

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, and individual : Brief of Appellee

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,**

Plaintiff & Appellee,

v.

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

**Case No. 20050714SC
990907648**

Defendants & Appellants.

BRIEF OF APPELLEE

**On Appeal from the Judgment of the Third District Court In and For
Salt Lake County, State Of Utah, The Honorable Bruce C. Lubeck, presiding**

**Sean N. Egan (#7191)
Kearns Bldg.-Suite 408
136 South Main
Salt Lake City, UT84101
Telephone: (801) 363-5181
Facsimile: (801) 363-5184
Attorney for Defendants-Appellants**

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
STATEMENT OF PARTIES.....	1
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES AND STANDARDS FOR APPELLATE REVIEW	1
STATEMENT OF THE CASE	2
Nature of the Case.....	2
Course of Proceedings.....	2
Disposition in the Lower Court.....	3
STATEMENT OF FACTS	4
SUMMARY OF THE ARGUMENT.....	10
ARGUMENT	14
POINT I BASED ON NAGLES' FAILURE TO COMPLY WITH UTAH R. APP. P. 24(a)(5)(A)(B), THE COURT SHOULD DECLINE REVIEW OF THE ISSUES LISTED IN POINTS I.A-C, II.A-C, III.A-D, IV AND V.A-C OF NAGLES' STATEMENT OF ISSUES	14
POINT II THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING SPECIFIC PERFORMANCE TO THE TRUST AND A CORRESPONDING CASH OFFSET TO NAGLES	16
A. In Equity, A Trial Court Does Not Abuse Its Discretion By Awarding Specific Performance To A Buyer Who Has Substantially Performed And/Or Where Other Equitable Factors Make It Inequitable To Award The Seller Specific Performance	16
B. The Trial Court Faithfully Executed The Directions of The Court Of Appeals In Awarding Specific Performance To The Trust And An Offset To Nagles.....	21
C. The Trial Court's Award Of Specific Performance To The Trust Is Not Inconsistent With The Parties' Rights And Obligations Under Their Contract and Addenda	22

TABLE OF CONTENTS cont'd.

D.	Nagles' Argument That The Trial Court's Award of Specific Performance Violated Nagles' Contractual Remedies In Case Of Breach, Is Erroneous Because Nagles' Contract Claims Are Barred By The Statute Of Limitations.....	25
E.	Nagles' Argument That No Evidence Supports The Trial Court's Finding That The Trust Made Improvements To The Property Is Contrary To The Record	27
POINT III	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CALCULATING THE AMOUNT OF THE EQUITABLE OFFSET AWARDED TO NAGLES.....	28
A.	The Issue Of Whether The Trial Court Properly Calculated Nagles' Offset Is Reviewed For Abuse Of Discretion	28
B.	The Trial Court's Equitable Calculation Of Nagles' Offset Does Not Implicate Nagles' Contractual Rights Or Remedies Which Have Been Barred By The Statute Of Limitations	28
C.	Nagles' Argument That The Trial Court Incorrectly Determined The Amount Of The Offset Because It Does Not Account For Appreciation Of The Property, Is Not Properly Before The Court And Is Contrary To Factual Findings Not Challenged By Nagles On Appeal	30
D.	Nagles' Argument That The Property Should Be Made Available To Satisfy The Payment Of The Offset Is Improperly Before The Court And The Court Should Decline Review	31
POINT IV	THE TRIAL COURT'S FINDING THAT COLLARD DELIVERED 105,000 SHARES OF STOCK TO NAGLES IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD	31
A.	The Trial Court's Factual Finding That Collard Delivered 105,000 Shares of Stock To Nagles Is Reviewed For Clear Error	31
B.	Nagles' Challenge To The Trial Court's Finding That Collard Delivered 105,000 Shares of Stock To Nagles Is Improperly Briefed.....	32
C.	The Mandate Rule Does Not Apply To The Trial Court's Factual Finding That Collard Delivered 105,000 Shares Of Stock To Nagles	32

TABLE OF CONTENTS cont'd.

D.	Nagles' Argument That The Trial Court's Finding That Collard Delivered 105,000 Shares Of Stock Violates The Statute Of Frauds Because Such Finding Purportedly Amounts To A Finding That the Parties Modified Their Agreement, Is Inadequately Briefed and Frivolous	34
E.	Nagles Fail To Demonstrate That The Trial Court's Finding That Collard Delivered 105,000 Shares of Stock to Nagles Is Clearly Erroneous By Marshaling All Of The Record Evidence Supporting This Finding.....	36
F.	Nagles' Argument That The Trust Is Bound By Its Purported Judicial Admission That Only 55,000 Shares Were Conveyed To Nagles Was Not Preserved In The Trial Court And Is Unsupported	40
G.	Nagles' Argument That The Trust Purportedly Did Not Raise The Issue Of The 105,000 Shares Until The Eve Of Trial Is Incorrect And Contrary To Trial Court's Findings Not Challenged By Nagles On Appeal	42
POINT V	NAGLES' ARGUMENT THAT THE TRIAL COURT ERRED IN CONCLUDING THAT THE TRUST ACTED EQUITABLY IN CONVEYING THE SUBJECT PROPERTY IS INADEQUATELY BRIEFED AND CONTRARY TO FINDINGS OF FACT NOT PROPERLY CHALLENGED BY NAGLES ON APPEAL	44
POINT VI	THE TRIAL COURT CORRECTLY DENIED PREJUDGMENT INTEREST ON NAGLES' EQUITABLE OFFSET BECAUSE IT COULD NOT BE CALCULATED WITH MATHEMATICAL ACCURACY AND HAD TO BE FASHIONED AT TRIAL.....	46
POINT VII	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING BOTH PARTIES ATTORNEY FEES BECAUSE NEITHER PARTY SUBSTANTIALLY PREVAILED AND THE ONLY REMEDIES GRANTED WERE IN EQUITY AND NOT UNDER THE CONTRACT	48
	REQUEST FOR DAMAGES AND FEES FOR FRIVOLOUS APPEAL.....	50
	CONCLUSION	50
	CERTIFICATE OF SERVICE.....	51

TABLE OF AUTHORITIES

STATE CASES

<u>Adair v. Bracken</u> , 745 P.2d 849 (Utah App. 1987).....	17,19
<u>Bellon v. Malnar</u> , 808 P.2d 1089 (Utah 1991).....	46,47
<u>Butler v. Wilkinson</u> , 740 P.2d 1244 (Utah 1987)	17
<u>Cahoon v. Cahoon</u> , 641 P.2d 140 (Utah 1982)	18,19
<u>Chen v. Stewart</u> , 2004 UT 82, 100 P.3d 1177.....	23
<u>Christensen v. Christensen</u> , 9 Utah 2d 102, 339 P.2d 101 (Utah 1959)	17
<u>Christensen v. Munns</u> , 812 P.2d 69 (Utah App. 1991)	14,16
<u>Collard v. Nagle</u> , 2002 UT App. 306, 57 P.3d 603	3,21,22,26,43
<u>Coalville City v. Lundgren</u> , 930 P.2d 1206 (Utah App. 1997)	46
<u>Crookston v. Fire Ins. Exch.</u> , 860 P.2d 937 (Utah 1993).....	24,28,39,45
<u>First Sec. Bank of Utah, N.A. v. Maxwell</u> , 659 P.2d 1078 (Utah 1983)	17,18
<u>Hughes v. Cafferty</u> , 2004 UT 22 89, P.3d 148.....	24, 48,49
<u>Kunzler v. O'Dell</u> , 855 P.2d 270 (Utah App. 1993).....	45,46
<u>Parduhn v. Bennett</u> , 2005 UT 22, 112 P.3d 495.....	16,20,21,23,24,26,27,28,31,36,37,38,39
<u>Reed v. Reed</u> , 806 P.2d 1182 (Utah 1991).....	35,36
<u>R.T. Nielson Co. v. Cook</u> , 2002 UT 11, 40 P.3d 1119	49
<u>State v. Benvenuto</u> , 1999 UT 60, ¶13, 983 P.2d 556	33
<u>State v. Marvin</u> , 964 P.2d 313 (Utah 1998)	40
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994)	45
<u>State v. Whittle</u> , 780 P.2d 819 (Utah 1989)	40

TABLE OF AUTHORITIES cont'd.

<u>State v. Larsen</u> , 828 P.2d 487 (Utah App. 1992), aff'd, 865 P.2d 1355 (Utah 1993)	16
<u>State ex rel C.Y. v. Yates</u> , 834 P.2d 599 (Utah App. 1992)	25
<u>Thurston v. Box Elder County</u> , 892 P.2d 1034 (Utah 1995)	16,28,49
<u>West Valley City v. Majestic Inv. Co.</u> , 818 P.2d 1311 (Ut. App. 1991)	25
<u>Wilson Supply, Inc. v. Fradan Mfg.Corp.</u> , 2002 UT 94, 54 P.3d 1177	23
<u>Woolsey v. Brown</u> 539 P.2d 1035 (Utah 1975)	18,19,20,21
<u>Young v.Young</u> , 1999 UT 38, 979 P.2d 338 (Utah 1999).....	31

UTAH CONSTITUTION

Article VIII, §1	1
Article VIII, §3	1

UTAH STATUTES

Utah Code Ann. §78-2-2	1
Utah Code Ann. §78-2a-3	1
Utah Code Ann. §25-5-8	17

OTHER LEGAL AUTHORITIES

Utah Rules of Appellate Procedure 24 (a)(9)	25
Utah Rules of Appellate Procedure 24 (a)(5)(A)(B)	10,14,15,16,30,31,32,34,44
Utah Rules of Appellate Procedure 24(b)(1)	4

TREATISES

Utah Standards of Appellate Review: Revised, 12 Utah Bar J.	45
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STATEMENT OF PARTIES

The parties in this case are all listed in the caption. In this brief, Plaintiff-Appellee Kathryn Collard, Trustee of the LeRoy Collard Trust and the Trust are collectively referred to as "the Trust." The Trust's decedent, LeRoy Collard, is referred to as "Collard." Defendants-Appellants are collectively referred to as "Nagles" and Appellants and their opening brief is referred to as "Aplnt. Br."

STATEMENT OF JURISDICTION

Jurisdiction of this appeal from a final judgment entered August 16, 2005 by the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Bruce C. Lubeck presiding, exists pursuant to §78-2-2, U.C.A. (1953), as amended, and Article VIII, §3 of the Utah Constitution.¹ Nagles filed their Notice of Appeal on August 18, 2005. The appeal was transferred to the Utah Court of Appeals on August 22, 2005, and the transfer order was vacated on September 29, 2005.

STATEMENT OF ISSUES AND STANDARDS FOR APPELLATE REVIEW

Nagles fail to comply with the requirements for the presentation of issues for appellate review under Rule 24(a)(5)(A)(B) of the Utah Rules of Appellate Procedure. Thus, the Court should decline review of the issues presented under Points IA-C, IIA-C, IIIA-D, IV, VA-C, Aplnt. Br. 1-5, 7-8. See, Argument, Point I, *infra*, at 14-16.

¹ Nagles incorrectly cite U.C.A. §78-2a-3 and Article VIII, §1, as the basis for the Court's jurisdiction. However, the jurisdiction of the Supreme Court is provided in U.C.A. §78-2-2 and Article VIII, §3 of the Utah Constitution. See, U.C.A. § 78-2-2 and Article VIII, §8, Utah Constitution, Add. 1.

STATEMENT OF THE CASE

Nature of the Case

This is Nagles' second appeal in this case. Originally, the Trust sought a declaratory judgment quieting title in the Trust of a condominium unit located in Salt Lake County, State of Utah, purchased by the Trust's decedent, LeRoy Collard, from Nagle Construction Company under a Uniform Real Estate Contract and Addendum 1 on March 30, 1978, and a subsequent undated Addendum 2. The Trust also asserted related claims for breach of contract and adverse possession. Gary and Marilyn Nagle filed an Answer and Counterclaim for breach of contract, forfeiture and foreclosure and quiet title. Nagle Construction filed an Answer but no Counterclaim.

Course of Proceedings

Nagles' first appeal followed the lower court's grant of summary judgment for the Trust on its quiet title claim and its dismissal of the Nagles' counterclaims for breach of contract, forfeiture and foreclosure, based on its finding that Nagles' counterclaims were all barred by the statute of limitations and/or the doctrine of waiver. (Order, Nov 6, 2000, R. 521-531) After Nagles failed to post the supersedeas bond ordered by the lower court as a condition of staying and superseding its orders requiring Nagles to convey title to the subject property to the Trust, Nagles conveyed title to the subject property to the Trust by Special Warranty Deed on November 21, 2000. (Order Granting Stay, 12/4/00, R. 599-602; Order Vacating Stay, 12/21/00, R. 621-626; Special Warranty Deed, dated 11/21/00, Tr. Exh. 19; Statement of Facts, ¶6, Aplt. Br. 14) On the same day Nagles conveyed the property to the Trust pursuant to the lower court's order, Nagles placed a lis pendens on

the property without notice to the trial court or the Trust. (Lis Pendens, dated 11/21/00, Tr. Exh. 18) In January, 2001, the Trust conveyed the property to a corporation owned by a family member. At that time, Nagles' lis pendens was discovered and disclosed to the buyer, who purchased the property at market value with a reasonable discount for the reduced value of the property caused by the presence of Nagles' lis pendens. (Kirk Blossch, Trial Testimony, R. 2619 at 333:10 - 335:19)

In the first appeal, the Utah Court of Appeals did not disturb the lower court's finding that Nagles' legal counterclaims for breach of contract, forfeiture, foreclosure and quiet title were barred by the statute of limitations, but held that Nagles might nonetheless be entitled to an equitable offset in some amount in the event Collard had not completely performed his obligations under the parties' contract and addenda. The Court of Appeals remanded the case to the district court for an equitable determination of these issues. (Collard v. Nagle, 2002 UT App 306, ¶¶22,27, 57 P.3d 603, Aplnt. Br. Add. B., R. 2426-2428)

Disposition In The Lower Court

The district court, Judge Bruce C. Lubeck presiding, conducted a bench trial June 7 and 8, 2005. On June 10, 2005, Judge Lubeck issued a Memorandum Decision ("MD"), determining that the Trust was entitled to specific performance and removal of Nagles' lis pendens and that Nagles were entitled to an equitable offset in the amount of \$32,550. (MD, ¶¶14-15, Aplnt. Br. Add. C, R. 2508-2509) The trial court denied Nagles' claim for prejudgment interest and both parties' claims for attorney fees. (Conclusions of Law, ¶¶13,16, MD, Aplnt. Br. Add. C, R. 2508-2510) This second appeal ensued.

