

1990

Leon Saunders, Robert Felton, J. Richard Rees,
Saunders Land Development Corp., White Pine
Ranches, and White Pine Enterprises v. John C.
Sharp, Geraldine Y. Sharp, and Associated Title
Company : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Saunders v. Sharp*, No. 900332 (Utah Court of Appeals, 1990).
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900332CA

IN THE COURT OF APPEALS IN AND FOR

THE STATE OF UTAH

N H. SAUNDERS; ROBERT FELTON;
RICHARD REES; SAUNDERS LAND
DEVELOPMENT CORP., a Utah
corporation; WHITE PINE RANCHES,
a Utah general partnership;
and WHITE PINE ENTERPRISES,
a Utah general partnership,

Appellants,

-v-

JOHN C. SHARP, GERALDINE Y. SHARP
and ASSOCIATED TITLE COMPANY, a
Utah Corporation, as Trustee,

Appellees,

Case No. 900332-CA

APPELLEES' BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE J. DENNIS FREDERICK,
DISTRICT JUDGE PRESIDING

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IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

LEON H. SAUNDERS; ROBERT FELTON;	:	
J. RICHARD REES; SAUNDERS LAND	:	
DEVELOPMENT CORP., a Utah	:	
corporation; WHITE PINE RANCHES,	:	
a Utah general partnership;	:	Case No. 900332-CA
and WHITE PINE ENTERPRISES,	:	
a Utah general partnership,	:	
	:	
Appellants,	:	
	:	
-v-	:	
	:	
JOHN C. SHARP, GERALDINE Y. SHARP	:	
and ASSOCIATED TITLE COMPANY, a	:	
Utah Corporation, as Trustee,	:	
	:	
Appellees,	:	

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JURISDICTION

Section 3 of Article VIII of the Utah Const., §78-2-2(3) of the Utah Code Ann., and Rule 3(a), Utah R. App. P., confer jurisdiction on this Court to hear this appeal.

NATURE OF PROCEEDING

This appeal is from an Amended Order Re: Defendants' Second Motion to Supplement Judgment and Motion to Increase Liability on Bond ("Amended Order"), dated May 14, 1990, of the Third Judicial District court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick presiding supplementing the Judgment entered in this matter on September 26, 1988 with interest accruing from that date through February 12, 1990 and additional attorney's fees incurred by the Sharps from September 1, 1988 through October 31, 1989.

STANDARD OF REVIEW

A trial court's findings of fact, whether based on oral or documentary evidence, will not be set aside on appeal unless clearly erroneous. Utah R. Civ. P. 52(a); Copper State Leasing Co. v. Blacker Appl. & Furn. Co., 770 P.2d 88, 93 (Utah 1988). A finding is clearly erroneous only if it is without adequate evidentiary support. State v. Walker, 743 P.2d 191, 193. When the terms of the contract are determined to provide for an award of attorney's fees, they are to be awarded as a matter of legal right, and the amount of such an award is within the trial court's discretion. Cobabe v. Crawford, 780 P.2d 834, 836 (Utah

Ct. App. 1989). A reviewing court will refrain from adjudicating issues on appeal if, pending the appeal, an event occurs which makes determination of the issue presented unnecessary and renders the case moot. In Interest of A. J., 736 P.2d 721 (Wyo. 1987); Despain v. Stewart, 639 P.2d 166 (Utah 1981); Duran v. Morris, 635 P.2d 43 (Utah 1981). In this case, the finding of the trial court regarding the award of additional attorney's fees is a factual finding which cannot be set aside unless clearly erroneous and is an award which is clearly within the discretion of the trial court. The other issues raised by the appellants in their Brief have been rendered moot by subsequent events.

PRIOR APPEAL

This is the second appeal filed by the appellants in the action before the trial court. The outcome of appellants' first appeal was an opinion of this Court, issued on May 25, 1990, in which this Court affirmed, in its entirety, the ruling of the trial court as it relates to these appellants. The Opinion, further, specifically affirmed the trial court's award of attorney's fees incurred by the Sharps evidenced by the unrebutted affidavits of the Sharps' counsel, Saunders v. Sharp, 135 Utah Adv. Rep. 68, 79 (Utah Ct. App. May 25, 1990), an issue raised once again by the appellants in this second appeal. A copy of the Opinion is attached hereto as Addendum 1.

