full amount, but has not raised the issue on appeal, leaving the question of the amount within the discretion of the court.

agreement is Exhibit “5”. The court had ample justification to disregard it. The letter was on Tretheway (Pinckney’s counsel) law office’s stationary (Record 120, *transcript*, page 77, line 3). From later testimony, Exhibit 5 was settlement discussion and inadmissible (Record 120, *transcript*, page 77, line 23 through page 78, line 9). It was prepared, negotiated, and executed after the instant litigation had commenced with a summons and complaint served (Record 120, *transcript*, page 81, lines 9-12). It was prepared and typed by Mr. Tretheway (Record 120, *transcript* page 81, line 17-23). Mr. Tretheway is not a disinterested party. He was Pinckney’s attorney (and attorney in this matter) and signed the Exhibit (Record 120, *transcript*, page 79, Exhibit 5). Pinckney relied on Mr. Tretheway as to the security of the loan for which Mr. Tretheway received a percentage (Record 120, *transcript*, pages 23-24). Mr. Tretheway received an origination and guarantee fee from the sale of the property of \$1,200.00. (Record 120, *transcript*, pages 33-34). Mr. Tretheway testified that he would be liable to Pinckney if the \$20,000.00 was not paid, (Record 120, *transcript*, pages 33-34). Note payments were made to Mr. Tretheway (Record 120, *transcript*, page 83). Mr. Tretheway provided legal advice to Snideman, as well (Record 120, *transcript*, page 85). Snideman understood the payments referred to therein to be mortgage payments (Record 120, *transcript*, page 40). Exhibit 5 mischaracterizes Snideman’s payments as rent payments (Record 120, *transcript* page 83, line 8-24) It was prepared without the aid of counsel for Snideman (Record 120, *transcript*, page 85). The document also misrepresented that a “default has been taken in the unlawful detainer action”, when, in fact, there was no entry of default (Record 120, *transcript*, page 88, lines 16-20), a fact especially observed by the court (Record, page 22).

In her appeal, Pinckney seeks to ignore the trust deed—her only basis—and continues to pursue the fiction of an oral lease. Her pellucid reason for avoidance, certainly, is that the trust

deed points directly to the corporation as the real party in interest, sustaining the trial courts decision. She also seeks to avoid the imposition of attorney's fees by disregarding the trust deed. The appellate court should sustain the findings, conclusions and order of the trial court.

SUMMARY OF POINTS OF ARGUMENT

Pinckney "reaches" to formulate a question of law to overcome her failure to provide evidence or convince the court of the essential elements of her claim and overcome the fact that the corporation is the real party in interest. At the same time she was pursuing a trust deed foreclosure, Pinckney's action in unlawful detainer was a disguised attempt to obtain a more expeditious and favorable remedy. The trial court could never reach the issue of unlawful detainer because Pinckney never established that Snideman was a tenant or that there was an "oral" lease—instead, the only reliable evidence established the relationship of trustor/beneficiary under the trust deed, of which the trustor was a corporation—pointing to it as the real party in interest. Thus, the court held as a finding of fact that the corporation, not Snideman, was the real party in interest and concluded that issues about obligations owed, if any, is more properly resolved in the foreclosure action. Pinckney's failure is further evidenced by her failure to comply with *Utah Rules of Appellate Procedure* Rule 24 (a)(5), nor can she, since the issue was never determined by the trial court nor preserved for appeal. Even if such issue were appropriately determined and preserved, no reliable underlying factual evidence supports the issue. The appellate court should defer to the trial court's factual determination. The authority cited by Pinckney supports, rather than detracts from the lower court's findings.

Pinckney should not be able to avoid the reciprocal imposition of attorney's fees by disclaiming the application of the document under which her complaint was brought and under which she originally sought attorney's fees. The findings of fact and conclusions of law clearly

provide the basis and authority for imposition of attorney's fees.

Pinckney's appeal is frivolous and just damages including reasonable attorney fees should be awarded Snideman.

