

2005

Kathryn Collard, Trustee of the LeRoy Collard Trust v. Nagle Construction, Inc., a Utah corporation; Gary M. Nagle, an individual and Marilyn F. Nagle, an individual : Reply Brief

Utah Supreme Court

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Kathryn Collard; The Law Firm of Kathryn Collard; Attorney for Plaintiff-Appellee.

Sean N. Egan; Attorney for Defendants-Appellants.

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IN THE UTAH SUPREME COURT

**KATHRYN COLLARD, Trustee of
the LeRoy Collard Trust,**

Appellee and Plaintiff,

vs.

**NAGLE CONSTRUCTION, INC., a
Utah corporation; GARY M. NAGLE,
an individual and MARILYN F.
NAGLE, an individual,**

Appellants and
Defendants.

Case No. 20050714-SC
990907648

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the Third Judicial District Court
of Salt Lake County, Honorable Bruce C. Lubeck

Kathryn Collard (# 0697)
The Law Firm of Kathryn Collard
Nine Exchange Place, Suite 1111
Salt Lake City, UT 84111
Telephone: (801) 537-5625
Facsimile: (801) 537-5630
Attorney for Plaintiff-Appellee

Sean N. Egan (# 7191)
Kearns Bldg. -- Suite 408
136 South Main Street
Salt Lake City, UT 84101
Telephone: (801) 363-5181
Facsimile: (801) 363-5184
Attorney for Defendants-Appellants

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Kearns Bldg. -- Suite 408
136 South Main Street
Salt Lake City, UT 84101
Telephone: (801) 363-5181
Facsimile: (801) 363-5184
Attorney for Defendants-Appellants

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I. **THE TRIAL COURT DETERMINED THAT THE TRUST DID NOT FULLY PERFORM. THEREFORE, THE TRUST IS NOT ENTITLED TO SPECIFIC PERFORMANCE UNDER UTAH LAW. THE TRUST HAS MISSTATED THE LAW TO THE CONTRARY.**

A. **The Trust Does Not Address The Controlling Legal Standards Regarding Specific Performance.**

Specific performance is an equitable remedy that requires the aggrieved party to make an **unconditional tender of the performance required by the agreement.** Kelley v. Leucadia Financial Corp., 846 P.2d 1238, 1243 (Utah 1992) (emphasis added). Thus, performance requires **“a bona fide, unconditional, offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent.”** Carr v. Enoch Smith Co., 781 P.2d 1292, 1294 (Utah App. 1989) (emphasis added).

Contrary to its assertions in its Brief, it is the Trust’s obligation to prove that it tendered full performance. Lincoln Land and Development Co. v. Thompson, 489 P.2d 426, 428 (Utah 1971). Indeed, the Trial Court expressly said so. Addendum, Ex. C, Conclusions of Law, ¶ 11, R. 2506 (**“it is plaintiff’s obligation under the remand order to prove the value of the stock reached \$85,000 and the Court has found and concluded plaintiff did not prove that value and so there was a failure of a condition of the contract”**)(emphasis added). Nagle is not required to prove that the Trust did not perform.

B. Substantial Performance Does Not Entitle a Party to a Decree For Specific Performance.

In its Brief, the Trust, at long last, admits that it did not perform under the Contract. Trust Brief at p. 11. Instead, it argues for the first time that it is entitled to specific performance because it substantially performed under the Contract. Because this argument was not raised before the Trial Court and the Trust offers no other basis for considering it, this Court should decline to hear it. Harline v. Barker, 854 P.2d 595, 598 (Utah App. 1993) (Party that obtained summary judgment from trial court could not raise argument supporting affirmance that was not raised before the trial court).

More importantly, the Trust misstates Utah law. The cases that the Trust cites do not support its position and in fact support Nagle's position. For example, in Christensen v. Christensen, 339 P.2d 101, 103-04 (Utah 1959), this Court held that a decree for specific performance would be appropriate because the buyers offered to and were prepared to complete performance but Seller refused to accept it ("**the plaintiffs offered to pay the balance on numerous occasions, but . . . defendants have at all times declined to accept the same; . . . The court found that the plaintiffs were able, ready and willing to pay the balance of the purchase price**") (emphasis added).

Similarly, in Woolsey v. Brown, 539 P.2d 1035, 1039 (Utah 1975), this Court held that plaintiff would be entitled to specific performance upon completion of performance under the contract ("**Upon payment of the \$49 balance plus the difference (\$19.73)**")

between the refund by the mortgagee to the defendant and the cost of the insurance and 1973 property taxes by plaintiffs, defendant is to deliver her conveyance") (emphasis added). The other cases cited by the Trust to support its argument make no reference to the proposition that substantial performance is sufficient to obtain a decree of specific performance.