CITATIONS TO THE RECORD

Citations to the Record will be abbreviated as follows:

Record on Appeal "R."

Exhibit "Ex."

The Addendum includes relevant portions of the record and other pleadings and shall be cited to as "Add." with the page number following the citation.

STATEMENT OF THE CASE

The genesis of this second appeal arises from the sale of certain property located in White Pine Canyon near Park City, Utah (the "property") by John C. and Geraldine Y. Sharp (the Sharps) to the appellants or their predecessors in interest ("White Pine"). To complete the purchase of the property, the buyers executed certain documents including a Trust Deed (Ex. 2, Add. 6-9) and Trust Deed Note (Ex. 3, Add. 10) and Memorandum of Closing Terms (the "Memo") (Ex. 15, Add. 11-15) (collectively, the "Agreement") and agreed to act in accordance with the terms and conditions contained therein. The Trust Deed Note provides for default interest to be charged on the payments thereunder at the rate of 18% per annum, and provides that if it "is collected by an attorney after default . . . the undersigned [White Pine] . . . agree to pay . . . a reasonable attorney's fee." (Ex. 3, Add. 10). Paragraph 7 of the Trust Deed provides that sums expended thereunder by the beneficiary or trustee shall bear interest at the rate of 10% per annum from the date of expenditure until paid, and contains three separate provisions for the recovery of attorney's fees. (Ex. 2, Add. 7-8) Paragraph 6 provides that

the beneficiary [the Sharps] "may commence, appear in and defend any action . . . and . . . employ counsel, and pay his reasonable fees." Paragraph 7 then requires trustor [White Pine] to "pay immediately . . . all sums expended hereunder by beneficiary," including sums expended in paragraph 6. Finally, under paragraph 16, the Sharps are entitled to "foreclose the Trust Deed [and] . . . recover in such proceeding all costs and expenses incident therein, including a reasonable attorney's fee." The Memo provides in paragraph 11 that the "defaulting party shall pay all expenses of enforcing the same or any right arising out of breach or default, including reasonable attorney's fees, whether incurred with or without suit and both before and after judgment." (Emphasis added). (Ex. 15, Add. 14) True and correct copies of the Trust Deed Note, Trust Deed, and Memo are attached hereto collectively as Addendum 2.

A dispute arose between the parties as to the respective obligations under the contract and on September 26, 1988, after concluding that White Pine had materially breached the contract, the trial court entered Judgment against White Pine in the total amount of \$759,415.63, including \$144,088.75 in attorney's fees. The Judgment categorized the interest on the sums awarded into the following categories: (1) interest on principal; (b) interest on costs and expenditures; and (c) interest on property taxes. (R. 1372, Add. 18) The Judgment further foreclosed the interest of White Pine in the property and ordered that the

property be sold and the proceeds be applied toward amounts due under the Judgment. (R. 1370-77, Add. 19-20) A true and correct copy of the Judgment is attached hereto as Addendum 3.

White Pine timely perfected the filing of an appeal of the Judgment (R. 1440-1442) and on May 25, 1990, this Court affirmed, in its entirety, the ruling of the trial court as it related to White Pine. Saunders v. Sharp, 135 Utah Adv. Rep. 68 (Utah Ct. App. May 25, 1990). (Add. 1-5) White Pine's Petition for a Writ of Certiorari is now pending before the Supreme Court.