STATEMENT OF FACTS

Pursuant to Utah R. App. P. 24(b)(1), the Trust disputes Nagles' Statement of Facts (Aplnt. Br. 11-15) in the following particulars:

1. Nagles' statement that, "Nagle agreed to convey title to the condominium when *the Trust* verified that the value of the stock was sufficient to cover the balance of the purchase price", (Emphasis supplied) (Statement of Facts, ¶2, Aplnt. Br. 12), is incorrect. The Trust's decedent, Collard, was the *buyer* of the property. Addendum 1 to the parties' contract specifically states "Title to premises shall be delivered to buyer when *seller [Nagles]* has verified marketability of stock..." (Emphasis supplied) (Addendum 1, Aplnt. Br. Add. A, R. 2416)

2. Nagles' statement that, "The shares of stock did not reach a value such that Nagle could have realized \$85,000 from their sale" (Statement of Facts, ¶2, Aplnt. Br. 13), is one-sided. The trial court held that, "it was not satisfied that *either party* proved, by a preponderance of the evidence, the value of the Utah Coal stock within the relevant period." (Emphasis supplied) (Findings of Fact, ¶12, MD, Aplnt. Br. Add. C, R. 2495; See also, Argument, Point IIC, *infra*, 22-24)

The Trust also disputes Nagles' omission from their Statement of Facts, of the following facts necessary to give context to the facts selectively cited by Nagles:

1. Immediately following the signing of the contract, Collard paid the down payment, began making payments on the mortgage and took possession of the property. (Findings Of Fact, ¶3, MD, Aplnt. Br. Add. C, R. 2489; Nagle Tr. Testimony, R. 2618, at 132:13-134:12)

2. Collard and his successors retained possession, paid the taxes and mortgage payments and made improvements to the property. (Findings Of Fact, ¶3, MD, Aplnt. Br. Add. C, R. 2489; Nagle Depo. 52:23-53:19, Tr. Exh. 7; Kelly James Kirch Affidavit, ¶¶1-16, Add. 5)

3. Addendum 2 is undated but was signed prior to September 18, 1979. (Findings Of Fact, ¶2, MD, Aplnt. Br. Add. C, R. 2488-2489; Addendum 2, Aplnt. Br. Add. A, R. 2417) Addendum 2 provides, in part, that if the sale of the 55,000 shares of Utah Coal stock referenced in Addendum 1 did not return \$85,000 for Nagles within the year following receipt, Collard would supply additional cash or shares to achieve that amount. However, Addendum 2 does not require such additional cash or shares to be delivered by any particular date. (Addendum 2, Id.)

4. In 1972, San Juan Mining and Developing Company changed its name to St. Mary's Glacier and in 1977 to Utah Coal and Chemicals Corporation, and in 1994 to Lifestream Technologies, but remained the same corporation. (Findings Of Fact, ¶6, MD, Aplnt. Br. Add. C, R. 2490; History of Utah Coal and Chemicals Corp., Tr. Exh. 1; Nagle's Response to Plaintiff's First Set of Interrogatories, Interrogatory No. 7, at 6-8, Add. 2; Nagle Trial Testimony, R. 2618, at 168:13-21)

5. Collard did not deliver the 55,000 shares of stock referenced in Addendum 1 to Nagles immediately after the contract was signed. Instead, these shares were included in the 105,000 shares of San Juan Mining Co. (predecessor to Utah Coal & Chemical Corp.) stock Collard delivered to Nagles some eighteen months later on September 18, 1979, via the stock transfer agent, Edda Eldredge, who registered the stock

in Gary Nagle's name on that date. (Findings Of Fact, ¶6, MD, Aplnt. Br. Add. C, R. 2490; Stock Transfer Record, Tr. Exh. 14, Add. 3; Nagle Tr. Testimony, R. 2618, at 155:14-155:25; 168:22-169:7; 181:22-182:2)

6. The microfiche stock trading records of Wilson-Davis for the week prior to September 18, 1979, showed Utah Coal stock trading at between \$.75 and \$1.22 a share. (Findings Of Fact, ¶12, MD, Aplnt. Br. Add. C, R. 2500; Trades for 9/13/79, 9/14/79 and 9/17/79, Tr. Exh. 34)

7. During the course of this action, Nagles initially denied receiving any stock from Collard in their Answers and Counterclaim and in Gary Nagle's Answer to Plaintiff's Request for Admissions.² (Findings Of Fact, ¶6, MD, Aplnt. Br. Add. C, R. 2491; Answer and Counterclaim, ¶5, Tr. Exh. 4, and Answer of Nagle Construction, ¶6, Tr. Exh. 5, denying Complaint, ¶10, Tr. Exh. 3, alleging, "Collard tendered the Stock to Nagle pursuant to the Contract.")

8. Subsequently, in his answers to Plaintiff's First Set of Interrogatories, Gary Nagle admitted receiving 105,000 shares of stock in San Juan Mining and Developing Co. from Collard, and further admitted that, "The San Juan Mining and Developing Co. stock was to be sold for \$85,000", the amount due under Addendum 2. (Nagles' Response To Plaintiffs' First Set of Interrogatories, Interrogatory No. 7, at 6-8, Add. 2)

9. Thereafter, in his deposition, Gary Nagle claimed that he had purchased

² The lower court inadvertently referenced Nagle's Answer to Interrogatories as one of Nagle's denials that he had ever received stock from Collard. The correct reference is Nagle's Answer to Plaintiff's Request for Admissions. (Findings Of Fact, ¶6, MD, Aplnt. Br. Add. C, R. 2491; Nagle's Answer to Request for Admissions, Request No. 1, Tr. Exh. 13 at 2)

50,000 of the 105,000 shares he admitted receiving from Collard on September 18, 1979, for \$10,000. (Nagle Depo. 20:9-21:3, Tr. Exh. 7)

10. During the trial of this action, Nagle was asked why he would have paid Collard \$10,000 for the 50,000 shares of stock rather than take the stock against the \$85,000 Collard owed under Addendum 2 and reduce the amount of Collard's debt. Nagle responded that, "I wanted the stock." (Findings Of Fact, ¶6, MD, Aplnt. Br. Add. C, R. 2491; Gary Nagle Trial Testimony, R. 2618, at 177:17-180:1, 180:15-19)

11. Gary Nagle had no documents to support his claim that he paid Collard \$10,000 for 50,000 shares of the 105,000 shares Collard delivered to him on September 18, 1979. (Findings Of Fact, ¶6, MD, Aplnt. Br. Add. C, R. 2492; Nagle Trial Testimony, R. 2618, at 178:23-181:5).

12. Gary Nagle did not sell any of the 105,000 shares of stock he received from Collard on September 18, 1979, at any time during the following year. Although Nagles' accountant contacted a broker at Wilson-Davis about selling the stock, Nagle could not sell the shares without delivering them to stockbroker Wilson-Davis, because he was not a regular customer. Gary Nagle never delivered the stock or attempted to sell it with a "limit order" that would have only allowed the stock to be sold in the event its sale would have realized \$85,000 for Nagles. (Findings Of Fact, ¶7, MD, Aplnt. Br. Add. C, R. 2492-2493; Nagle Tr. Testimony, R.2618, at 182:3-12; Nagle's Answer to Interrogatories, Interrogatory No. 7, at 6-8, Add. 2; Rex Trial Testimony, R. 2618, at 236:6-237:12; Earl Tr. Testimony, R.2618, at 98:25-99:17; Barkley Tr. Testimony, R. 2618, at 267:11-268:25)

13. On December 13, 1979, Gary Nagle purchased an additional 60,000 shares of Utah Coal stock, through Johnson-Bowles, a brokerage firm, in an independent transaction. (Findings Of Fact, ¶7, MD, Aplnt. Br. Add. C, R. 2493; Nagle's Answer to Interrogatories, Interrogatory No. 7, at 6-8, Add. 2; Nagle Tr. Testimony, R. 2619, at 165:17-166:23, 180:11-25)

14. Due to the passage of time and the lack of records, including records regarding the volume of the stock sold during the relevant period, the value that the stock reached between September 18, 1979 and September 18, 1980 is not readily ascertainable or calculable. (See generally, Findings Of Fact, ¶12, MD, R. 2494-2501, particularly, R. 2599 ("Unfortunately, the value of the stock is not in fact, and the court finds it to be a fact and a conclusion of law, readily ascertainable or calculable."); R. 2495 ("The court was not satisfied that either party proved, by a preponderance of the evidence, the value of the Utah Coal stock within the relevant time."); R. 2497 ("The court still cannot, however, conclude that the value of the stock achieved or did not achieve the value of \$.81 for a variety of reasons."))

15. Nagles did not produce any evidence at trial that they made any written request to Collard for any additional stock or cash, or advised Collard of the amount of any deficiency in the stock conveyed by Collard to pay the balance due under Addendum 2, during the year following their receipt of the stock. In the letter of January 13, 1981, Nagles did not notify Collard of the amount of any such deficiency necessary to effect a foreclosure or forfeiture of Collard's rights under the contract. (Findings Of Fact, ¶8, MD, Aplnt. Br. Add. C, R. 2493; Lloyd Letter, dated 1/13/81, Tr. Exh. 17)

16. Although Nagles threatened to take legal action against Collard for his purported breach of Addendum 2 in the letter of January 13, 1981, Nagles never initiated any legal claim against Collard until Gary and Marilyn asserted such claims in their Counterclaim more than 18 years later. (Nagle Depo. 50:3-12, Tr. Exh. 7; Findings Of Fact, ¶9, MD, Aplnt. Br. Add. C, R. 2493-2494; Lloyd Letter dated 1/13/81, Tr. Exh. 105; Kathryn Collard Letters dated 1/22/81 and 1/23/81, Tr. Exhs. 108-109; Answer and Counterclaim, ¶5, Tr. Exh. 4)

17. At no time prior to filing their Counterclaim in this action, did Nagles return the down payment, mortgage payments or stock they received from Collard and the Trust in fulfillment of the parties' contract and addenda. (Nagle Depo. at 45:20-25, Tr. Exh. 7; Check from Merrill Title To Wells Fargo paying off balance of Nagle Construction's mortgage, dated 1/22/01, Tr. Exh. 26).

18. After the Trust filed this action on July 26, 1999, (Complaint, at 6, Tr. Exh. 3), Gary Nagle executed an Assignment of Contract purporting to assign Nagle Construction's rights, but none of its liabilities, under its contract and addenda with Collard, to Gary Nagle, retroactive to March 30, 1978. (Findings Of Fact, ¶11, MD, Aplnt. Br. Add. C, R. 2494; Assignment of Contract, Tr. Exh. 10)

19. Collard transferred his interest in the subject property to the Trust by warranty deed on January 3, 1997. Collard passed away on February 8, 1997. (Findings Of Fact, ¶10, MD, Aplnt. Br. Add. C, R. 2494; Complaint, Tr. Exh. 3, ¶16, 19; Nagles' Pretrial Order, ¶V, Uncontested Facts, ¶m, R. 2408)

20. The Trust completed the payment of the mortgage obligation to FSB on January 1, 2001. (Check from Merrill Title Company, Tr. Exh. 26)

21. In 1999, the property was appraised for \$252,000. In January 2001, having received title to the property by Special Warranty Deed, the Trust negotiated a sale of the property to KNB, a corporation owned by a family relation, Kirk Blosch, and Nagles' lis pendens was discovered at that time. Due to the presence of Nagles' lis pendens, which was disclosed to KNB, the Trust discounted the sale price to approximately \$230,000. Because Nagles' lis pendens is still on the property, KNB has not been able to sell the property and has only been able to lease it. (Findings Of Fact, ¶10, MD, Aplnt. Br. Add. C, R. 2494; Appraisal, Tr. Exh. 110; Special Warranty Deed, Tr. Exh. 19; Closing Statement, Sale to Kirk N. Blosch, Tr. Exh. 111; Lis Pendens, Tr. Exh. 18; Kirk Blosch Trial Testimony, R. 2619, at 331:2-334:19)

SUMMARY OF THE ARGUMENT

POINT I The Court Should Decline Review Of The Issues Listed In Points I.A-C, II.A-C, III.A-D, IV AND V.A-C Of Nagles' Statement Of Issues Based On Nagles' Failure To Comply With Utah R. App. P. 24(A)(5)(A)(B)

Nagles' challenges to the trial court's equitable determination awarding the Trust specific performance and removal of Nagles' lis pendens and awarding Nagles a \$32,550 cash offset to be paid by the Trust, are inadequately briefed. Nagles' "Statement of The Issues For Review" (Aplnt. Br. 1-9) does not comply with Utah R. App. P. 24 (a)(5)(A)(B), in that Nagles fail to delineate for each issue presented for review: (1) the applicable standard of appellate review with supporting authority; (2) citation to the

record showing that the issue was preserved in the trial court; or (3) a statement of grounds for seeking review of an issue not presented in the trial court. Additionally, some of the issues presented in Nagles' argument are not presented in Nagles' Statement of Issues. Accordingly, the Court should decline review of these issues.

POINT II The Trial Court Did Not Abuse Its Discretion In Awarding Specific Performance To The Trust And A Cash Offset To Nagles

The fact that Collard did not fully perform did not preclude the Court from awarding the Trust specific performance where the court found that Collard substantially performed, that Nagles complicated Collard's performance such that it would inequitable for Nagles to recoup the property, and that balanced with other relevant evidence, the most equitable solution to resolve the parties' claims and put an end to the litigation, was to award the Trust specific performance and removal of Nagles' lis pendens and to order the Trust to pay Nagles a cash offset to reflect any shortfall in payment to Nagles.

Contrary to Nagles' arguments, the trial court's equitable determination did not violate the Court of Appeals' instructions on remand or any of Nagles' statutorily barred rights under the parties' agreements.

POINT III The Trial Court Did Not Abuse Its Equitable Discretion In Calculating Nagles' Offset

The trial court did not abuse its discretion in calculating the amount of the equitable offset it ordered the Trust to pay Nagles based on the subsidiary findings of fact, some of which are not challenged by Nagles, and others which Nagles fail to properly challenge by marshaling the evidence to support them. Additionally, the trial court's calculation of the amount of the offset did not implicate Nagles' legal rights under

the contract which had been previously barred by the statute of limitations, or violate Nagles' rights because the amount established did not include appreciation of the property. Finally, Nagles' argument that the property should be made available to satisfy payment of the offset is inadequately briefed such that the Court should decline review.

POINT IV The Trial Court's Finding That Collard Delivered 105,000 Shares Of Stock To Nagles Is Supported By Substantial Evidence In The Record

Nagles fail to properly marshal the evidence supporting this finding to show that it is clearly erroneous, and the finding is supported by substantial evidence in the record. The finding is not contrary to the mandate rule, because neither the trial court, prior to the first appeal, nor the Court of Appeals in the course of the first appeal, made any findings relative to the number of shares of stock Collard delivered to Nagles under Addendum 2. Nagles' arguments that this factual finding violates the Statute of Frauds, is contrary to judicial admissions of the Trust, and that the Trust failed to assert the issue until the eve of trial, are factually and legally unsupported and should be rejected.

POINT V Nagles' Argument That The Trial Court Erred In Concluding That The Trust Acted Equitably In Conveying The Subject Property, Is Inadequately Briefed And Contrary To Findings Of Fact Not Properly Challenged By Nagles On Appeal

Nagles' argument on this point is inadequately briefed because Nagles fail to delineate the appropriate standard for review for the issue and argue that the issue is one of law reviewed for correctness when the issue is actually a mixed issue of law and fact reviewed for abuse of discretion. Nagles fail to properly challenge trial court's subsidiary factual determinations, or demonstrate that they collectively do not provide a rational basis for the court's determination. Accordingly, the

Court should hold that the trial court did not abuse its discretion in making the challenged finding.

POINT VI The Trial Court Correctly Denied Nagles An Award Of Prejudgment Interest

The trial court did not abuse its discretion in declining to award Nagles prejudgment interest based on its findings that the equitable offset it fashioned could not be calculated with mathematical certainty and that the amount of the offset could not be determined until the time of trial. The trial based this determination on findings of fact that Nagles fail to properly challenge on appeal. Additionally, Nagles' argument that they never received any payment under Addendum 2, such that they are purportedly entitled to the full amount of the balance due under Addendum 2, is contrary to the trial court's findings of fact which Nagles fail to properly challenge by marshaling the record evidence supporting these findings.