Indeed, the Trust appears to be using these cases as part of an effort to redefine what the measure of performance was to be in this case. However, the Appeals Court clearly stated that the measure of performance would be as follows:

If, on remand, the fact finder determines that the 55,000 shares were worth at least \$85,000 at some point in time between September 18, 1979 and September 18, 1980, and that [Nagle] was obligated to sell the shares at that time, then [the Trust] has performed [its] obligations and [Nagle] is not entitled to further relief. However, if the fact finder determines that the shares did not reach a value of \$85,000 within the appointed period, then [Nagle] is entitled to offset the amount of the shortfall [the Trust] was obligated to pay in cash or additional shares against the value of the property.

Addendum, Ex. B at ¶ 27, R. 2428 (emphasis added); Addendum, Ex. A, R. 2417 (emphasis added). The Trust's argument that it made tender of performance incorrectly characterizes its performance obligation. Full performance is not measured by delivery of the shares but by whether they reach the agreed upon value. Carr, 781 P.2d at 1294. Nor is the Trust's argument, raised here for the first time, that Nagle complicated and hindered Collard's

performance entitled to consideration because it depends entirely upon the Trial Court's flawed construction of the Contract. Performance was tied the value of the shares during the year period not to any action or inaction of Nagle.

The Trust also argues that the Utah Statute of Frauds, U.C.A. § 25-5-8, "permits specific performance in the case of an oral contract, where a party has partially or substantially performed." Trust Brief at p. 17. This argument, too, was not presented to the Trial Court and is therefore not properly before this Court. More importantly, the Trust reads far too much into that provision. The part performance referred to in the Utah statute is that performance which removes an oral contract outside the purview of the Statute of Frauds. This Court has expressly held that to obtain a decree for specific performance in equity under an oral contract which has been removed from the Statute of Frauds, the party must complete performance. Young v. Moore, 663 P.2d 78, 81 (Utah 1983) ("**To achieve an equitable result the decree [for specific performance] should provide for complete performance of the settlement agreement by both parties**") (emphasis added).

C. The Trust Mischaracterizes The Trial Court's Ruling Regarding Performance.

The Trust claims that the Trial Court "specifically found that Collard made an unconditional tender of performance required pursuant to the contract." Trust Brief at p. 18. The Trial Court made no such finding, as a review of the Trust's supporting citations indicates. To the contrary, as the Trust subsequently acknowledges, the Trial Court

specifically concluded as a matter of law that the Trust did indeed fail to perform. Addendum, Ex. C, Conclusions of Law, ¶ 11, R. 2506 (“**the Court has found and concluded plaintiff did not prove that value and so there was a failure of a condition of the contract**”) (emphasis added).

II. THE TRUST DOES NOT ADEQUATELY ADDRESS THE DEEP FLAWS IN THE TRIAL COURT’S CONSTRUCTION OF THE REAL ESTATE PURCHASE CONTRACT.

A. Nagle’s Arguments Concerning Construction of The Contract Are Not Barred by The Statute of Limitations.

Throughout its Brief, the Trust argues that Nagle’s arguments concerning the Trial Court’s improper construction of the Real Estate Purchase Contract are barred by the Statute of Limitations. This argument is contrary to the holding of the Appeals Court. Rather, the Appeals Court expressly held:

[The Trust] argues that the statute of limitations prevents [Nagle] from asserting [the Trust’s] failure to assume the mortgage and failure to pay the amount due under Addendum 2 as counterclaims. In this case, the Trial Court held [Nagle’s] claims for breach of contract accrued no later than January 25, 1981. Nevertheless, even if [Nagle’s] counterclaims are barred by the statute of limitations, [Nagle] is permitted to use these counterclaims as an offset or recoupment against [the Trust’s] claims.

Addendum, Ex. B at ¶ 22, R. 2426 - 27 (emphasis added). Accordingly, it is clear from the mandate from the Appeals Court that Nagle is entitled to raise matters of contract construction on appeal as part of his claim for recoupment and offset. Moreover, the Statute

of Limitations was not asserted by the Trust on remand of the case at the time Nagle was arguing contract construction points before the Trial Court. See, e.g., R. 2619 at 375: 16-25. Therefore, it cannot raise this point here. Harline, 854 P.2d at 598.

B. The Trust Ignores The Language of The Contract.

Like the Trial Court, the Trust ignores the plain language of the Real Estate Purchase Contract. Yet, it is simply undeniable that the factors the Trial Court relied upon to fashion its remedy had the affect of rewriting the parties' agreement.

