

2005

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

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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KATHRYN COLLARD, Trustee of  
the LeRoy Collard Trust,

Appellee and Plaintiff,

vs.

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

Appellants and  
Defendants.

Case No. 20050714-SC  
990907648

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APPELLANTS' BRIEF

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### **PARTIES TO APPEAL**

**Appellants:** Nagle Construction, Inc., Gary M. Nagle, Marilyn F. Nagle (collectively “Nagle”).

**Appellee:** Kathryn Collard as Trustee for the LeRoy Collard Trust, the successor-in-interest to LeRoy Collard (collectively the “Trust”).

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal pursuant to U.C.A. § 78-2a-3 and Article 8, § I of the Utah Constitution. This is an appeal from a final judgment of the Third Judicial District Court of Salt Lake County, State of Utah, entered on August 15, 2005. Appellants filed a Notice of Appeal on August 18, 2005. This case was ordered transferred to the Utah Court of Appeals on August 22, 2005. This Court vacated the transfer order on September 29, 2005.

### **STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW**

- I. **THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE TRUST A DECREE FOR SPECIFIC PERFORMANCE AFTER DETERMINING THAT THE TRUST HAD NOT FULLY PERFORMED UNDER THE REAL ESTATE PURCHASE CONTRACT BETWEEN THE PARTIES.**
  - A. **Specific Performance is an Equitable Remedy Which Requires That The Party Seeking It Must First Tender Full Performance of Its Own Contractual Obligations.**

- B. The Measure of Performance in This Case Was Whether The Shares of Stock Tendered by The Trust Pursuant to The Real Estate Purchase Contract Ever Reached a Value During The Time Period September 18, 1979 Through September 18, 1980 Such That Nagle Could Realize \$85,000.**
- C. The Trial Court Abused Its Discretion in Granting The Trust Specific Performance Because It Determined That The Shares Never Reached a Value Where Nagle Could Realize \$85,000 and Because The Court Imposed Duties on Nagle Which Were Contrary to Nagle's Rights Under The Real Estate Purchase Contract.**

**Standard of Review:** In an equity action, the Appeals Court reviews the Trial Court's legal conclusions under a correction of error standard according those conclusions no particular deference. Englert v. Zane, 848 P.2d 165, 168 (Utah App. 1993) (citing Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991)). The Appeals Court reviews the granting of a decree for specific performance for abuse of discretion. Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981).

**Preservation of Issue For Review:** Entitlement to a decree of specific performance identified by Appeals Court as issue on remand. See Addendum, Ex. B at ¶¶ 26-27, R. 2427-28; raised by Nagle in his Memorandum in Support of his Motion in Limine, R. 1300; raised in Nagle's Pretrial Order, R. 2408; raised at trial, R. 2618 at 37-38, 41, R. 2619 at 371-75, 385; rejected by Trial Court in Memorandum and Order of June 10, 2005. See Addendum Ex. C at p. 24, R. 2502; Notice of Appeal, R. 2605-07.

**Grounds For Review of Any Issues Not Preserved:** The Trial Court committed plain error in ruling that the Trust was entitled to a decree of specific performance having also determined that the Trust did not fully perform its obligations under the Real Estate Purchase Contract. The error should have been obvious to the Trial Court and the error is harmful to Nagle. Therefore, Appellate Court review of this case is appropriate. State Ex. Rel. T.M., 73 P.3d 959, 963 (Utah App. 2003).

- II. ASSUMING THAT NAGLE IS ENTITLED ONLY TO A MONETARY REMEDY, THE TRIAL COURT ABUSED ITS DISCRETION BY CALCULATING AN OFFSET BASED UPON WHAT NAGLE COULD HAVE SOLD THE SHARES OF STOCK FOR BETWEEN SEPTEMBER 18, 1979 AND SEPTEMBER 18, 1980 BECAUSE THE REAL ESTATE PURCHASE CONTRACT EXPRESSLY CONTEMPLATED THAT NAGLE WOULD NOT BE REQUIRED TO SELL THE SHARES UNTIL THEY REACHED A VALUE WHERE THEY COULD REALIZE \$85,000 AND THAT NEVER HAPPENED.**
- A. The Court Determined That an Offset Should be Calculated Based on What The Trust Owed Nagle (\$85,000) Minus What Nagle Could Have Sold The Stock For During The Time Period in Question.**
  - B. The Terms of The Real Estate Purchase Contract Between The Parties, Specifically Addendum No. 2, Expressly State That Nagle Was Not Required to Sell Shares Until They Reached a Value During The Time Period September 18, 1979 through September 18, 1980 Whereby Nagle Could Realize \$85,000.**
  - C. The Correct Offset Amount Should be at Least The Unpaid Purchase Price Plus Interest.**



**Standard of Review:** In an equity action, the Appeals Court reviews the Trial Court's legal conclusions under a correction of error standard according those conclusions no particular deference. Englert v. Zane, 848 P.2d 165, 168 (Utah App. 1993) (citing Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991)). The Trial Court's fashioning of an equitable remedy is reviewed for abuse of discretion. United States Fuel Co. v. HCIC, 79 P.3d 945, 948 (Utah 2003).

**Preservation of Issue For Review:** Raised at trial R. 2618 at 45, R. 2619 at 371-74; rejected by Trial Court in Memorandum and Order of June 10, 2005. See Addendum, Ex. C at p. 25, R. 2503; Notice of Appeal, R. 2605-07.

**Grounds For Review of Any Issues Not Preserved:** The Trial Court committed plain error in ruling that the appropriate calculation of an offset should be measured by the amount due and owing Nagle minus what Nagle could have sold shares for during the time period at issue even though the contract between the parties did not require Nagle to sell the shares until they reached a value whereby Nagle could realize \$85,000. The error should have been obvious to the Trial Court and the error is harmful to Nagle. Therefore, Appellate Court review of this issue is appropriate. State Ex. Rel. T.M., 73 P.3d 959, 963 (Utah App. 2003).

**III. THE TRIAL COURT ERRED IN DETERMINING THAT THE TRUST HAD CONVEYED 105,000 SHARES OF STOCK TO NAGLE AS PART OF THE REAL ESTATE PURCHASE CONTRACT.**

- A. The Trial Court's Ruling is Contrary to The Law of The Case. The Appeals Court Had Already Determined That The Trust Only Conveyed 55,000 Shares As Part of The Transaction.**
- B. The Trial Court's Ruling Barred is by The Statute of Frauds Because it is Predicated on a Finding That the Parties Orally Modified Their Contract to Sell Real Property.**
- C. The Trial Court's Ruling is Against The Weight of The Evidence And is Clearly Erroneous.**
- D. The Trust is Bound by Its Numerous Judicial Admissions That Only 55,000 Shares Were Conveyed Under The Real Estate Purchase Contract.**

**Standard of Review:** In an equity action, the Trial Court's legal conclusions are reviewable under a correction of error standard according those conclusions no particular deference. Englert v. Zane, 848 P.2d 165, 168 (Utah App. 1993) (citing Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991)). The Trial Court's findings of fact in cases of equity are reviewed for clear error. Parduhn v. Bennett, 112 P.3d 495, 502 (Utah 2005).

**Preservation of Issue For Review:** Raised in Nagle's Objection to the Trust's Rule 26(a)(4) Disclosures, R. 2104; raised in Nagle's Motion to Strike the Trust's Pretrial Order, R. 2378-79; raised by Nagle in his Pretrial Order, R. 2406 - 2408; objection raised at trial and overruled, R. 2618 at 981; R. 2619 at 375; rejected by Trial Court in Memorandum

and Order of June 10, 2005, Addendum, Ex. C at pp. 14-15, R. 2491-92; Notice of Appeal, R. 2605-07.

**Grounds For Review of Any Issues Not Preserved:** The Trial Court committed plain error in ruling that the Trust conveyed 105,000 shares of stock to Nagle as part of the Real Estate Purchase Contract between the parties. The error should have been obvious to the Trial Court and the error is harmful to Nagle. Therefore, Appellate Court review of this issue is appropriate. State Ex. Rel. T.M., 73 P.3d 959, 963 (Utah App. 2003).

**IV. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE TRUST BEHAVED EQUITABLY WHEN IT CONVEYED THE PROPERTY AT ISSUE TO AN INSIDER OF THE TRUST DURING THE PENDENCY OF THE FIRST APPEAL WHO PAID BELOW FAIR MARKET VALUE AND TOOK TITLE WITH FULL KNOWLEDGE THAT NAGLE HAD PLACED A LIS PENDENS ON THE PROPERTY.**

**Standard of Review:** In an equity action, the Appeals Court reviews the Trial Court's legal conclusions under a correction of error standard according those conclusions no particular deference. Englert v. Zane, 848 P.2d 165, 168 (Utah App. 1993) (citing Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991)). The Trial Court's findings of fact in cases of equity are reviewed for clear error. Parduhn v. Bennett, 112 P.3d 495, 502 (Utah 2005). The Trial Court's application of equitable principles is reviewed for abuse of discretion. Id. at 506.



**Preservation of Issue For Review:** Raised at trial R. 2619 at 324-328; rejected by Trial Court in Memorandum and Order of June 10, 2005, Addendum, Ex. C at p. 16, R. 2494; Notice of Appeal, R. 2605-07.

**Grounds For Review of Any Issues Not Preserved:** The Trial Court committed plain error in ruling that the Trust behaved equitably when it conveyed title to the property to an insider of the Trust during the pendency of the first appeal when the insider paid below fair market value for the property and took title with knowledge of the lis pendens Nagle placed on the property. The error should have been obvious to the Trial Court and the error is harmful to Nagle. Therefore, Appellate Court review of this issue is appropriate. State Ex. Rel. T.M., 73 P.3d 959, 963 (Utah App. 2003).

**V. THE TRIAL COURT ERRED IN NOT AWARDING NAGLE PREJUDGMENT INTEREST BECAUSE THE AMOUNT OWED (\$85,000) WAS A FIXED AMOUNT DUE AND OWING AT THE TIME THE TRUST FAILED TO PERFORM ITS OBLIGATIONS UNDER THE REAL ESTATE PURCHASE CONTRACT AND INTEREST CAN BE CALCULATED WITH MATHEMATICAL ACCURACY.**

- A. The Trial Court Determined That The Trust Had Failed to Perform Its Obligations Under The Real Estate Purchase Contract in That The Stock Conveyed as Part of The Purchase Price Did Not Reach a Value at Any Time During September 18, 1979 Through September 18, 1980 Where Its Sale Could Realize \$85,000.**
- B. Following September 18, 1980, The Trust Was in Default of The Agreement And Was Subsequently Notified by Nagle of The Default.**



**C. Upon Default, Nagle Was Owed a Fixed Amount of \$85,000 Which is a Fixed Sum. The Default Was Never Cured. Interest Can be Calculated With Mathematical Accuracy.**

**Standard of Review:** A trial court's decision to grant or deny a prejudgment interest presents a question of law reviewed for correctness. Lyon v. Burton, 5 P.3d 616, 636 (Utah 2000).

**Preservation of Issue For Review:** Issue of prejudgment interest raised by Nagle in Pretrial Order, R. 2408; raised by Nagle at trial R. 2618 at 45; R. 2619 at 385; denied by Trial Court in Memorandum and Order Of June 10, 2005, Addendum, Ex. C at p. 30, R. 2508; Notice of Appeal, R. 2605-07.

**Grounds for Review of Any Issue Not Preserved:** The Trial Court committed plain error in ruling that Nagle was not entitled to prejudgment interest after ruling that the Trust had failed to perform its obligations and Nagle was owed \$85,000 under the express terms of the Real Estate Purchase Contract. The error should have been obvious to the Trial Court and the error is harmful to Nagle. Therefore, Appellate Court review of this issue is appropriate. State Ex. Rel. T.M., 73 P.3d 959, 963 (Utah App. 2003).

**VI. THE TRIAL COURT ERRED IN NOT AWARDING NAGLE ATTORNEY'S FEES AS PREVAILING PARTY.**

**Standard of Review:** Review of the Trial Court's determination as to who was the prevailing party is conducted under an abuse of discretion standard. R.T. Nielson Co. v. Cook<sup>h</sup>, 40 P.3d 1119, 1127 (Utah 2002).

**Preservation of Issue for Review:** Identified for issue on remand, Addendum, Ex. B at ¶ 29, R. 2429. Raised at trial, R. 2618 at 45; 2619 at 385-86; rejected by Trial Court in Memorandum and Order of June 10, 2005, Addendum, Ex. C at p. 32, R. 2510; Notice of Appeal, R. 2605-07.

**Grounds For Review of Any Issues Not Preserved:** The Trial Court committed plain error in not awarding attorneys fees to Nagle as prevailing party. The error should have been obvious to the Trial Court and the error is harmful to Nagle. Therefore, Appellate Court review of this issue is appropriate. State Ex. Rel. T.M., 73 P.3d 959, 963 (Utah App. 2003).

## **STATEMENT OF THE CASE**

### **Nature of The Case**

This is an action to determine whether the Trust performed its obligations under a Real Estate Purchase Contract with Nagle so that the Trust would be entitled to a decree for specific performance to obtain title to a condominium unit that Nagle built and owned. Under the terms of the contract, the Trust was required to pay Nagle \$10,000 down, assume a mortgage on the property and pay an additional \$85,000. Nagle agreed to accept 55,000 shares of stock in lieu of the \$85,000 provided that during the time period of September 18, 1979 through September 18, 1980 the shares reached a value where Nagle could realize \$85,000 from their sale. If the shares did not reach that value, the Trust was to pay \$85,000 in cash or more shares before receiving title to the property.

The Trust paid the \$10,000 down; it did not assume the mortgage although it did pay the mortgage amounts through payoff; the 55,000 shares never reached a value where they could realize \$85,000 during the appointed time. The Trust never paid Nagle \$85,000 nor tendered more shares. Because Nagle never received shares or cash valued at \$85,000, he never conveyed title to the property to the Trust.

### **Course of Proceedings**

The Trust filed a Complaint on July 28, 1999, alleging breach of contract, adverse possession and declaratory judgment to quiet title, among other claims. Nagle filed an Answer and Counterclaim. The parties ultimately filed cross-motions for summary judgment. On November 6, 2000, the Trial Court granted the Trust's request for quiet title relief and ordered Nagle to convey title to the Trust upon final payment of the mortgage. Nagle appealed this judgment but was unable to stay enforcement. Title was subsequently conveyed to the Trust.

In a ruling dated September 26, 2002, as amended on November 12, 2002, the Utah Court of Appeals vacated the Trial Court's November 6, 2000 Order in its entirety and remanded the case back to the Trial Court to determine whether the Trust had actually performed under the contract. Specifically, the Appeals Court held:

If, on remand, the fact finder determines that the 55,000 shares were worth at least \$85,000 at some point in time between September 18, 1979 and September 18, 1980, and that [Nagle] was obligated to sell the shares at that time, then [the Trust] has



performed [its] obligations and [Nagle] is not entitled to further relief. However, if the fact finder determines that the shares did not reach a value of \$85,000 within the appointed period, [Nagle] is entitled to offset the amount of the shortfall [the Trust] was obligated to pay in cash or additional shares against the value of the property.

The Appeals Court subsequently amended its opinion to allow Nagle to seek title to the property as a remedy for the Trust's default. Addendum, Ex. B at ¶ 26, R. 2418, R. 2428.

### **Disposition in The Lower Court**

The Trial Court conducted a bench trial on June 7 and 8, 2005. The Trial Court issued a Memorandum and Order on June 10, 2005 granting the Trust a decree of specific performance, despite finding that the shares of stock never reached a value of \$85,000 during the specified time period. The Trial Court also fashioned an offset remedy awarding Nagle \$32,550 representing the difference between the \$85,000 owed by the Trust and what the Trial Court concluded Nagle could have earned had he attempted to sell the shares during the time in question.

The Trial Court entered a final judgment on August 15, 2005. This appeal followed.

### **STATEMENT OF FACTS**

1. On March 30, 1978, the Trust entered into an agreement with Nagle to purchase a condominium unit. Using a Uniform Real Estate Contract, the Trust agreed to pay \$100,500 for the condominium by (1) making a down payment of \$10,000; (2) assuming a mortgage loan owed by Nagle to First Security Bank in the amount of \$59,958.75; and (3)

tendering 55,000 shares of the Utah Coal & Chemical Company for the balance of the purchase price. See Real Estate Purchase Contract, Addendum, Ex. A, R. 2414-17; see also Appeals Court Opinion, Addendum, Ex. B at ¶ 2, R. 2420. In return, Nagle agreed to convey title to the condominium when the Trust verified that the value of the stock was sufficient to cover the unpaid balance of the purchase price. R. 2413; R. 2420.