ARGUMENTS

1. PINCKNEY'S FIRST ISSUE ON APPEAL WAS NOT DECIDED NOR REACHED BY THE LOWER COURT

The trial court refrained from making a finding of an oral or written lease or that Snideman was a tenant. Pinckney simply failed to carry its burden. Such lease or tenancy was an essential element of fact to Pinckney's claim. No reliable evidence supported Pinckney's factual claim—rather the evidence pointed to the Corporation being the real party in interest. Snideman denied the existence of an oral lease or any such tenancy. Pinckney was also pursuing a trust deed foreclosure on the same property. Snideman, the sole shareholder and officer of the corporation owning the property, claimed that Pinckney's action in unlawful detainer was a disguised attempt to obtain a more expeditious and favorable remedy by avoiding the statutory protections⁵ provided by a statutory trust deed foreclosure (Record 9, 120 *transcript*, pages 5-8). The court agreed with Snideman by its findings and conclusions. After a bench trial, the trial court found that the real party in interest, rather than Defendant Snideman was the then owner of the real property, the corporation named Prodigy Enterprises, Inc. (Record, 109). The court also found that a foreclosure of the subject trust deed was proceeding outside of the present action

⁵Under Section 57-1-31, Utah Code Annotated, a trustor has the right to cure within three months of the filing of a notice of default and is entitled to notice of the Trustee's sale and may bid thereon. The detailed procedural requirements for a trustee's sale of real property are intended to protect the debtor/trustor, and provide protections that substitute for the six-month right of redemption guaranteed in judicial mortgage foreclosures, *Jones v. Johnson*, 761 P.2d 37 (Utah Ct. App. 1988).

and concluded that issues about obligations owed, if any, is more properly resolved in the foreclosure action. Pinckney's fashioned claim of unlawful detainer was denied. Pinckney's first issue (under her "Issues Presented") was not determined by the trial court, rather, the trial court made no determination of the existence of a lease or tenancy.

2. PINCKNEY'S FAILURE TO FOLLOW PROCEDURE AND ATTEMPT TO FRAME HER ISSUE DOES NOT COMPORT WITH THE FACTS.

Utah Rules of Appellate Procedure, Rule 24 (a)(5) requires either (A) a citation to the record showing that the issue was preserved in the trial court; or (B) a statement of grounds for seeking review of an issue not preserved in the trial court. The statement of the issues provided by Pinckney contain neither one. Without the same, Snideman's response may be unnecessarily broad.

Pinckney in presenting her first issue appears to attempt to convert the lower court's Finding of Fact #1⁶ and related factual determinations into an over-generalized and inapplicable question of law. Pinckney's first issue, if purely a matter of law, would be more properly stated, *As an assignee under a trust deed, can a plaintiff force a more speedy favorable remedy for default by alleging a fictitious, oral lease between a corporate trustor and its officer and thus avail itself of the use of the more expeditious remedies under the unlawful detainer statutes?*

Or, in application to the facts of the instant case

Can a Plaintiff force a more speedy favorable conclusion by the use of the more expeditious remedies under the Unlawful Detainer Statutes as an assignee under a Trust Deed, and avoid the protections (right to cure default, right to notice of default, right to notice of sale,

⁶Findings of Fact #1 states, "The real party in interest in this matter, rather than Defendant John David Snideman is a corporation named Prodigy Enterprises, Inc." See Statement of the Case and Statement of Facts for more detail.

and right of redemption) afforded the real party in interest, the property owner (which is a Corporation) by treating the payments under the trust deed as payments of rent under an oral, fictitious, lease between an officer of the Corporation and the Corporation?

The answer to either issue, obviously, is a resounding “NO”.

Pinckney admitted that indeed, she would have no claim in unlawful detainer against the owner of the real property⁷. On appeal, Pinckney continues her pursuit of the fiction that Snideman is a “renter” or a “tenant” even though her own drafted proposed findings of fact and conclusions of law states the opposite (Record at 53). Similarly inconsistent, to fashion the facts to support her appeal, and caught in her argument over the issue of attorney’s fees, Pinckney abandoned the fiction of an oral lease, asserting instead that “at the time of the unlawful detainer action being filed, Pinckney’s attorney thought there was a written lease (Record, page 72). Contrary to such position, the complaint refers only to an oral lease in the context of the Trust Deed and sought reasonable attorney’s fees under the unlawful detainer statute (Record 2-4). The actions and various positions of Pinckney not only militate against denial of appeal, but for imposition of sanctions, as previously made by motion to the Utah Supreme Court, now pending before the Court of Appeals.