POINT VII The Trial Court Did Not Err In Denying Nagles Attorney's Fees

Nagles' argument that the trial court improperly denied them attorney fees, is inadequately briefed. The argument assumes that the issue is reviewed under a correction of error standard, rather than the abuse of discretion standard that applies to a trial court's determination of attorney fees in equity. Nagles fail to demonstrate that the trial court abused its discretion in denying Nagles attorney fees based on the trial court's determination that neither party substantially prevailed, and that the only remedies

granted were in equity and not under the parties' contract. Thus, the Court should affirm this equitable determination.

ARGUMENT

POINT I BASED ON NAGLES' FAILURE TO COMPLY WITH UTAH R. APP. P. 24(a)(5)(A)(B), THE COURT SHOULD DECLINE REVIEW OF THE ISSUES LISTED IN POINTS I.A-C, II.A-C, III.A-D, IV AND V.A-C OF NAGLES' STATEMENT OF ISSUES

In their Statement of Issues, Nagles repeatedly fail to comply with Rule 24(a)(5)(A)(B) of the Utah Rules of Appellate Procedure. The Rule provides that an appellant's brief must contain, inter alia,

- (a)(5) A statement of the issues presented for review, including *for each issue* the standard of appellate review with supporting authority; and
- (a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or
- (a)(5)(B) a statement of the grounds for seeking review of an issue not preserved in the trial court. (Emphasis supplied)

The Rule requires attorneys to identify the standard of review for each issue appealed. "The standard of review requirement in Subdivision (a)(5) should not be ignored. The purpose of the requirement ... is to focus the briefs, thus promoting more accuracy and efficiency in the processing of appeals." Christensen v. Munns, 812 P.2d 69, 73 (Utah App. 1992)

Instead of separately listing each issue for review followed by the appropriate standard of appellate review with supporting authority for each issue, as required by Utah R. App. P. 24(a)(5), Nagles lump issues listed under Roman numeral headings together with issues listed under alphabetical headings and fail to state the applicable standard of

appellate review for each issue. (Statement of Issues and Standard of Appellate Review, Points I.A-C, II.A-C, III.A-D, IV, V.A-C, Aplnt. Br. 1-5, 7-8)

Following each group of issues, Nagles provide a litany of the various standards of appellate review, including the standards for review of a trial court's factual findings, legal findings, findings based on the trial court's discretion and review based on plain error, leaving it to the Court and Appellee to divine which standard of appellate review Appellant believes is applicable to each issue. In several instances, Nagles' statement of an issue improperly conflates legal, factual and discretionary determinations of the trial court which have different standards of appellate review, instead of listing each issue separately accompanied by its applicable standard of appellate review. (Point I.A-C, Point II.A-C, Point III.A-D, Point IV, Point V.A-C, Aplnt. Br. 1-5, 7-8) Because Nagles fail to distinguish the appropriate standard of appellate review for each issue listed for review, they also fail to apply the standard of review in the analysis of the issues set forth in their arguments, rendering them insufficient. (Aplnt. Br. 21-49)

Nagles also fail to provide separate citations for each issue contained in the various groups of issues, demonstrating that each issue was preserved in the trial court, as required under Utah R. App. P. 24(a)(5)(A), again casting upon the Court and Appellee the burden of searching the entire lower court record to determine whether each of the listed issues was preserved for appeal in the lower court. (Point I.A-C, Point II.A-C, Point III.A-D, Point IV, Point V.A-C, Aplnt. Br. 1-5, 7-8) The foregoing tactics are improper. "A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of

argument and research." State v. Larsen, 828 P.2d 487, 491 (Utah App. 1992), aff'd 865 P.2d 1355 (Utah 1993) (internal citations omitted).

Based on Nagles' failure to properly delineate the issues for appellate review as required pursuant to Utah R. App. P. 24(a)(5)(A)(B), the Court should decline review of the issues listed under Points I.A-C, II.A-C, III.A-D, IV, V.A-C of Nagles' Statement of Issues for Review. Aplnt. Br. 1-5, 7-8. Christensen v. Munns, 812 P.2d 69, 73 (Utah App. 1991) ("Due to appellant's lack of compliance with our rules on this issue, we assume the correctness of the trial court's judgment.")

Without waiving and expressly preserving this argument to the referenced issues, the Trust also responds to Nagles' arguments on other procedural grounds and the merits.

**POINT II THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN
AWARDING SPECIFIC PERFORMANCE TO THE TRUST
AND A CORRESPONDING CASH OFFSET TO NAGLES**

**A. In Equity, A Trial Court Does Not Abuse Its Discretion By Awarding
Specific Performance To A Buyer Who Has Substantially Performed
And/Or Where Other Equitable Factors Make It Inequitable To
Award The Seller Specific Performance**

The issue of whether a trial court properly fashioned an equitable remedy is reviewed under an abuse of discretion standard. Parduhn v. Bennett, 2005 UT 22, ¶41; Thurston v. Box Elder County, 892 P.2d 1034, 1041 (Utah 1995) ("A trial court is accorded considerable latitude and discretion in applying and formulating an equitable remedy.")

Nagles argue that because the trial court found there was insufficient evidence to prove that the 105,000 shares of stock Collard delivered to Nagles could have been sold

to achieve a value of \$.81 per share during the year following its delivery to Nagles, that Collard "did not perform in the manner required by the express terms of the Real Estate Contract or in the manner set forth by the Appellate Court." (Aplnt. Br. 21-24) Thus, Nagles argue, the trial court was legally precluded from awarding the Trust specific performance. This argument is incorrect.

In an equity action, a trial court has discretion to award specific performance to a purchaser of real property where the trial court determines the purchaser has substantially performed, and/or that other equitable considerations, including conduct of the seller complicating the buyer's performance, or waiving the buyer's strict performance, persuade the trial court equity requires the award of specific performance to the buyer. See, e.g., Christensen v. Christensen, 9 Utah 2d 102, 339 P.2d 101, 103-104 (Utah 1959), (affirming trial court's award of specific performance to the buyer under an oral contract where plaintiff buyer had partially performed³); Adair v. Bracken, 745 P.2d 849, 852-853, (Utah App. 1987) (seller's notice failing to state amount of deficiency owed was fatal to attempt to terminate buyer's rights under contract); Butler v. Wilkinson, 740 P.2d 1244, 1257 (Utah 1987) (notice necessary to forfeit interests of buyer under uniform real estate contract would include notice of the exact amount of default); First Sec. Bank of Utah, N.A. v. Maxwell, 659 P.2d 1078, 1081 (Utah 1983) (person to whom tender is

³ Under Utah law, the Statute Of Frauds permits specific performance in the case of an oral contract, where a party has partially or substantially performed. §25-5-8, U.C.A. (1953), as amended, expressly provides that, "Nothing in this chapter shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof."

made must, at the time, specify the objections to it, or they are waived);⁴ Cahoon v. Cahoon, 641 P.2d 140, 144 (Utah 1982) (parties to a contract are obliged to proceed in good faith and one party cannot make it impossible or difficult for another to perform and then invoke the others non-performance as a defense); Woolsey v. Brown, 539 P.2d 1035, 1038-1039 (Utah 1975) (equity will not permit party to accept performance for many years and then claim terms contrary to the evidence as a basis to avoid specific performance, although offset may be awarded)

Although Nagles cite several cases for the proposition that a party seeking specific performance under a contract must make an unconditional tender of the performance required by the agreement (Aplnt. Br. 22), the trial court specifically found that Collard made an unconditional tender of the performance required pursuant to the contract. The trial court found that Collard or his successors tendered performance by making the down payment and paying off Nagles' mortgage although the bank would not permit Collard to formally assume the mortgage due to a prior bankruptcy. The trial court found that the parties agreed under Addendum 2 that Collard would pay an additional \$50,000 for the property in lieu of formally assuming Nagles' mortgage. The trial court found that Collard made a good faith effort to perform his obligations under Addendum 2 by

⁴ Section 78-27-3, Utah Code Ann. (1953), as amended, also provides that, "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument or property, or he is deemed to have waived it; and, if the objection is to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amounts, terms or kind which he requires, or be precluded from objection afterwards."

delivering 105,000 shares of stock to Nagles in a single delivery on September 18, 1979, to pay off the higher \$85,000 balance due under Addendum 2. (Findings of Fact, ¶¶3, 6, 10, MD, R. 2489, 2490-2942; See also, Stock Transfer, Add. 3; Nagles' Answers To Interrogatories, Interrogatory No. 7, at 6-8, Tr. Exh 11, Add. 2)

Based on the foregoing factual findings, the trial court concluded that Collard's tender of 105,000 shares of stock to Nagles was based on a good faith belief that the stock would generate at least \$95,000, based on the recent selling price of the stock, such that Collard's failures to perform "were in degree rather than a failure to perform or partially perform." (Conclusions of Law, ¶¶ 3-4, MD, R. 2501-2504)

The trial court also made factual findings that Nagles complicated Collard's performance by: (1) not making reasonable efforts to determine the value of the stock; (2) by speculating in the stock as evidenced by Nagles' purchase of additional Utah Coal stock in unrelated transactions; (3) by not preparing to sell the stock; and (4) by failing to give Collard adequate notice of any claimed deficiency in the amount of stock to pay the balance due under Addendum 2 at any time following Nagles' receipt of the stock. (Findings of Fact, ¶ 6-9, MD, Aplnt. Br. Add. C, R. 2492-2494; See also, Adair v. Bracken, 745 P.2d 849, 852-853, (Utah App. 1987) (Seller's notice failing to state amount of deficiency owed was fatal to attempt to terminate buyer's rights under contract); Cahoon v. Cahoon, 641 P.2d 140, 144 (Utah 1982) (Parties to a contract are obliged to proceed in good faith and one party cannot make it impossible or difficult for another to perform and then invoke the others non-performance as a defense); Woolsey v. Brown, 539 P.2d 1035, 1038-1039 (Utah 1975) (Equity will not permit party to accept

performance for many years and then claim terms contrary to the evidence as a basis to avoid specific performance, although offset may be awarded)

Here, the trial court also found that in addition to substantially performing in the particulars described above, Collard and/or his successors had entered and continuously remained in possession of the property from the time of its purchase until the present, and paid the taxes on the property and made improvements thereto. (Findings of Fact, ¶¶ 3, Aplnt. Br. Add. C, R. 2489) The trial court also considered that the fact that the Trust had previously acquired title to the property via a Special Warranty Deed from Nagles after Nagles failed to supersede and stay the lower court's orders requiring Nagles to convey the property, and that title had passed to a corporation owned by a family relative, for a price the trial court considered reasonable under the circumstances. (Findings of Fact, ¶¶ 10, 14, MD, Aplnt. Br. Add. C, R. 2494, 2501)

Balancing the equitable factors before it, the trial court reasonably concluded that it would not be equitable for Nagles to regain title to the property and awarded specific performance to the Trust and an offset to Nagles. (Conclusions of Law, ¶¶ 3-4, MD, R. 2501-2504).

Because Nagles fail to demonstrate that the foregoing findings of fact are clearly erroneous, or do not otherwise provide a reasonable basis for the trial court's equitable determination, Nagles' argument that the trial court abused its discretion in awarding specific performance to the Trust based on such findings, is unsupported and must be rejected. (Parduhn, *supra*, ¶39: "Because we defer both to the district court's findings of

fact and to its balancing of those facts, we will also defer to its conclusion that it had a sufficient factual basis for reaching an equitable distribution.")

B. The Trial Court Faithfully Executed The Directions of The Court of Appeals In Awarding Specific Performance To The Trust And An Offset To Nagles

Contrary to Nagles' argument (Aplnt. Br. 22-23), the Court of Appeals did not hold that the trial court could not equitably award the Trust specific performance on remand. Instead, the Court of Appeals indicated that the Trust could be awarded specific performance in the event that: (1) the trial court found that that the Trust had fully performed, in which case "Seller is not entitled to further relief"; or (2) 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 to Nagles in an "amount of the shortfall buyer was obligated to pay in cash or additional shares..." (Collard v. Nagle, supra, at ¶¶ 26-27, Aplnt. Br. Add. B, R. 2427-2428). Thus, Collard's failure to fully perform did not preclude the trial court from awarding the Trust specific performance. Woolsey v. Brown, 539 P.2d 1035, 1038-1039 (Utah 1975), (awarding buyer specific performance and requiring buyer to pay offset to seller).

Although the trial court held that the Trust did not produce sufficient evidence to prove, by a preponderance of the evidence, that the stock Collard delivered to Nagles achieved \$85,000 in value during the year after its receipt, (Aplnt. Br. 23), this finding did not preclude the trial court from awarding the Trust specific performance. Under the Court of Appeals' instructions on remand discussed above, the trial court had discretion

to award the Trust specific performance and require the Trust to pay a cash offset to Nagles and that is precisely what the trial court did.

Nagles' arguments that, "Nagles are entitled to recoup title to the property because that was the status of the parties until the Trial Court's November, 2000, Order requiring Nagle to convey title to the Trust" and that "That Order was vacated in its entirety by the Appeals Court", (Aplnt. Br. 23-24), must be rejected. These arguments are inadequately briefed in that they contains no citations to the record, and are unsupported by any legal authority or analysis. Additionally, the latter argument fails to acknowledge that the Court of Appeals did not disturb the lower court's finding on summary judgment that Nagles' legal claims under the parties' contract and addenda were barred by the applicable statute of limitations. (Collard v. Nagle, ¶22, Aplnt. Br. Add. B, R. 2426)

C. The Trial Court's Award Of Specific Performance To The Trust Is Not Inconsistent With The Parties' Rights And Obligations Under Their Contract and Addenda

Nagles argue that the trial court abused its discretion in awarding specific performance to the Trust, because such determination purportedly imposed duties on Nagles they did not have under the parties' contract and addenda. This argument, in turn, is based on Nagles' unsupported contention they had no duty to sell the stock delivered under Addendum 2, because the stock purportedly never reached a value where it could have been sold to generate the \$85,000 required to pay the balance owing under Addendum 2 during the year following its delivery to Nagles. (Aplnt. Br. 24-27)

This argument is untenable for at least three reasons.

First, Nagles' argument that that had no duty to sell the stock delivered by Collard, assumes a fact on which Nagles, not the Trust, bore the burden of proof at trial, namely that the value of the stock *never* achieved a value of \$85,000 during the relevant period, a burden which the trial court held that Nagles failed to carry. Specifically, the trial court found that, "The court was not satisfied that *either party* proved, by a preponderance of the evidence, the value of the Utah Coal stock within the relevant time." (Emphasis supplied) (Findings of Fact, ¶12, MD, Aplnt. Br. Add. C, R. 2495) Because Nagles never proved the value of the stock at any time during the relevant period, then they did not carry their burden to show that they had no duty to sell the stock on the basis that it would not realize \$85,000.

Second, Nagles do not challenge the trial court's factual finding that they failed to prove the value of the stock during the relevant time frame. To do so, Nagles are required to marshal the evidence to supporting the finding, and then show that such evidence is legally insufficient to support the finding when viewed in the light most favorable to the trial court's findings. In Parduhn v. Bennett, 2005 UT 22, ¶39, 112 P.3d 495, this Court discusses the marshalling requirement:

An appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Chen v. Stewart, 2004 UT 82, ¶76, 100 P.3d 1177 (internal citations omitted). An appellant "must present in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." Id. at ¶77 (internal citations omitted.) Moreover, an appellant may not simply review the evidence presented at trial, nor ... "re-argue the factual case ... presented in the trial court." Id..... If an appellant argues that no evidence supports a factual finding, the burden to marshal does not then shift to the appellee; rather, the

appellee may prove that appellant did not meet [the] marshaling burden, by presenting a "scintilla" of evidence supporting the district court's finding. Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶22, 54 P.3d 1177.