2. The Trust paid the \$10,000 down and began making payments on the mortgage. However, the Trust never assumed the mortgage. R. 2421. Nagle informed the Trust that he considered the Trust's failure to assume the mortgage a breach of contract and advised the Trust that default and foreclosure proceedings could be instituted. In lieu of foreclosure proceedings, the Trust and Nagle added a Second Addendum to the contract on September 18, 1979. In Addendum No. 2, the Trust agreed to pay approximately \$50,000 more for the condominium in exchange for Nagle's forbearance. Addendum 2 reads as follows:

Title of premises being sold under the contract referred to above will be transferred when [Nagle] sells sufficient of the shares of Utah Coal & Chemical Corp. transferred under [the contract] to realize \$85,000 cash. [Nagle] hereby agrees to sell shares sufficient to realize \$85,000 within one year of receipt thereof providing the market value of said shares will cause a realization of \$85,000.

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

R. 2421. The shares of stock did not reach a value such that Nagle could have realized \$85,000 from their sale. Memorandum and Order of June 10, 2005, Addendum, Ex. C at p. 21, R. 2499.

3. On January 13, 1981, Nagle, through his attorney, sent the Trust a letter informing the Trust that the shares of stock did not reach the required value of \$85,000 within one year and that the Trust had not yet paid the difference. Nagle went on to inform the Trust that he would consider the Trust in default if the Trust did not pay the amount still owed on the contract by January 25, 1981. The Trust did not make any further payments to Nagle. R. 2422; Trial Ex. 105, Addendum, Ex. D, R. 2430-31.

4. The Real Estate Purchase Contract provides that in the event of default:

[Nagle] shall have the right, upon failure of the [Trust] to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, all payments which have been made theretofore on this contract by the [Trust], shall be forfeited to [Nagle] as liquidated damages for the non-performance of the contract, **and the [Trust] agrees that [Nagle] may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the [Trust] thereon, and the said additions and improvements shall remain with the land become [sic] the property of [Nagle], the [Trust] becoming at once a tenant at will of [Nagle].**

Real Estate Purchase Contract at ¶ 16, Addendum, Ex. A, R. 2415 (emphasis added).

5. On July 28, 1999, the Trust brought suit against Nagle, seeking a declaratory judgment to quiet title based on breach of contract and adverse possession. Nagle answered and counterclaimed for remedies under the contract, including forfeiture and foreclosure. Nagle also sought a declaratory judgment quieting title in him. Both parties filed motions for summary judgment. R. 2422.

6. On November 6, 2000, the Trial Court granted the Trust's motion for quiet title relief. The Court stayed that judgment pending Nagle posting bond. When Nagle was unable to post bond, the Trial Court vacated the stay and title to the property was conveyed to the Trust. R. 521-531; R. 621-626.

7. On November 7, 2000, Nagle filed a Notice of Appeal, appealing the entirety of the Trial Court's judgment. R. 535. On November 21, 2000, Nagle placed a lis pendens on the property. Memorandum and Order of June 10, 2005, Addendum, Ex. C at p. 6, R. 2484; Trial Ex. 18.

8. On January 18, 2001, the Trust conveyed the property to K.N.B. Holdings, LLC ("KNB"). KNB is an affiliate of the Trust. Specifically, KNB's principal Kirk Blosch is married to a beneficiary of the Trust and is a brother-in-law of the trustee. KNB paid less than fair market value and took title to the property with full knowledge of the lis pendens. R. 2619 at p. 331, 333-34.



9. On September 26, 2002, the Utah Court of Appeals issued a ruling vacating the Trial Court's order and remanding the case for further proceedings. That opinion was amended on November 12, 2002 to allow Nagle to recover title for the property. Addendum, Ex. B, R. 2418-30; R. 2619 at 321-27.

10. The Trial Court conducted a bench trial on June 7 and 8, 2005. The Court issued a Memorandum Order on June 10, 2005. In that Order, the Trial Court granted the Trust a decree for specific performance and awarded Nagle an offset of \$32,550. Final judgment was entered on August 15, 2005. Addendum, Ex. C, R. 2479-2511.

11. Nagle timely filed a Notice of Appeal and obtained a stay of judgment. R. 2599-2602; R. 2605-07.

### **SUMMARY OF ARGUMENT**

**I. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE TRUST A DECREE FOR SPECIFIC PERFORMANCE AFTER DETERMINING THAT THE SHARES OF STOCK DID NOT REACH A VALUE WHERE NAGLE COULD REALIZE \$85,000 DURING THE TIME PERIOD SEPTEMBER 18, 1979 THROUGH SEPTEMBER 18, 1980.**

**A. Specific Performance is an Equitable Remedy Which Requires That The Party Seeking It Must First Tender Full Performance of Its Contractual Obligations.**

The Trial Court granted the Trust a decree for specific performance. It is a long-standing principle in Utah law that in order to obtain a decree for specific performance, the party seeking it must fully tender its own performance. The Trust did not tender full

performance because the Trial Court found that the shares of stock conveyed by the Trust never reached a value where Nagle could realize \$85,000 during the time period of September 18, 1979 through September 18, 1980 as the Real Estate Purchase Contract required.

**B. The Measure of Performance in This Case Was Whether The Shares of Stock Tendered by The Trust Pursuant to The Real Estate Purchase Contract Ever Reached a Value During The Time Period September 18, 1979 Through September 18, 1980 Such That Nagle Could Realize \$85,000.**

In its Opinion vacating the Trial Court's November 6, 2000 Order, the Utah Court of Appeals identified the measure of performance to be whether the 55,000 shares of Utah Coal & Chemical stock tendered by the Trust under the Real Estate Purchase Contract ever reached a value such that Nagle could realize the \$85,000 remaining on the purchase price for the property.

**C. The Trial Court Abused Its Discretion in Granting The Trust Specific Performance Because The Shares Never Reached a Value Where Nagle Could Realize \$85,000 And Because The Court Imposed Duties on Nagle Which Were Contrary to Nagle's Rights Under The Real Estate Purchase Contract.**

The Trial Court determined that the shares conveyed by the Trust did not reach a value where Nagle could realize \$85,000. Therefore, the Trust did not tender full performance of its obligations and is not entitled to a decree of specific performance under Utah law. Yet, the Trial Court nevertheless granted specific performance because, it concluded, Nagle could

have sold the shares to realize something close to \$85,000 in the year period and therefore it would not be equitable to allow Nagle to recoup title. In reaching this conclusion, the Trial Court imposed contractual duties and burdens upon Nagle the parties did not bargain for, in violation of long-standing principles of equity and contract construction. The Trial Court abused its discretion in granting the Trust specific performance.

**II. ASSUMING THAT NAGLE IS ONLY ENTITLED TO A MONETARY REMEDY, THE TRIAL COURT ERRED BY CALCULATING AN OFFSET BASED UPON WHAT NAGLE COULD HAVE SOLD THE SHARES OF STOCK FOR BETWEEN SEPTEMBER 18, 1979 AND SEPTEMBER 18, 1980 BECAUSE THE REAL ESTATE PURCHASE CONTRACT EXPRESSLY CONTEMPLATED THAT NAGLE WOULD NOT BE REQUIRED TO SELL THE SHARES UNTIL THEY REACHED A VALUE WHERE THEY COULD REALIZE \$85,000 AND THAT NEVER HAPPENED.**

**A. The Court Determined That an Offset Should be Calculated Based Upon What The Trust Owed Nagle (\$85,000) Minus What Nagle Could Have Sold The Stock For During The Time Period In Question.**

Assuming that Nagle is only entitled to a monetary remedy, the Trial Court abused its discretion in its calculation of the offset amount. The Trial Court decided that the offset should be based on the difference between what the Trust owed Nagle (\$85,000) and what Nagle could have sold the shares he received to make up the difference.

**B. The Real Estate Purchase Contract, Specifically Addendum No. 2, Expressly States That Nagle Is Not Required to Sell Shares Until They Reach a Value During The Appointed Time Period Whereby Nagle Could Realize \$85,000.**

The language of Addendum No. 2 expressly states:



[Nagle] hereby agrees to sell shares sufficient to realize \$85,000 within one year of receipt thereof **providing the market value of said shares will cause a realization of \$85,000.**

(emphasis added).

This provision means Nagle had no obligation to sell the shares until they reached a value where they could realize \$85,000. Therefore, Nagle did not have any contractual obligation to make up any difference on his own between what the Trust owed him (\$85,000) and what it paid him (\$0). For the Trial Court to fashion a remedy based on a failure to perform a condition that was not in the contract is an abuse of discretion.

**C. The Correct Offset Amount Should Be At Least The Unpaid Purchase Price Plus Interest.**

The Appeals Court made clear that any offset should consist of “the amount of the shortfall [the Trust] was obligated to pay.” At the very least, then, Nagle is owed \$85,000 which is the difference between what he was owed and what the Trust paid. Nagle is also entitled to the interest that has accrued over the years because he timely notified the Trust of its default no later than January, 1981 and this default was never cured.

**III. THE TRIAL COURT ERRED IN DETERMINING THAT THE TRUST HAD CONVEYED 105,000 SHARES OF STOCK TO NAGLE AS PART OF THE REAL ESTATE PURCHASE CONTRACT.**

**A. The Trial Court's Ruling Is Contrary To The Law of The Case.**

The Trial Court ruled in its November 6, 2000 Order, which the Trust prepared, that the Trust had conveyed 55,000 shares of Utah Coal & Chemical stock to Nagle under Addendum No. 2 to the Real Estate Purchase Contract. The Appeals Court adopted this finding in its November, 2002 ruling. Under the mandate rule of the law of the case doctrine, the Trial Court did not have the authority to reconsider the issue of how many shares were conveyed, particularly when no new evidence was presented on the matter at the June, 2005 trial.

**B. The Trial Court's Ruling is Barred By The Statute Of Frauds.**

The Trial Court essentially concluded the parties orally modified their agreement to call for more shares to be tendered as part of the purchase price. Yet, because the contract allegedly modified involved the sale of real property, the modification must be in writing. Otherwise, its unenforceable under the Utah Statute of Frauds. U.C.A. § 25-5-3.

**C. The Trial Court's Ruling Is Against The Weight Of The Evidence And Is Clearly Erroneous.**

The overwhelming weight of the evidence establishes that only 55,000 shares were conveyed to Nagle under the Real Estate Purchase Contract. This evidence includes the Real Estate Purchase Contract Addendum No. 2, contemporaneous correspondence of the parties

and judicial admissions from the Trust. The Trust did not provide any evidence supporting its position but merely re-argued the meaning of neutral documents.

**D. The Trust Is Bound by Its Judicial Admission That Only 55,000 Shares Were Conveyed Under The Real Estate Purchase Contract.**

The Trust has admitted throughout this case that it conveyed only 55,000 shares to Nagle as part of the transaction. It did not raise the issue of 105,000 shares until the eve of trial. It did not point to any new evidence which might otherwise warrant not holding the Trust to its admission. The Trust should not have been allowed to alter its stated and accepted position at trial.

**IV. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE TRUST BEHAVED EQUITABLY WHEN IT CONVEYED THE PROPERTY AT ISSUE TO AN INSIDER OF THE TRUST DURING THE PENDENCY OF THE FIRST APPEAL WHO PAID BELOW FAIR MARKET VALUE FOR IT AND TOOK TITLE WITH A LIS PENDENS RECORDED AGAINST IT.**

Shortly after receiving title to the property and while the first appeal was pending before the Appeals Court, the Trust conveyed the property to a party in privity who paid below fair market value for it and took it with full knowledge of the lis pendens Nagle had recorded. The transfer was not an arms-length transaction but was designed to deny Nagle a remedy, namely recoupment of title to the property in the event he prevailed on appeal.

**V. THE TRIAL COURT ERRED IN NOT AWARDING NAGLE PRE-JUDGMENT INTEREST.**

Nagle was owed the fixed and determined sum of \$85,000 at the time the Trust failed to perform after September 18, 1980. It was certainly owed that sum when he notified the Trust that it was in default in January, 1981. Prejudgment interest is a sum which can be calculated with mathematical accuracy in this case. Accordingly, Nagle is entitled to prejudgment interest from the time of the default to the present.

**VI. THE TRIAL COURT ERRED IN NOT AWARDING NAGLE ATTORNEY'S FEES AS PREVAILING PARTY.**

The Real Estate Purchase Contract provides for attorney's fees to the prevailing party. Because the Trial Court determined that the Trust had not performed and that Nagle was entitled to a remedy, it follows necessarily that Nagle is the prevailing party for purposes of the Real Estate Purchase Contract and should be awarded attorney's fees.

**ARGUMENT**

**I. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE TRUST A DECREE FOR SPECIFIC PERFORMANCE AFTER DETERMINING THE SHARES OF STOCK DID NOT REACH A VALUE WHERE NAGLE COULD REALIZE \$85,000.**

**A. Specific Performance is an Equitable Remedy Which Requires That The Party Seeking It Must First Tender Full Performance Of Its Own Contractual Obligations.**

The criteria for awarding specific performance is well known. **"To obtain a decree for specific performance against a defaulting party, the aggrieved party must make an**



**unconditional tender of the performance required by the agreement.”** Kelley v. Leucadia Fin. Corp., 846 P.2d 1238, 1243 (Utah 1992) (emphasis added). Failure to make the tender called for under the agreement is a sufficient basis to deny specific performance. LHIW, Inc. v. DeLorean, 753 P.2d 961, 963 (Utah 1988); see also Lincoln Land & Development Co. v. Thompson, 489 P.2d 426, 428 (Utah 1971). The Trial Court’s award of specific performance is reviewed under an abuse of discretion standard. Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981). However, even in an equity action, the Appellate Court reviews the Trial Court’s legal conclusions under a correction of error standard according to those conclusions with no particular deference. Englert v. Zane, 848 P.2d 165, 168 (Utah App. 1993) (citing Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991)).

**B. The Measure of Performance in This Case Was Whether The Shares of Stock Tendered By The Trust Pursuant to The Real Estate Purchase Contract Ever Reached a Value During The Time Period September 18, 1979 Through September 18, 1980 Such That Nagle Could Realize \$85,000.**

In its Opinion reversing the Trial Court’s November 6, 2000 Order, the Appeals Court stated unequivocally:

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

**the amount of the shortfall [the Trust] was obligated to pay in cash or additional shares against the value of the property.**

Addendum, Ex. B at ¶ 27; R. 2428 (emphasis added).

Accordingly, whether the Trust fully and unconditionally performed its obligations is measured by determining whether the shares of stock tendered by the Trust ever reached a value during the time in question so that Nagle could realize \$85,000.

The Trial Court, after hearing the evidence from both sides, held: “[T]he court finds that the value of the stock did not achieve \$ .81 in the time frame to be considered by the court on remand from the appeals court. There is simply insufficient evidence.”

Addendum, Ex. C at p. 21, R. 2499 (emphasis added). The Trial Court further stated: “[T]he 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.” Addendum, Ex. C at p. 21, R. 2499 (emphasis added).

Since the value of the shares never reached a price where Nagle could realize \$85,000, the Trust did not perform in the manner required by the express terms of the Real Estate Purchase Contract or in the manner set forth by the Appeals Court. Under long-standing Utah law, the Trust is not entitled to a decree for specific performance. Kelley, 846 P.2d at 1243. Rather, Nagle is 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. That Order was vacated in its entirety by the Appeals Court.

**C. The Trial Court Abused Its Discretion in Granting The Trust Specific Performance.**

Notwithstanding its finding that the shares of stock did not reach a value sufficient to realize \$85,000, and therefore that the Trust did not fully perform its contractual obligations, the Trial Court granted the Trust a decree for specific performance. It appears to have done this for the following reasons.

First, the Trial Court concluded that Nagle could have sold the shares of stock for some value during the time period September 18, 1979 to September 18, 1980 but chose not to. Instead, the Trial Court concluded, Nagle was "speculating" in the stock value "and did nothing to attempt to sell even a portion of the stock when it would have realized some value . . . ." Addendum, Ex. C at p. 25, R. 2503.