On May 14, 1990, the trial court entered the Amended Order Re: Defendants' Second Motion to Supplement Judgment and Motion to Increase Liability on Bond ("Amended Order") (R. 2197-2205, Add. 24-32) which supplemented the Judgment with interest through February 12, 1990, the date on which the Motion was heard. A true and correct copy of the Amended Order is attached hereto as Addendum 4. The Amended Order also granted additional attorney's fees incurred by the Sharps from September 1, 1988 through October 31, 1989 in the amount of \$79,967.34, which amount excluded certain categories set forth in a Summary of Plaintiffs' Objections to Attorney's Fees presented as defendants' Exhibit 2 at the hearing on defendants' Motion. The excluded categories were: "Settlement," "Attorney's Fees," and "Tracy Collins Appeal." (Add. 27) The Amended Order specifically categorized the various calculations of interest based upon three unrebutted Affidavits of Albert D. Nystrom. (R. 1539-49, 1781-90, 2064-66,

Add. 33-57) True and correct copies of the Affidavits of Albert D. Nystrom, C.P.A., are attached hereto as Addendum 5. The Amended Order also required White Pine to pay the delinquent property taxes on the property securing the supersedeas bond ("Lot 1") and to post additional security in the amount of \$136,899.00 on or before March 15, 1990. (R. 2202, Add. 29) In the event White Pine failed to post the additional security by March 15, 1990, the Order staying proceedings would be vacated and the Sharps would be allowed to proceed with their remedies, including foreclosure, as provided in the September 26, 1988 Judgment.

On July 12, 1990, White Pine filed identical Motions for Stay of Remittitur and Judgment Pending Review and for Approval of Supersedeas Bond simultaneously in the trial court (R. 2254-2257) and in this Court. In an Order dated July 18, 1990, this Court refused to consider the Motion based on lack of jurisdiction. (Add. 58) The district court also denied the Motion of White Pine by way of a Minute Entry dated August 1, 1990. (Add. 59) True and correct copies of the Orders are attached hereto collectively as Addendum 6. On August 2, 1990, White Pine filed a Motion for Stay Pending Action on Petition for Certiorari and supporting Memorandum in the Utah Supreme Court. A true and correct copy of the Motion is attached hereto as Addendum 7.¹

¹White Pine's Petition for Certiorari is still pending before the Utah Supreme Court.

The Motion for Stay was granted but the Supreme Court remanded the case to the district court for the purpose of fixing the amount of the bond. (Add. 73) A true and correct copy of the Order of the Utah Supreme Court is attached hereto as Addendum 8.

On August 23, 1990, the parties hereto entered into a Stipulation pursuant to which White Pine posted additional security for a supersedeas bond in the amount of \$136,899.00 as required under the Amended Order and the Sharps stipulated to the adequacy of the security posted, in the form of two certificates of deposit. A true and correct copy of the Stipulation (without attachments) is attached hereto as Addendum 9. Further, the parties stipulated that as a result of the posting of additional security, the stay of execution of the Judgment would continue in effect through October 1, 1990 and after that, until the district court, after a motion, has determined the amount of any additional bond and the time set for filing the additional bond has expired. (Add. 79-81)

On November 9, 1990, in an effort to simplify the issues raised on appeal, the Sharps filed in district court a Motion to Amend the Amended Order to delete from the Amended Order, the phrase "for a total Judgment of \$938,053.02 as of February 12, 1990," the phrase to which White Pine objects in this Appeal. A true and correct copy of the Motion to Amend the Amended Order is attached hereto as Addendum 10. This Motion is currently before the trial court.

SUMMARY OF ARGUMENT

1. The Sharps agree they are not entitled to compound interest but deny the Amended Order has that effect. The Amended Order specifically categorizes each calculation of interest to avoid any compounding of interest. The Sharps are not seeking to compound interest and have, in an effort to simplify the issues on appeal, filed a Motion in the trial court to amend the Amended Order and delete the phrase "for a total judgment of \$938,053.02 as of February 12, 1990."

2. The Stipulation pursuant to which the parties agreed to the sufficiency of two certificates of deposit totaling \$136,899.00 as good and sufficient security for their supersedeas bond and the actual posting of that bond by White Pine has rendered the issue of whether the trial court entered an order exceeding the nature and issues raised by the pleadings moot. Accordingly, the argument relating to that issue need not be considered by this Court.