3. DEFERENCE TO THE TRIAL COURT’S FACTUAL DETERMINATION SHOULD BE MADE UNLESS CLEARLY ERRONEOUS.

The appellate court should defer to the trial court’s assessment and determination of factual matters. Judge Hermansen, for the Trial Court, who heard opening statements, testimony and cross examination of six different witnesses, and closing arguments, succinctly stated:

⁷“If they have a deed showing that he bought it, we are dead.”Record 120, transcript, pages 9-10).

The Court finds from the documentary evidence received, that the real party in interest is the corporation (Record, 22).

Utah Rules of Civil Procedure Rule 17(a) requires every action to be prosecuted in the name of the real party in interest. *Utah Rules of Civil Procedure* Rule 17(d) regarding associated parties specifically excludes Corporations from its application. Even though Snideman owned all, or practically all, of the stock of the corporation, such a fact does not qualify him as the real party in interest, *Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028 (Utah 1979). Snideman, despite his association with the Corporation, was not the real party in interest and could not be liable for what the court found to be a corporate concern—notwithstanding the effort of Pinckney to create a fictitious, oral⁸ lease.

4. EXHIBIT “5” SHOULD BE DISREGARDED.

Pinckney’s only claimed evidence of a lease agreement relies on Exhibit “5” a letter on Tretheway (Pinckney’s counsel) law office’s stationary (Record 120, *transcript*, page 77, line 3). The court had ample justification to disregard it:

- A. *Settlement Discussion is Inadmissible.* From later testimony, Exhibit 5 was settlement discussion and inadmissible (Record 120, *transcript*, page 77, line 23 through page 78, line 9).
- B. *Facts can’t be “built” by subsequently created documents.* It was prepared, negotiated, and executed after the instant litigation had commenced with a summons and complaint served (Record 120, *transcript*, page 81, lines 9-12).
- C. *Presumptions go against its creator, Pinckney’s attorney.* It was prepared and

⁸Even if Pinckney had submitted evidence as to an oral lease, such would also fail due to the Statute of Frauds, *Utah Code Annotated* §25-5-1.

typed by Mr. Tretheway (Record 120, transcript page 81, line 17-23).

- D. *Pinckney had an unfair advantage in its creation.* Mr. Tretheway is not a disinterested party. He was Pinckney's attorney (and attorney in this matter) and signed the Exhibit (Record 120, transcript, page 79, Exhibit 5).
- E. *Pinckney relied on Creator's legal acumen to maintain security.* Pinckney relied on Mr. Tretheway as to the security of the loan for which Mr. Tretheway received a percentage (Record 120, transcript, pages 23-24).
- F. *Snideman also received legal advice from Tretheway, its creator.* Mr. Tretheway provided legal advice to Snideman (Record 120, transcript, page 85).
- G. *Mr. Tretheway had a personal interest not disclosed in the document.* Mr. Tretheway received an origination and guarantee fee from the sale of the property of \$1,200.00. (Record 120, transcript, pages 33-34).
- H. *Mr. Tretheway had a personal liability not disclosed in the document.* Mr. Tretheway testified that he would be liable to Pinckney if the \$20,000.00 was not paid, (Record 120, transcript, pages 33-34).
- I. *Mr. Tretheway was a participant in the underlying transaction.* Note payments were made to Mr. Tretheway (Record 120, transcript, page 83).
- J. *The document fails to reflect the understanding of the parties.* Snideman understood the payments referred to therein to be mortgage payments (Record 120, transcript, page 40).
- K. *The document has no basis in fact as to essential elements.* Exhibit 5 mischaracterizes Snideman's payments as rent payments (Record 120, transcript page 83, line 8-24)

L. *Overreaching.* It was prepared without the aid of counsel for Snideman. (Record 120, *transcript*, page 85).

M. *The document misrepresented key-material facts.* The document also misrepresented that a “default has been taken in the unlawful detainer action”, when, in fact, there was no entry of default (Record 120, *transcript*, page 88, lines 16-20), a fact especially observed by the court (Record, page 22).