Addendum 2 to the Contract states:

Title of premises being sold under the contract referred to above will be transferred when Nagle Construction Company sells sufficient of the shares of Utah Coal & Chemical Corp. transferred under Addendum No. 1 [55,000 shares] to realize \$85,000 cash. Seller hereby agrees to sell shares sufficient to realize \$85,000 within one year of receipt thereof providing the market value of said shares will cause a realization of \$85,000.

Should the value of the 55,000 shares conveyed not equal \$85,000 within one year Buyer agrees to convey additional shares of Utah Coal & Chemical Corp. stock or cash sufficient to bring the total value conveyed to Seller to \$85,000 before [Nagle] conveys title to premises sold to [the Trust].

Addendum, Ex. A, R. 2417 (emphasis added).

The Contract does not require Nagle to make efforts to determine the value of the stock; it does not prohibit Nagle from speculating in the stock; it does not require Nagle to

prepare to sell the stock; it does not require Nagle to provide “a notice of deficiency” during the year period; it does not require Nagle to sell as many of the shares as he can during the year period and then seek the remainder from the Trust if there is a deficiency.¹ Yet, the Trial Court fashioned a remedy based on Nagle’s alleged failure to perform those enumerated functions.

In reaching these conclusions, the Trial Court has imposed extra-contractual obligations on Nagle which substantially reconfigure the parties’ obligations to each other. This is a function the Trial Court may not do even though it is sitting in equity. Warner v. Sirstins, 838 P.2d 666, 670 (Utah App. 1992) (“**Although a court, sitting in equity, exercises discretion in granting or denying relief . . . , it does not have the authority to ignore existing principles of law in favor of its view of the equities**”) (emphasis added). One such principle of law the Trial Court ignored is that a court “**will not make a better contract for the parties than they have made for themselves Nor will [a court] avoid the contract’s plain language to achieve an ‘equitable’ result.**” Bakowski v. Mtn. States Steel, Inc., 52 P.3d 1179, 1185 (Utah 2002) (citations omitted) (emphasis added); see

¹ For these same reasons, the Trust’s argument that Nagle “complicated” the Trust’s performance is without merit. Trust Brief at p. 17. As stated previously, the measure of performance under the Appeals Court mandate is whether the shares reached a value where Nagle could realize \$85,000 from their sale. Nagle’s action or inaction is irrelevant to this performance measure.

also Utah Transit Authority v. Salt Lake City Southern, ____ P.3d ____, 2006 WL 346480

(Utah App. 2006).

The Contract also provides:

In the event of a failure to comply with the terms hereof by [the Trust], or upon the failure of [the Trust] to make any payment or payments when the same shall become due . . . [Nagle] shall have the right upon failure of [the Trust] to remedy the default within five days of written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by [the Trust], [sic] shall be forfeited to [Nagle] as liquidated damages for the nonperformance of the contract, and [the Trust] agrees that [Nagle] may at his option reenter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by [the Trust] thereon, and the said additions and improvements shall remain with the land become [sic] the property of [Nagle], [the Trust] becoming at once a tenant-at-will of [Nagle].

Addendum, Ex. A, R. 2415 (emphasis added).

In relying on Collard's continuous occupation of the premises as justification for granting specific performance, both the Trial Court and the Trust ignore Nagle's express rights under Section 16 of the Contract to keep title and treat Collard as a tenant-at-will. Indeed, the Trial Court does not even mention that portion of the Contract, although Nagle raised the issue at trial. R. 2619 at 380: 16 - 381: 20. The Trial Court has simply penalized Nagle for exercising his rights under the Contract. This is not equitable, particularly since

the result of that penalty is that the Trust receives the benefit of the property even though Collard undeniably breached the Contract.

C. The Trial Court Was Not Faithful to The Mandate of The Appeals Court on Remand.

For purposes of this case on remand and now on appeal, the core of the Appeals Court decision is this:

Allowing an offset or recoupment in circumstances where a defendant's affirmative claims are barred by the statute of limitations is based on a sound policy of preventing a plaintiff from waiting to assert a claim until after defendant's counterclaim is barred. See Coulon, 915 P.2d at 1072, **Allowing an offset is appropriate even though [the Trust] essentially seeks specific performance rather than money damages because equity requires it.** To the extent that [Nagle] sat on his rights and delayed asserting those rights, [the Trust] did the same. Moreover, although [Nagle] may have ultimately waived his claim, it is [the Trust] who initially breached the parties' original contract by never assuming the mortgage. **To allow [the Trust] to breach one of [its] obligations under the contract, then, years later – after never having brought suit to have title conveyed – to obtain title without having to perform [its] other obligations under the same contract, is not equitable.**