3. The district court had subject matter jurisdiction to enter the Amended Order since the issues of an increase in the supersedeas bond and award of attorney's fees were collateral to the issues raised by White Pine in its first appeal and involved matters necessary for the protection of the rights of the Sharps pending the outcome of the appeal. In fact, both this Court and the Utah Supreme Court recognized the trial court as the appropriate forum for the bond issues to be determined.

4. The supplementation of the Judgment by the amount of the attorney's fees incurred by the Sharps is in accordance with the terms of the Trust Deed Note, the Trust Deed and the Memo constituting the Agreement between the parties and comes within the purview of the language of the Judgment and enforcing the Agreement between the parties.

ARGUMENT

POINT I

COMPOUND INTEREST IS NOT AWARDED IN THE AMENDED ORDER SUPPLEMENTING THE JUDGMENT.

The rate of interest to be awarded on judgments is governed by §15-1-4, Utah Code Ann., which provides:

Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall be interest at the rate of 12% per annum.

(Emphasis added.)

In this case, the Agreement between the parties provided for different rates of interest. The payments to be made under the Trust Deed Note, once in default, are to bear the interest rate of 18% per annum. (Ex. 3, Add. 10) Expenditures made by the beneficiary under the Deed of Trust, however, bear interest at the rate of 10% per annum. (Ex. 2, Add. 7) Pursuant to the terms of the Utah statute, attorney's fees awarded accrued interest at the rate of 10% per annum pre-judgment and 12% per annum after judgment. Accordingly, the Sharps presented detailed

Affidavits of Albert D. Nystrom, a certified public accountant, presenting the calculations of all of the various interest rates and the per diem rates thereon. (R. 1539-49, 1782-90, 2064-66, Add. 33-57) Those affidavits were un rebutted by White Pine.

In accordance with the calculations of Albert D. Nystrom, paragraph 2 of the Amended Order provides for the supplementation of the Judgment in the amount of \$231,636.97 and itemizes the supplementation into specific categories. (R. 2197-2205, Add. 26-27) Subparagraph 2(b) sets forth pre-judgment interest at 10% from March 22, 1988, the date on which the trial court made its bench ruling in the trial of this matter to September 26, 1988, the date on which the Judgment was finally entered. Subparagraph 2(c) of the Amended Order then sets forth post-judgment interest at specific per diem rates calculated by Albert D. Nystrom from September 26, the date of the entry of the Judgment through February 12, 1990, the date of the hearing on the Motion to Supplement the Judgment. (R. 1539-49, 1782-90, 2064-66; Add. 26-27)

The Sharps agree that they are not entitled to compound interest. The specific itemization of the interest was calculated for the very purpose of avoiding any compounding of interest. Additionally, although the Sharps deny that the Amended Order has the effect of compounding interest, they have submitted a Motion in the district court to amend the Amended Order to delete the phrase "for a total Judgment of \$938,053.02" which phrase, White

Pine claims, at pages 9 and 13 of its Brief, is objectionable and results in compounding of interest. (Add. 85-87) White Pine's appeal as to the issue of interest is, therefore, without merit.

POINT II

THE ISSUE OF WHETHER THE TRIAL COURT ENTERED AN ORDER EXCEEDING THE NATURE AND ISSUES RAISED BY THE PLEADINGS HAS BEEN RENDERED MOOT.

Generally, an appellate court should dismiss an appeal if, pending the appeal, an event occurs which makes determination of the issue presented unnecessary and renders the case moot. In Interest of A. J., 736 P.2d 721 (Wyo. 1987). In that event, the case is moot and the court will normally refrain from adjudicating it on the merits. Despain v. Stewart, 639 P.2d 166 (Utah 1981); Duran v. Morris, 635 P.2d 43 (Utah 1981).

Here, White Pine's objections to the provisions of the Amended Order vacating the stay and requiring the posting of additional security, at pages 15-20 of its Brief, have been rendered moot by White Pine's own actions subsequent to the entry of that Order. White Pine has entered into a Stipulation by which White Pine agreed to post, and has now, in fact, posted the additional \$136,899.00 required by the Court and by which the Sharps agreed to the sufficiency of the form of the security for the additional \$136.899.00. (Add. 74-80) The terms of the Stipulation further render moot the objection to the vacation of the stay since the parties agree therein that the stay shall continue in effect as does the prior Order of the Utah Supreme

Court. (Add. 74-80, 73) Accordingly, it is unnecessary for this Court to consider the issue any further.²

POINT III

THE DISTRICT COURT HAD JURISDICTION TO ENTER THE AMENDED ORDER.