Because Nagles wholly fail to marshal the record evidence that supports the trial court's finding that neither party proved the value of the stock during the relevant period, Nagle's assertion that he had no duty to sell the stock because it purportedly never reached a value of \$85,000 during the relevant period, is contrary to this unchallenged finding, and is legally insufficient to demonstrate that the trial court abused its discretion in awarding the trust specific performance. Parduhn v. Bennett, 2005 UT 22, at ¶41, 112 P.3d 495 ("Because we have concluded that the facts found by the district court are not clearly erroneous, we need only determine whether the district court abused its discretion in balancing the facts and equities as it did. Hughes v. Cafferty, 2004 UT 22, ¶20, 89 P.3d 148)"

Third, even assuming arguendo that the trial court improperly relied on its factual finding that Nagles' failure to make any reasonable attempt to sell the stock delivered by Collard during the year following its receipt, in determining to award the Trust specific performance, Nagles fail to demonstrate that the trial court's alternative findings of fact concerning Collard's substantial performance of the contract and Nagles' conduct in complicating Collard's performance, do not provide a "rational basis" for its award of specific performance to the Trust. (Findings of Fact, ¶¶1-5, 7-14, MD, Aplnt. Br. Add. C, R. 2488-2500) Accordingly, the Court should conclude that the trial court did not abuse its discretion in awarding the Trust specific performance and Nagles a cash offset and affirm the trial court's decision. Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah

1993) ("A trial court abuses its discretion if there is "no reasonable basis for the decision")

D. Nagles' Argument That The Trial Court's Award of Specific Performance Violated Nagles' Contractual Remedies In Case Of Breach, Is Erroneous Because Nagles' Contract Claims Are Barred By The Statute Of Limitations

Nagles argue that the trial court abused its discretion in awarding the Trust specific performance because it purportedly "ignored well settled rules of construction and equity." (Aplnt. Br. 26-28) This argument is improperly briefed. Although citing numerous general rules of contract interpretation, Nagles' argument is devoid of appropriate references to the trial court's decision or record evidence, demonstrating that the trial court incorrectly applied such rules. "Extensive quotations from numerous case authorities and treatises, while helpful, cannot substitute for the development of appellate arguments explicitly tied to the record." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 (Utah App. 1991).

Similarly, Nagles' argument that he is entitled to recoup the property "because that was the status of the parties until the Trial Court's November, 2000 Order", which Nagles assert was "vacated in its entirety by the Appeals Court", Aplnt. Br. 23- 24, is also improperly briefed in that it is unsupported by any argument or citation to the record as required pursuant to Utah R. App. P. 24 (a)(9).

Because the foregoing arguments are inadequately briefed, the Court should decline review. State ex rel C.Y. v. Yates, 834 P.2d 599, 602 (Utah App. 1992) (Court declined to consider argument that was not adequately briefed).

Nagles do not challenge the trial court's factual findings that the Trust consistently occupied the property, and paid off Nagles' mortgage. Instead, Nagles contend the trial court abused its discretion in relying on such findings in awarding the Trust specific performance because, in Nagles' view, such findings ignore Nagles' purported right to treat Collard as a tenant at will following his purported breach of Addendum 2. (Aplnt. Br. 27-29) This argument is frivolous because in making an equitable determination, a trial court is entitled to balance "the relative significance of facts and applicable law to achieve a fair and equitable relief." Parduhn, supra, at ¶23. Facts regarding a buyer's performance under a contract to purchase property, are relevant and routinely considered by a trial court sitting in equity, in determining whether a buyer is entitled to an equitable award of specific performance.

Although Nagles argue that the trial court's award of specific performance to the Trust unlawfully deprives them of a contractual right to retake the property and treat Collard as a tenant at will for a breach of the contract (Aplnt. Br. 27-29), the Court of Appeals agreed that Nagles' rights and legal remedies under the contract were barred by the statute of limitations. The Court of Appeals determined that Collard should not be awarded specific performance on summary judgment due to a factual issue as to the value of the stock conveyed to Nagle, and held that if it did not achieve \$85,000, Nagles would only be entitled to an "offset in the amount of the shortfall," not that Nagles would be entitled to assert their legal rights against Collard under the contract. (Collard v. Nagle, ¶¶22,27, Aplnt. Br. Add. B, R. 2426-2428)

Additionally, Nagles' argument is contrary to the trial court's factual finding that Nagles failed to provide Collard with sufficient notice to invoke Nagles' rights under the contract in the event of a breach by Collard. (Findings of Fact, ¶8, MD, Aplnt. Br. Add. C, R. 4293) Nagles fail to challenge this factual finding by marshaling the evidence to support it. Thus, the Court should assume this finding is correct and reject Nagles' argument that the court's award of specific performance to the Trust violates Nagles' rights under the parties' contract.

E. Nagles' Argument That No Evidence Supports The Trial Court's Finding That The Trust Made Improvements To The Property Is Contrary To The Record

Nagles argue that the trial court's finding that Collard and his successors made improvements to the property, is not supported by any evidence "about what improvements were made on the property or what value they had, especially in the years before the Trust filed suit." (Aplnt. Br. 30). This is incorrect. The affidavit of Collard's daughter, Kelly James Kirch, filed as Exhibit H to the Trust's motion for summary judgment, discusses the improvements made to the property prior to the filing of this action. (Kirch Affidavit, ¶¶ 9-11, Add. 5, R. 185-186); See also, Parduhn v. Bennett, 112 P.3d 495, 2005 UT 22, at ¶25 ("If an appellant argues that no evidence supports a factual finding, the burden to marshal does not shift to appellee, rather the appellee may prove that the appellant did not meet [their] marshalling burden by presenting a "scintilla" of evidence supporting the district court's finding.")

Because none of Nagles' arguments demonstrate that the trial court abused its broad discretion in awarding the Trust specific performance and awarding Nagles a cash

offset, the trial court's equitable determination should be affirmed. Parduhn, supra, at ¶25 ("We will affirm a district court's exercise of that discretion unless the district court abused it.")

**POINT III THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN CALCULATING THE AMOUNT OF THE EQUITABLE
OFFSET AWARDED TO NAGLES**

A. The Issue Of Whether The Trial Court Properly Calculated Nagles' Offset Is Reviewed For Abuse Of Discretion

The issue of whether a trial court properly fashioned an equitable remedy is reviewed under an abuse of discretion standard. Parduhn v. Bennett, supra, at ¶41; Thurston v. Box Elder County, 892 P.2d 1034, 1041(Utah 1995). A trial court abuses its discretion if there is "no reasonable basis for the decision." Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993).

B. The Trial Court's Equitable Calculation Of Nagles' Offset Does Not Implicate Nagles' Contractual Rights Or Remedies Which Have Been Barred By The Statute Of Limitations

Nagles argue that the trial court abused its discretion in calculating the amount of the \$32,550⁵ offset it ordered the Trust to pay Nagles, "based on what the Trust owed Nagle (\$85,000) and what Nagle could have sold the shares he received for to make up the difference." This argument proceeds on Nagles' prior, unsupported argument that he had no duty to sell the stock under the contract because the stock purportedly never achieved a value of \$85,000 during the relevant period.⁶ (Aplnt. Br. 31-32)

⁵ There is a typographical error in the lower court's Conclusions of Law, MD, ¶4, R. 2503. The figure \$52,500 mistakenly appears as \$52,500,000. The correct amount, \$52,500 is the accurate product of \$.50 per share times 105,000 shares.

This argument is incorrect, because it assumes that the stock never reached a value of \$85,000 during the year following its receipt by Nagles. This assumption is contrary to the trial court's findings of fact and law, not challenged by Nagles on appeal, that whether sale of the 105,000 shares of stock conveyed by Collard to Nagle would have realized \$85,000 during the relevant period, was not "readily ascertainable or calculable", and that "the Court was not satisfied that *either party* proved, by a preponderance of the evidence, the value of the Utah Coal stock within the relevant time." (Finding of Fact ¶12, MD, Aplnt. Br. Add. C, R. 2494-2501, quoted language at 2495, 2499; Conclusions of Law, ¶¶3-4, 11, Id. at R. 2501-2504, 2506-2507) (Emphasis supplied)

Based on the trial court's finding that the value of the stock Collard delivered to Nagles was not readily ascertainable or calculable as a matter of fact or law, (Findings of Fact, ¶12, MD, R. 2494-2501; Conclusions of Law, ¶¶3-4, R. 2501-2504, Aplnt. Br. Add C), the trial court did not abuse its discretion in determining the amount of the offset it awarded Nagles, by calculating the difference between what Nagles were owed under the contract ($\$.81 \times 105,000 = \$85,050$), minus the average value of the stock during the relevant period ($\$.50 \times 105,000$), to arrive at the \$32,550 offset awarded Nagles. (Id.)

Additionally, the trial court's findings of fact concerning Collard's substantial performance under the contract, and Nagles' conduct in speculating in the stock, buying additional Utah Coal stock in unrelated transactions, and failing to give Collard sufficient

⁶ Nagles incorrectly cite the trial court's calculation of the amount of the offset as R. 2505. The trial court's findings of fact on this matter are found at Findings of Fact, ¶6, MD, Aplnt. Br. Add. C, R. 2490-2492, Finding of Facts, ¶12, Id. at R. 2494-2501, and Conclusions of Law, ¶4, Id. at R. 2503-2504.

notice of the amount of any deficiency in the value of the stock during the year following its receipt by Nagles, or thereafter (Findings of Fact, ¶¶1-3, 6-12, MD, Aplnt. Br. Add C., at R. 2488-2489; 2490-2501; and Conclusions of Law, ¶1-4, Id. at R. 2501-2504), not properly challenged by Nagles on appeal, are more than sufficient to support the trial court's equitable determination to award the Trust specific performance and to order the Trust to pay Nagles an offset in the amount of \$32,550.

C. Nagles' Argument That The Trial Court Incorrectly Determined The Amount Of The Offset Because It Does Not Account For Appreciation Of The Property, Is Not Properly Before The Court And Is Contrary To Factual Findings Not Challenged By Nagles On Appeal

Nagles argue that the trial court incorrectly determined the amount of the offset, because it purportedly "in no way accounts for the appreciation of the property over time." (Aplnt. Br. 32). However, Nagles fail to properly identify this issue in their Statement of Issues, fail to delineate the applicable standard of appellate review with supporting authority and a citation to the record showing that this specific issue was preserved in the trial court, and fail to provide a statement of grounds for seeking review of an issue not preserved in the trial court, as required pursuant to Utah R. App. P. 24(a)(5)(A) and (B). (Aplnt Br. 1-9) Accordingly, the Court should decline review of this issue on appeal.

Additionally, Nagles' argument ignores the fact that although Nagle threatened Collard with legal action on January 13, 1981, he chose not to follow through and made a calculated decision to wait until Collard came to him. (Nagle Depo. 50: 3-12, Tr. Exh. 7; Counterclaim, ¶30-31 at 9-10, Tr. Exh. 4). Thus, the trial court did not abuse its

discretion in not awarding Nagles' an offset based on the "appreciation" of the property, because Nagles could have brought a claim for the property at the time of the purported breach, but chose not to do so. For the same reason, Nagles' argument that they are entitled to 8% prejudgment interest on the offset (Aplnt Br. 47), fails because Nagles made a calculated decision not to assert claims under the contract prior to the filing of this action.

D. Nagles' Argument That The Property Should Be Made Available To Satisfy The Payment Of The Offset Is Improperly Before The Court And The Court Should Decline Review

Nagles argue that "the subject property should be made available to satisfy any monetary judgment this Court may order because the current owner is in privity with the Trust." (Aplnt. Br. 33) However, Nagles fail to include this issue in their Statement of Issues For Review, and fail to provide the applicable standard of appellate review with supporting authority, or any citation to the record showing that the issue was preserved in the trial court, or a statement of grounds for reviewing an issue not preserved in the trial court as required pursuant to Utah R. App. P. 24(a)(5)(A)(B). (Aplnt. Br. 1-9)

Accordingly, the Court should decline review of this issue.

POINT IV THE TRIAL COURT'S FINDING THAT COLLARD DELIVERED 105,000 SHARES OF STOCK TO NAGLES IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

A. The Trial Court's Factual Finding That Collard Delivered 105,000 Shares of Stock To Nagles Is Reviewed For Clear Error

The trial court's factual finding that Collard delivered 105,000 shares of stock to Nagles is reviewed for clear error. Parduhn, supra, ¶24 "A trial court's findings are

"clearly erroneous" "if they are so lacking as to be against the clear weight of the evidence." Young v. Young, 1999 UT 38, ¶15, 979 P.2d 338 (Utah 1999).

B. Nagles' Challenge To The Trial Court's Finding That Collard Delivered 105,000 Shares of Stock To Nagles Is Improperly Briefed

Nagles' statement of four issues for review on this point (Aplnt. Br. 5-6), fails to comply with the requirements of Utah R. App. P. 24(a)(5)(A)(B), in that Nagles fail to delineate for each issue, the appropriate standard of review with supporting authority; citation to the record to show that each issue was preserved in the trial court, and a statement of grounds for seeking review of each issue not preserved in the trial court. Accordingly, the Court should decline review of these issues.

C. The Mandate Rule Does Not Apply To The Trial Court's Factual Finding That Collard Delivered 105,000 Shares Of Stock To Nagles

Nagles cite several cases for the proposition that the mandate rule dictates that "pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings in that case." (Aplnt. Br. 34) (Emphasis supplied) Because the trial court's finding that Collard delivered 105,000 is not a "legal issue", but a finding of fact, the mandate rule does not apply.

Contrary to Nagles' argument (Aplnt. Br. 33-34), the lower court never made any findings concerning the stock Collard delivered to Nagles to pay the additional \$50,000 Collard agreed to pay under Addendum 2. The only lower court finding cited by Nagles states that, "On or prior to September 18, 1979, Collard tendered the 55,000 shares of stock to Nagle as required by *Installment 3* to the contract." (Findings of Fact, ¶7, R. 524, at 4, Add.6). (Emphasis supplied) Reference to a previous finding indicates that

Installment 3 refers to the delivery of 55,000 shares to pay the original balance of \$30,541.26 *under Addendum 1*. (Findings of Fact, ¶3(3), R. 524, at 3, Add. 6)

In regard to Addendum 2 to the parties' agreement, the lower court found that Collard was required to furnish additional cash or stock in the event the sale of the 55,000 shares provided under Addendum 1 was insufficient to pay the revised balance of \$85,000 under Addendum 2. (Findings of Fact, ¶10, R. 524, at 4, Add. 6) However, the lower court made no findings regarding the Collard's delivery of additional cash or stock under Addendum 2, or the amount or date thereof. (Findings of Fact, *Id.*, passim) Indeed, the matter was not at issue and the lower court had no reason to do so, given the fact that its grant of summary judgment to the Trust was based on its conclusion that Nagles' counterclaims were barred by the statute of limitations. (Conclusions Of Law, ¶¶1-15, R. 526-528. Thus, there is no factual basis for Nagles' argument that the trial court determined these issues prior to the first appeal, or that the Court of Appeals adopted this non-existent determination. (Aplnt. Br. 34-35)

Nagles also argue that the trial court's finding on remand that Collard delivered 105,000 shares of stock to Nagles on September 18, 1979, is based on "no new evidence." (Aplnt. Br. 33-36) This argument is directly contrary to the trial court's factual finding, not challenged by Nagles on appeal, that it based this finding "on testimony and examination of exhibits more than the affidavits and records involved in the case at the summary judgment stage." (Findings of Fact, ¶6, MD, Aplnt. Br. Add. C, R. 2491)

Because Nagles fail to marshal the evidence supporting this finding in order to challenge it, the Court should assume the finding is correct. Appellate courts will not

address a challenge to a trial court's factual finding unless the appellant has properly "marshaled the evidence." State v. Benvenuto, 1999 UT 60, ¶13, 983 P.2d 556.