If, on remand, the fact finder determines that the 55,000 shares were worth at least \$85,000 at some point in time between September 18, 1979 and September 18, 1980, and that [Nagle] was obligated to sell the shares at that time, then [the Trust] has performed [its] obligations and [Nagle] is not entitled to further relief. However, if the fact finder determines that the shares did not reach a value of \$85,000 within the appointed period, then [Nagle] is entitled to offset the amount of the shortfall [the Trust] was obligated to pay

in cash or additional shares against the value of the property.

Addendum, Ex. B at ¶¶ 26 and 27, R. 2427 - 28.

The Trial Court strayed from this mandate. First, it granted specific performance to the Trust even as it acknowledged that the Trust had not fully performed its other obligations under the same contract. Indeed, the Trial Court concluded as a matter of fact and law that the shares of stock did not reach a value where they could realize \$85,000 and therefore there was a failure of a condition of the contract. Addendum, Ex. C, Findings of Fact, ¶ 12, R 2495, 2497, 2499, Conclusions of Law, ¶ 11, R. 2506.

The Appeals Court staked out the parameters of equity that were supposed to have guided the Trial Court, i.e., it would not be equitable to allow the Trust to keep title to the property if did not fully perform its contractual obligations. Yet, the Trial Court substituted its own concept of the equities over that of the Appeals Court. This violates the mandate rule of the law of the case doctrine. Petty v. Clark, 192 P.2d 589, 594 (Utah 1948) (The legal pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case). This substitution also violates well settled principles of Utah equity jurisprudence. Warner v. Sirstins, 838 P.2d at 670 (**“Although a court, sitting in equity, exercises discretion in granting or denying relief . . . , it does not have the authority to ignore existing principles of law in favor of its view of the equities”**) (emphasis added).

The Trial Court also violated the mandate of the Appeals Court by revisiting the issue of the number of shares that were part of the transaction. The legal issue to be decided as framed by the Appeals Court was whether the 55,000 shares conveyed to Nagle ever reached a value where Nagle could realize \$85,000 from their sale. Addendum, Ex. B at ¶ 27, R 2428. The Trial Court was not authorized to revisit that issue and make factual and legal determinations on evidence that was already in the record.

The Trust's efforts to remedy the Trial Court's errors are unavailing. First, it does not accurately recount what the Appeals Court said regarding specific performance. **NOWHERE** did the Appeals Court say that the Trial Court could award specific performance "if the trial court found that the Trust did not fully perform, by awarding the Trust specific performance and requiring the Trust to pay an offset." Trust Brief at p. 21. Nor would the Appeals Court have said that because that is not the law in Utah. Instead, the Appeals Court focused on whether the Trust had performed because the law in Utah is that a party must fully perform in order to obtain a decree for specific performance. See, e.g., Kelley, 846 P.2d at 1243 ("**Specific performance is an equitable remedy that requires the aggrieved party to make an unconditional tender of the performance required by the agreement**") (emphasis added); Young, 663 P.2d at 81 (complete performance is required for specific performance); Carr, 781 P.2d at 1294.

The Appeals Court also held that it would not be equitable for the Trust to keep the property if it had not fully performed. Addendum, Ex. B at ¶ 26, R. 2427 - 28 (“**To allow [the Trust] to breach one of [its] obligations under the contract, then, years later--after never having brought suit to have title conveyed--to obtain title without having to perform [its] other obligations under the same contract, is not equitable**”) (emphasis added). The Trust’s reliance on Woolsey, 539 P.2d at 1038-39 is inapt. There, this Court required plaintiff to pay the remaining amounts owed on the mortgage-- that is, to complete performance--before awarding a decree for specific performance. The Trial Court was not faithful to the mandate of the Appeals Court.

D. The Trial Court’s Offset Calculation Was an Abuse of Discretion.²

The purpose of the offset called for by the Appeals Court in the event of non-performance by the Trust was to complete the Trust’s performance so that the parties could each get what they bargained for. Collard owed Nagle \$85,000 in September, 1979. As the Trial Court determined, the shares of stock never reached a value where Nagle could realize \$85,000 and Collard never tendered \$85,000 despite Nagle’s demand. Addendum, Ex. C,

² Nagle is not challenging the factual findings made by the Trial Court; rather, he is challenging the legal conclusions derived from those findings. Thus, contrary to the Trust’s repeated arguments, it is not necessary for Nagle to marshal the evidence in order to challenge the Trial Court’s offset remedy. Wardley Better Homes and Gardens v. Cannon, 61 P.3d 1009, 1014 (Utah 2002).