In reaching this conclusion, the Trial Court ignored the plain language of the contract:

Title of premises being sold under the contract referred to above **will be transferred when [Nagle] sells sufficient of the shares** of Utah Coal & Chemical Corp. transferred under Addendum # 1 to realize \$85,000 cash. [Nagle] hereby agrees to sell shares sufficient to realize \$85,000 within one year of receipt thereof **providing the market value of said shares will cause a realization of \$85,000.**

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

Under the plain language of the Real Estate Purchase Contract, Nagle had no obligation to sell **any** shares **until** they reached a value where he could realize \$85,000. The shares never reached that value. Addendum, Ex. C. at p. 21, R. 2499. The parties bargained that in the event the shares could not realize \$85,000 in the one year period, the **Trust** would pay \$85,000 in cash or more shares. This conclusion is supported again by the plain language of the Contract:

**Should the value of the 55,000 shares conveyed not equal \$85,000 within 1 year [the Trust] agrees to convey additional shares . . . or cash sufficient to bring the value conveyed to [Nagle] to \$85,000 before [Nagle] conveys title . . . .**

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

The parties did not bargain that if the shares could not realize \$85,000 Nagle would sell as many of the shares as he could, seek the remainder from the Trust and convey title to the Trust regardless. The Trust expressly assumed the risk that, prior to receiving title to the property, it would have to come up with \$85,000 cash if the shares did not reach the agreed upon value.

The Trial Court has effectively rewritten the parties' agreement so that it is Nagle--not the Trust--who must take affirmative action in the event the shares do not reach the agreed upon value, i.e., sell the shares and seek the difference from the Trust. The effect of this rewriting is to give the Trust the benefit of a bargain it did not perform while Nagle receives-



-after the fact--the burden of a bargain to which he did not agree and never had a chance to perform. This result constitutes an abuse of the Trial Court's discretion.

In fashioning the remedy it did, the Trial Court ignored well-settled rules of contract construction and equity. First, the Utah Supreme Court recently reaffirmed its long-standing principle that **"we will not make a better contract for the parties than they have made for themselves . . . . Nor will we avoid the contract's plain language to achieve an 'equitable' result."** Bakowski v. Mountain States Steel, Inc., 52 P.3d 1179, 1185 (Utah 2002) (emphasis added) (citations omitted). Second, **"although a court, sitting in equity, exercises discretion in granting or denying relief . . . , it does not have the authority to ignore existing principles of law in favor of its view of the equities."** Warner v. Sirstins, 838 P.2d 666, 670 (Utah App. 1992) (emphasis added) (citing Jarvis v. State Land Dept's., 479 P.2d 169, 173 (Ariz.1970)) (**"equity obeys and conforms to the law's general rules and policies whether the common law or statute law"**) (emphasis added). See also Land v. Land, 605 P.2d 1248, 1251 (Utah 1980) ("Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made"). Courts in other states have long held similar views. For example, in McCall v. Carlson, 172 P.2d 171, 187-88 (Nev. 1946), the Supreme Court of Nevada held:

**Our equitable powers do not extend so far as to permit us to disregard fundamental principles of the law of contracts, or arbitrarily to force upon parties contractual obligations, terms or conditions which they have not voluntarily**

**assumed. In this regard, equity respects and upholds the fundamental right of the individual to complete freedom to contract or decline to do so, as he conceives to be for his best interests, so long as his contract is not illegal or against public policy. In this respect, and many others, equity follows the law. (Emphasis added).**

This equitable principle was recently reaffirmed in ARC LifeMed, Inc. v. AMC-Tennessee, Inc., 2005 WL 1819210 (Tenn. App. 2005).

Similarly, the Court of Appeals of New Mexico recently stated:

**[T]he decision of which of two profit-seeking parties is more deserving to prevail is not within the province of the courts . . . . The written words of the contract afford greater certainty of intention, and more accurate compliance with the performance of the terms of the contracts by the parties thereto than do the retrospective, impassive conclusions of a court of equity. A court of equity . . . is bound by a contract as the parties have made it and has no authority to substitute for it another and different agreement, and should afford relief only where obviously there is fraud, real hardship, oppression, mistake, unconscionable results, and the other grounds of righteousness, justice and morality.**

United Properties Ltd. Co. v. Walgreen Properties, Inc., 82 P.3d 535, 544 (N.M. App. 2003) (emphasis added). This authority from Utah and elsewhere demonstrates that the Trial Court committed reversible error by ignoring the express terms of the parties' agreement.

The second factor the Trial Court erroneously focused on in fashioning its relief was the fact that the Trust consistently occupied the property from the time of the transaction in 1978, including paying the mortgage and improvements, to the present. In relying on this

factor, the Trial Court once again ignored Nagle's rights under the Real Estate Purchase Contract. Specifically, once the Trust failed to perform in September, 1980 and certainly no later than it was notified that it was in default in January, 1981, Trial Ex. 105, Addendum Ex. D, R. 2430-31, Nagle was entitled to treat the Trust as a tenant-at-will. The Real Estate Purchase Contract expressly stated:

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

Addendum, Ex. A at ¶ 16, R. 2415 (emphasis added).

Indeed, Nagle viewed the Trust as a tenant-at-will, R. 106-07, and Nagle did not convey title to the Trust until ordered to do so by the Trial Court in its November 6, 2000 Order. R. 529. Under these circumstances, it is appropriate to regard the mortgage payments the Trust made as rent. There was no evidence about what improvements were made on the property or what value they had, especially in the years before the Trust filed suit. Thus, that factor is not entitled to weight in this appeal.



Once again, the Trial Court is rewriting the parties' agreement to deprive Nagle of his rights under the contract in order to bestow a benefit in equity upon the Trust. The parties agreed that if there was a default, Nagle would be entitled to treat the Trust as a tenant. The Trust, therefore, assumed the risk that following notice of default, which the Trust received in January, 1981, Trial Ex. 105, Addendum, Ex. D, R. 2430-31, its payments would be treated as rent not equity. The Trust assumed that risk and received the benefit of a rent which stayed fixed even as the value of the property rose from \$100,500 to over \$380,000 by the time of trial. R. 2619 at 346. The Trial Court's Order creates a risk for Nagle that he did not bargain for, namely that his contract right upon default to hold title and treat the Trust as a tenant-at-will would be transformed into an equitable basis to convey title to the Trust years after Nagle made his decision.

The Trial Court was also influenced by the fact that the share price shortly before the transaction was almost sufficient to realize \$85,000. This conclusion is based upon the Trial Court's erroneous determination that 105,000 shares were conveyed to Nagle under the Real Estate Purchase Contract. That erroneous determination is discussed in depth herein. See pp. 33-43. For the reasons stated there, the Trial Court's reliance on this factor is an abuse of discretion.

Finally, the fact that the Trust conveyed the property to a family member does not support the Trial Court's decision at all. As will be discussed below, the Trust conveyed the

property to an insider during the pendency of the first appeal. Moreover, that insider, K.N.B. Holdings, LLC, paid below fair market price for the property and took title with knowledge of this lis pendens. KNB therefore had actual and constructive knowledge of the risk that it could lose title to the property if the Trial Court's November 6, 2000 Order was reversed, as it was. R. 2619 at 334. The Trust argued that KNB paid fair market value for the property. If this is true, then the Trust received fair market value for reselling the property even though it has yet to pay Nagle fair market value for that same property. It is difficult to see where equity is being done under these circumstances.

In summary, the factors the Trial Court relied upon in fashioning its equitable remedy are at odds with long-standing principles of Utah law relating to specific performance, contract construction and the interplay of equity and law. These factors therefore do not support the remedy the Trial Court developed and the use of them under these circumstances constitutes an abuse of discretion warranting reversal in its entirety of the Trial Court's grant of specific performance.

**II. ASSUMING THAT NAGLE IS ONLY ENTITLED TO A MONETARY REMEDY, THE TRIAL COURT STILL ERRED BY CALCULATING AN OFFSET BASED UPON WHAT NAGLE COULD HAVE SOLD THE SHARES OF STOCK FOR BECAUSE THE REAL ESTATE PURCHASE CONTRACT EXPRESSLY PROVIDES THAT NAGLE WOULD NOT BE REQUIRED TO SELL THE SHARES UNTIL THEY REACHED A VALUE WHERE THEY COULD REALIZE \$85,000 AND THAT NEVER HAPPENED.**

**A. The Trial Court Determined That An Offset Should be Calculated Based Upon What The Trust Owed Nagle (\$85,000) Minus What Nagle Could Have Sold The Stock For During The Time Period In Question.**

The Trial Court determined that Nagle was entitled an offset of \$32,550. Addendum at Ex. C, R. 2505. The Trial Court determined that the offset should be 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. Even assuming that the Trial Court was correct in deciding that Nagle may only recover a monetary remedy, it still abused its discretion in calculating the actual amount.

**B. The Real Estate Purchase Contract Expressly States That Nagle Is Not Required To Sell Shares Until They Reach a Value During The Time Period At Issue At Which Nagle Could Realize \$85,000.**

As discussed previously, the Real Estate Purchase Contract did not require Nagle to sell his shares as payment for the property until those shares reached a value of \$85,000. R. 2417. Yet, in fashioning an equitable remedy for the Trust, the Trial Court again penalized Nagle for doing something he had an express contractual right to do: Hold onto the shares until they reached a value where he could realize \$85,000.



Moreover, the offset in no way accounts for the appreciation of the property over time. The property is currently worth approximately \$380,000. R. 2619 at 346. Thus, under the Trial Court's Order, the Trust is allowed to purchase the property at substantially less than fair market value both at the time of the contract because it did not pay the \$85,000 owed and today because it did not have to pay the \$85,000 or that sum in today's value. Yet, when the Trust sold the property to KNB, it received and kept for itself what it considered to be fair market value. This is not equitable. This is contrary to the principles of equity and contract construction discussed above.

**C. The Correct Offset Amount Should Be At Least Be The Unpaid Purchase Price Plus Interest.**

In discussing an offset remedy, the Appeals Court made clear any offset should consist of "the amount of the shortfall [the Trust] was obligated to pay." Addendum, Ex. B at ¶ 27, R. 2428. The Trust is obligated to pay at least \$85,000 because it has never paid **any** of that amount. Therefore, any offset amount should, at the very least, start with the \$85,000 the Trust undeniably owes Nagle for its failure to fully perform its obligations. Nagle is further entitled to the time value of that \$85,000 over the years. The simplest way to measure this would be the statutory interest rate in effect at the time of the breach under U.C.A. § 15-1-1, 8 % per annum. The applicable time period would be from September, 1980, the time of the breach to the present.



Even if this Court determined that Nagle is not entitled to recoup title to the property as a remedy for the Trust's nonperformance, the property should still be made available to Nagle to satisfy any monetary judgment this Court may order. This is appropriate because KNB is in privity with the Trust. See Statement of Fact No. 8; Press Pub., Ltd. v. Matol Botanical Intern., Ltd., 37 P.3d 1121, 1128 (Utah 2001) (a finding of privity depends mostly on the parties "relationship to the subject matter of the litigation"). A contrary ruling would mean that a privy of the Trust gets the full value of the property for which the Trust did not pay while Nagle is denied a remedy to satisfy a judgment he is undeniably owed. Moreover, because the principal of that privy is a close family member of beneficiaries of the Trust, the Trust essentially maintains access to the property and enjoys its benefits. R. 2819 at 330. That result is not equitable.

### **III. THE TRIAL COURT ERRED IN DETERMINING THAT THE TRUST HAD CONVEYED 105,000 SHARES OF STOCK TO NAGLE AS PART OF THE REAL ESTATE PURCHASE CONTRACT.**

#### **A. The Trial Court's Ruling Is Contrary To The Law of The Case.**

In its November 6, 2000 Order, the Trial Court found as a matter of undisputed fact, based on its review of a complete factual record, that the Trust conveyed 55,000 shares of Utah Coal & Chemical stock to Nagle as part of its obligations under the Real Estate Purchase Contract. R. 524. The Appeals Court expressly adopted this finding in its November, 2002 Opinion. Addendum, Ex. B at ¶ 20, R. 2425. No new evidence was

introduced at the June, 2005 trial on the issue of how many shares were tendered. Notwithstanding these express findings, the Trial Court ruled that 105,000 shares were conveyed. Addendum, Ex. C at p. 13, R. 2491. This ruling is contrary to the law of the case.

The law of the case doctrine is a legal doctrine under which a decision made on an issue during one stage of a case is binding in successive stages of the same litigation. Plumb v. State, 809 P.2d 734, 739 (Utah 1990). The doctrine was developed in the interests of economy and efficiency to avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on matters previously decided in the same case. Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977).

One element of the law of the case doctrine is known as the “mandate rule.” This rule dictates that legal pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case. Petty v. Clark, 192 P.2d 589, 594 (Utah 1948). The lower court must not depart from the mandate, and any change with respect to the legal issues governed by the mandate must be made by the appellate court that established it or by a court to which it, in turn, owes obedience. State v. Lopes, 34 P.3d 762, 766 (Utah 2001). The lower court must implement both the letter and the spirit of the mandate, taking into account the Appeals Court’s Opinion and the circumstances it embraces. Street v. Fourth Judicial Dist. Court, 191 P.2d 153, 159 (Utah 1948).

The legal issue decided by the Appeals Court in its November, 2002 Opinion was under what parameters the Trial Court would determine whether the Trust performed its contractual obligations or not. Specifically, the Appeals Court held:

To allow [the Trust] to breach one of [its] obligations under the contract, then, years later--after never having brought suit to have title conveyed--to obtain title without having to perform [its] other obligations under the same contract, is not equitable.

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

Addendum, Ex. B at ¶¶ 26-27, R. 2427-28 (emphasis added).

There is nothing in this ruling inviting the Trial Court to revisit the issue of how many shares were tendered as part of the transaction. The Appeals Court, based upon the Trial Court's findings of fact in its November 6, 2000 Order, determined the number of shares at issue already decided. The parties took no additional discovery after the Trial Court entered its November, 2000 Order and no new evidence was presented at the June, 2005 trial on this subject that was not already part of the record in November, 2000. For the Trial Court to make new findings on old evidence, as it has done, is to stray from the issue as framed by the

Appeals Court. This violates the mandate rule under long-standing Utah law. Lopes, 34 P.3d at 766; see also Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984).

There are exceptional circumstances under which a lower court can revisit issues already decided. They are narrowly defined under Utah law and consist of the following: (1) When there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice. Gillmor v. Wright, 850 P.2d 431, 439 (Utah 1993). (Per Orme, J. concurring.)

None of these considerations is present here. Indeed, the Trial Court did not even attempt to justify its findings under the law of the case doctrine. There was no intervening change of authority; there was no new evidence presented at trial and there was no showing that a manifest injustice would result from following the Appeals Court's Opinion. The Trial Court's decision was contrary to the law of the case doctrine and should be reversed.

**B. The Trial Court's Ruling That The Trust Conveyed 105,000 Shares Is Barred By The Statute of Frauds.**

Both Addendum No. 1 and No. 2 to the Real Estate Purchase Contract clearly contemplate that the Trust will convey 55,000 shares of stock to pay the remaining \$85,000 due and owing. Addendum, Ex. A, R. 2416-17. Notwithstanding this unequivocal evidence of the parties' intent and absent any other written document drafted by the parties evidencing a change in intent, the Trial Court concluded that the parties actually agreed to something



else. In other words, the Trial Court concluded that the parties had orally modified their contract to provide that the Trust would convey 105,000 shares to pay off the remaining \$85,000.

Under Utah law, “parties to a contract may, by mutual consent, modify any or all of a contract.” Harris v. IES Associates, Inc., 69 P.3d 297, 310 (Utah App. 2003). **“A valid modification of a contract requires a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly with sufficient definiteness.”** Id. (citations omitted) (emphasis added). It is the Trust’s burden to prove the parties’ mutual assent to modify the Real Estate Purchase Contract to provide for delivery of 105,000 shares. Harris, 69 P.3d at 310. The Trust has not carried that burden.

However, even if the parties properly modified the contract, the modification is unenforceable because it is barred by the Utah Statute of Frauds. U.C.A. § 25-5-3. That provision states:

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

It is well-settled under Utah law that **“if an original agreement is within the statute of frauds, a subsequent agreement which modifies the original written agreement must also satisfy the requirements of the statute of frauds to be enforceable.”** Golden Key

Realty, Inc. v. Mantas, 699 P.2d 730, 732 (Utah 1985); R.T. Nielson Co. v. Cook, 40 P.3d 1119, 1124 (Utah 2002) (emphasis added). There is no question that the original contract between the parties needed to be, and was, in writing. Thus, the purported modification needed to be in writing. Even assuming it existed at all, the fact that it was not in writing renders it unenforceable. Accordingly, the Trial Court's conclusion that 105,000 shares were tendered under the contract is based on an unenforceable agreement and is an invalid conclusion of law and finding of fact.