Accordingly, Nagles' argument that the trial court's findings on these matters "is contrary to the law of the case", are unsupported and must be rejected.

D. Nagles' Argument That The Trial Court's Finding That Collard Delivered 105,000 Shares Of Stock Violates The Statute Of Frauds Because Such Finding Purportedly Amounts To A Finding That the Parties Modified Their Agreement, Is Inadequately Briefed

Nagles' argument on this point is improperly before the Court, because Nagles fail to specify this issue for review in their Statement of Issues (Aplnt. Br. 1-9), and fail to set forth the standard for review of the issue with supporting authority, and citation to the record showing that the issue was preserved in the trial court, or a statement of grounds for review if it was not preserved in the trial court, as required pursuant to Utah R. App. 24(a)(5)(A)(B). Thus, the Court should decline review.

Alternatively and without waiving the foregoing argument, contrary to Nagles' argument (Aplnt Br. 36-37), there is no inconsistency between the parties' contract and addenda, and the trial court's factual findings that the 55,000 shares of stock required under Addendum 1 were not delivered immediately after the parties' contract was consummated, but were delivered together with an additional 50,000 shares conveyed under Addendum 2 to the parties' contract, for a total of 105,000 shares, some 18 months later on September 18, 1979. (Aplnt. Br. Add. A, R. 2416-2417)

Addendum 2 expressly provided that "in the event the 55,000 shares conveyed not equal \$85,000 within 1 year, buyer agrees to convey addition shares ... or cash sufficient

to bring the total value conveyed to seller to \$85,000." (Addendum 2, Id., R. 2417) In this regard, the trial court found that "[i]t is clear to the court that Collard owed Nagle \$85,000 and that to pay that amount would require more than the 55,000 shares would be required given the historical value of the Utah coal shares" and that "the exhibits admitted show that in fact Nagle received 105,000 shares of Utah Coal stock on September 19, 1979 from Collard." (Findings of Fact, ¶6, MD, R. 2490-2491)

Although Gary Nagle testified at trial that he purchased 50,000 of the 105,000 shares Collard delivered to Nagles on September 18, 1979, the trial court rejected this testimony, based on "all the history of the case and records involved", including: (1) Nagles' prior sworn statements in their Answer denying the receipt of any stock from Collard; (2) Nagles' subsequent admission in interrogatory responses that Collard delivered 105,000 shares of stock which "was to be sold for \$85,000." (Id.); (3) the records from the stock transfer agent showing Nagles received 105,000 shares; and (4) the fact that Nagles had no documentation of any such purchase. (Statement of Facts, ¶¶ 7-11, *supra*, at 6-7) Based on the foregoing evidence, the trial court concluded

If Collard owed Nagle \$85,000, it does not comport with reason that Nagle would give Collard \$10,000 in the form of check for those shares as Nagle said. 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 shares. Further, Nagle had no documents, even though his accountant and financial advisor, did his books, that supported the claimed payment by Nagle to Collard of \$10,000 in the September 1979 time frame. (*See*, Findings of Fact, ¶6, MD, Aplnt. Br. Add. C, R. 2491-2492)

Because the trial court judge is in the best position to assess the credibility of witnesses, and there is a reasonable basis to support the trial court's finding that 105,000

shares of stock were conveyed by Collard to Nagles, the Court should reject Nagles' argument that this finding is clearly erroneous. Reed v. Reed, 806 P.2d 1182, 1184 (Utah 1991) ("It is the province of the trier of fact to assess the credibility of witnesses...")

Based on the foregoing, no modification of the parties' contract or addenda was required for the trial court to find that Collard delivered 105,000 shares of stock to Nagles on September 18, 1979, and Nagles' challenge to this finding based on his argument that it violates the Statute of Frauds (Aplnt. Br. 36-38), is frivolous and furnishes no basis for reversal of the trial court's equitable determination in this case.

E. Nagles Fail To Demonstrate That The Trial Court's Finding That Collard Delivered 105,000 Shares of Stock to Nagles Is Clearly Erroneous By Marshaling All Of The Record Evidence Supporting This Finding

Although Nagles claim that the challenged finding of fact is "against the weight of the evidence and clearly erroneous" (Aplnt. Br. 38-40), Nagles fail to properly marshal all of the evidence in the trial court record supporting this finding "and then demonstrate why that evidence is legally insufficient to support it even when viewing it in a light most favorable to the trial court below." Parduhn, supra, ¶30 (internal citations omitted) Instead of attempting to carry this burden, Nagles selectively recite the evidence supporting their position, and argue the trial court erred in not accepting Nagles' view of the evidence without supporting authority or citation to the record.

Thus, Nagles first argue that the stock transfer documents showing that Collard delivered 105,000 shares of stock to Nagles on September 18, 1979, (Tr. Exh. 14), and Nagles' admission in his interrogatories that he receive the 105,000 shares to "pay the \$85,000 balance" (Tr. Exh. 11) "do not support the Trial Court's conclusion of

modification." (Aplnt. Br. 38-29). However, Nagles fail to provide any record citation demonstrating that the trial court actually concluded that the parties' "modified their agreement" and the trial court made no such conclusion. (Conclusions of Law, MD, Aplnt. Br. Add. C, R. 2501-2510) Thus, this argument is simply a straw man.

Additionally, as discussed above, Nagles fail to demonstrate that any modification of the parties' contract and addenda is a necessary corollary of the trial court's finding that Collard delivered 105,000 shares of stock to Nagles. Thus, Nagles' arguments that the foregoing evidence does not support the non-existent "modification", do not demonstrate that the trial court's challenged factual finding is clearly erroneous, or that such evidence is "legally insufficient" to support it. Parduhn, supra, ¶30.

Second, Nagles argue that (2) Gary Nagle's interrogatory response in which he indicates he purchased Utah Coal stock from other individuals, but does not indicate that he purchased any of the 105,000 shares of Utah Coal stock he received from Collard, and (2) Nagles' lack of any documentation to support Gary Nagles' testimony that he purchased any stock from Collard, does not support the trial court's finding that Collard delivered 105,000 shares of stock to Nagles, because "it is not evidence to show mutual assent." (Aplnt. Br. 39) This argument is based only on Nagles' unsupported argument that trial court concluded that the parties had modified their agreement, and does not explain how the challenged evidence, either alone or in combination with other facts supporting the challenged finding, is "legally insufficient" to support the challenged finding, as required under Parduhn, Id.

Although Nagles concede that the trial court was not required to believe Gary Nagles' testimony that he purchased 50,000 shares of the 105,000 Collard delivered to Nagles on September 18, 1979 (Aplnt. Br. 39), Nagles argue that such finding "does not mean that the obverse is true." Again, Nagles fail to demonstrate that the trial court's finding that Nagles did not purchase any of the 105,000 shares delivered by Collard, is "legally insufficient" to support the challenged finding.

Nagles also argue that based on Gary Nagle's inability to produce documents showing he purchased 50,000 of the 105,000 shares Collard delivered to him on September 18, 1979, that the trial court "unfairly shifted the burden of proof" to Nagle to prove his claim that he purchased this stock. (Aplnt. Br. 39). This argument is frivolous. Nagles are simply subject to the legal maxim that, "He who asserts must prove." Thus, the fact that Nagles produced no documents at trial to support his claim that he purchased 50,000 shares of the 105,000 shares Collard delivered to him, was a fact that the trial court could legitimately consider, together with other evidence, in rejecting Nagles' claim that he purchases 50,000 of the 105,000 shares Collard delivered to him on September 18, 1979.

The trial court also rejected Gary Nagle's testimony that he purchased 50,000 of the 105,000 shares of stock delivered by Collard for \$10,000, based on Nagles' prior conflicting testimony and Nagles' prior admission that the 105,000 shares of stock he received from Collard was to pay off the \$85,000 balance, and the unlikelihood that Nagles would have been purchasing stock from Collard if, as Nagles claimed, Collard still owed them money under the parties' contract and addenda. (Findings of Fact, ¶6,

MD, Aplnt. Br. Add. C, R. 2490-2492); Parduhn, supra, at 36 ("We hold that a judge in an equitable proceeding may draw reasonable inferences with respect to the parties' likely course of action in a given situation.") (internal citations omitted)

Nagles further argue that, "it was the Trust's burden to prove modification of the contract" (Aplnt. Br. 39). This argument lacks any evidentiary support because Nagles fail to provide any citation to the record demonstrating that the Trust asserted any modification of the parties' agreement.

Nagles argue that, "the Trial Court's determination that the parties understood that more shares would be needed to reach \$85,000 given the trading price at the time is sheer conjecture." (Aplnt. Br. 39-40) This argument is improperly briefed because Nagles fail to marshal all of the record evidence supporting this subsidiary factual finding, as a prerequisite to challenging it. (Finding of Facts, ¶6, MD, Aplnt. Br. Add. C, R. 2490-2492)

The evidence contained in Addendum 1 reflecting the parties' agreement that 55,000 shares would be necessary to pay the original balance of \$30,541.26, under Addendum 1 (Aplnt. Br. Add. A, R. 2416), supports the trial court's conclusion that additional shares would be necessary to pay the higher balance of \$85,000 under Addendum 2. Parduhn, supra, ¶25 (appellee may prove that appellant did not meet their marshaling burden by presenting a "scintilla" of evidence supporting the district court's findings)

Although Nagles dispute the manner in which the trial weighed the evidence underlying the challenged factual finding, and selectively present evidence favorable to

its position (Aplnt. Br. 36-43), such argument "does not begin to meet the marshaling burden it [Nagles] must carry." Crookston v. Fire Ins. Exch., 817 P.2d 789, 799-800 (Utah 1991) ("Fire Insurance has made not attempted to marshal the evidence in support of the jury finding of fraud. In fact, all Fire Insurance has done is argue selected evidence favorable to . . . its position. That does not begin to meet the marshaling burden it must carry.") Accordingly, the Court should affirm the trial court's factual finding that Collard conveyed 105,000 shares of stock to Nagles, and reject Nagles' argument that such conveyance constituted an oral modification of the contract violating the statute of frauds.

F. Nagles' Argument That The Trust Is Bound By Its Purported Judicial Admission That Only 55,000 Shares Were Conveyed To Nagles Was Not Preserved In The Trial Court And Is Unsupported

Rule 24(a)(5) requires counsel to provides citations to the record demonstrating that an issue was preserved in the lower court. "Specific and timely objections and motions must be made before the lower tribunal, then identified for the appellate court." State v. Whittle, 780 P.2d 819, 820-21 (Utah 1989). When the trial court has not considered the matter, the appellate court has nothing to review, plain error and exceptional circumstances aside. State v. Marvin, 964 P.2d 313, 318 (Utah 1998).

Nagles' claim that they preserved the issue of whether the Trust judicially admitted that only 55,000 shares of stock were conveyed, is unsupported by Nagles' citations to the trial record. Although Nagles' counsel objected to a hypothetical question involving Collard's delivery of 105,000 shares of stock, the objection was not based on the ground here asserted, to wit, that the Trust had purportedly judicially admitted that only 55,000 shares were conveyed. Instead, Nagles' counsel objected on the ground that "it was

contrary to Gary Nagle's testimony", which objection was overruled by the trial court. (Aplnt. Br. 41, citing R. 2618 at 98)

Nagles also failed to preserve this issue in their Objections to Plaintiffs' Rule 26(a)(4) Disclosures, or in Nagles' Objection and Motion to Strike Plaintiffs' Pretrial Order. (Aplnt. Br. 41, citing R. 2103, 2376) Because this issue was not preserved in the lower court and Nagles fail to present any argument establishing exceptional circumstances of plain error requiring review, the Court should decline to address this issue on appeal.

Alternatively, and without waiving the foregoing argument, Nagles argue that "the Trust has continually acknowledged both formally and informally that only 55,000 shares were conveyed to Nagles under the parties' contract and addenda." (Aplnt. Br. 41-42) However, the only document in which Nagles claim the Trust made the purported admission, does not so state. The finding of fact referenced by Nagles states that:

7. On or prior to September 18, 1979, Collard tendered 55,000 shares of stock to Nagle as required by Installment 3 of the contract.

(Aplnt. Br. 41, citing R. 524-525) This statement, on its face, indicates that 55,000 shares were "involved" in the transaction, not that "only" 55,000 shares were delivered, as Nagles erroneously assert. (Aplnt. Br. 41-42) Moreover, the "Installment 3" referenced in the foregoing finding, refers to the provision in Addendum 1 requiring Collard to convey 55,000 shares of stock to pay off the balance of \$30,541.26, (Findings of Fact, ¶3, Id., at R. 523) and contains no reference to the additional 50,000 shares of stock Collard delivered to Nagles to pay the additional \$50,000 Collard agreed to pay Nagles under

Addendum 2, in lieu of formally assuming Nagles' mortgage. Thus, the foregoing finding is not evidence of any judicial admission by the Trust regarding the total shares conveyed to Nagles by Collard in fulfillment of Addendum 2. Accordingly, Nagles' argument is unsupported and must be rejected.

G. Nagles' Argument That The Trust Purportedly Did Not Raise The Issue Of The 105,000 Shares Until The Eve Of Trial Is Incorrect And Contrary To Trial Court's Findings Not Properly Challenged By Nagles On Appeal

Nagles' further argument that "the Trust did not raise the issue of 105,000 shares until the eve of trial" (Aplnt. Br. 41), is incorrect. As reflected in the trial court's factual findings, the issue was disputed in discovery and was not determined until the trial court heard and resolved the conflicting testimony and evidence on the issue at trial. (Findings of Fact, ¶¶6-9, MD, Aplnt. Br. Add. C, R. 2491-2494)

As indicated in the trial court's foregoing findings, Nagles initially denied receiving any stock from Collard in their Answers to the Trust's Complaint. (Answer and Counterclaim of Gary and Marilyn Nagles, ¶5, dated September 29, 1999, Tr. Exh. 4, and Answer of Nagles Construction, ¶5, dated October 18, 1999, Tr. Exh. 5) (both denying the allegation of Complaint, ¶10, Tr. Exh. 3, alleging that "Collard tendered the Stock to Nagle pursuant to the contract.") Gary Nagle also denied receiving any stock from Collard pursuant to the parties' contract and addenda in his answers to Plaintiff's Request For Admissions. (Gary M. Nagle's Answer To Plaintiff's Request for Admission, Responses to Requests Nos. 1 and 3, dated December 3, 1999, Tr. Exh. 13)

In Plaintiff's First Set of Interrogatories, the Trust specifically requested Gary Nagle to state the number of shares he had received of any of the companies that became

Utah Coal & Chemical Corporation and to describe how he had acquired these shares. In response to Interrogatory No. 7, Gary Nagle under oath, admitted receiving 105,000 shares of San Juan Mining and Developing Co. stock from Collard on September 18, 1979, and further admitted, "Roy Collard delivered the above shares to Gary Nagle and Edda R. Eldredge who was the transfer agent who registered them in the Nagles' name." (Nagle's Response to Plaintiff's First Set of Interrogatories, ¶7, Add. 2 at 7-8)

In his answer to the same interrogatory, Gary Nagle also admitted that, "The San Juan Mining stock was to be sold for \$85,000. However, the stock declined in value and was never sold." Id. In his foregoing interrogatory answer, Nagle does not indicate that he acquired any of the 105,000 shares from Collard by purchasing them, whereas he affirmatively indicates that he "purchased" the 60,000 shares of Utah Coal stock he acquired in an unrelated transaction on December 13, 1979. Id.