Findings of Fact at ¶ 12, R. 2495; Conclusions of Law at ¶ 11, R. 2506. Nagle declared Collard in default shortly after the one year period expired. Addendum, Ex. D, Trial Ex. 105, R. 2430 - 31. Thus, at the time of the breach, the Trust owed Nagle the sum certain of \$85,000.

By imposing performance duties on Nagle which are not in the contract, the Trial Court reduced the amount the Trust was required to pay as an offset to complete performance. As a result, the Trust is able to “complete” performance of the contract by paying less for the property than it originally agreed to pay. Moreover, Nagle offered unrefuted evidence at trial that the value of the property had increased to at least \$380,000. R. 2619 at 346: 18 - 20. The Trust had already sold the property to an affiliate for approximately \$230,000 four years prior to trial. R. 2619 at 331: 2 - 7. The Trust therefore received a benefit from the sale of the property at an appreciated value which it kept for itself without compensating Nagle at any value. The Trial Court’s decision to deny Nagle the full benefit of his bargain is not equitable if for no other reason that that the Trust is receiving the full benefit of its bargain even though it did not fully perform.

The Trust argues that Nagle is not entitled to additional compensation including interest because he could have brought suit before 1987 but did not. The Trust does not explain why that fact is important. Upon Collard’s default, Nagle simply kept title, as he was entitled to do under paragraph 16A of the Contract. The Trust has not provided any authority

to support the proposition that it was Nagle who should have brought suit upon breach. Indeed, such a proposition does not make sense. The transaction at issue is a land sale. Obviously, if there is a breach of the land sale contract, the vendor's first remedy is to retain title until the vendee performs. Pitcher v. Lauritzen, 423 P.2d 491, 494 (Utah 1967) (“**Until payment is made, or if terms are given by a contract, until compliance therewith so as to entitle the purchaser to the possession of the land, the purchaser would not be entitled to the possession . . .**”) (emphasis added). This is precisely what Nagle did. By imposing extra-contractual duties upon Nagle, by allowing the Trust to complete performance for an amount less than the parties agreed upon and without accounting for the fact that the Trust has already benefitted from the appreciation of the property, the Trial Court abused its discretion in the calculation of the offset.

E. This Court Has The Power to Order The Property to be Made Available to Secure a Judgment.

The Trust claims that the issue of making the property available to satisfy a monetary judgment is not properly before this Court. This argument is mistaken for two reasons. First, Nagle did raise before the Trial Court the issue of the Court's ability to take control of the property as part of providing a remedy to Nagle. R. 2619 at 324: 21 - 25.

Second, regardless of whether the issue was properly raised below, this Court has the inherent authority to fashion a remedy which makes the property available to satisfy a monetary judgment. Jackson v. Jackson, 617 P.2d 338, 340 (Utah 1980) (The Supreme Court

“is charged with the review of both facts and law in equity decisions, and may, where the occasion warrants, substitute its own judgment for that of the trial court and fashion its own remedy according to the demands of justice”) (emphasis added). In this regard, it bears repeating that the property was conveyed to family members of the beneficiaries of the Trust. R. 2619 at 329; 9 - 331; 7. As such, even as the Trust claims the property has been conveyed to a third-party, the Trust beneficiaries continue to have access to the property and to enjoy its benefits. Therefore, it does not offend equity to ensure that Nagle is able to obtain satisfaction of a monetary judgment, should this Court rule in his favor on the merits.

III. THE TRIAL COURT BOTH ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR IN FINDING THAT THE TRANSACTION INVOLVED 105,000 SHARES OF STOCK.

A. In Ruling That The Transaction Between Collard And Nagle Involved 105,000 Shares, The Trial Court Abused Its Discretion.

1. The Trial Court’s Ruling Violated The Mandate Rule of The Law of The Case Doctrine.

For the reasons discussed supra at p. 11, the Trial Court abused its discretion by entertaining and ruling upon argument and evidence already in the record which, the Trust argued, showed that the transaction involved 105,000 shares.