**C. The Trial Court's Ruling Is Against The Weight Of Evidence And Is Clearly Erroneous.**

There is no document signed by the parties acknowledging a modification to the Real Estate Purchase Contract. Rather, the evidence offered by the Trust to support its claimed modification consists of the following:

1. Trial Ex. 14, a document dated September 18, 1979 indicating the registration of 105,000 shares of Utah Coal & Chemical stock in Gary Nagle's name; and
2. Trial Ex. 11, Nagle's Answers to the Trust's First Set of Interrogatories dated January 26, 2000, particularly Interrogatory No. 7.

This evidence does not support the Trial Court's conclusion of modification for several reasons. First, Trial Ex. 14 was not prepared by the parties and no foundation was laid that the document reflected the necessary mutual assent of the parties to modify their

agreement. To the contrary, the document merely shows that 105,000 shares were registered on a particular day.

Trial Ex. 11, the interrogatory Answer, is even less helpful. Interrogatory No. 7 has ten subparts to it, each of which seeks a significant amount of information dating back over twenty years. The Trust suggested through questioning of Gary Nagle at trial that because the answer did not expressly indicate that 50,000 shares of the 105,000 registered were purchased in a separate agreement, therefore they were all part of the Real Estate Purchase Contract. R. 2618 at 187. But this is argument. It is not evidence to show mutual assent. Moreover, both Gary Nagle and Doug Rex testified that 55,000 shares were part of the contract and the remaining 50,000 were separately purchased but delivered and registered at the same time. R. 2618, 179-80, 212-213; R. 2619 at 337. It is true that the Trial Court is not required to believe that testimony but discounting testimony does not mean that the obverse of it is true.

Moreover, in focusing on Nagle's inability to produce documentation showing he paid separately for the additional 50,000 shares registered on September 18, 1979, the Trial Court unfairly shifted the burden of proof to him and then drew an adverse inference from his inability to meet that burden. Addendum, Ex. C at p. 14, R. 2492. As stated, it is the Trust's burden to prove modification of the contract. Harris, 69 P.3d at 310. Finally, 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. Addendum, Ex. C at p. 13, R. 2591. Moreover, it ignores the fact that the stock was “penny stock” whose primary appeal to investors is its highly speculative nature.

The Trial Court also ignored the evidence presented by Nagle that the Trust understood the transaction involved only 55,000 shares. For example, in Trial Ex. 108, Addendum, Ex. E, R. 2477, counsel for the Trust acknowledged in January, 1981 that the transaction involved only 55,000 shares. Counsel is now arguing that the transaction actually was for 105,000 shares. Moreover, as discussed below, the Trust admitted in numerous pleadings that the transaction involved 55,000 shares only. See, e.g., the Trial Court’s November 6, 2000 Findings of Fact and Conclusions of Law, R. 524-25, **which the Trust prepared**. Finally, both addenda to the contract specifically reference 55,000 shares.

The Trial Court made several references in its June 10 Memorandum and Order to the Trust’s good faith belief as to the value of the stock. See, e.g., Addendum, Ex. C at p. 24, R. 2502. Yet, there is absolutely no evidence in the record reflecting LeRoy Collard’s belief or understanding about the value of the stock at the time of the transaction at all and none is identified by the Trial Court. Mr. Collard did not testify at trial because he is deceased and there are no contemporaneous records which reflect what he actually thought of the stock. The Trial Court ignored the weight of the evidence and its finding that 105,000 shares of stock were transferred is clearly erroneous.



**D. The Trust Is Bound By Its Judicial Admission That Only 55,000 Shares Were Conveyed Under The Real Estate Purchase Contract.**

Throughout this case, the Trust has continually acknowledged both formally and informally that only 55,000 shares were conveyed to Nagle under the terms of the Real Estate Purchase Contract. Indeed, in findings of fact and conclusions of law **it prepared** for the Trial Court's signature in November, 2000, the Trust stated that the real estate purchase transaction involved 55,000 shares. R. 524-25.

The Trust did not raise the issue of 105,000 shares until the eve of trial in its Rule 26(a)(4) Disclosures it submitted, R. 2077, and then, more clearly, in a "Pretrial Order" it unilaterally filed in May, 2005 just before trial. R. 2127. Nagle objected to Plaintiffs' Rule 26(a)(4) disclosures, R.2103, filed an Objection and Motion to Strike Plaintiffs' "Pretrial Order," R. 2376, and objected at trial to this evidence, R. 2619 at 98. The Trial Court overruled those objections. R. 2618 at 98.

A judicial admission is "a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute." Gordon v. Benson, 925 P.2d 775, 781 (Colo. 1996). "An admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it." Baldwin v. Vantage Corp., 676 P.2d 413, 415 (Utah 1984). The Trust admitted numerous times that the transaction involved 55,000 shares. See, e.g., R. 524-25. Nagle has never acted in any way which suggests that he believed that any more than

55,000 shares were conveyed under the contract. The Trust should not be allowed to ignore its admissions to raise an issue on the eve of trial that was wholly inconsistent with the position it had adopted during the previous six years of this litigation. Indeed, it should be estopped from doing so. See Stevenson v. Goodson, 924 P.2d 339, 352 (Utah 1996) (“**The principle of judicial estoppel prevents a party from seeking judicial relief by uttering statements inconsistent with its own sworn statement in a prior judicial proceeding**”) (emphasis added).

**E. The Trial Court’s Erroneous Conclusion Was Material To Its Ruling.**

The Trial Court’s erroneous conclusion that the parties agreed the Trust would convey 105,000 as part of the transaction was material to its decision in at least two ways.

First, one of the equitable considerations underlying the Trial Court’s decision to grant the Trust specific performance was based on how close the Court thought the Trust came to actually performing. If, as the Appeals Court determined, the Trust conveyed 55,000 shares, those shares would have had to reach a value of over approximately \$1.54 per share during the time period at issue to realize \$85,000. If, as the Trial Court determined, the Trust conveyed 105,000 shares then the share price needed only to reach 81 ¢ per share. The Trial Court acknowledged that the shares never reached either price during the time in question but the price did approach and occasionally exceed 81 ¢ per share prior to the time period set forth in Addendum No. 2. Addendum at Ex. C at pp. 24-25, R. 2502-03. This factor among

others persuaded the Trial Court that: "Plaintiff's failures were in degree rather than a failure to perform or partially perform." Addendum at Ex. C at p. 24, R. 2502. In other words, according to the Trial Court, the Trust is entitled to specific performance because it **almost** performed.

Significantly, the Trial Court rejected the evidence offered by the Trust that the stock traded at \$1.62 per share during the time in question. Addendum, Ex. C at p. 17, R. 2495. Obviously, then, the Trial Court's conclusion that 105,000 shares had been conveyed affected its evaluation of the equitable considerations presented by the parties because if only 55,000 shares were tendered, the Trust did not "almost" perform. Rather, the Trust never came close to performing and a decree for specific performance would be wholly unwarranted. Kelley, 846 P.2d at 1243.

Second, even if the Trial Court is correct that Nagle's offset should be calculated based on the fact that he could have sold shares for some value, and even if the Court's determination that the average price per share during the one year time period was 50¢ is correct, the erroneous conclusion that the contract involved 105,000 shares substantially lessened the offset Nagle received. If the deal involved 55,000 shares Nagle's offset, according to the Trial Court's methodology, is \$57,500 (\$85,000 minus \$27,500 realized from the sale of 55,000 shares). The Trial Court's conclusion that the offset is \$32,500



(based on the sale of 105,000 shares) deprives Nagle of approximately \$25,000 of recovery.

This is manifestly unfair to Nagle and constitutes an abuse of discretion by the Trial Court.

**IV. THE TRIAL COURT ERRED IN CONCLUDING THE TRUST BEHAVED EQUITABLY WHEN IT CONVEYED THE PROPERTY TO AN INSIDER OF THE TRUST DURING THE PENDENCY OF THE FIRST APPEAL WHO PAID LESS THAN FAIR MARKET VALUE AND TOOK THE PROPERTY WITH ACTUAL NOTICE OF NAGLE'S LIS PENDENS.**

On January 18, 2001, the Trust conveyed the property to KNB Holdings, LLC ("KNB"). At that time, Nagle had already filed a Notice of Appeal on the Trial Court's November 6, 2000 Order and Nagle had already placed a lis pendens on the property. R. 2619 at 331. The sole member and manager of KNB is Kirk Blosch who is married to a beneficiary of the Trust and is the brother-in-law of the Trustee. R. 2619 at 330. Mr. Blosch, an experienced real estate developer, paid \$230,000 for the property pursuant to an oral agreement. R. 2618 at 67; R. 2619 at 330. KNB purchased the property with actual knowledge of the lis pendens. R. 2619 at 331. The purchase price was based upon an appraisal that was conducted two years earlier with a discount of 7.5 % to account for the lis pendens. R. 2619 at 334. As such, the purchase price is well below fair market value.

Given the experience of Kirk Blosch in real estate development matters, the below fair market amount paid for the property, the lack of documentation concerning the transaction and the timing of the transaction, the more obvious inference to be drawn is that the purpose of the conveyance from the Trust to KNB was to keep the property out of Nagle's reach in



the event of an adverse ruling from the Appeals Court yet simultaneously to enable the beneficiaries of the Trust to maintain constructive possession of and access to the property. Indeed, the Appeals Court originally believed that offset was the only remedy available to the Trust because the property had been conveyed to a “third-party.” See Collard v. Nagle, 57 P.3d 603, 608 (Utah App. 2002).<sup>1</sup> It was only because Nagle filed with the Appeals Court a Motion for Clarification of its Opinion that the Appeals Court eliminated the restriction on Nagle’s ability to recoup title to the property. R. 2418; R. 2619 at 327. Similarly, the Trial Court referred to this conveyance as another reason why Nagle should not receive title as a remedy for the Trust’s nonperformance. Addendum, Ex. C at p. 24, R. 2502.

A long-standing rule in equity jurisprudence is that a party who seeks an equitable remedy must have acted in good faith and not in violation of equitable principles. Hone v. Hone, 95 P.3d 1221, 1223 (Utah App. 2004) (citing Park v. James, 364 P.2d 1, 3 (Utah 1961)). The Trial Court erred in determining that the Trust had behaved equitably in conveying the property to an insider during the pendency of the appeal for below fair market value.

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<sup>1</sup> This opinion is **not** the corrected opinion of November, 2002, Addendum, Ex. B; R. 2418-30.

**V. THE TRIAL COURT ERRED IN NOT AWARDING NAGLE PREJUDGMENT INTEREST BECAUSE THE AMOUNT OWED WAS A FIXED AMOUNT AT THE TIME THE TRUST DEFAULTED AND INTEREST CAN BE CALCULATED WITH MATHEMATICAL ACCURACY.**

Under Utah law, prejudgment interest represents an amount awarded as damages due to a defendant's delay in tendering an amount clearly owing under an agreement or other obligation. Baker v. Data Phase, Inc., 781 F. Supp. 724, 731 (D. Utah 1992); L&A Drywall, Inc. v. Whitmore Constr. Co., 608 P.2d 626, 629 (Utah 1980). A court may award prejudgment interest where the loss is fixed as of a particular time and the amount of the loss can be calculated with mathematical accuracy. Baker, 781 F. Supp. at 731. A Trial Court's decision to grant or deny prejudgment interest presents a question of law which is reviewed for correctness. Lyon v. Burton, 5 P.3d 616, 636 (Utah 2000).

With respect to the criteria Utah courts look at when awarding prejudgment interest, the Utah Supreme Court has held:

**The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value.**

Smith v. Fairfax Realty, Inc., 82 P.3d 1064, 1069 (Utah 2003) (citations omitted) (emphasis added).

The parties agreed in Addendum No. 2 to the Real Estate Purchase Contract that if the shares tendered did not reach a value sufficient to realize \$85,000 during the specified time period, the Trust would be required to tender \$85,000 in cash. That is a fixed sum certain. There is no dispute that in January, 1981, Nagle notified the Trust that it was in default under the Real Estate Purchase Contract because the shares could not be sold to realize \$85,000. Trial Ex. 105, Addendum, Ex. D, R. 2477. The Trust did not cure that default. Prejudgment interest is easily calculable by simply multiplying \$85,000 by the time period until judgment is entered at 8 % (the applicable rate of interest at the time the contract was signed under U.C.A. § 15-1-1). Because Nagle's loss can be calculated with mathematical certainty, he is entitled to prejudgment interest.

The Trial Court determined that because the judgment Nagle received was the offset amount which had not yet been calculated, he was not entitled to prejudgment interest. Addendum, Ex. C. at p. 30, R. 2508. The Trial Court's conclusion concerning offset is incorrect and has been discussed elsewhere in this brief. See pp. 30-33.

**VI. THE TRIAL COURT ERRED IN NOT AWARDING NAGLE ATTORNEY'S FEES AS PREVAILING PARTY.**

The Real Estate Purchase Contract gives the prevailing party the right to seek reasonable attorney's fees. Addendum, Ex. A at ¶ 17, R. 2415. Under Utah law, courts examine the following factors to determine which litigant is a prevailing party: (1) The contractual language; (2) the number of claims, counterclaims, cross-claims, etc. brought by the parties; (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole; and (4) the dollar amounts attached to and awarded in connection with the various claims. R.T. Nielson Co. v. Cook, 40 P.3d 1119, 1127 (Utah 2002).

The central issue in this case is whether the 55,000 shares conveyed by the Trust to Nagle ever reached a value where Nagle could realize \$85,000. The Trust was unable to carry its burden on this point. Addendum, Ex. C at p. 21, R. 2499. The next issue related to whether Nagle was entitled to an offset. Nagle first argued that he was entitled to recoup title to the property as a remedy for the Trust's non-performance. In the alternative, however, he argued that he was entitled to a monetary offset. The Trial Court granted an offset to Nagle although Nagle sharply objects to the method by which the court calculated it. Addendum, Ex. C at p. 25, R. 2503. Nevertheless, Nagle has received some of the relief he asked for.

The upshot of these rulings is that Nagle was able to require the Trust to take action to complete the purchase of the property. In contrast, the Trust has argued consistently that



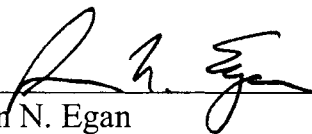
it had already performed and owed nothing further. See, e.g., R. 2618 at 31. Under the circumstances, Nagle is the prevailing party and is entitled to an award of reasonable attorney's fees.

### CONCLUSION

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

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of December, 2005.

By

  
Sean N. Egan

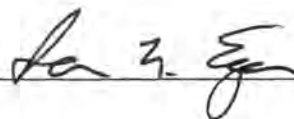
Attorney for Appellants/Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16<sup>th</sup> day of December, 2005, a true and correct copy of the foregoing **APPELLANTS' BRIEF** was served upon the persons named below, at the address set out below their name, either by mailing postage prepaid, hand-delivery, Federal Express, or by telecopying to them, a true and correct copy of said document.

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

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

By 

Tab A

"THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE."

# UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 11th day of March, A. D. 1978,  
by and between Nagle Construction Company Inc.  
hereinafter designated as the Seller, and LeRoy Collard 3842 Quail Hollow Dr.  
Salt Lake City, Utah 84109  
hereinafter designated as the Buyer, of one condominium unit (no. B-24) in Cove Point  
a Planned Community Development 3842 Quail Hollow Dr. SLC, UT

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Salt Lake, State of Utah, to-wit: 3842 Quail Hollow Dr. SLC, UT  
More particularly described as follows:

Condominium unit no. B-24 (a Planned Unit Development)

Legal Description:

All of Lot B-24 Cove Point Phase One a Planned Unit Development according to the Official Plat thereof, dated May 13, 1976 filed and recorded May 26, 1976 in Book 76-5 page 118 records of Salt Lake County, State of Utah.

Together with all rights and responsibilities of membership in the Cove Point Homes Association, a nonprofit corporation as provided in the articles of Corporation, Bylaws, Declaration of Covenants, conditions and restrictions dated May 13, 1976 and recorded May 26, 1976 in Book 4212 pages 277-287. One

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of One  
Hundred Thousand Five Hundred Dollars (\$ 100,500.00)

payable at the office of Seller, his assigns or order \* \* \* \* \*  
strictly within the following times, to-wit: Ten Thousand Dollars (\$ 10,000.00)  
cash, the receipt of which is hereby acknowledged, and the balance of \$ 90,500.00 shall be paid as follows:

per attached:

cont'd. Legal Description-

records of Salt Lake County, State of Utah.

Subject to all of the Covenants, Conditions, Restrictions, and easements contained and set forth in the Declaration of Covenants, Conditions, and Restrictions dated May 13, 1976 and recorded May 26, 1976 in Book 4212 page 277-287 records of Salt Lake County, State of Utah.