5. THE AUTHORITY CITED BY PINCKNEY SUPPORTS, RATHER THAN DETRACTS FROM THE LOWER COURT’S FINDINGS.

The authority cited by Pinckney supports, rather than detracts from the lower court’s findings, making perhaps a more compelling argument for Snideman. In the sole authority cited by Pinckney on this issue, *Pearce v. Schurtz*, 270 P2d 442 (Utah 1954), page 443, the bond for deed (then used similarly as a trust deed)

“expressly provided that upon default the buyer at seller’s election became at once a tenant at will of the seller”.

In *Pearce*, the court found that

“this provision was undoubtedly adopted to obtain the benefits of the unlawful detainer statute. Such was the express provision of the contract and this court will not rewrite the agreement. It is not within our province to torture some other meaning out of the bond for deed. . .”

Even with the express provision, the Supreme Court in *Pearce* was divided and had difficulty imposing the unlawful detainer provisions under circumstances arising from a Deed of Conveyance. Justice Crockett in *Pearce* in his extensive dissenting opinion believed that notwithstanding the express provision “the artificial relationship of tenancy at will was not created, and the action of unlawful detainer should be dismissed.”

The express provision contained in *Pearce* creating a tenancy is not present in the instant

case. No such provision is contained in the trust deed or any other document. Indeed, in her Complaint, Pinckney attempted to torture the note and trust deed of a purchase transaction into an “oral “ lease agreement and thereby obtain the benefits of the unlawful detainer statute. The court in *Pearce* would not permit the facts to be tortured to avoid the unlawful detainer statute. A fortiori, the trial court in the instant matter should not countenance Pinckney’s torture of the facts to bring it within the unlawful detainer statute and the appellate court should uphold the decision of the trial court.

6. RESPONSE TO PINCKNEY’S SECOND ISSUE, MORE PROPERLY STATED AS, *CAN PINCKNEY AVOID THE RECIPROCAL IMPOSITION OF ATTORNEY’S FEES BY DISCLAIMING THE APPLICATION OF THE DOCUMENT UNDER WHICH HER COMPLAINT WAS BROUGHT AND UNDER WHICH SHE ORIGINALLY SOUGHT ATTORNEY’S FEES?*

The trial court made findings and conclusions as to the basis and amount of attorney’s fees⁹ to be awarded Snideman. (Record 22, 108, 109) The lower court found, after stating its findings as to the position of the parties with respect to certain documents that

“7. The subject All-Inclusive Trust Deed Note and All Inclusive Trust Deed provide for at least one party to recovery (sic) attorney fees. [and] 8. The reasonable attorney’s fees to be awarded Defendant in this matter is the sum of \$3,418.03.”

It concluded that

“3. Under Section 78-27-56.5, the Court may award attorney’s fees to the prevailing party [and] 4. Defendant should be awarded its

⁹The record would show that the attorney’s affidavit submitted after the first hearing was voluntarily reduced by over \$1,000.00 for the time spent on negotiations regarding the default under the trust deed outside of the unlawful detainer action. At the final hearing on objections, buy interlineation, the Court reduced the award of attorney fees by an additional \$1,000.00 to \$3,418.03 as reasonable attorney’s fees for that matter. Snideman would contend that he should be entitled to the full amount, but has not raised the issue on appeal, leaving the question of the amount within the discretion of the court.

costs and a reasonable attorney's fees."

The order appealed from reflects such findings and conclusions.

U.C.A. Section 78-27-56.5 states that

"A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees."

The essential elements of the statute are certainly fulfilled. Snideman prevailed in a civil action based upon a trust deed executed after April 28, 1986 which provided for Pinckney to recover attorney's fees. The statute imposes no requirement that the prevailing party be a party to the writing, as contended by Pinckney, with good reason. Otherwise, any defendant that prevails against a writing by proving its inefficacy would be denied its recovery of attorney's fees—rendering the statute meaningless.