2. The Trial Court's Ruling Violated The Statute of Frauds.

The Real Estate Purchase Contract between the parties clearly stated that 55,000 shares would be conveyed to Nagle and, if they reached a value where they could realize \$85,000 during the one-year period, Nagle would convey title. Addendum, Ex. A, R. 2417. Notwithstanding this express contractual provision the Trial Court determined that “it is clear to the court that Collard owed \$85,000 to Nagle and that to pay that amount **more than 55,000 shares** would be required given the historical value of the Utah Coal shares.” Addendum, Ex. C at Findings of Fact, ¶ 6, R. 2491 (emphasis added). The Trial Court also determined. “Rather it is reasonable that Collard would transfer the additional 50,000 shares to Nagle and Nagle would simply reduce the \$85,000 owing to the amount remaining depending on the value of those 50,000 shares.” Addendum, Ex. C, Findings of Fact at ¶ 6, R. 2492.

These conclusions necessarily mean that the parties modified their agreement subsequent to Addendum 2. Indeed, the sequence of events described by the Trial Court could not have happened without some kind of modification agreed upon by the parties. This can be seen because the last writing between the parties indicated 55,000 shares would be conveyed but the next document, which the Trial Court appears to have relied on, the stock transfer record, Trial Ex. 14, states 105,000 shares were registered. There is no writing indicating the parties agreed to increase the amount of shares. Yet, the Statute of Frauds is

unequivocally clear that such modification must be in writing for purposes of this contract.

U.C.A. § 25-5-3. Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 732 (Utah 1985).

B. The Trial Court's Ruling Regarding 105,000 Shares Was Also Clearly Erroneous.

The factual record does not support the Trial Court's factual determination that the transaction between the parties involved 105,000 shares.

1. Nagle Properly Marshaled The Evidence.

The Trust does not point to any evidence which Nagle failed to marshal as part of the argument that the Trial Court's finding was clearly erroneous and which would have served as the basis for the Trial Court's decision. Rather, the Trust argues over the meaning of the evidence marshaled. The Trust also takes another opportunity to argue against the obvious conclusion that the Trial Court implicitly determined that the parties had orally, and therefore impermissibly, modified their contract.

2. The Evidence Was Insufficient to Support The Trial Court's Finding.

It was the Trust's burden as plaintiff to prove that the transaction actually involved 105,000 shares. Harris v. IES Associates, Inc., 69 P.3d 297, 310 (Utah App. 2003). The Trust did not carry this burden. In particular, it laid no foundation for the admissibility of Trial Ex. 14, the stock transfer record, as evidence that the parties agreed the transaction would involve 105,000 shares. Rather, the document merely indicated that 105,000 shares

were registered by the transfer agent on September 18, 1979. Beyond that, the Trial Court appears to have concluded that because Nagle could not prove that he did not buy the extra 50,000 shares, they must have been part of the transaction. There is simply insufficient evidence to support this conclusion.

IV. THE TRIAL COURT INCORRECTLY DENIED PRE-JUDGMENT INTEREST.

The Trial Court concluded as a matter of fact and law that the Trust did not perform and that there was a failure of a condition of the contract. Addendum, Ex. C, Findings of Fact, ¶ 12, R. 2495 - 97, Conclusions of Law, ¶ 11, R. 2506. Accordingly, Nagle was owed at least \$85,000. That amount was due and owing and demanded in January, 1981. Addendum, Ex. D, Trial Ex. 105, R. 2430 - 31.

The \$85,000 due and owing is a sum certain and the interest applied utilizing the then prevailing interest rate (8% per annum) allows the Court to determine an amount with mathematical certainty. That is all Utah law requires. L. & A Drywall, Inc. v. Whitmore Const. Co., 608 P.2d 626, 629 (Utah 1980).

The supposed uncertainty of the amount owed which the Trust points to support a denial of pre-judgment interest arises from the Trial Court's erroneous calculation of the offset, particularly the misreading of Nagle's obligations under the Contract. Once the Trial Court's abuses of discretion are remedied, it is clear that Nagle is owed an amount certain capable of being calculated with mathematical accuracy. Accordingly, if Nagle is not

entitled to recoup title to the property, he is entitled to an offset reflecting the \$85,000 plus interest.

V. THE APPEALS COURT HELD THAT ATTORNEY'S FEES WERE RECOVERABLE UNDER THE CONTRACT.

The Trust erroneously contends that attorney's fees are to be awarded in equity and not in contract. Thus, the appropriate standard of review is abuse of discretion. Trust Brief at p. 48. This contention is contrary to the Appeals Court decision. The Appeals Court expressly held:

We conclude that the trial court erred in granting summary judgment for [the Trust] and ordering title to be conveyed to [the Trust] upon payment of the mortgage. **We also conclude that the only basis for awarding attorney's fees is the contract, and leave to the Trial Court on remand to determine whether and to whom attorney's fees and costs should be awarded.**

Addendum, Ex. B at ¶ 30, R. 2429 (emphasis added).