On remand, a district court has jurisdiction to interpret the decision and mandate of an appellate court. Berland's, Inc. v. Northside Shopping Center, 447 P.2d 768 (Okla. 1968). In this case, both this Court and the Supreme Court determined jurisdiction to determine the bonding issue was in the district court. In order to determine the amount of the bond, and to protect the Sharps against damages accruing during the pendency of the appeal, the district court, necessarily, had to determine the amounts by which the Judgment against White Pine had increased, taking into account interest and attorney's fees since the time the prior bond amount had been established. The fact that an appeal has been filed in a matter and a supersedeas bond posted does not stay the accrual of the obligations which are the subject of the appeal. Lund v. Lund, 6 Utah 2d 425, 315 P.2d 856 (1957). The entry of the Amended Order supplementing the Judgment is a logical corollary of the determination of the bond amount.

²Even if the issue is not moot, the Amended Order reflects what happens by operation of law. Under Utah R. Civ. P. Rule 62(d), a stay is effective only when the supersedeas bond is approved by the court. A court cannot approve a bond until it is posted.

Even in absence of remand, a trial court has jurisdiction to consider issues collateral to the appeal. White v. State of Utah, 137 Utah Adv. Rep. 3 (Utah 1990). A trial court also has the authority to consider applications for attorney's fees and matters relating to supersedeas bonds and the modification of injunctions during the pendency of an appeal. Venen v. Sweet, 758 F.2d 117 (3rd Cir. 1985).

In White, a case relied on by White Pine for its assertion the district court lacked jurisdiction, defendants brought a motion to modify the judgment against them to reflect a credit for the amounts they claim to have paid, thereby reducing the amount of the Judgment. In holding the trial court had jurisdiction to rule on the motion, the Supreme Court stated:

An adjudication of the motion, though a modification of the judgment may result, will not affect the legal issues raised here with respect to attorney's fees and defendant's liability. Under these circumstances, we see no need to suspend our jurisdiction while the district court has the matter under consideration as that will only delay proceedings. . . . If the motion is granted, the trial court in this case need only advise this court that the judgment has been modified. The district court action granting or denying the motion and the modified judgment should be included in the record when it is prepared for review by this court.

Id. at 4.

Other jurisdictions considering the matter have determined that a trial court is not deprived of the power to require an additional injunction bond or the power to dissolve such an

injunction upon failure to file a bond and have specifically found that a trial court retains jurisdiction to test the sufficiency of an appeal bond. In Porter v. Superior Court, 78 Cal. App. 790, 248 P. 1077 (Cal. 1926), a motion to increase the amount of an injunction bond as a condition of keeping the injunction in force was filed in the trial court after an appeal had been perfected. The Court stated:

As the jurisdiction of respondent court to increase the amount of the undertaking before the appeal was taken from the judgment was plainly existent, and as the appeal did not transfer to the appellate tribunal the matters incident to the giving of the undertaking, it appears plain to us that respondent court has jurisdiction, despite the appeal, to order an increase in the amount of the undertaking, even though the final result may be that the injunction will be set aside for a failure to give the new undertaking. There is as great danger to the rights of defendant in the action from an insufficiency of the undertaking, which insufficiency appears after the appeal, as from an insufficiency which might have appeared before the appeal. Under such circumstances, the jurisdiction to order a sufficient undertaking must rest somewhere, and, as it does not reside in the appellate tribunal after the appeal, it must still abide in the superior court.

Id. at 1078.

In Osborn v. Riley, 331 So.2d 268 (Ala. 1976), the Alabama Supreme Court held a motion for additional supersedeas bond was collateral to the issues which had been appealed.