Possession of said premises shall be delivered to buyer on the \* \* \* \* \* day of \* \* \* \* \* 1978

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from \* \* \* \* \* on all unpaid portions of the purchase price at the rate of \* \* \* \* \* per cent ( \* \* \* \* %) per annum. The Buyer, at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of First Security Bank with an unpaid balance of \$ 59,958.75, which buyer will assume

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following:

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed \* \* \* \* \* percent ( \* \* \* \* %) per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises except the following:

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.



12. The Buyer agrees to pay the general taxes after 1977

13. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in the amount of not less than the unpaid balance on this contract, or \$1,000, and to assign said insurance to the Seller as his interests may appear and to deliver the insurance policy to him.

14. In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of 1% of one percent per month until paid.

15. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within \_\_\_\_\_ days thereafter, the Seller, at his option shall have the following alternative remedies:

- A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or
- B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorneys fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or
- C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

17. It is agreed that time is the essence of this agreement.

18. In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Seller, then the Buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may, at the option of the Buyer, be suspended until such time as such suspended payments shall equal any sums advanced as aforesaid.

19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of deed, at the option of Buyer.

20. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto.

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

22. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties to this agreement have hereunto signed their names, the day and year first above written.

Signed in the presence of

Charles A. Bullock

Nagle Construction Company Inc.

by Walter M. Stiles

Seller

Walter M. Stiles

Buyer

Approved Form:  
BLANK NO. 108—R. C. M. PRINTING CO.—1917

Uniform Real Estate Contract

Ne

To

Addendum #1

To Real Estate Contract between Nagle Construction Company and  
LeRoy Collard. Dated 22 Feb 1975

Paragraph 3.....

Balance of Sales price due of \$90,500.00 shall be paid as follows:

Assumption by LeRoy Collard of a mortgage loan on the above described property in the principal amount of \$59,958.75 presently payable by Nagle Construction Company to First Security Bank and the balance of \$30,541.26 is payable by delivery and conveyance to seller of 55,000 shares of Utah Coal and Chemical Corp. Capital stock. The stock conveyed to seller is to be free of any encumbrances, liens or restrictions on trading.

Title of said premises shall be delivered to buyer when seller has verified marketability of stock, conveyed and verified a market value sufficient to cover the unpaid balance. Such time is to be determined by seller but will not be unreasonably delayed.

Charles A. Rutledge  
Witness

Nagle Construction Company :

by [Signature]  
Seller

[Signature]  
Buyer

Addendum #2

To Real Estate Contract between Nagle Construction Company and LeRoy Collard. Dated March 15, 1975

Title of premises being sold under the contract referred to above will be transferred when Nagle Construction Company sells sufficient of the shares of Utah Coal and Chemical Corp. transferred under addendum #1 to realize \$85,000 cash. Seller hereby agrees to sell shares sufficient to realize \$85,000 within 1 year of receipt thereof providing the market value of said shares will cause a realization of \$85,000.

Should the value of the 55,000 shares conveyed not equal \$85,000 within 1 year, buyer agrees to convey additional shares of Utah Coal and Chemical Corp. stock or cash sufficient to bring the total value conveyed to seller to \$85,000 before seller conveys title to premises sold to buyer.

Carly A. Reddy  
Witness

Nagle Construction Company.

by [Signature]  
Seller

[Signature]  
Buyer

Tab B



Norman H. Jackson  
Presiding Judge  
Judith M. Billings  
Associate Presiding Judge  
Russell W. Bench  
Judge  
James Z. Davis  
Judge  
Pamela T. Greenwood  
Judge  
Gregory K. Orme  
Judge  
William A. Thorne, Jr.  
Judge

## Utah Court of Appeals

450 South State Street  
P.O. Box 140230  
Salt Lake City, Utah 84114-0230

Appellate Clerks' Office (801) 578-3900  
Judges' Reception (801) 578-3950  
FAX (801) 578-3999  
TDD (801) 578-3940



Marilyn M. Branch  
Appellate Court Administrator

Paulette Stagg  
Clerk of the Court

November 12, 2002

Ralph J. Marsh  
68 South Main Street, Suite 800  
Salt Lake City, UT, 84101

Kathryn Collard  
9 Exchange Place, Suite 1111  
Salt Lake City, Utah 84111

Re: 'Collard v. Nagle, Case No. 20000976-CA

A correction has been made to the Court's Opinion in the above-referenced case, which was originally issued on September 26, 2002. The correction is as follows:

- The last two sentences were removed from Paragraph 26.

A copy of the corrected Opinion is enclosed, along with a copy of the Court's Order concerning the correction. The issuance date will remain the same.

We apologize for the confusion and/or inconvenience.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Paulette Stagg".  
Paulette Stagg  
Clerk of the Court

PS:cam  
Enclosure  
cc: Hon. William B. Bohling

This opinion is subject to revision before  
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

**FILED**  
Utah Court of Appeals

SEP 26 2002

Paulette Staggs  
Clerk of the Court

----ooOoo----

Kathryn Collard, Trustee of  
the LeRoy Collard Trust,

Plaintiff and Appellee,

v.

Nagle Construction, Inc., a  
Utah corporation; Gary M.  
Nagle, an individual; and  
Marilyn F. Nagle, an  
individual,

Defendants and Appellants.

AMENDED OPINION  
(For Official Publication)

Case No. 20000976-CA

F I L E D  
(September 26, 2002)

2002 UT App 306

Gary M. Nagle,

Counterclaim Plaintiff,

v.

Kathryn Collard, Trustee of  
the LeRoy Collard Trust,

Counterclaim Defendant.

-----

Third District, Salt Lake Department  
The Honorable William B. Bohling

Attorneys: Ralph J. Marsh, Salt Lake City, for Appellants  
Kathryn Collard, Salt Lake City, Appellee Pro Se

-----

Before Judges Jackson, Davis, and Orme.

DAVIS, Judge:

¶1 Defendants Nagle Construction, Inc., Gary M. Nagle, and  
Marilyn F. Nagle<sup>1</sup> appeal from the trial court's decision to grant

1. Nagle Construction, Inc. was the original seller in this  
case. It conveyed its interest in the property at issue to Gary  
(continued...)

summary judgment for Plaintiff Kathryn Collard,<sup>2</sup> trustee of the LeRoy Collard Trust. The trial court denied Seller's motion for summary judgment and granted Buyer's motion for summary judgment, ruling Buyer was entitled to title in certain real property. Buyer cross-appeals the trial court's decision to deny Buyer attorney fees pursuant to the parties' Uniform Real Estate Contract.

### BACKGROUND<sup>3</sup>

¶2 On March 30, 1978, Buyer purchased a condominium unit from Seller. Using a Uniform Real Estate Contract, Buyer agreed to pay \$100,500.00 for the condominium by (1) making a down payment of \$10,000.00; (2) assuming a mortgage loan owed by Seller to First Security Bank in the amount of \$59,958.75; and (3) tendering 55,000 shares of stock of the Utah Coal and Chemical Company for the balance of the purchase price of \$30,541.26. In return, Seller agreed to convey title to the condominium when Seller verified that the value of the stock was sufficient to cover the unpaid balance of the purchase price.

¶3 Buyer and Seller also addressed attorney fees in the contract:

The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing

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1. (...continued)

M. Nagle on April 12, 1978. We refer to Nagle Construction, Inc., Gary M. Nagle, and Marilyn F. Nagle collectively as Seller. We use the third person pronoun "he" when referring to Seller.

2. LeRoy Collard, Kathryn Collard's father, was the original buyer in this case. However, LeRoy Collard conveyed his interest in the property to Kathryn Collard on January 3, 1997, and died on February 8, 1997. Thus, we refer to Kathryn Collard and LeRoy Collard collectively as Buyer. We use the third person pronoun "she" when referring to Buyer.

3. It is well established that "in reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993). We recite the facts of this case accordingly.



this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

¶4 Buyer paid the \$10,000.00 down payment and began making payments on the mortgage. She also took possession of the condominium, began paying property taxes, and began making improvements to the property. In May 1979, Buyer recorded notice of the contract and tendered the required 55,000 shares of stock to Seller. However, Buyer never assumed the mortgage.

¶5 Seller informed Buyer that he considered Buyer's failure to assume the mortgage a breach of contract and advised Buyer that default and foreclosure proceedings could be instituted. In lieu of foreclosure proceedings, Buyer and Seller added a second addendum<sup>4</sup> to the contract on September 18, 1979. In Addendum 2, Buyer agreed to pay approximately \$50,000.00 more for the condominium in exchange for Seller's forbearance. Addendum 2 reads:

Title of premises being sold under the contract referred to above will be transferred when [Seller] sells sufficient of the shares of Utah Coal and Chemical Corp. transferred under [the contract] to realize \$85,000 cash. Seller hereby agrees to sell shares sufficient to realize \$85,000 within 1 year of receipt thereof providing the market value of said shares will cause a realization of \$85,000.

Should the value of the 55,000 shares conveyed not equal \$85,000 within 1 year buyer agrees to convey additional shares of Utah Coal and Chemical Corp. stock or cash sufficient to bring the total value conveyed to seller to \$85,000 before seller conveys title to premises sold to buyer.

¶6 On January 13, 1981, Seller, through his attorney, sent Buyer a letter informing Buyer that the stocks did not reach the contracted value of \$85,000.00 within one year and that Buyer had

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4. The parties drafted Addendum 1 as part of the original contract. Therefore, we make no separate reference to Addendum 1.



not yet paid the difference. Accordingly, Seller informed Buyer that he would consider Buyer in default if Buyer did not pay the amount still owed on the contract by January 25, 1981.

¶7 Buyer responded to the letter on January 25, 1981, by asserting that she was not in default and by enclosing information that allegedly demonstrated the stocks could have been sold for \$85,000.00 during the one-year period referred to in Addendum 2. After Buyer's response, no further action concerning the contract was taken by either party until 1999. During this time, Buyer continued to inhabit the condominium and make mortgage, tax, and improvement payments. In 1986, Buyer sought to refinance the mortgage on the condominium, and received a response letter informing her that title to the condominium was in Seller's name. Later, in 1989, Buyer wrote a letter specifically requesting that Seller's name be replaced with Buyer's name on the title.

¶8 On July 28, 1999, Buyer brought suit, seeking a declaratory judgment to quiet title based on breach of contract and adverse possession. Seller answered and counterclaimed for remedies under the contract, including forfeiture and foreclosure. Seller also sought a declaratory judgment quieting title in him. Both parties filed motions for summary judgment. After a July 17, 2000 hearing, the trial court ruled that the statute of limitations barred both parties' claims, and ordered a hearing to determine whether the court had equitable powers to resolve the dispute.

¶9 During that hearing, on August 30, 2000, the trial court ruled that only Seller was barred by the statute of limitations. The trial court determined that the statute of limitations ran against Seller when he failed to bring suit against Buyer within six years after Buyer allegedly failed to pay the \$85,000.00 required by Addendum 2. However, the statute of limitations had not run against Buyer because her continuous mortgage payments had kept and would continue to keep the remainder of the contract alive. Accordingly, the trial court ruled that Buyer's legal right to title would accrue when she finished paying the mortgage.

¶10 In its December 4, 2000 written order, the trial court listed the undisputed facts of the case. Among these facts, the trial court specifically stated: "The court makes no finding regarding the value of the 55,000 shares of Stock received by [Seller] at any point in time"; "[N]o additional agreements or changes to the contract were entered into between [Seller and Buyer] after January 25, 1981"; and Seller "retained the 55,000 shares of Stock and the \$10,000.00 down payment made by [Buyer]"

¶11 Based on the undisputed facts, the trial court concluded that the contract was governed by the six-year statute of limitations as set forth in Utah Code Ann. § 78-12-23 (1996); that Seller's cause of action for breach of contract based on Buyer's failure to assume the mortgage arose no later than January 25, 1981; that Seller's counterclaim based on Addendum 2 and the value of the 55,000 shares of stock was barred no later than January 25, 1987; and that Seller's continued acquiescence in Buyer's payments on the mortgage balance operated as a waiver of the assumption requirement. The court also concluded that "[e]ach and every cause of action set forth in [Seller's] Answer and Counterclaim was and is barred by the six year Statute of Limitations set forth in [section] 78-12-23."

¶12 The court went on to find that: "Except for the terms or requirements of the contract, the enforcement of which is now barred by the statute of limitations . . . the Contract remains a valid and binding agreement between the parties"; "The [Buyer'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 [mortgage]"; and finally, "Pursuant to the terms of the Contract, [Buyer] is entitled to immediate delivery of fee title subject to and conditioned upon payment of the remaining balance owed on the [mortgage]."

¶13 The court then fashioned an order that denied Seller's motion for summary judgment, denied Buyer's cross-motion for summary judgment on her breach of contract and adverse possession claims, awarded summary judgment for Buyer on Seller's counterclaims, and granted Buyer's cross-motion for summary judgment for "Declaratory Relief-Quiet Title." The court ordered delivery of the deed to an escrow agent of Buyer's choosing, ordered Buyer to pay off the mortgage, and ordered the deed released to Buyer once the mortgage was paid. On November 6, 2000, the Court rejected Buyer's request for attorney fees and costs.

¶14 On December 4, 2000, the trial court entered an order staying judgment on appeal conditioned upon Seller's posting bond. Seller failed to post bond, and the Court vacated the ordered stay. Title to the condominium passed to Buyer when she finished making the mortgage payments. Thereafter, the condominium was sold to a third party.



## ISSUES AND STANDARDS OF REVIEW

¶15 The first issue on appeal is whether the trial court correctly granted Buyer's motion for summary judgment, ruling that Buyer was entitled to title of the property. "Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." Jones v. ERA Brokers Consol., 2000 UT 61, ¶8, 6 P.3d 1129; see also Utah R. Civ. P. 56(c). "Because entitlement to summary judgment is a question of law, we accord no deference to the trial court's resolution of the legal issues presented." K & T, Inc. v. Koroulis, 888 P.2d 623, 627 (Utah 1994). "We determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact." Berenda v. Langford, 914 P.2d 45, 50 (Utah 1996) (citations and quotations omitted).

¶16 The second issue on appeal is whether the trial court erred in denying Buyer attorney fees. "Whether a party may recover attorney fees in an action is a question of law that we review for correctness." Ault v. Holden, 2002 UT 33, ¶46, 44 P.3d 781.

## ANALYSIS

### I. Summary Judgment and Specific Performance

¶17 Seller argues that the trial court erred in granting Buyer's motion for summary judgment because Buyer was not entitled to receive title to the condominium without first paying the full purchase price.

¶18 Although the trial court characterized its decision as an order to quiet title, the trial court's decision is actually a decree for specific performance. A quiet title action is a "proceeding to establish a plaintiff's title to land." Black's Law Dictionary 30 (7th ed. 1999); see also Utah Code Ann. § 78-

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5. Seller also argues that Buyer did not meet the requirements of rule 9(h) of the Utah Rules of Civil Procedure when she pleaded the affirmative defense of statute of limitations because she did not "refer[] to or describ[e] such statute specifically and definitely by section number." We decline to reach this argument as it is raised for the first time on appeal. See, e.g., Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996) (holding "'issues not raised at trial cannot be argued for the first time on appeal' . . . unless the petitioner demonstrates that 'plain error' occurred or 'exceptional circumstances' exist") (quoting State v. Lopez, 886 P.2d 1105, 1113 (Utah 1994)).

40-1 (1996). "To succeed in an action to quiet title to real estate, a plaintiff must prevail on the strength of his own claim to title and not on the weakness of a defendant's title or even its total lack of title." Church v. Meadow Springs Ranch Corp., 659 P.2d 1045, 1048-49 (Utah 1983). Conversely, an action for specific performance is an action seeking "precise fulfillment of a legal or contractual obligation." Black's Law Dictionary 1407 (7th ed. 1999); see also Kelley v. Leucadia Fin. Corp., 846 P.2d 1238, 1243 (Utah 1992). In this case, Seller, not Buyer, held title to the condominium and the trial court determined that Buyer was not in adverse possession. Consequently, Buyer's only claim to title of the condominium was through specific performance of the contract. Unless the trial court ordered Seller to perform, Buyer had no claim to legal title of the condominium. See Olwell v. Clark, 658 P.2d 585, 586-87 (Utah 1982) (recognizing that under the adverse possession statute "possession of real property is presumed to be in the legal title holder and that occupancy by any other is deemed subordinate to that title" (emphasis in original)). Therefore, the trial court's order in Buyer's favor is an order granting specific performance.