Accordingly, the Trial Court's determination of the issue of attorney's fees is entitled to no particular deference. Englert v. Zane, 848 P.2d 165, 168 (Utah App. 1993). For the reasons set forth in Nagle's Opening Brief, Nagle is entitled to attorney's fees as the prevailing party and would be entitled to attorney's fees should he prevail on this appeal.

VI. THE TRUST'S CLAIMS OF BRIEFING INADEQUACIES ARE WITHOUT MERIT.

The Trust asks this Court to ignore almost all of Nagle's argument because of alleged briefing inadequacies. The Trust's claims are largely trivial. More importantly, they are an obvious attempt to distract this Court's attention away from the merits of Nagle's appeal and, the Trust seems to hope, to act as an inducement for this Court to avoid the thorny issues raised by this difficult case. These improper overtures should be summarily rejected and this Court should decide the case on its merits.

A. Nagle Has Not Violated U.R.A.P. 24.

The Trust's description of the alleged deficiencies in Nagle's Brief is simply wrong. Trust Brief at pp. 14 - 15. Moreover, to construct a brief in the fashion the Trust seems to suggest would lengthen and stultify the briefing process. This is directly contrary to the purposes of U.R.A.P. 24 as described in the cases cited by the Trust. See, e.g., Christensen v. Munns, 812 P.2d 69, 73 (Utah App. 1991).

Simply put, Nagle properly identified the appropriate standards of review not only in that specific section of his Brief but also in the body of the argument. Moreover, the preservation of the record citations do not require this Court "to search[] the entire lower court record." Such exaggeration amply demonstrates the smallness of the Trust's argument.

Finally, even if there are deficiencies in Nagle's Brief they do not come anywhere near to those which concerned the Appeals Court in the Christensen case nor do they come close

to those overlooked by the Appeals Court in Demetropoulos v. Vreeken, 754 P.2d 960, 962 (Utah App. 1988).³ Nagle's Brief easily satisfies this Court's standards. Indeed, the Trust understood Nagle's Brief well enough to draft a 50 page response. This is a case which calls out for a determination on the merits. It should not be resolved on the basis on a strategically motivated use of hyper-technicalities.

B. Nagle Properly Preserved Issues Before The Trial Court Where Possible.

The Trust urges this Court to ignore important arguments favoring reversal of the Trial Court on the grounds that the arguments were not properly preserved at the Trial Court level. The Trust again is not correct.

1. The Issue of The Statute of Frauds Could Not Be Preserved At Trial.

The issue of modification did not emerge until the Trial Court explained its reasoning behind its ruling in its Memorandum Decision that the transaction involved 105,000 shares. Addendum, Ex. C, Findings of Fact, ¶ 6, R. 2490 - 91. The Trust, as it has acknowledged here, did not argue that the contract had been modified. Therefore, it was not possible to

³ There, in deciding to reach merits of case, the Appeals Court stated:

We concede that not every brief filed is in strict compliance with our rules. Nor is every brief we see any more than every opinion we write, a masterpiece of legal writing. Ordinarily, however, the briefs do enable us to understand, with varying degrees of effort, what particular errors were allegedly made, where in the record those errors can be found, and why, under applicable authorities, those errors are material ones necessitating reversal or other relief.

preserve the issue of modification at the Trial Court because it simply did not come up. It was not necessary for Nagle to file a post-judgment motion challenging the Trial Court's ruling in order to raise the issue before the Appeals Court. Sittner v. Schriever, 2 P.3d 442, 445 (Utah 2000) (The general rule is that failure to raise an argument before the trial court precludes a party from raising that argument on appeal. **"However, this rule does not require a party to file a post-judgment motion before the trial court as a prerequisite to filing an appeal"**) (emphasis added). Nagle did object to the introduction of evidence concerning the 105,000 shares on other grounds. See, e.g., Nagle's Motion to Strike the Trust's Pretrial Order, R. 2378 - 79.

2. The Issue of The Trust's Judicial Admissions Was Sufficiently Preserved at The Trial Court.

In his Motion to Strike the Trust's Pretrial Order, Nagle stated: "In its November 6, 2000 Order, **which was drafted by the Trust**, the Court referred at several junctures to the 55,000 shares" (emphasis added). R. 2379. At trial, Nagle stated: "In every other pleading that the Trust has submitted, the Court's – Judge Bohling's Order, the Appeals Court Order, all make reference to 55,000." R. 2619 at 375: 8 - 10. Moreover, the Trust, through counsel, contemporaneously acknowledged that the transaction involved 55,000 shares. Addendum, Ex. E, Trial Ex. 108, R. 2477 - 78.