Pinckney contends error since Snideman was not a party to the Agreement, yet in her complaint she seeks attorney's fees from Snideman. Pinckney claims that since *she* failed to convince the court to adopt the fiction of an oral lease construed from the Trust Deed, that *her* failure disposes of any basis for reciprocal attorney fees. Even though *her* Complaint (Record, 2-4) refers extensively to the All-Inclusive Trust Deed which is the basis of *her* Complaint and is the only document by which *she* sought attorney's fees in *her* original Complaint, Pinckney contends that on appeal, there is no note, contract, or other writing, and thus no attorney fees.

The statute does not condition the reciprocal rights of attorneys fees upon a Defendant proving the viability of an unfavorable document imposed upon him by a Plaintiff's suit. The statute should not be construed to deny a Defendant its reciprocal right of attorney fees if in his defense, he convinces the court to disregard, nullify, void, or determine the non-existence of

such unfavorable document—or, as in this case, to disregard the fiction of a lease.

Similarly, in *4447 Associates v. First Security Financial*, 973 P.2d 992 (Court of Appeals of Utah, January 22, 1999), the non-prevailing party attempted to avoid the imposition of attorney’s fees. There, an agreement providing for attorney’s fees had been extinguished and replaced by an agreement (that did not provide for attorney’s fees) upon which suit was made. The extinguished agreement provided for attorney’s fees for actions “arising from” the same. The appellate court held that “At bottom, Zions/4447 brought this suit to enforce the payment terms of [the extinguished agreement]”. The appellate court, in *4447 Associates* not only affirmed the trial court in awarding attorney fees, but also awarded attorney fees on appeal.

Pinckney’s authority is not on point and is distinguishable. *Maynard v. Wharton*, 912 P2d 446) denied attorney’s fees because “Seller’s did not establish that buyers defaulted on any covenant or agreement and thus have no basis for an award of attorney fees.” Such elements are not present in the instant case. *Wardley Corporation v. Welsh*, 962 P2d 86, dealt with third-party beneficiaries and declined to address arguments made as to U.C.A.78-27-56.5.

Pinckney claimed attorney’s fees in her Complaint. Her basis was the Trust Deed. She should now be estopped from claiming its inapplicability. To fail to do so would render Section 78-27-56.5 meaningless. To fail to do so would mean that any potential Plaintiff with any contract providing attorney’s fees for its enforcement could sue without fear of the imposition of Section 78-27-56.5. For under Pinckney’s theory, if a Defendant raises a claim of any sort that might render the contract invalid or otherwise negated and prevails on that claim, the Plaintiff—the losing party—could then avoid the imposition of attorney’s fees by claiming “no contract, thus no attorney’s fees”. Certainly, such is not contemplated by the statute.

7. PINCKNEY, IN HER ARGUMENT OVER HER ISSUE #2 CLAIMS

INSUFFICIENCY OF EVIDENCE AS TO ATTORNEY'S FEES, YET HAS FAILED TO PROPERLY RAISE SUCH ISSUE ON APPEAL.

The issue has not been properly raised, being "added in" Pinckney's claimed issue of law. Furthermore, Pinckney has not fulfilled the requirement of marshalling the evidence with regard to the same. Had she marshalled the evidence, she would have found several copies of the affidavit for attorney's fees, the earliest of which was date-stamped September 20, 1999 (Record 120, *transcript* 56-59). Though Pinckney received a copy on July 6, 1999 (record, page 101), she apparently is concerned that the court has still not located the original that was delivered to the Court on July 6, 1998, by Certified Mail, Return Receipt Requested and received by one "JM". Snideman should not be penalized for a court's apparent administrative mistake. Furthermore, the matter was discussed in open court (Record, 107) with the fees reduced by an additional \$1,000.00. In any event, the court having heard the case could make its independent determination of what would constitute a reasonable attorney's fee. It apparently did so, thus the reduction by interlineation.

8. RESPONSE TO PINCKNEY'S THIRD ISSUE, *THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER PROVIDE FOR ATTORNEY'S FEES.*

As previously stated in response to Pinckney's Issue 2, the Findings of Fact and Conclusions of Law (Record, 110) contain the essential elements for the award of attorney's fees.