In his subsequent deposition testimony, Gary Nagle testified that "I believe I purchased part of [the 105,000 shares]", and that he paid "a very low amount." (Nagle Deposition, at 20:9-21:3, 22:7-18, 23:9-17, Tr. Exh. 7) This testimony directly contradicted Nagle's prior admission in response to Interrogatory 7, that the 105,000 shares he received from Collard "was to pay off the \$85,000." Had Nagle purchased 50,000 of the 105,000 shares, they would not have gone to "pay off the \$85,000" balance under Addendum 2, as Nagle admitted in response to Interrogatory 7.

Because Nagles disputed that Collard delivered 105,000 shares to Nagles under Addendum 2 and the value of the shares, these disputed fact were not included in the parties' cross-motions for summary judgment before the trial court, which focused on

whether Nagles' Counterclaims were barred by the statute of limitations and the Trust's right to attorney's fees under the contract. (Collard v. Nagle, n.7, Aplnt. Br. Add. B, R. 2426-2427) (recognizing that the trial court resolved the summary judgment motions based on the statute of limitations such that the trial court had not considered nor resolved issues relating to the parties' performance under the contract.)

During the trial of this action on June 7-8, 2005, Nagle testified he purchased 50,000 of the 105,000 shares of stock delivered by Collard, and the trial court resolved the conflicting evidence on this issue in favor of the Trust. (Nagle Trial Testimony, R. 2618, at 178:16-179: 5; Findings of Fact, ¶¶1,2 and 6, MD, Aplnt. Br. Add. C, R. 2490-2492) Accordingly, Nagles' argument that "the Trust did not raise the issue of the 105,000 shares until the eve of trial", Aplnt. Br.41-42, is incorrect and must be rejected.

POINT V NAGLES' ARGUMENT THAT THE TRIAL COURT ERRED IN CONCLUDING THAT THE TRUST ACTED EQUITABLY IN CONVEYING THE SUBJECT PROPERTY IS INADEQUATELY BRIEFED AND CONTRARY TO FINDINGS OF FACT NOT PROPERLY CHALLENGED BY NAGLES ON APPEAL

Nagles argue that the trial court erred in concluding that the Trust acted equitably in conveying the property to a family member during the pendency of the first appeal. (Aplnt. Br. 44-45). However, this argument is inadequately briefed such that the Court should decline review.

Utah R. App. P. 24(a)(5) provides an appellant's brief shall contain "A statement of the issues presented for review, including for each issue, the standard of appellate review with supporting authority." Nagles fail to comply with the foregoing Rule, and instead set forth four possible standards of appellate review for this issue. (Aplnt. Br. 6-7)

Nagles assert that the trial court "erred" in making the challenged finding, inferring that challenged determination is a legal issue reviewed under a correction of error standard. (Aplnt. Br. 44-45) This argument is incorrect. Instead, the challenged finding is one of mixed fact and law, properly reviewed under an "abuse of discretion" standard. "When a trial court must determine whether a given set of facts comes within the reach of a given rule of law, the trial court is given a de facto grant of discretion." State v. Pena, 869 P.2d 932, 935-936 (Utah 1994).

"To challenge a discretionary ruling, the appellant must show that the trial court exceeded the measure of discretion allowed or boundaries set by principles or rules of law, by showing 'no reasonable basis for the decision', Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993) or 'arbitrary and capricious action.' Kunzler v. O'Dell, 855 P.2d 270, 275 (Utah App. 1993)." See, Judge Norman H. Jackson, "Utah Standards of Appellate Review: Revised", 12 Utah Bar J. 8, 21-22 (discussing appropriate standard for review of mixed questions of fact and law). Because Nagles fail to discern and articulate the correct standard of review, their argument on the issue is devoid of any analysis under the "abuse of discretion" standard of review. (Aplnt. Br. 44-45) For this additional reason, this issue is inadequately briefed and the Court should decline review.

The trial court's determination that the Trust acted equitably in selling the property to a corporation owned by a family member for a price that was reasonable under all the circumstances (Findings of Fact, ¶10, Aplnt. Br. Add. C, R. 2494), is supported by substantial evidence in the record, including evidence that: (1) prior to selling the property, the Trust had obtained legal title to the property under the Special Warranty

Deed from Nagles (Special Warranty Deed, Tr. Exh. 19); (2) the testimony of Kirk Blossch that the property had appraised in 1999 for approximately \$250,000 and that the real estate market had been flat to slightly down since the appraisal, and (3) Mr. Blossch's testimony that the purchase price was discounted to approximately \$230,000 because there was no broker's commission and there was a lis pendens on the property, such that it was unfeasible to sell the property. (Blossch Trial Testimony, R. 2619 at 335:2-19)

Nagles fail to demonstrate that the foregoing evidence does not supply a "rational basis" for the trial court's finding, to show that the trial court "abused its discretion" in making the challenged finding. A trial court "abuses its discretion" when its determination "is so unreasonable that it can be classified as arbitrary and capricious." Kunzler v. O'Dell, supra, at 275 (Utah App. 1993).

Nagles' only effort to counter the foregoing record evidence consists of self-serving assertions and conclusions, unsupported by citation to record evidence, that "... the more obvious inference to be drawn is that the purpose of the conveyance... was to keep the property out of Nagle's reach..." (Aplnt. Br. 44-45). Such arguments are insufficient to show that the trial court abused its discretion in finding that the Trust did not act inequitably in conveying the property. Thus, the Court should affirm this finding.

POINT VI THE TRIAL COURT CORRECTLY DENIED PREJUDGMENT INTEREST ON NAGLES' EQUITABLE OFFSET BECAUSE IT COULD NOT BE CALCULATED WITH MATHEMATICAL ACCURACY AND HAD TO BE FASHIONED AT TRIAL

"Under Utah law, ... prejudgment interest is proper if the loss is fixed at a definite time and the interest can be determined with mathematical accuracy." Coalville City v.

Lundgren, 930 P.2d 1206, 1212 (Utah App. 1997) In Bellon v. Malnar, 808 P.2d 1089, 1097 (Utah 1991), a case involving the equitable determination of parties' rights under a real estate purchase contract, as in the case at bar, this Court indicated that the lack of mathematical certainty generally prevents an award of prejudgment interest in equity claims. In this regard, the Court stated

No case has been cited to us where we have allowed prejudgment interest in an action such as the instant case, which is for equitable relief. "A suit of this nature ... invokes consideration of the principles of equity which address themselves to the conscience and discretion of the court."

As in Bellon, the trial court here was vested with broad discretion in determining the amount, if any, to be awarded in prejudgment interest. The trial court found that it could not determine the value of the stock during the relevant period in calculating the offset to Nagles to a mathematical certainty, due to the fact that "[T]he price of stock obviously fluctuates and changes and is dependent on many variables." The trial court also discussed the difficulty in valuing the stock due to the lack of complete records showing the numbers of shares traded and the volume of shares traded during the relevant time period. As the trial court stated, "The evidence simply did not lend itself to an exact calculation." (Findings of Fact, ¶¶12, Aplnt. Br. Add. C, R. 2494-2501, quoted language at R. 2500)

Based upon the foregoing factual findings, not challenged by Nagles on appeal, the trial court concluded as a matter of law that an award of prejudgment interest to Nagles was improper because

For prejudgment interest to be applicable, the damages must be complete and measurable by fixed rules of evidence and known standards of value. Here, the amount of any offset was not determinable until facts were presented, and then the amount is set only as an equitable remedy after the facts were known. The amount was not set as of a particular time and the damage remedy has been determined by a fact finder. No prejudgment interest is awarded.

(Conclusion of Law, ¶13, MD, Aplnt. Br. Add. C, R. 2508).

Although Nagles argue for prejudgment interest, claiming they have never received any payment of the balance due under Addendum 2 (Aplnt. Br. 46-47), this argument is contrary to the trial court's findings of fact and conclusions of law, not properly or persuasively challenged by Nagles on appeal. (Argument, Points I, II, III and IV, *supra*, at 14-44) Thus, Nagles fail to demonstrate that the trial court abused its discretion in declining to award them prejudgment interest.

POINT VII THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING BOTH PARTIES ATTORNEY FEES BECAUSE NEITHER PARTY SUBSTANTIALLY PREVAILED AND THE ONLY REMEDIES GRANTED WERE IN EQUITY AND NOT UNDER THE CONTRACT

Nagles argue that the trial court "erred" in not awarding them attorney fees based on a provision in the parties' contract giving the prevailing party the right to seek reasonable attorney fees. (Aplnt. Br. 48). This argument assumes that the trial court's award of attorney's fees is to be made under the parties' contract, and that the issue poses a question of law to be reviewed for correctness. Both assumptions are unwarranted.

In Hughes v. Cafferty, 2004 UT 22, ¶20, this Court squarely held that an abuse of discretion standard applies to a trial court's grant of attorney's fees in equity, where no contractual remedies are awarded. In this regard, the Court declared that

We hold that the appropriate standard for reviewing equitable awards of attorney's fees is abuse of discretion. When a court awards attorney fees pursuant to a statute or contract, it does so in recognition of a party's legal right to an award. In contrast, a court making an equitable award of fees is concerned not with a party's legal entitlement to an award, but with the equities. In other words, the court must ascertain whether the equities in a given case justify the use of its inherent and discretionary power to award fees. See, Thurston v. Box Elder County, 892 P.2d 1034,1041 (Utah 1995). ("A trial court is accorded considerable latitude and discretion in applying and formulating an equitable remedy"; Saunders, 840 P.2d at 809 (noting the discretion courts have when awarding fees as an equitable remedy as opposed to awarding fees as a matter of right.)

In the instant case, the trial court concluded, as a matter of law, that neither party was entitled to attorney's fees because neither party substantially prevailed on their legal claims under the parties' contract and no contractual remedies were granted, but only remedies in equity. (Conclusions of Law, ¶14, MD, Aplnt. Br. Add. C, R. 2509- 2510)

This Court's decision in R.T. Nielson Co. v. Cook, 2002 UT 11, ¶25, 40 P.3d 1119 cited by Nagles (Aplnt. Br. 48-49), does not support Nagles' entitlement to an award of attorney fees in equity. That case involved an appeal from the trial court's award of attorney's fees in a breach of contract case decided by a jury, not an appeal from an equitable determination of an offset by a trial court in an equity proceeding, as in the instant case.

REQUEST FOR DAMAGES AND FEES FOR FRIVOLOUS APPEAL


Nagles' appeal in this case is "frivolous" under Utah R. App. P. 34(b). As detailed herein, Nagles repeatedly fail to comply appellate rules regarding the presentation of issues and arguments in an appellate brief. Nagles also fail to properly marshal the evidence to support the numerous factual determinations of the trial court they directly, or

indirectly, challenge on appeal. Nagles make numerous and prolix arguments for reversal of the trial court's decision that are nothing more an attempt to relitigate the case as a contract action, rather than an equity action, on appeal. These arguments are not grounded in fact, warranted by existing law, or based on any good faith argument to extend, modify, or reverse existing law. In having to respond the Nagles' numerous, lengthy and frivolous arguments on appeal, the Trust has incurred substantial attorney's fees and costs that Nagles should be assessed. Accordingly, the Trust hereby respectfully requests the award of such costs and fees pursuant to Utah R. App. P.33(c)(1) and Utah R. App. P. 34(a)(c).

CONCLUSION

The trial court did not abuse its discretion in rendering an equitable determination awarding the Trust specific performance and removal of Nagles' lis pendens and awarding Nagles a \$32,550 cash offset to be paid by the Trust. Nagles fail to demonstrate that any of the factual findings on which the trial court based its determination are clearly erroneous, or that any of the conclusions of law supporting its determination are incorrect. The trial court also did not abuse its discretion in declining to award Nagles prejudgment interest or attorney's fees. Accordingly, the Court should affirm the trial court's judgment.

DATED and respectfully submitted this 14th day of February, 2006.


KATHRYN COLLARD
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2006, I had two (2) correct copies of the above and foregoing **BRIEF OF APPELLEE**, hand delivered to counsel for Appellant at his office address listed below:

Mr. Sean N. Egan
Kearns Bldg., Suite 408
136 South Main Street
Salt Lake City, UT 84101


KATHRYN COLLARD
Attorney for Appellee

INDEX TO APPELLEE'S ADDENDA

1. Utah Code Ann. §78-2-2. Supreme Court Jurisdiction and Article VIII, §1 and §3, Utah Constitution
2. Gary M. Nagle's Response To Plaintiff's First Set of Interrogatories and Request for production of Documents, dated 1/26/00, Trial Exhibit 11
3. Stock Transfer showing 105,000 shares delivered to Nagles, dated 9/18/1979, Trial Exhibit 14
4. Stock Transfer showing Nagles' purchase of 60,000 shares, dated 12/13/1979, Trial Exhibit 15
5. Affidavit of Kelly James Kirch, dated 3/28/2000
6. Findings of Fact and Conclusions of Law and Order, dated 11/6/2000, Trial Exhibit 23

Tab 1

U.C.A. § 78-2-2. Supreme Court jurisdiction

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;
- (d) final orders of the Judicial Conduct Commission;
- (e) final orders and decrees in formal adjudicative proceedings originating with:
 - (i) the Public Service Commission;
 - (ii) the State Tax Commission;
 - (iii) the School and Institutional Trust Lands Board of Trustees;
 - (iv) the Board of Oil, Gas, and Mining;
 - (v) the state engineer; or
 - (vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;
- (f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);
- (g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;
- (h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;
- (i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;
- (j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and
- (k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

- (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
- (b) election and voting contests;
- (c) reapportionment of election districts;
- (d) retention or removal of public officers;
- (e) matters involving legislative subpoenas; and
- (f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

UTAH CONSTITUTION

Article VIII, Section 1 [Judicial power - Courts.]

The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

Article VIII, Section 3 [Jurisdiction of the Supreme Court.]

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.

Tab 2

William Thomas Thurman (3267)
Gregory J. Adams (6159)
McKAY, BURTON & THURMAN
10 East South Temple, Suite 600
Salt Lake City, UT 84133
Telephone: 801/521-4135
Facsimile: 801/521-4252

Attorneys for Gary and Marilyn Nagle

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

KATHRYN COLLARD, Trustee of the
LeRoy Collard Trust,

Plaintiff,

vs.

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

Defendants.

GARY M. NAGLE,

Counterclaim Plaintiff,

vs.

KATHRYN COLLARD, Trustee of the
LeRoy Collard Trust,

Counterclaim Defendant.

GARY M. NAGLE'S RESPONSE
TO PLAINTIFF'S FIRST SET
OF INTERROGATORIES AND
REQUEST FOR PRODUCTION
OF DOCUMENTS

Civil No. 990907648

Judge William B. Bohling



INTERROGATORIES

INTERROGATORY NO. 1: Please identify the name, address and telephone number of each individual likely to have discoverable information supporting the Defendants' counterclaims or defenses and identify the subjects of the information.

ANSWER:

- 1.1. The Nevada Agency & Trust Co.
30 West Liberty Street
Reno Nevada 89501
Phone: (775) 322-0626
Mark Miller - Agent
Information has been furnished regarding stock in the following:

San Juan Mining & Developing Co.
Utah Coal & Chemical Corp.
Lifestream Technologies Inc.