It is true that the term "judicial admission" was not used. However, the elements of judicial admission are present and Nagle's objection to evidence regarding 105,000 shares

was such that the specific issue of judicial admissions was reasonably discernible from the pleadings, affidavits and exhibits offered. Baldwin v. Vantage Corp., 676 P.2d 413, 415 (Utah 1984); James v. Preston, 746 P.2d 799, 801 (Utah App. 1987). Finally, the Trust has failed to respond to Nagle's argument that it should be estopped from arguing that the transaction involved more than 55,000 shares. Stevenson v. Goodson, 924 P.2d 339, 352 (Utah 1996).

3. Nagle Properly Raised The Issue of Appreciation of The Property.

The Trust contends that Nagle did not preserve for the record at the Trial Court the issue of the appreciation of the property. This is not accurate. At trial, Nagle introduced evidence, without objection, concerning the appreciated value of the property. R.2619 at 346:18-20. Nagle also requested that if the Trial Court did not allow him to recoup title to the property, that he receive the value of the property. R. 2619 at 321: 17 - 322: 8; 385: 20 - 25. Nagle also raised the issue of the value of the property in his pre-trial order. R. 2408. Moreover, the Trust raised the issue of appreciation when attempting to demonstrate that it did not behave inequitably when it conveyed the property to an affiliate. R. 2619 at 335: 2 - 10.

4. This Court May Consider These Matters Even if They Were Not Properly Preserved.

Even if these matters were not properly preserved, this Court may still consider them. This is so because “**an appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision.**” Kaiserman Associates, Inc. v. Francis Town, 977 P.2d 462, 464 (Utah 1998) (emphasis added).

In addition, this Court may consider the issues discussed in Nagle’s Brief because the Trial Court made plain errors. Theses plain errors were described in Nagle’s Opening Brief. Nagle’s Opening Brief at pp. 3-9. To prevail under a plain error analysis, an error must have occurred, that error should have been apparent to the Trial Court, and the error must be harmful. Classic Cabinets, Inc. v. All American Life Ins. Co., 978 P.2d 465, 470 (Utah App. 1999). In each instance described above--the modification of the contract, the Trust’s judicial admissions and the appreciation of the property – the Trial Court should have seen, even absent an objection from Nagle, that it was making an error in not recognizing the issues and their correct resolution. As such, Nagle is entitled to raise these issues on appeal. Classic Cabinets, 978 P.2d at 470.

VII. NAGLE’S APPEAL IS NOT FRIVOLOUS

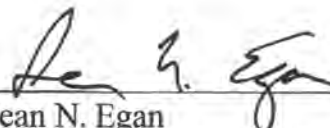
An appeal is frivolous when it has no reasonable or legal or factual basis. Barton v. Barton, 29 P.3d 13, 19 (Utah App. 2001). The length of the Trust’s Brief and the efforts it makes to substantively rebut Nagle’s legal arguments are the clearest indications that,

regardless of whether Nagle prevails, he has submitted an appeal that has a legal and factual basis. Accordingly, the Trust is not entitled to sanctions under U.R.A.P. 33 or costs under U.R.A.P. 34.

CONCLUSION

As has been amply demonstrated, the Trial Court made numerous material errors in rendering its judgment in this case. These errors, standing alone and taken together, warrant a complete reversal of the Trial Court's judgment. Nagle respectfully requests that this Court reverse the Trial Court's August 15, 2005 judgment and award title to the property to Nagle along with attorney's fees and all other costs and fees incurred in this action, including the costs of this appeal. Alternatively, if this Court determines that Nagle is not entitled to recoup title to the property but is only entitled to a monetary remedy, Nagle respectfully requests that he be awarded the full \$85,000 due and owing plus interest, including pre-judgment interest, secured by the property, along with the other relief previously requested. Either of these results will ensure the parties both provide and receive what they bargained for. In this way will equity truly be accomplished.

RESPECTFULLY SUBMITTED this 15th day of March, 2006

By 
Sean N. Egan
Attorney for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of March, 2006, a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** was served upon the persons named below, at the address set out below their name, either by mailing postage prepaid, hand-delivery, Federal Express, or by telecopying to them, a true and correct copy of said document.

Kathryn Collard, Esq.
THE LAW FIRM OF KATHRYN
COLLARD, L.C.
Attorney for Appellee/Plaintiff
9 Exchange Place, Suite 1111
Salt Lake City, UT 84111

[☒] U.S. Mail
[] Federal Express
[] Hand-Delivery
[] Telefacsimile
[] Other:

By