¶19 Specific performance is an equitable remedy. See Fischer v. Johnson, 525 P.2d 45, 46 (Utah 1974). "To obtain a decree for specific performance against a defaulting party, the aggrieved party must make an unconditional tender of the performance required by the agreement." Kelley, 846 P.2d at 1243 (emphasis added). "Neither party to an agreement 'can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has tendered his own performance.'" Id. (quoting Century 21 All W. Real Estate & Inv., Inc. v. Webb, 645 P.2d 52, 56 (Utah 1982)). Thus, to be entitled to the equitable remedy of specific performance on the contract, Buyer must have fully tendered, or stood ready to fully tender, her own performance under the contract.

¶20 Under the terms of the contract, Buyer was required to perform the requirements outlined in the contract before receiving title to the condominium. Buyer made the \$10,000.00 down payment in 1978 and tendered the 55,000 shares of stock in 1979. However, Buyer failed to assume the mortgage. In response to Buyer's breach, Seller and Buyer added Addendum 2 to the contract. Under Addendum 2, Buyer was obligated to pay an additional \$50,000.00, bringing the total to \$85,000.00. This \$85,000.00 was to be realized from the 55,000 shares of stock she had already tendered to Seller. In Addendum 2, Seller agreed to sell the stock within one year if it reached a value of at least \$85,000.00 within that year. Otherwise, Buyer was obligated to "convey additional shares of Utah Coal and Chemical Corp. stock



or cash sufficient to bring the total value conveyed to seller to \$85,000 before seller conveys title to premises sold to buyer."

¶21 Summary judgment is inappropriate because whether Buyer ever performed the requirements of Addendum 2 is a disputed issue of fact. Although Buyer conveyed the 55,000 shares of stock, there is evidence in the record presented by Seller to show that the shares never reached a value of at least \$85,000.00. In contrast, Buyer submitted evidence that the shares did obtain a value of at least \$85,000.00 within the one-year period specified in Addendum 2. The trial court seemed to recognize this conflict, but expressly noted that it made no finding<sup>7</sup> as to the value of the 55,000 shares of stock at any time. If the stock did reach a value of at least \$85,000.00 within one year and Buyer assumed the mortgage, then Buyer fully performed and is entitled to specific performance. However, if the stock did not reach a value of \$85,000.00 within one year and Buyer never tendered stock or cash sufficient to bring the total value conveyed to \$85,000.00, then Buyer never fully performed and is not entitled to specific performance.

¶22 Buyer argues that the statute of limitations prevents Seller from asserting Buyer's failure to assume the mortgage and failure to pay the amount due under Addendum 2 as counterclaims. In this case, the trial court held Seller's claims for breach of contract accrued no later than January 25, 1981. Nevertheless, even if

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6. We note that the trial court incorrectly interpreted the language of Addendum 2. "In interpreting a contract, the intentions of the parties are controlling." Spears v. Warr, 2002 UT 24, ¶39, 44 P.3d 742 (quoting Central Fla. Invs., Inc. v. Parkwest Assocs., 2002 UT 3, ¶12, 40 P.3d 599). "When presented with a written instrument, we look first to the four corners of the agreement to determine the parties' intentions. If the language within the four corners is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language." Id. (internal citation omitted). The language of Addendum 2 is unambiguous. Buyer was obligated to transfer \$85,000.00 in value before Seller conveyed title. However, the parties and the trial court misinterpreted the language of Addendum 2 to mean Buyer was required to pay the total \$85,000.00 within one year. The one-year time limitation to which the trial court refers relates not to Buyer's obligation to pay, but to Seller's obligation to sell the stock if the stock reached a value of at least \$85,000.00 within one year.

7. Since findings in a summary judgment context are inappropriate anyway, the court presumably determined it was unnecessary to reach this issue given its conclusion that Seller's claims were barred by the statute of limitations.

Seller's counterclaims are barred by the statute of limitations. Seller is permitted to use these counterclaims as an offset or recoupment against Buyer's claims.

¶23 Offset is permitted when "cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up." Utah R. Civ. P. 13(i). When offset is utilized, "the two demands shall be deemed compensated so far as they equal each other." Id. Under this doctrine, a defendant may even "utilize a counterclaim, normally barred by the statute of limitations, to offset a plaintiff's claim." Coulon v. Coulon, 915 P.2d 1069, 1072 (Utah Ct. App. 1996). Recoupment is similar to offset and is utilized where parties' claims arise from the same transaction. See Mark VII Fin. Consultants Corp. v. Smedley, 792 P.2d 130, 132-33 (Utah Ct. App. 1990) (holding that although offset "refers to an unrelated transaction" and recoupment refers to "the same transaction," "the distinctions between recoupment, [offset], and counterclaim have . . . been dissolved in Utah").

¶24 In this case, either offset or recoupment is permitted. First, offset is permitted because Buyer's and Seller's causes of action coexisted. "An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim." Utah Code Ann. § 78-40-1. Buyer brought her action against Seller in 1999. Buyer argues that she had to wait to bring suit until after she paid the remaining amount owed on the mortgage. However, this contention is contradicted by Buyer's own course of conduct. This action was brought before Buyer finished paying the balance of the mortgage. Thus, because Seller's and Buyer's claims coexisted, Seller is entitled to use his counterclaims to offset Buyer's claims. Second, recoupment is permitted because Seller's and Buyer's claims arose from the same contract.

¶25 Buyer argues that offset is not available to Seller because Seller did not plead offset as an affirmative defense as required by rule 12(h) of the Utah Rules of Civil Procedure. However, neither offset nor recoupment are affirmative defenses that must be pleaded or waived. Instead, offset and recoupment are merely mechanisms that may be used to ensure substantial justice if a party asserts a counterclaim that is barred by the statute of limitations. See, e.g., Jacobsen v. Bunker, 699 P.2d 1208, 1210 (Utah 1985) (holding that where a defendant has "a counterclaim that otherwise would have been barred by a statute of limitations, the counterclaim could be [offset] against the plaintiff's claim").

¶26 Allowing an offset or recoupment in circumstances where a defendant's affirmative claims are barred by the statute of



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

¶27 If, on remand, the fact finder determines that the 55,000 shares were worth at least \$85,000.00 at some point in time between September 18, 1979<sup>8</sup> and September 18, 1980, and that Seller was obligated to sell the shares at that time, then Buyer has performed her obligations and Seller is not entitled to further relief. However, if the fact finder determines that the shares did not reach a value of \$85,000.00 within the appointed period, then Seller is entitled to offset the amount of the shortfall Buyer was obligated to pay in cash or additional shares against the value of the property.

¶28 We reject Buyer's other arguments for affirming the trial court's order. First, Buyer argues the trial court's decision granting specific performance was correct because Seller waived his right to sue for breach of contract. Regardless of any implied waiver by Seller as to Buyer's duty to assume the mortgage, the above analysis, based on equity and the propriety of an offset for Seller, controls. Second, Buyer argues that the trial court's decision was appropriate because the doctrine of laches prevents Seller from asserting his rights under the contract. Laches bars a recovery when there has been a delay by one party causing a disadvantage to the other party. See Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256, 1260 (Utah 1975). Whether laches bars recovery in this case turns on disputed issues of fact, making it inappropriate for summary judgment.

## II. Attorney Fees

¶29 The language of the contract respecting attorney fees is unambiguous. The parties intended that the defaulting party should be responsible for costs and attorney fees. Accordingly,

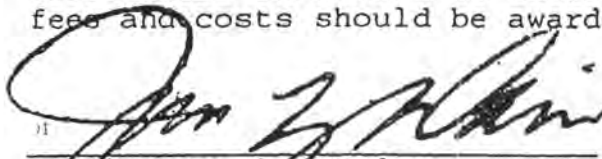
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8. The date of execution of Addendum 2.


on remand the trial court should determine and award costs and attorney fees as may now be appropriate.

#### CONCLUSION

¶30 We conclude that the trial court erred in granting summary judgment for Buyer and ordering title be conveyed to Buyer upon payment of the mortgage. We also conclude that the only basis for awarding attorney fees is the contract, and leave to the trial court on remand to determine whether and to whom attorney fees and costs should be awarded.

  
James Z. Davis, Judge

¶31 WE CONCUR:

  
Norman H. Jackson,  
Presiding Judge

  
Gregory T. Caine, Judge



Tab C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR 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 MARILYN F. NAGLE,

Defendants.

MEMORANDUM DECISION

Case No. 990907648

Honorable BRUCE C. LUBECK

DATE: June 10, 2005

By  
SALT LAKE COUNTY  
Deputy Clerk

JUN 10 2005

FILED DISTRICT COURT  
Third Judicial District

The above matter came before the court for a bench trial on June 7 and 8, 2005. Plaintiff was present through Kathryn Collard, Trustee and counsel, and Defendants were present with Sean N. Egan.

BACKGROUND

This case has considerable background.

The formal case began with a complaint filed July 28, 1999, but most relevant events were two decades before that, in 1978-1980. The complaint sought to quiet title to a condominium unit on Quail Hollow Drive. It alleged on March 30, 1978, some twenty years previous, LeRoy Collard and Nagle Construction signed a Uniform Real Estate Contract and Collard took possession of the property immediately, and made mortgage payments to First Security Bank. The price was to be \$100,500. Addendum I was executed actually as part of the contract and it required Collard to assume the mortgage in favor of First Security in the sum of

approximately \$60,000, and the balance (approximately \$30,000) was to be paid by Collard by a tender of 55,000 shares of stock of Utah Coal and Chemical to Nagel Construction. The complaint alleged Collard tendered that stock and in April, 1978, the Nagles executed a deed of trust in favor of First Security in the principal amount of approximately \$60,000, which deed was recorded. A Notice of Contract was recorded by Collard May 18, 1979. The contract stated defendants agreed to transfer title to Collard upon sale of the stock. In January 1981, counsel for defendants wrote a letter to Collard which alleged a breach by Collard, but which acknowledged receipt of the stock. On January 3, 1997, Collard transferred by warranty deed the property to plaintiff as trustee. Collard died February 8, 1997.

Plaintiff alleged a cause of action for breach of contract in that defendants did not tender fee title to Collard. A second cause alleged adverse possession, that Collard or his assigns had been in open and notorious possession for over 20 years and paid taxes. The third cause of action sought declaratory judgment and quiet title, that the trust is the owner in fee simple, subject only to the interest of First Security Bank.

On September 30, 1999, the Nagles filed an answer and counterclaim. That counterclaim alleged the contract, the Uniform Real Estate Contract, was an installment land sale contract,

whereby Collard agreed to possess the property while Nagle Construction retained legal title as security for its rights. It alleged \$10,000 was paid at closing, and the remainder, under Addendum I, was to be paid as above stated, by assumption of a mortgage and tender of stock by Collard. Defendants allege the stock sale would not realize \$30,000, but Collard prevailed on defendants to forebear claiming the price of the stock would go up, and as a result Addendum 2 was entered into. That addendum indicated that title would pass when Nagle sold shares sufficient to realize \$85,000, and if the shares did not equal that amount within one year, Collard was to convey additional shares or cash sufficient to bring the total to \$85,000 before Nagle conveyed title to Collard. The counterclaim alleged the value of the stock never reached \$85,000. Collard never tendered cash or additional shares of stock. Nagel never sought his default remedies believing he could exercise them at any time or that the value of the stock would rise. The contract left Nagle with three options of forfeiture, suit, or to declare the unpaid balance due and treat the contract as a note and mortgage. The counterclaim alleged three causes: (1) forfeiture, (2) foreclosure, and (3) quiet title.

On October 12, 1999, plaintiff filed a reply to the counterclaim.



On October 19, 1999, Nagle Construction filed an answer but no counterclaim.

Motions and cross motions for summary judgment were filed by the parties.

In an order dated November 6, 2000, the court, the *Honorable William B. Bohling*, found as undisputed facts that Collard tendered the down payment under the contract, and began making payments on the First Security obligation but did not refinance the loan in his own name or otherwise remove defendants from the First Security obligation, and that Collard took possession and later recorded a notice of Contract May 18, 1979. The order provided that the failure to assume the obligation was a breach of the contract by Collard, but other than write a letter Nagel did nothing to act on that default. Nagle retained the stock and down payment and Collard and his heirs continued to make payments, reducing the principal to approximately \$30,000 as of the date of the court's order. The court ruled the contract was binding, but subject to the statute of limitations of six years. The court ruled the counterclaims were all barred by that limitation on actions. Further, Nagle's conduct was a waiver of any remedies. Because Nagle did not elect any remedies and the letter was not sufficient to demand forfeiture, and because of the continued acceptance of the tendered performance, the court

ruled forfeiture was waived. The court ruled the contract remained a valid agreement, but the enforcement was barred by the statute of limitation. The right of Collard to demand delivery of fee title was ruled not to arise until the First Security obligation was paid. The court granted plaintiffs cross motion for summary judgment on the quiet title cause of action and ordered defendants to deliver to an escrow agent a special warranty deed granting the property to plaintiff. Plaintiff was to tender all funds needed to pay off the First Security obligation. A Title company was then to issue a title policy. The district court also denied Collard's motion for cross summary judgment on the breach of contract and adverse possession causes of action.

The court granted a stay of enforcement on December 4, 2000, upon the posting of a supersedeas bond by defendant. That bond was not posted and on December 21, 2004, the court vacated the stay and required the title company to release the deed to plaintiff for recording in connection with the payoff of the First Security obligation. That was all accomplished.

Defendants appealed that ruling. Plaintiff filed a cross appeal of the order denying attorney fees to plaintiff.

On November 21, 2000, Nagle filed a *lis pendens* on the property and conveyed by special warranty deed the property to plaintiff.

The Utah Court of Appeals heard the appeals and on September 26, 2002, filed an opinion and in November an amended opinion. *Collard v. Nagle*, 57 P.3d 603 (UT App 2002).

The Court of Appeals ruled that the trial court's decision was actually a decree for specific performance, an equitable remedy. For such a remedy, Collard must have fully tendered, or stood ready to fully tender, his own performance under the contract. The Court of Appeals ruled summary judgment was inappropriate because there was a dispute about whether Collard performed the requirements of Addendum 2. The evidence before the court at that time was that Nagle said the value of the stock never reached \$85,000 and Collard said it did. If the value did reach \$85,000 within the year as set forth in Addendum 2, then Collard would have fully performed and been entitled to specific performance. If the value did not reach that level, Collard would not have fully performed.

The Court of Appeals also discussed equitable remedies of offset and recoupment and indicated offset is permitted when cross demands have existed under circumstances that if one had brought an action, a counterclaim could have been set up. Even

if barred by a limitations statute, an offset may be permissible. Recoupment is similar and is utilized where the claims arise from the same transaction. They are both concepts used to assure substantial justice is done.

The Court of Appeals remanded the matter and stated that if the fact finder determines that the 55,000 shares were worth at least \$85,000 at some point between September 18, 1979, and September 18, 1980, and that Nagle was obligated to sell the shares at that time, then Collard has performed fully and Nagle is entitled to no further relief. If the value did not reach \$85,000 within that time period, Nagle is entitled to offset the amount of the shortfall Collard was obligated to pay in cash or additional shares.

As to attorney fees, the Court of Appeals held the contract was clear and remanded the matter to the district court to determine under the contract those fees as appropriate.

After that ruling, the case again has taken on a new life, despite what appears to this court to be a fairly straightforward task on remand.

Nevertheless, plaintiff sought summary judgment as to performance under Addendum 2. That was denied in a order dated July 8, 2003.



On January 20, 2004, the case was scheduled for trial for April 20, 2004. Motions were to be filed by February 9, 2004.

On February 11, 2004, plaintiff filed a motion for summary judgment on Nagle's offset defense.

After hearing on April 12, 2004, that was denied in an order dated April 26, 2004. Motions in limine were scheduled.

Nagle filed a motion in limine in May, 2004, and plaintiff filed four motions in limine. On May 26, 2004, the court ruled those motions of plaintiff were actually motions that should be adjudicated under summary judgment standards, and those were set for argument.

Those were further briefed and were argued. At a hearing on July 14, 2004, Nagle's motion to exclude Steven Earl from testifying was denied in an order of July 22, 2004.

Plaintiffs motions were also heard and after intermediate motions for relief an order was issued October 14, 2004. Plaintiff's first motion in limine was denied (dealing with mutuality of obligations, and Nagle's standing), the third and fourth motions were denied (dealing with the sale of the 55,000 shares and election of remedies by Nagle), and the second was granted (dealing with parol evidence being allowed concerning a

novation of Addendum 2).

At a scheduling conference of February 25, 2005, a trial was set for June 7 and 8, 2005, after an earlier trial had been scheduled and postponed due to an illness in counsel's family.