- 1.2. Edda R. Eldredge Co.
315 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone: 364-3114
Information on stock transfer records for:

San Juan Mining & Developing Co.
Utah Coal & Chemical Corp.

- 1.3. W. Walden Lloyd
Attorney for Gary Nagle, who notified LeRoy Collard of his default and failure to pay. Dated January 13, 1981.
10 East South Temple Suite 900
Salt Lake City, Utah 84133
Phone: 530-7315

- 1.4. First Security Bank / Crossland Mortgage Co. Payment records.
P.O. Box 57909
Salt Lake City, Utah 84157-0909
Phone: 269-2882

Has information that payments were made on Nagles' loan.

- 1.5. Richard Burch
Involved in similar loan transactions secured by San Juan Mining & Developing Co. stock and subsequently found to have no value.
- 1.6. Garth Whitney
Involved in similar loan transactions secured by San Juan Mining & Developing Co. stock and subsequently found to have no value.

INTERROGATORY NO. 2: Please identify and describe all discoverable documents or things in Defendant's possession or control supporting the Defendants' claims or defenses in this matter.

ANSWER:

- 2.1. Uniform Real Estate Contract between Roy Collard and Nagle Construction Co. providing for Collard to assume First Security loan dated March 30, 1978 ("Contract").
- 2.2. Addendum #1 to Contract dated March 30, 1978
- 2.3. Addendum #2 to Contract
- 2.4. 60,000 shares Utah Coal & Chemical Co. purchased by Gary Nagle on December 13, 1979
- 2.5. Letter from Walden Lloyd Jan. 13, 1981 constitutes notice of default. Nagle unable to sell stock for \$85,000.00 within the one year period.
- 2.6. Deed retained by Nagle. (This deed was not delivered as a result of Collards failure to pay \$85,000.00 as required in addendum #2.)
- 2.7. Crossland Mortgage Co. records of mortgage which is still in the name of Gary Nagle.

2.8. The record of declaration of bankruptcy by LeRoy Collard dated June 10, 1980.

INTERROGATORY NO. 3: Please identify any and all contracts and agreements between Plaintiff and Defendants and any and all amendments, modifications, alternations, changes thereto ("Contracts") arising out of or relating in any way to the property which is the subject of this action.

ANSWER:

The Uniform Real Estate Contract and the addendums to such Contract are the written contracts between Collard and Nagle Construction Co.

INTERROGATORY NO. 4: Please state whether any Defendant has been convicted of a felony involving moral turpitude in the past 10 years.

(a) If the answer to Interrogatory number 4 is affirmative, please state the date of the conviction and the crime for which the identified Defendant was convicted.

ANSWER:

No defendant has ever been convicted of any felony.

INTERROGATORY NO. 5: Please state whether any Defendant has declared bankruptcy (voluntary or involuntary) since March of 1978.

(a) If the answer to Interrogatory No. 5 is affirmative, please give the date and the case number.

(b) If the answer to Interrogatory No. 5 is affirmative, please state whether the identified Defendant included the Uniform Real Estate Contract with LeRoy

Collard or any stock issued by Utah Coal & Chemicals Company, Inc., its predecessors or successors as an asset of the Defendant's bankruptcy estate.

ANSWER:

Defendants object to information sought in Interrogatory No. 5 as irrelevant and not likely to lead to any evidence which would be admissible at trial of this matter.

INTERROGATORY NO. 6: Please state whether any Defendant has been a plaintiff or named as a defendant in a lawsuit involving the development, construction, purchase or sale of real estate since March of 1978.

(a) If the answer to Interrogatory No. 6 is affirmative, please give the name of the plaintiff and defendants, the approximate date of the suit and the case number.

(b) If the answer to Interrogatory No. 6 is affirmative and a judgment was rendered against any Defendant, please state; (1) whether any supplemental proceedings were conducted, and; (ii) whether the Defendant included the Uniform Real Estate Contract with LeRoy Collard or any stock issued by Utah Coal & Chemicals Company, Inc. or its predecessors or successors as an asset of the Defendant in such proceedings.

ANSWER:

Defendants object to information sought in Interrogatory No. 5 as irrelevant and not likely to lead to any evidence which would be admissible at trial of this matter.

INTERROGATORY NO. 7: Please state whether any Defendant owns or has owned or held stock in any of the following companies or their predecessors or successors: Utah Coal and Chemicals Company, Inc., San Juan Mining and Developing Company, Inc. and Lifestream Technologies, Inc.

(a) If the answer to Interrogatory No 7 is affirmative, please state the following:

- (i) the name of the company in which the stock which was acquired;
- (ii) from whom the stock was acquired (including name, address and phone number);
- (iii) the number of shares acquired;
- (iv) the consideration given or purchase price paid for the stock;
- (v) the names of any brokers or agents who were involved in the transaction (including name, address and phone number);
- (vi) the date the stock was acquired;
- (vii) the date the stock was sold, the sales price or consideration and to whom its was sold (including name, address and phone number);
- (viii) the certificate numbers of any stock sold or currently held;
- (ix) whether there were any witnesses to any of the foregoing and identify such witnesses;

(x) whether there were any documents or things which document or support your answers to the above interrogatories and identify such documents and things.

ANSWER:

San Juan Mining & Developing Co. ("SJM&D") 105,000 shares.
Utah Coal & Chemical Co. 60,000 shares.
Lifestream Technologies 3,000 shares
105,000 shares of San Juan Mining & Developing Co. on
September 18, 1979 the following shares were recorded.

<u>Certificate No:</u>	<u>No. of shares:</u>	<u>Seller:</u>
m-1028	10,000	
m-1027	10,000	
m-1026	10,000	
m-1025	10,000	
m-1024	10,000	
m-1061	10,000	Roger J. Loyal
m-1060	10,000	
m-1067	10,000	Gunther Hommel
m-1339	10,000	Kelsey L. Boltz
m-1338	10,000	
m-1107	5,000	M.A. Clark
Total SJM&D	105,000	

The addresses and phone numbers of the above are not known.
Roy Collard delivered the above shares to Gary Nagle and Edda R. Eldredge who was the transfer agent who registered them in Nagles' name.

On December 13, 1979 Gary Nagle purchased 60,000 shares of Utah Coal & Chemical Co.

<u>Certificate No:</u>	<u>No. of Shares:</u>	<u>Seller:</u>
2957	25,000	Nordico
2958	35,000	
Total Utah Coal & Chemical	60,000	

Johnson - Bowles was the broker that Nagle purchased the stock from.

The address and phone number of the above is not known.

The San Juan Mining and Developing Co. stock was to be sold for \$85,000.00. However, the stock declined in value and was never sold.

Lifestream Technologies now in the Nagles' name is 3000 shares. It is the successor to Utah Coal & Chemical 120,000 shares. There have been two reverse splits and the 3000 shares is all that remains derived from the Utah Coal & Chemical 120,000 shares. The 3000 shares now have a value of 0.95 cents per share. 3000×0.95 would be worth \$2,850.00 (less brokerage and expenses).

(Note: Nagle has never received Lifestream Technologies stock.)

The Lifestream Technologies stock is listed below. The dates listed below are the dates when San Juan Mining and Utah Coal certificates were registered (above) and the reverse splits reflected.

<u>Certificate No:</u>	<u>Shares:</u>	<u>Dated:</u>
2788	125	9/18/79
2790	125	9/18/79
2792	250	9/18/79
2793	250	9/18/79
2794	250	9/18/79
2795	250	9/18/79
2796	250	9/18/79
2797	250	9/18/79
3153	1250	12/13/79
Total now held:	3,000	

This stock has never been sold.

Defendants estimate that sale at this date would net about \$2,500.00

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: Please produce a copy of all documents and things identified in the answers to Plaintiff's First Set of Interrogatories.

RESPONSE: Copies of the documents requested will be made available for inspection and review at the offices of counsel for the Defendants upon reasonable request during normal business hours.

REQUEST NO. 2: Please produce copy of all discoverable documents or tangible things within the possession or control of the Defendants supporting Defendants' claims or defenses raised in this matter.

RESPONSE: Copies of the documents requested will be made available for inspection and review at the offices of counsel for the Defendants upon reasonable request during normal business hours.

REQUEST NO. 3: Please produce copies of the entire file(s) in the possession of former counsel W. Walden Lloyd relating to Le Roy Collard or the real property which is the subject of this action.

RESPONSE: Defendants object to this request to the extent it requests privileged information.

REQUEST NO. 4: To the extent you assert that any document or thing in your possession or control is subject to a privilege which precludes its production or discovery in this matter, please produce a privilege log identifying each such document or thing by category and describe the document or thing in sufficient detail to submit to the court as part of an *in camera* review.

RESPONSE: Copies of the documents requested will be made available for inspection and review at the offices of counsel for the Defendants upon reasonable request during normal business hours.

REQUEST NO. 5: Please produce copies of any and all documents and things, correspondence, documents and data by and between Le Roy Collard and Defendants, their agents, affiliates, or successors arising out of or relating to the subject matter of this action.

RESPONSE: Copies of the documents requested will be made available for inspection and review at the offices of counsel for the Defendants upon reasonable request during normal business hours.

REQUEST NO. 6: Please produce copies of each of the Defendants' brokerage account statements, financial statements, general ledgers, profit and loss statements, accounting ledgers, personal income statements, tax returns, receipts, transaction reports, bills of sale, or any other documents or things containing any information pertaining to the stock identified by Defendants or the Contracts at issue herein for period from January 1978 through today.

RESPONSE: Copies of the documents requested relating to the stock and contracts at issue will be made available for inspection and review at the offices of counsel for the Defendants upon reasonable request during normal business hours. Defendants object to the remaining portion of the request as irrelevant and not designed to lead to evidence which may be presented at trial.

REQUEST NO. 7: Please produce copies of all stock certificates in your possession or control issued by Utah Coal and Chemicals Company, San Juan Mining and Developing Company and/or Lifestream Technologies, Inc. or their predecessors or successors.

RESPONSE: Copies of the documents requested will be made available for inspection and review at the offices of counsel for the Defendants upon reasonable request during normal business hours.

REQUEST NO. 8: Please produce copies of all documents and things in your possession or control which evidence the receipt, purchase, acquisition or sale of any stock identified by you in your Answers to Plaintiffs Interrogatories or Answers to Requests for Admissions.

RESPONSE: Copies of the documents requested will be made available for inspection and review at the offices of counsel for the Defendants upon reasonable request during normal business hours.

DATED this 24 day of January, 2000.


GARY M. NAGLE

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

Gary M. Nagle, being first duly sworn, deposes and says that he has read the foregoing answers to Requests for Admissions, that the same are true and correct to the best of his knowledge, information and belief.

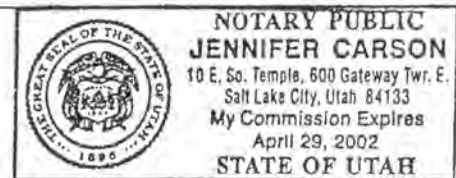
Gary Nagle

SUBSCRIBED AND SWORN TO before me this 26th day of January, 2000.

Jennifer Carson
NOTARY PUBLIC

My Commission Expires:

Residing at:



Tab 3

11

6

TRANSFER & EXCHANGE OFFICE
EDDA R. ELDREDGE & CO., INC.

315 Newhouse Building Phone 364-3114
10 Exchange Place
Salt Lake City, Utah 84111

September 18, 1979

To: Mr. Gary M. ~~XXXX~~ Nagel
5945 Fountain Bleu
Salt Lake City, Utah 84121

We are in receipt of a communication from you enclosing for transfer, shares of
San Juan Mining & Developing Co. Stock represented by:

Certificate No.	No. Shares	Name
M1107	5,000	M. A. Clark
M1338	10,000	Kelsey L Boltz
M1339	10,000	Same
M1067	10,000	Gunther H Hommel
M1060	10,000	Roger J Joyal
M1061	10,000	Same
M1024/28 (10M each)	50,000	John G. Roylance, Jr.

DEPOSITION
EXHIBIT

J



Corporate domicile located in Nevada.

Acting under your instructions we have today transferred this stock and enclose it herewith represented by certificates bearing number, issued in names and for the respective number of shares as follows:

Certificate No.	No. Shares	Name
788/90 (5M each)	15,000	Gary M Nagle
790/99 (10M each)	90,000	Gary M Nagle

Certificates \$3.00 each, payable in advance,
or \$4.00 each if we have to bill you.

Please make check payable to:

EDDA R. ELDREDGE & CO., INC.

Received as above stated.

Date

9-18-79

Signed

Transfer Fee \$36.00
Handling & Postage.....
Total \$36.00

Paid
[Signature]

Tab 4

7

TRANSFER & EXCHANGE OFFICE
EDDA R. ELDREDGE & CO., INC.

315 Newhouse Building Phone 364-3114
 10 Exchange Place
 Salt Lake City, Utah 84111

To: Jensen-Movian Company, Inc.
 Continental Bldg. Building
 200 South Main
 Salt Lake City, Utah 84101

DEPOSITION
EXHIBIT

4

We are in receipt of a communication from you enclosing for transfer, shares of
 Stock represented by:

Certificate No.	No. Shares	Name
2887	25,000	W. J. H. H. H.
2888	25,000	W. J. H. H. H.

*Note original shares dated Nov. 9, 1979
 Utah coal & chemical must not have existed before this date*

PLAINTIFF'S
EXHIBIT
35
990907648

Acting under your instructions we have today transferred this stock and enclose it herewith represented by certificates bearing number, issued in names and for the respective number of shares as follows:

Certificate No.	No. Shares	Name
3151/52 (50 each)	10,000	Johnco
3153	50,000	Gary Hagler

Certificates \$3.00 each, payable in advance,
 or \$4.00 each if we have to bill you.

Please make check payable to:
 EDDA R. ELDREDGE & CO., INC.

Received as above stated.

Transfer Fee
 Handling & Postage.....
 Total

Date..... Signed

JOHNSON-BOWLES COMPANY, INC.

TRANSFER ORDER

CONTINENTAL BANK BUILDING
200 SOUTH MAIN • SALT LAKE CITY, UTAH 84101
(801) 364-1900 MEMBER INTERMOUNTAIN STOCK EXCHANGE

Edda R. Eldrdge

DEC 13 11 21 AM '79

A/C DELIVERED TO	20010
A/C RECEIVED FROM	DEC 13 3 03 PM '79
TRANSACTION NO.	T 1307
SECURITY NO.	UT1
NO. OF SHARES	60,000

PLEASE TRANSFER THE ATTACHED SECURITIES AS SHOWN BELOW:

SECURITY DESCRIPTION	CERTIFICATES PRESENTED TO TRANSFER		
tah Coal and Chemicals Corporation	#2957	1 X 25,000	Nordico
	#2958	1 X 35,000	Nordico

QUANTITY	DENOMINATIONS	#	TAXPAYER NO.	CUSIP NUMBER	CONTROL	PRESENTOR #	DATE
	2 X 5,000 In JOHNCO						12/12

TO BE REGISTERED IN THE NAME OF

1 X 50,000 Gary Nagle
5945 Fontaine Bleu Dr.
Salt Lake City, Utah 84107

I have received the above mentioned securities and
acknowledge receipt of same.

Signature

Date

TRANSFER AGENTS COPY

Tab 5

Bradley R. Helsten (5878)
NELSON RASMUSSEN & CHRISTENSEN
215 South State, Suite 900
Salt Lake City, UT 84111
Telephone: (801) 531-8400
Attorneys for Plaintiff



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

KATHRYN COLLARD, Trustee of the
LeRoy Collard Trust,

Plaintiff,

vs.