The lower court found, after stating its findings as to the position of the parties with respect to certain documents that

"7. The subject All-Inclusive Trust Deed Note and All Inclusive Trust Deed provide for at least one party to recovery (sic) attorney fees. [and] 8. The reasonable attorney's fees to be awarded Defendant in this matter is the sum of \$3,418.03."

It concluded that

“3. Under Section 78-27-56.5, the Court may award attorney’s fees to the prevailing party [and] 4. Defendant should be awarded its costs and a reasonable attorney’s fees.”

The order appealed from reflects such findings and conclusions.

Pinckney’s contentions approach the absurd on this issue and become frivolous without factual basis. The Findings, Conclusions, and Order are clear on the theory of attorney’s fees being awarded. Pinckney’s failure to prove her case should not impose an obligation on Snideman to prove part of Pinckney’s case in order to benefit from the reciprocal award of attorney’s fees. The authority cited by Pinckney, *Maynard V. Wharton*, 912 P.2d 446 (Utah Ct. App.), cert. Denied, 919 P.2d 1208 (Utah 1996) that Snideman “ must show that the contract’s provisions contemplate that award” simply is oxymoronic when considered against *Utah Code Annotated*, §78-27-56.5, the reciprocal rights to recover attorney’s fees, designed to prevent drafting documents denying reciprocal rights.

9. PINCKNEY’S APPEAL IS FRIVOLOUS AND JUST DAMAGES INCLUDING REASONABLE ATTORNEY FEES SHOULD BE AWARDED

The Supreme Court deferred consideration of Snideman’s Request for *Utah Rules of Appellate Procedure* Rule 33 Damages and *Utah Rules of Appellate Procedure* Rule 37 Suggestion of Mootness. Argument regarding the same are not here repeated. As the appellate court, in *4447 Associates* not only affirmed the trial court in awarding attorney fees, but also awarded attorney fees on appeal, so should the same be awarded Snideman.

CONCLUSION

From a bench trial, the trial court denied an unlawful detainer claim filed by Pinckney and awarded Snideman his costs and a reasonable attorney’s fee. Though fashioned as an

unlawful detainer claim on an oral lease, her claim was based on a note and deed of trust with Prodigy Enterprises, Inc. against whom, at the same time, Pinckney was pursuing a trust deed foreclosure. Snideman, the sole shareholder and officer of Prodigy, denied the existence of an oral lease or any such tenancy, claiming that Pinckney's action in unlawful detainer was a disguised attempt to obtain a more expeditious and favorable remedy than the ongoing trust deed foreclosure. No reliable evidence supported the existence of an oral lease or tenancy. The trial court found the corporation, rather than Snideman, to be the real party in interest. The court also found that foreclosure of the subject trust deed was proceeding outside of the present action, concluding that issues about obligations owed, if any, is more properly resolved in the foreclosure action. The court also made findings and conclusions as to the basis and amount of attorney's fees to be awarded Snideman, based on the statutory reciprocal rights to recover attorney's fees.

On appeal, Pinckney seeks to ignore the trust deed—her only basis—and continues to pursue the fiction of an oral lease. The trust deed points directly to the corporation as the real party in interest, sustaining the trial courts decision. She also seeks to avoid the imposition of attorney's fees by again disregarding the trust deed and further disclaiming any agreement between the parties—inconsistent with her claim and her earlier argument.

The appellate court should defer to the trial court's factual determination. Pinckney relies on a single authority, *Pearce*, as permitting an unlawful detainer to be pursued against Snideman. *Pearce*, however, is factually different and frankly supports the position of Snideman rather than Pinckney.

Pinckney should not be able to avoid the reciprocal imposition of attorney's fees by disclaiming the application of the document under which her complaint was brought and under

which she herself originally sought attorney's fees. The findings of fact and conclusions of law clearly provide the basis and authority for imposition of attorney's fees.

The appellate court should not only uphold the trial court's order in all respects, but should also consider and grant Snideman's motion for sanctions.

NO ADDENDUM IS REQUIRED UNDER *Utah Rules of Appellate Procedure* RULE 24(a)(11).

Respectfully submitted,

Date

Thomas J. Klc, Attorney for
Appellee Snideman