Thereafter, numerous motions in limine were again filed. In a ruling of April 25, 2005, the court ruled on those.

Plaintiff on May 20, 2005, filed a document entitled "Plaintiff's Proposed Pretrial Order." It is a further memo of plaintiff, dealing with plaintiff's defenses to the offset remedy, those defenses including the need for defendant to remove the lis pendens, election of remedies, the merger doctrine, violation of covenants of title, and other legal doctrines. It purports to list 56 paragraphs of uncontested facts (pp. 33-47) and contested issues of fact and law.

Nagle on May 31, 2005, filed a motion to strike plaintiff's pre trial order arguing it was merely another summary judgment motion. On that same date Nagle filed his own pre trial order.

On that same date, May 31, 2005, plaintiff filed a motion to quash a subpoena issued to Kirk Blosch and requested an expedited determination. Defendant opposed that motion on June 3, 2005.

The court dealt with that motion at trial and did not quash the subpoena.

The court heard evidence, received exhibits, heard argument of counsel, took the matter under advisement, and is fully advised, and renders the following memorandum decision.

The court finds as follows:

#### FINDINGS OF FACT

1. On March 30, 1978, LeRoy Collard (Collard) purchased a condominium on Quail Hollow Drive from Nagle Construction using a Uniform Real Estate Contract together with Addendum 1. (Ex. 6). The price was to be \$100,500, and Collard was to pay \$10,000 as a down payment, assume the mortgage with First Security Bank in the sum of \$59,958.75, and give 55,000 shares of stock in Utah Coal and Chemical Corp. to pay the balance of \$30,541.26. Title was to be delivered to Collard when the marketability of the stock and its value were verified and there was not to be an unreasonable delay in so doing.

2. Collard did not assume the mortgage because Collard had a previous bankruptcy and was unable to do so. Nagle considered this a breach and notified Collard orally, but not in writing, and Collard and Nagle Construction entered into Addendum 2. That

document (Ex. 6) is undated but was signed before September 18, 1979. It provided that title under the contract would be transferred when Nagle Construction sold sufficient shares of the stock to realize \$85,000 cash. Nagle Construction was to accomplish that sale within one year of receipt of the shares providing the value reached \$85,000. If the value did not reach that amount within one year, Collard was to convey more shares or cash sufficient to bring the total value to \$85,000 before Nagle Construction was to convey title. In other words, Addendum 2 required basically an additional \$55,000 from Collard in exchange for the forbearance of Nagle in not seeking foreclosure based on the failure of Collard to assume the mortgage. Addendum 2 did not provide any times in which any thing was to be done. The Uniform Contract, however, contained a standard "time is of the essence" provision.

3. Collard paid the down payment and began making payments on the mortgage and took possession of the property immediately after the contract was signed. He also paid taxes and made improvements to the property over the years. Collard or his successors continued to retain possession, make improvements, pay taxes and make payments on the mortgage until January, 2001.

4. On a date unknown, but in April, 1978, Gary Nagle (Nagle), as president of Nagle Construction, executed a warranty deed from Nagle Construction to Nagle, recorded April 12, 1978.



(Ex. 8). That was done without notice to Collard. On that same date a Deed of Trust was recorded with the Nagles as Trustors and First Security as Beneficiary. (Ex. 9).

5. On May 18, 1978, Collard recorded a Notice of Contract, which Nagle, on behalf of Nagle Construction, signed. That simply indicated Collard claimed and asserted an interest under the contract in the property. (Ex. 12).

6. On or about September 18, 1979, Collard delivered 105,000 shares of stock in San Juan Mining, the predecessor of Utah Coal, to Nagle and a transfer agent, who registered the shares in Nagle's name that date. (Ex. 14). San Juan changed its name in 1972 to St. Mary's Glacier and in 1977 to Utah Coal and later in 1994 to Lifestream Technologies, but it remained the same corporation. (Ex. 1).

The court finds that the original 55,000 shares of Utah Coal were not delivered by Collard to Nagle Construction immediately after the contract was signed. The delivery occurred approximately eighteen months later, in September, 1979.

If the case involves 55,000 shares the value of each share would have to reach \$1.54 to achieve \$85,000 if sold. If the number of shares involved is 105,000, the value of each share would have to reach \$.81 to result in \$85,000 upon sale, not considering any commissions or other fees.

The court is fully aware that the Utah Court of Appeals

indicated that the task of this court on remand was to determine the value of the 55,000 shares. Addendum 1 talks of 55,000 shares. However, the court, having heard the evidence and testimony and examined the exhibits and having thus considered more than the affidavits and records involved in the case at the summary judgment stage, finds as a fact contrary to the understanding previously that 55,000 shares was involved. The records clearly demonstrate that the 55,000 shares was the amount set forth in Addendum 1, and that Addendum 1 was referred to in Addendum 2. The court is finding, however, that it is clear to the court that Collard owed \$85,000 to Nagle and that to pay that amount more than the 55,000 shares would be required given the historical value of the Utah Coal shares.

The court finds that 105,000 shares were delivered by Collard to Nagle. That is contrary to Nagle's testimony that 55,000 shares were received from Collard under the contract and that he, Nagle, purchased an additional 50,000 shares from Collard. The court bases this finding on the unlikelihood of that being true given all the history of the case and the records involved. Originally Nagle denied in his answer and answers to first set of interrogatories that he had received any stock at all from Collard. The exhibits admitted show that in fact Nagle received 105,000 shares of Utah Coal on September 19, 1979 from Collard. If Collard owed Nagle \$85,000, it does not comport with

reason that Nagle would give Collard \$10,000 in the form of a 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 50,000 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. The court can understand and appreciate that events that long ago may fade in memory and many records may be destroyed or lost, but given all the circumstances of this transfer of Utah Coal shares, the court finds as above. Thus, for the 105,000 shares to realize \$85,000 under the contract, the price of Utah Coal would have had to reach \$.81 per share. That delivery of stock was intended to be in payment of the \$85,000 owing by Collard to Nagle.

7. Nagle did not sell the stock delivered at any time during the year after receipt. Nagle inquired as to the value of the stock through his accountant on one occasion. The only evidence was that the accountant asked an unnamed broker at a brokerage firm, Wilson-Davis, to sell the stock but it was not established at what price the sale was to be nor was it established in any way what occurred except that the stock was not sold. There was no testimony as to any other attempts to sell the stock. Nagle

did not place a "limit order" such that the stock would be sold when it reached a certain value. Nagle did not deliver the stock certificates to any broker, including Wilson-Davis, for sale. Without being a regular customer Wilson-Davis could not sell the shares without having possession of the stock certificates. In addition, Nagle purchased, independent of this transaction with Collard, an additional 60,000 shares in Utah Coal through a different brokerage firm in December, 1979. That indicates to the court that Nagle was not seeking to sell the stock but was seeking to acquire the stock, no doubt in the anticipation that the value of the stock would rise.

8. Nagle during the year following the receipt of the 105,000 shares did not ever tell Collard that the price did not yield \$85,000 nor did Nagle ask for more shares or cash. Nagle and Collard did have several conversations about the transaction but Nagle never notified Collard in writing of any default until the letter of January 13, 1981. Nagle did not properly advise under the contract, or advise in any manner, the amount of "deficiency" Collard owed. That is, Nagle did not state that the stock was selling for "X" and so Collard owed "Y" amount to make up the difference between the value of the sale at "X" value and the \$85,000.

9. In a letter from Nagle Construction's lawyer on January 13, 1981, (Ex. 17) Nagle Construction said Collard had breached



the agreement and threatened to file suit. Collard responded that indeed the value had reached \$85,000. That letter of January 13, 1981, again refers to the 55,000 shares and not 105,000 shares, but the court finds, as discussed above, that the sequence of events and the documents from neutral entities such as the transfer agent show that it was not 55,000 shares involved at the time of Addendum 2.

10. Collard transferred his interest to plaintiff trust by warranty deed on January 3, 1997. Collard passed away February 8, 1997. Plaintiff sold the property to a third party, a family member, for a price the court finds reasonable under the circumstances. There was an appraisal in 1999 for approximately \$250,000 on the property. The sales price, without commission involved, was \$230,000 approximately, and there was a *lis pendens* on the property which made it not feasible to resell the property, and it has been leased by the current owners. The court finds no inequitable conduct on behalf of plaintiff in the sale in the facts presented.

11. After this complaint was filed Nagle Construction, through Nagel, executed an assignment of the contract which purported to, as of March 30, 1978, transfer all of the rights of Nagel Construction under the contract to Nagle, but none of the liabilities were assigned. (Ex. 10).

12. The parties introduced conflicting evidence as to the

value of the Utah Coal stock in the relevant time period- September 18, 1979, through September 18, 1980. (See exhibits 34-37, 102). Plaintiff's evidence showed the value of the stock, during at least eleven weeks, was sufficient, if sold, to realize \$85,000. Defendant's evidence showed the value was never sufficient such that if sold the stock would realize \$85,000.

The court paid close attention to the two competing experts and has examined their documents carefully. 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.

The court was not satisfied that plaintiff, through its expert, showed the value of the stock at any given time in the relevant year was any value that can be stated with certainty. However, the court is more satisfied from defendant's expert that the value of the stock, 105,000 shares of Utah Coal, was at or near a certain value at various times in the relevant year. Of course that was not the intent of the parties in calling those witnesses but the court finds and concludes as follows. Still, the court has not been convinced by either party by a preponderance of the evidence as to what the value was at any given time.

Plaintiff's expert provided documents that he said were national averages, yet the court was not and is not satisfied

that the underlying data is reliable or believable. Even the witness stated he did not verify the underlying data. Moreover, the court simply is not clear, under a preponderance of the evidence standard, just how the figures used by plaintiff's expert as set forth in Exhibit 2 were arrived at or can be relied upon. If the figures are national averages the court does not understand how those were arrived at by whomever compiled the information. The court admitted the exhibit as an exception to the hearsay rule under URE, 803(17), but that does not compel the conclusion that the court must rely on the information. If Utah Coal was a Utah corporation, or a Nevada corporation, it seems unlikely that there would be much trading in the stock in, for example, Charleston, South Carolina or Mobile, Alabama. It was not explained by the witness how the "averages" were arrived at, what volume of stock sale was involved, how many different entities contributed to the data used in compiling the averages, or why the sales price would be where the exhibit suggested it was in comparison to actual sales that occurred in Utah in the same time frame. Those Utah sales were much, much lower than the national "averages" and for those reasons the court finds the testimony of plaintiff's expert was not such that it convinced the court that exhibit 2 established any legitimate values at any particular time.

On the other hand, defendant's expert's testimony, on both

direct and cross examination, as well as the exhibits produced, present to the court a much more believable and understandable and reasonable series of facts relating to the value of the stock. The data used by the defendant's experts, in exhibits 102 and 34-37 as provided by plaintiff, reflect actual Utah sales and the volume of stock sold and whether it was bought or sold.

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. Defendant's expert validated exhibits produced and obtained, in fact, by plaintiff, from business records of the employer of defendant's expert. (Exs. 34-37). Those showed that at various time in the relevant year, the stock sold on almost all occasions at less than \$.81, but on two occasions, September 19 and 20, 1979, it sold for \$.83, those each involving 1000 shares. Those exhibits were less than fully persuasive also because they covered only the last quarter of 1979. Those records did not reflect trading in 1980, the bulk of the time. Exhibit 102, produced by defendant, is less credible overall than exhibits 34-37, produced by plaintiff, in that Exhibit 102 was a randomly selected series of transactions meant to be illustrative of the value in a given month, yet it was clear that there were several transactions reflected in exhibits 34-39 that were not utilized by defendant's expert that in fact show the value of the stock was higher than represented by



exhibit 102. The court does not comment on nor find the expert of defendant did any such calculations for improper purposes, but it is factually clear that there were transactions involving a higher value that he did not use to illustrate the value in exhibit 102. As noted, the records of Wilson-Davis which were produced were only for 1979. At least exhibit 102 had the benefit of having some information for 1980 and those entries, as described, show the stock was trading higher in early 1980 than it was later in the year.

Moreover, and the court does not attach great weight to this fact, plaintiff in its response (Ex. 7) in a letter of January 23, 1981, relied on the Wilson-Davis records in its effort to convince defendant that the value of the stock was at a certain level.

Moreover, even if the two instances where the stock traded at \$.83 are fully considered, they involved 1000 shares each. This stock involved, even if it was considered to be 55,000 shares, involved a substantially larger volume and number of shares. While there are many exceptions to a general rule explained by the testimony that larger amounts of shares usually sell for less than smaller numbers, that number of shares would not necessarily command or yield the same price as much smaller transactions. Further, commissions were not considered and even at a value of \$.83, on that number of shares, the court does not

believe if sold at \$.83, 105,000 shares would yield the cash equivalent of \$85,000 to Nagle.

Thus, the court finds that the value of the stock did not achieve \$.81 in the time frame to be considered by the court on remand from the Court of Appeals. There is simply insufficient evidence.

The court does not fault either party for the paucity of evidence but the problems reflects the difficulty, frankly, of the court's task on remand. The Court of Appeals evidently envisioned a rather mathematical calculation as to the value of the shares of stock, and if it was worth \$85,000 Collard fully performed under the contract and if the value did not, the value was readily calculable and Nagle was entitled to an offset of the difference between \$85,000 and that readily calculable amount. 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.

Stock prices, as is common knowledge and as is revealed by the testimony and exhibits in this case, fluctuate seemingly with the wind, based on factors that probably occupy many minds who attempt to figure out such problems. The court simply is able to do the best it can in finding a "value" of the stock. The contract, Addendum 2, provided that defendant could sell the stock whenever it reached a certain value. There were times when

it did in some fashion. The court's task is frankly made impossible because the stock, like all stocks, traded in value at different times for different prices. The records, if fully relied on and believed, show on one day a certain volume of shares sold for as little as \$.16. (Ex. 102, Aug. 28, 1980). Even the actual transactions, if believed fully, show that on September 17, 1979 (a date irrelevant to the court's task of finding the value, but illustrative of the problem) shares sold for as much as \$1.22 and ON THE VERY NEXT DAY, September 18, 1979, sold for \$.77. Just exactly how this court is to "find" a "true" value at some point in the year so that the court can calculate an offset is a task seemingly unguided.

The court concludes, after examining all the exhibits of both experts, and considering the testimony, that during the relevant year the stock could have been sold for an average price of \$.50. That is based on the exhibits which show that just before September 18, 1979, the stock traded in some transactions at approximately \$1.20, and at various times during the relevant year traded in the \$.50 to \$.75 range, and on two occasions at \$.83 as mentioned. The price of stock obviously fluctuates and changes and is dependent on many variables. The evidence simply did not lend itself to an exact calculation, given that the range of prices were almost all for substantially smaller numbers of shares of stock. The larger volume sales were in the range of

price at about \$.25. Given this number of shares, and all the evidence, the court has done the best it can to determine the value of the stock for purposes of this case.

13. On November 24, 2001, Nagle caused a *lis pendens* to be recorded against the property. (Ex. 20).

14. Based on the order of the court Nagle and Nagle Construction executed a special warranty deed conveying the property to plaintiff on November 21, 2000. That was recorded January 5, 2001. (Ex. 20).

Based on the above findings and discussion, the court makes the following:

#### CONCLUSIONS OF LAW

1. Plaintiff did not fulfill the conditions of the contract which called for him to provide, in shares of Utah Coal, the equivalent of \$85,000 cash before he was entitled to title.

2. The Utah Court of Appeals fashioned an equitable remedy and remanded the matter to this court to basically find the value of the stock and further fashion an equitable remedy in the form of offset or recoupment if the court found Collard had not fully performed by tendering the requisite value of stock.