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

Defendants.

AFFIDAVIT OF
KELLY JAMES KIRCH

Civil No. 990907648

Judge William B. Bohling

GARY M. NAGLE,

Counterclaim Plaintiff,

vs.

KATHRYN COLLARD, Trustee of the
LeRoy Collard Trust,

Counterclaim Defendant.

Kelly James Kirch, having been sworn an oath deposes and states as follows:

1. I am an adult resident of the State of Utah and have personal knowledge of the facts stated herein and am competent to testify thereto.

2. I currently reside at 3842 Quail Hollow Drive, Salt Lake City, Utah 84119 (hereafter referred to as the "Property").

3. I have resided at the above address since 1991.

4. Prior to the time that I occupied the Property, the Property was occupied by my father, LeRoy Collard.

5. My father moved in to the Property, taking up residence there in approximately March or April of 1978.

6. My father, immediate family members and I have been the only residents of the Property since that date.

7. During the time that we have been residents of the Property, we have paid all of the property taxes which have been imposed through the impound account with Crossland Mortgage and/or First Security Bank, loan numbers # 86002 100 0008649 (old) and #5413232 (new).

8. Since March of 1978, my father and/or I have made all payment on a mortgage on the property in favor of First Security Bank in the approximate amount of \$700.00 per month.

9. Since 1979, my father Le Roy Collard, immediate family members and I have performed all improvements, maintenance, repairs and other capital expenditures relative to the property in excess of \$5.00 per year.

10. As an example of the type of improvements which have been undertaken since our possession of the Property, I personally paid \$1,400.00 for new carpet in 1999; \$350.00 for paint in 1999, \$2,500.00 for repairs to the deck in 1999, homeowners association special assessments in 1999 of over \$1500.00.

11. Similar expenses and improvements have been made every year since I have been in possession of the Property.

12. At all times since taking possession of the Property in 1979, my father conducted himself in all respects as the owner of the Property.

13. At all times since taking possession of the Property in 1991, I have also conducted myself, in all respects, as the owner of the Property.

14. All of the utilities servicing the Property have been in my name or in the name of my father or immediate family members since 1978.

15. I am currently an active members of the Condominium homeowner's association and have paid monthly assessments of \$155.00 as required by the Association.

16. Before his death in February of 1997, my father deeded all of his interest in the Property to the LeRoy Collard Trust, Kathryn Collard, Trustee.

17. At no time have I ever seen Mr. Gary M. Nagle at or on the Property and to my knowledge he has never been in the Property.

18. To the best of my knowledge, from the time I took possession of the Property in 1991, at no time did Gary M. Nagle ever contact anyone at this address, indicating that he claimed ownership or any interest in the Property.

19. In approximately April or May of 1999, I decided to refinance the balance on the First Security Loan in order to take advantage of the low interest rates and to do some remodeling.

20. Upon conversing with my title company regarding the refinancing of the Property, I was informed that Title to the Property was still held by Gary M. Nagle.


21. Prior to my contact with the title company, I believed that legal title was in my father's name or the name of his Trust and the only connection that Gary M. Nagel had to the property was that my father had assumed the First Security obligation set forth in paragraph 7 which was in the name of Nagle Construction, Inc.


Kelly James Kirch

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

On this 28 day of March, 2000, personally appeared before me, Kelly James Kirch, the signer of the within instrument, who duly acknowledged to me that she executed the same.




NOTARY PUBLIC

Tab 6

FILED DISTRICT COURT
Third Judicial District

NOV 06 2000

By SALT LAKE COUNTY
Deputy Clerk

Bradley R. Helsten (5878)
NELSON RASMUSSEN & CHRISTENSEN
576 E. South Temple
Salt Lake City, Utah 84102
Telephone: (801) 531-8400
Attorneys for Plaintiff

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

KATHRYN COLLARD, Trustee of the
LeRoy Collard Trust,

Plaintiff,

vs.

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

Defendants.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

Civil No. 990907648

Judge William B. Bohling

GARY M. NAGLE,

Counterclaim Plaintiff,

vs.

KATHRYN COLLARD, Trustee of the
LeRoy Collard Trust,

Counterclaim Defendant.

On Monday, July 17, 2000, the Court heard oral argument from counsel for Plaintiff and Defendants on Defendants' *Motion for Summary Judgment*, dated February 23, 2000 and on Plaintiff's *Cross-Motion for Summary Judgment*, dated March 29, 2000. The Court then ordered further briefing on issues as directed by the Court. After submitting supplemental briefs in support and in opposition, a supplemental oral argument was conducted on August 30, 2000.

The Court, having reviewed the all of the pleadings and papers filed herein and having heard oral argument from counsel for the parties and considering the undisputed facts in the light most favorable to Defendants, is persuaded by the pleadings, points authorities and arguments of Plaintiff's counsel and hereby grants summary judgment to Plaintiff and against the Defendants and hereby FINDS and ORDERS as follows:

FINDING OF UNDISPUTED FACTS

The Court finds the following to be the material, undisputed facts or the facts cast in the light most favorable to the Defendants as required by U.R.C.P 56 upon which the Court's judgment is based:

1. The real property at issue in this case is a condominium and land located at 3842 S. Quail Hollow Drive, Salt Lake City, Utah, in the Cove Point condominiums (the "**Property**").
2. On or about March 30, 1978, LeRoy Collard ("**Collard**") as buyer and Defendant Nagle Construction Company ("**Nagle Construction**") as seller executed a Uniform Real Estate

Contract ("**Contract**") for the purchase of the Property.¹ The stated purchase price for the Property was \$100,500.00.

3. The \$100,500.00 purchase price was to be paid by Collard by three separate actions or installments as follows:

(1) a down payment of \$10,000.00 (hereafter referred to as "**Installment 1**");

(2) assumption of mortgage which was being placed on the Property by Nagle Construction in favor of First Security Bank of Utah in the approximate amount of \$60,000.00 (the "**FSB Obligation**") (hereinafter referred to as "**Installment 2**"); and

(3) tender 55,000 shares of the stock of Utah Coal and Chemical Company ("**Stock**") to Defendants for the balance of the purchase price of \$30,541.26 (hereinafter referred to as "**Installment 3**").

4. Collard tendered the down payment in satisfaction of the requirements of Installment 1.

5. Collard began making payments on the FSB Obligation directly to First Security Bank under Installment 2 but did not refinance the loan in his own name or otherwise remove Defendants from the FSB Obligation.

6. Collard immediately took possession of the Property and recorded a Notice of Contract on May 18, 1979.

¹ Mr. Collard's interest in the Property was subsequently transferred to Plaintiff and Defendant Nagle Construction's interest in the Property was subsequently assigned to Defendants, Gary M. Nagle and Marilyn F. Nagle.

7. On or prior to September 18, 1979, Collard tendered the 55,000 shares of Stock to Nagle as required by Installment 3 of the Contract.

8. Mr. Nagle testified that he considered Mr. Collard's failure to fully assume the FSB Obligation to be a breach of the Contract.

9. Mr. Nagle further testified that he agreed to forego declaring a default at that time because Mr. Collard agreed to pay additional consideration for the Property which agreement became Addendum No. 2 to the Contract ("**Addendum No. 2**").

10. Under Addendum No.2, Collard agreed that if the value of the Stock did not reach a value of at least \$85,000.00 within 1 year, Collard would tender additional shares or cash to make up the difference.

11. Mr. Nagle testified that Addendum No. 2 was executed on or about September 18, 1979.

12. Sometime after the expiration of the 1 year period specified in Addendum No. 2, on January 13, 1981, the law firm of Jensen & Lloyd wrote to a letter to Mr. Collard on behalf of Mr. Nagle alleging Mr. Collard had breached the Contract; specifically the requirements of Installment 3, as amended by Addendum No. 2.

13. Counsel for Defendants declared that if the additional stock or cash was not tendered to satisfy the requirements of Installment 3, as amended by Addendum No. 2, prior to January 25, 1981, Collard would be "deemed by Nagle Construction to be a default thereunder

and will result in the institution of legal proceedings against you for foreclosure of the contract as a note and mortgage."

14. On January 23, 1981, attorney Kathryn Collard, daughter of LeRoy Collard, wrote a letter to Nagle's counsel informing them that the Stock could have been sold for the required \$85,000.00 on a number of dates between its delivery and January of 1981, and provided brokerage records to support the assertion.

15. The Court makes no finding regarding the value of the 55,000 shares of Stock received by Nagle at any point in time.

16. Mr. Nagle admits that neither he or his attorneys Walden & Lloyd did anything to follow up Mr. Lloyd's January 13, 1981 letter.

17. Mr. Nagle also admitted that no additional agreements or changes to the Contract were entered into between Mr. Nagle and Mr. Collard after January 25, 1981.

18. Mr. Nagle retained the 55,000 shares of Stock and the \$10,000.00 down payment made by Collard.

19. Collard and/or his heirs have continued to make monthly payments on the FSB Obligation from 1978 continuing through today the current balance remaining on the FSB Obligation is approximately \$30,000.00.

20. In July of 1999, Plaintiff filed a quiet title action in this matter alleging causes of action for Breach of Contract, Adverse Possession and Declaratory Relief.

21. Subsequent to the letter dated January 13, 1981, declaring Mr. Collard to be in default and breach of the Contract, Mr. Nagle took no affirmative legal action to assert a default in the Contract until filing the *Answer and Counterclaim* in this matter in September of 1999.

22. In September of 1999, Defendants filed an *Answer and Counterclaim* against Collard alleging as causes of action, Forfeiture, Foreclosure and Quiet Title based on Collard's alleged breach of the Contract arising out of the events occurring prior to January 25, 1981.

CONCLUSIONS OF LAW:

1. The written Contract in this matter is governed by the six year statute of limitations set forth in U.C.A. § 78-12-23.
2. The Contract between Plaintiff and Defendants is a binding, enforceable agreement under Utah law.
3. Collard performed Installment 1 of the Contract.
4. Defendants' claims and causes of action alleging that Collard breached or defaulted on Installment 2 of the Contract, as alleged in the *Answer and Counterclaim* arose and accrued no later than January 25, 1981.
5. After the letter dated January 13, 1981, declaring Mr. Collard to be in default and breach of the Contract, Mr. Nagle took no affirmative action to declare a default, elect a remedy or otherwise exercise any rights or remedies under the Contract until filing the *Answer and Counterclaim* in this matter in September of 1999.

6. Defendants' counterclaim for Forfeiture, Foreclosure and Quiet Title based on Collard's alleged default and breach of the requirements of Installment 3 of the Contract (as modified by Addendum No. 2) were barred, as a matter of law, no later than January 25, 1987. Consequently, Defendants' Counterclaims fail as a matter of law.

7. Defendants' claims and causes of action alleging default and breach of the requirements of Installment 3 of the Contract arose and accrued no later than January 25, 1981.

8. Nagle's continued acceptance of Collard's method of performance of Installment 2 of the Contract, even if a breach of the terms of the Contract, operated as a waiver of the strict assumption requirements of Installment 2. Additionally, Collard's manner of performance of Installment 2 of the Contract and Nagle's continued acceptance of the tendered performance operated to modify Installment 2 to permit direct payments on the FSB Obligation.

9. Defendants' claims of default and breach of the Contract for Collard's alleged failure to perform Installment 3 were barred or waived, as a matter of law, no later than January 25, 1987. Consequently, Defendants' claims of Forfeiture, Foreclosure and Quiet Title based on default and breach of Installment 3 of the Contract as set forth in their Counterclaim fail as a matter of law.

10. The letter from Defendants' counsel dated January 13, 1981, did not satisfy the strict notice and procedural requirements to effect a forfeiture under the Contract or Utah law. Therefore no forfeiture occurred, and even if it had, the subsequent conduct of the parties

operated as a waiver of the forfeiture alleged by the Defendants. Consequently, Defendants' election of the remedy of forfeiture fails as a matter of law.

11. After sending the January 13, 1981 letter notifying Mr. Collard of the alleged default and electing the remedy of foreclosure, Defendants failed to take any further action to foreclose on the Property. Consequently, Defendants' claims and causes of action for foreclosure were barred by U.C.A. §78-12-23, as a matter of law no later than January 25, 1987.

12. Each and every cause of action set forth in Defendants' *Answer and Counterclaim* was and is barred by the six year Statute of Limitations set forth in U.C.A. § 78-12-23.

13. Except for the terms or requirements of the Contract, the enforcement of which is now barred by the statute of limitations as found by the court above, the Contract remains a valid and binding agreement between the parties.

14. The Plaintiff's right to demand delivery of fee title pursuant to the Contract has not arisen and will not arise or accrue until payment of the remaining balance owing on the FSB Obligation.

15. Pursuant to the terms of the Contract, Plaintiff is entitled to immediate delivery of fee title subject to and conditioned upon payment of the remaining balance owed on the FSB Obligation.

ORDER:

1. Defendants' *Motion for Summary Judgment*, dated February 23, 2000 is DENIED.

2. Plaintiff is entitled to Summary Judgment against Defendants on Defendants' Counterclaim. All claims and causes of action set forth in the Counterclaim are dismissed against Defendants with prejudice.

3. Plaintiff's *Cross-Motion for Summary Judgment*, dated March 29, 2000 on its cause of action for Declaratory Relief-Quiet Title is GRANTED and Plaintiff is entitled to delivery of fee title subject to and conditioned upon payment of the remaining balance owed on the FSB Obligation, subject to the following:

A. Within 15 business days of the final entry of this Order, Defendants are to deliver to an Escrow Agent designated by Plaintiff, a Special Warranty Deed granting and transferring the Property to Plaintiff and to provide for a policy of Title Insurance in the form and as required by Section 19 of the Contract.

B. Plaintiff is to tender to the Escrow Agent all funds necessary to pay off the FSB Obligation within 10 days of delivery of the Deed by Defendants.

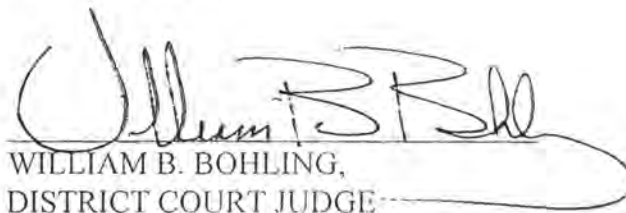
C. The Escrow Agent shall, upon payment of the remaining balance of the FSB Obligation, issuance of the Title Policy and transmittal of confirmation of the same to the Parties, release the Deed to Plaintiff for recording.

D. The Parties shall execute any other and further documents as may be required by the Escrow Agent to effect the payment of the remaining balance of the FSB Obligation and the transfer of fee title to the Plaintiff.

4. Plaintiffs's *Cross Motion for Summary Judgment* asserting Breach of Contract and Adverse Possession is DENIED.

ORDERED this November 3, 2000.

BY THE COURT:


WILLIAM B. BOHLING,
DISTRICT COURT JUDGE

Approved as to Form:

MCKAY, BURTON & THURMAN

By: _____
William T. Thurman
Allan O. Walsh
Attorneys for Defendants

NELSON RASMUSSEN & CHRISTENSEN, P.C.

By: _____
Bradley R. Helsten
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the _____ day of _____, 2000 I caused to be mailed a true and correct copy of the foregoing document postage prepaid to the following:

William Thomas Thurman
Allan O. Walsh
McKay, Burton & Thurman
600 Gateway Tower East
10 East South Temple
Salt Lake City, Utah 84133

Bradley R. Helsten
Nelson Rasmussen & Christensen, P.C.
576 East South Temple
Salt Lake City, Utah 84102