3. Given that plaintiff fulfilled the other conditions of the contract, by paying the down payment and mortgage payments



and improvements, and by continuously inhabiting the property, the court concludes it would not be equitable to allow defendant to regain title to the property. The Court of Appeals indicated it would not be equitable to allow plaintiff to have title if he did not fulfill the conditions of the contract. It would also not be equitable at this point to allow defendant to obtain title. The property has been sold and is in the hands of third parties, though a family member of Collard. Plaintiff had a good faith belief in the value of the stock he tendered, as indicated by the historical trading values which showed that before the relevant year the stock traded at over \$1.00 on several occasions. Thus, plaintiff's failures were in degree rather than a failure to perform or partially perform. Offset is a particularly proper remedy in this case because of factors obvious from the findings of fact. Defendant clearly could have, at varying points throughout the year, sold the stock for at least something. It could have often been sold for very near, in all likelihood, the value needed to achieve \$85,000. Had this contract simply called for the payment of money, plaintiff would have defaulted and the partial performance would not likely salvage this remedy for plaintiff. Here, the contract called for the delivery of stock. The records from the past illustrate that Collard had at the very least a good faith belief that the stock was worth at least \$95,000 as its traded value had often been

over \$1.00. For defendant to do nothing as far as selling the stock, or even a portion of it during the relevant year, and then claim, in essence, that no payment had been made is not equitable. Had defendant sold the stock at SOME value, the amount owing by Collard would have been reduced. Defendant clearly, by inference from the fact that he purchased 60,000 more shares independent of this transaction, hoped for and anticipated an increase in value of the stock of Utah Coal. Evidently that did not happen and the stock value declined. Such is the market evidently. Still, given those factors, that defendant was "speculating" in the stock value, and did nothing to attempt to sell even a portion of the stock when it would have realized some value had he done so, does not entitle him to a forfeiture and possession of the property, but does entitle him to a fair offset. That is what the court has attempted to do.

4. The difference in the value of the stock as found by the court and the amount due under the contract is \$32,550. ( $\$.81 \times 105,000 = \$85,050$  minus  $\$52,500,000 [ \$.50 \times 105,000 ]$ ). Thus, the amount of "failing" of plaintiff was approximately one fifth of the purchase price (\$150,000). These events were over 25 years ago. Neither party treated the matter properly in the late 1970s or early 1980s. The court, in fashioning an equitable remedy, believes that offset is proper as indicated by the Court of Appeals, and that the amount of offset to which Nagle is entitled

is \$32,550, being the difference in the value of the stock as found by the court and the difference in what would be needed to completely fulfill the contract. Recoupment and reconveyance of title would not be equitable given all the circumstances, as mentioned above. Further, as noted by this court in its November 6, 2000, order (now overruled) forfeiture was waived. Offset is the proper remedy under these facts.

5. Plaintiff raised several legal defenses and arguments in the motion for directed verdict at the end of its case and at the end of the case which it says defeats an offset claim. All motions are denied, including the motion of defendant for directed verdict. The court believes that with the exception of the claim of the merger doctrine and laches, the defenses have been rejected previously and are the law of the case.

6. As to plaintiff's claim that defendant elected remedies the court believes that the issue was raised in plaintiff's motion in limine, treated by the court as a summary judgment motion, and was determined against plaintiff on October 14, 2004. That is the law of the case on this issue and precludes the court from reconsidering it.

7. Plaintiff's claim that the Nagles lack standing and that there is not mutuality of obligation is rejected. The court also believes that has been dealt with in the order of October 14, 2004, and is the law of the case on this issue. Associated with

that argument is the argument that the warranty deed from Nagle Construction to Nagle is invalid because Nagle Construction had already sold the property and equitable conversion applies. If Nagle had the ability and sufficient ownership to convey by special warranty deed this property to plaintiff under court order, which deed is relied on by plaintiff to legitimize the sale to a third party, then Nagle has sufficient ability to seek its return.

8. As to the claim that Nagle Construction is dissolved and thus could did not assert a counterclaim the court believes that a dissolved corporation may defend itself and do any act needed to wind up its affairs, even after a passage of time of this length. Plaintiff sued Nagle Construction, and it did not file a counterclaim but the Court of Appeals has allowed an offset if certain facts are found by the trial court. The court believes the law allows that to occur even though Nagle Construction is dissolved.

9. As to plaintiff's argument that offset is precluded because of the "merger" doctrine and that this offset claim is in violation of the statutory covenants of the special warranty deed, that issue was not considered previously nor was it considered by the court of appeals. The court believes that the merger doctrine does not apply in this case because the special warranty deed was executed by Nagel pursuant to an order of this



court. Granted, the defendant did not stay the order effectively. However, the Court of Appeals reversed the grant of summary judgment, and thus the order of specific performance which was the basis for the special warranty deed. Thus, the order of the court requiring the execution and delivery and recording of the special warranty deed is not effective, and the special warranty deed is not effective. The doctrine does not apply under these facts.

10. Plaintiff's claim that there was a condition precedent unfulfilled by Nagle which excuses Collard from performance is rejected. There is no such language in the addenda or the contract.

11. Plaintiff claims that defendant did not mitigate his damages in that he did not attempt to sell the stock and seek the difference. The court agrees that the value of the stock, and what it "truly" was at any given time was not proven by either party by a preponderance of the evidence. However, and even though the court has commented upon the failure of defendant to attempt to sell the stock at some price, it is plaintiff's obligation under the remand order to prove the value of the stock reached \$85,000, and the court has found and concluded plaintiff did not prove that value and so there was a failure of a condition of the contract.

In equity, the court is granting specific performance as did

the court on summary judgment and as was approved, if the conditions were fulfilled by Collard, by the Utah Court of Appeals. Defendant came closer to proving the value of the stock than did plaintiff. Given the uncertainty as to value, the court is crafting this equitable remedy which it thinks does justice to both sides in this rather ancient dispute. Specific performance was declared by the Utah Court of appeals to be a proper remedy in this case, but not on summary judgment where there was a dispute over certain facts.

12. Plaintiff claims laches precludes the offset. The Court of Appeals indicated in the remand order that whether laches precludes recovery turns on disputed issues of fact and so it was not a proper consideration under summary judgment standards. Plaintiff claims that laches, waiver, or equitable estoppel defeat this claim because Nagle never asserted the claim for breach despite the January 13, 1981, letter. Witness memories have faded, documents have been lost or destroyed, and key witnesses (Collard, and Eldredge, the transfer agent) have died. For laches to succeed, there must be a lack of diligence on the part of a party and an injury to the other party owing to that lack of diligence. Again, this is an equitable doctrine. Plaintiff also waited until 1999 to file suit, and as the Court of Appeals stated, Collard sat on his rights as did defendant. The loss of documents and memory has affected more than one

party. The records form the greater part of this case, rather than live testimony. While certainly Collard could have benefitted from being able to counter some of the testimony of Nagle, the court has not greatly credited Nagle in his key testimony. The court does not believe that plaintiff has suffered injury due to a lack of action by defendant and laches does not preclude this offset remedy. The court has relied principally on records in reaching its findings and conclusions and the court sees no prejudice to plaintiff. Under all of the facts as are present in this case laches is not applicable as a defense.

13. As to defendant's request for prejudgment interest, that is not proper in this case. For prejudgment interest to be applicable, the damages must be complete and be 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.

14. Plaintiff is entitled to the specific performance that has occurred and to any documents that are needed to effectuate this order. Because plaintiff did not fulfill completely the conditions of the contract, defendant is entitled to an offset in

the sum set forth above and judgment is granted to defendant in that amount.

15. The *lis pendens* should be removed immediately. Plaintiff has suffered no damages proven from the lodging of that *lis pendens*. No evidence was presented on that issue. Plaintiff withdrew a previously filed petition to nullify the lien. Any damages have been waived if there were any. Title was in plaintiff, now a third party, and the *lis pendens* is ordered removed.

16. Defendant sought a reconveyance of the title and forfeiture and possession of the property. Accordingly, the court does not believe that defendant has fully prevailed in this action. Defendant's claims are in equity and defendant did not prevail on any legal claim asserted in a counterclaim, he did not prevail under the contract. The Court of Appeals on remand made clear that the trial court was to determine whether and to whom attorney fees and costs should be awarded, as the parties intended the defaulting party should be responsible for attorney fees. The contract allows fees incurred in obtaining possession or in pursuing a remedy under the contract or in enforcing the contract. Possession was not obtained by defendant and a remedy and enforcement was not under the contract, but a remedy in equity was granted.

Because the default was plaintiff's, but an equitable remedy



only is fashioned, and neither defendant nor plaintiff has fully and substantially prevailed, neither party is entitled to attorney fees.

Defendant is to prepare an order in compliance with URCP, Rule 7(f) setting forth this ruling.

DATED this 10 day of June, 2005.

BY THE COURT:



BRUCE C. LUBECK  
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 990907648 by the method and on the date specified.

METHOD NAME

Mail KATHRYN COLLARD  
ATTORNEY PLA  
1111 BOSTON BUILDING  
9 EXCHANGE PLACE  
SALT LAKE CITY, UT 84111  
Mail SEAN N EGAN  
ATTORNEY DEF  
136 S MAIN STE 408  
SALT LAKE CITY UT  
84101-3636

Dated this 10 day of June, 20 05.  
following the date specified

to the  
the date

Roh  
Deputy Court Clerk

AND

990907648

Tab D

ROBERT WALTER JENSEN  
W. WALDOAN LLOYD  
THOMPSON E. FEHR

LAW OFFICES OF  
**JENSEN & LLOYD**  
870 COMMERCIAL SECURITY BANK TOWER  
50 SOUTH MAIN STREET  
SALT LAKE CITY, UTAH 84144

TELEPHONE  
(801) 322-2300

January 13, 1981

Mr. LeRoy Collard  
3842 Quail Hollow Drive  
Salt Lake City, Utah 84119

Re: Uniform Real Estate Contract dated March 30, 1978

Dear Mr. Collard:

This office represents Nagle Construction Company, Inc. We have been requested by Nagle Construction to contact you concerning that certain Uniform Real Estate Contract made March 30, 1978 by and between Nagle Construction Company, Inc. as seller and you as buyer.

In connection with the above-referenced Contract, you are reminded that pursuant to Addendum #2 thereof, Nagle Construction Company, Inc. was to sell 55,000 shares of capital stock in Utah Coal and Chemical Corporation which had been tendered by you as part of the down payment for the property which is the subject of the Contract. The sale of the stock was to occur any time during the period specified in the Addendum at which Nagle Construction could realize the sum of \$85,000. You are further reminded that in keeping with the terms of Addendum #2, Nagle Construction Company, Inc. informed you within the period specified in the Addendum of its intention to sell the stock. Upon being so informed, you represented and agreed to purchase from Nagle Construction the 55,000 shares of stock for the sum of \$85,000. In reliance thereon, Nagle Construction withheld sale of the stock on the open market pending tender by you of said sum. Thereafter, the value of the stock declined, making it impossible for Nagle Construction to realize the requisite sum from a sale of the stock on the open market. Your offer to purchase the stock and Nagle Construction's detrimental reliance thereon constitutes a novation of the Uniform Real Estate Contract to the extent that your representations and Nagle Construction's reliance modified its terms.

2430



ROBERT WALTER JENSEN  
W. WALDAN LLOYD  
THOMPSON E. FEHR

LAW OFFICES OF  
**JENSEN & LLOYD**  
870 COMMERCIAL SECURITY BANK TOWER  
50 SOUTH MAIN STREET  
SALT LAKE CITY, UTAH 84144

TELEPHONE  
(801) 322-2301

January 13, 1981

Mr. LeRoy Collard  
3842 Quail Hollow Drive  
Salt Lake City, Utah 84119

Re: Uniform Real Estate Contract dated March 30, 1978

Dear Mr. Collard:

This office represents Nagle Construction Company, Inc. We have been requested by Nagle Construction to contact you concerning that certain Uniform Real Estate Contract made March 30, 1978 by and between Nagle Construction Company, Inc. as seller and you as buyer.

In connection with the above-referenced Contract, you are reminded that pursuant to Addendum #2 thereof, Nagle Construction Company, Inc. was to sell 55,000 shares of capital stock in Utah Coal and Chemical Corporation which had been tendered by you as part of the down payment for the property which is the subject of the Contract. The sale of the stock was to occur any time during the period specified in the Addendum at which Nagle Construction could realize the sum of \$85,000. You are further reminded that in keeping with the terms of Addendum #2, Nagle Construction Company, Inc. informed you within the period specified in the Addendum of its intention to sell the stock. Upon being so informed, you represented and agreed to purchase from Nagle Construction the 55,000 shares of stock for the sum of \$85,000. In reliance thereon, Nagle Construction withheld sale of the stock on the open market pending tender by you of said sum. Thereafter, the value of the stock declined, making it impossible for Nagle Construction to realize the requisite sum from a sale of the stock on the open market. Your offer to purchase the stock and Nagle Construction's detrimental reliance thereon constitutes a novation of the Uniform Real Estate Contract to the extent that your representations and Nagle Construction's reliance modified its terms.



Mr. LeRoy Collard  
January 13, 1981  
Page Two

Contrary to your agreement to do so, you have failed to deliver to Nagle Construction the sum of \$85,000. As a direct and foreseeable consequence thereof Nagle Construction has failed to realize the sum of \$85,000 from the sale of the stock as contemplated by the provisions of Addendum #2 to the Contract and the subsequent novation thereof.

Demand is herewith made upon you to deliver to Nagle Construction Company, Inc. either the sum of \$85,000 or a sufficient number of shares of stock in Utah Coal and Chemical Corporation which when combined with the 55,000 shares currently held by Nagle Construction will equal a current market value of \$85,000.

Delivery of either the aforesaid sum or the stock to Nagle Construction Company, Inc. or to the undersigned at the address listed above must be accomplished on or before January 25, 1981. You are advised that your failure to tender the sums or the stock as required in Addendum #2 to the Contract and its subsequent novation will be deemed by Nagle Construction to be a breach of the Contract and a default thereunder and will result in the institution of legal proceedings against you for foreclosure of the Contract as a note and mortgage.

Yours truly,

JENSEN & LLOYD

A handwritten signature in dark ink, appearing to read "W. Waldan Lloyd", is written over the typed name. The signature is fluid and cursive.

W. Waldan Lloyd

WWL/ds

Tab E

**COLLARD, KUHNHAUSEN, PIXTON & DOWNES**

ATTORNEYS AT LAW

417 CHURCH STREET  
SALT LAKE CITY, UTAH 84111  
TELEPHONE 801 • 534-1863

KATHRYN COLLARD  
STEVEN KUHNHAUSEN  
SUZAN PIXTON  
WILLIAM W. DOWNES, JR.

January 22, 1981

Mr. W. Waldan Lloyd  
Jensen & Lloyd  
870 Comerical Security Bank Tower  
50 South Main Street  
Salt Lake City, Utah 84144

RE: Roy Collard/Uniform Real Estate Contract dated  
March 30, 1978

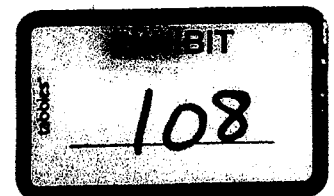
Dear Mr. Lloyd:

I am writing in response to your letter to  
my father, Roy Collard, dated January 13, 1981.

Let me begin by saying that my father has  
had business dealings with Gary Nagle and Nagle Con-  
struction Co. for several years. During that time,  
he has considered Mr. Nagle to be a personal friend  
as well as a business associate. He has certainly  
endeavored to treat Mr. Nagle fairly and feels badly  
that Mr. Nagle does not feel that he has received  
fair treatment in this instance.

In your letter, you assert that the 55,000  
shares of Utah Coal and Chemicals stock declined  
in value and could not be sold for the \$85,000.00  
referred to in the contract. However, in checking  
the summary sheets of stock sale quotations compiled  
by Prince-Covey, I find that there are numerous days  
on which the stock could have been sold and the  
\$85,000.00 realized. I have enclosed copies of the  
sheets for your information. I have also inquired  
at Wilson-Davis and asked them to prepare similar  
summaries to further document the sale price of the  
stock.

Certainly, after Mr. Nagle received the Utah  
Coal and Chemicals stock, my father had no control  
over the sale of the stock and could not force its





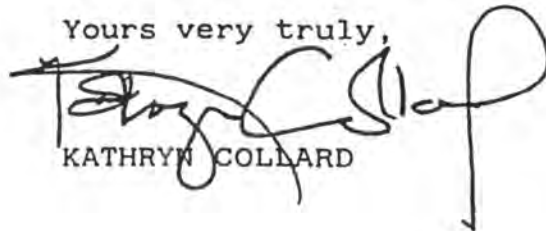
Mr. W. Waldan Lloyd  
January 22, 1981  
Page 2

sale. Like any investor, Mr. Nagle had the opportunity to sell or hold the stock as he chose according to his judgment of the market. The fact that he failed to sell the stock on those occasions when he could have realized the sum set forth in the contract is in no sense attributable to any action on the part of my father.

I sincerely hope that in light of the foregoing, your client will choose not to initiate legal proceedings. Based upon my evaluation of the facts of this case, the action you propose would be groundless and would only result in further expense and inconvenience to both parties.

I appreciate your attention to this matter.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Kathryn Collard', written over the typed name.

KATHRYN COLLARD

KC/ts

c.c.: Roy Collard