[T]he Rileys' motion for an additional supersedeas bond is part of a proceeding that is separate and distinct from the decree appealed from. The question present-

ed by the Rileys' motion, that is, whether the original \$5,000 supersedeas bond adequately protected the Rileys' interest in the court's order entered in their favor, does not involve the rights and equities relative to the question of whether their deed should have been set aside. The Rileys' motion does not raise any question going behind the decree appealed from, nor does it raise any question decided by that decree. In short, the Rileys' motion presented a question which is clearly collateral to the questions raised by Osborn's appeal of the court order setting aside the deed.

Id. at 272. The court further recognized the trial court's jurisdiction to rightfully make orders that are needful for the preservation of the res and the rights of the parties pending to the appeal. "So it is that the Rileys' motion for additional bond involved a matter necessary for the full protection of their rights pending Osborn's appeal" Id. White Pine's appeal of this issue is disturbing, to say the least, since both this Court and the Utah Supreme Court have, in effect, told White Pine that jurisdiction of the bonding issue is in the district court.

White Pine cites the case of In re: Federal Facilities Realty Trust, 227 F.2d 651 (7th Cir. 1955), for the proposition that a district court has no power to revoke a stay once an appeal has been taken. The holding of that case, however, has been criticized and appears to have been abrogated by Rule 8(a), Fed. R. App. P., which requires "application for a stay of a judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending,

modifying, restoring granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court." (Emphasis added.) Rule 8, Utah R. App. P. is substantially similar to Rule 8, Fed. R. Civ. P. and appears to recognize the reality that an appellate court is ill-equipped to take evidence or make factual determinations as to the sufficiency of a supersedeas bond, as the Utah Supreme Court and this Court so held with these parties. Swasey v. Rocky Point Ditch Co., 649 P.2d 1 (Utah 1982) (decided under former Utah R. Civ. P., Rule 73).

If the appellate court cannot take evidence, and, as White Pine asserts, the district court has no jurisdiction, the illogical result is that a judgment holder is left with no forum in which his security will be protected, even if, subsequent to the filing of the appeal, the security is lost, destroyed, or devalued, an absurd result.

In In re: Long, 93 Br. 791 (Bankr. M.D. Ga. 1988), the court noted that the holding of Federal Facilities had been incorporated into former Fed. R. Civ. P. 73(e). The court noted:

The former rule's provision that the docketing of an appeal divests the lower court of jurisdiction to address matters relating to the bond or to a stay pending appeal was rejected when Rule 8(a) of the Federal Rules of Appellate Procedure was adopted. The advisory committee note to Rule 8(a) states:

The requirement of FRCP 73(e) appears to be a concession to the view that once an appeal is perfected, the district court loses all power over its

judgment. See In re: Federal Facilities Realty Trust, 227 F.2d 651 (7th Cir. 1955) and cases cited at 654-655. No reason appears why all questions related to supersedeas or the bond for costs on appeal should not be presented in the first instance to the district court in the ordinary case.

In re: Long, 93 Br. at 791. See also Venen v. Sweet, 758 F.2d 117 (3rd Cir. 1985) (district court, during the pendency of an appeal is not divested of jurisdiction to determine an application for attorney's fees or to issue orders regarding the filing of bonds or supersedeas bonds or to modify, restore or grant injunctions).

As noted above, in order to determine the damages which would accrue during the pendency of White Pine's appeal and the sufficiency and amount of the bond to be posted by White Pine, the district court was required to make a determination of the amount of attorney's fees incurred by the Sharps, since attorney's fees are an integral part of damages incurred by the stay of execution. Cf. Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1262 (Utah 1984).

Here, the award of additional attorney's fees is collateral to the issues raised in White Pine's first appeal. In First Div., Inc. v. Bermaor, 449 So.2d 290, 291 (Fla. Dist. Ct. App. 1983), the court held that the mere fact a first judgment was on appeal did not deprive the trial court of jurisdiction to enter a subsequent judgment for attorney's fees, stating:

A proceeding seeking attorneys' fees and costs pursuant to the primary judgment is not a proceeding to enforce the primary judgment, and a supersedeas of such primary judgment does not, any more than the appeal therefrom, divest the trial court of jurisdiction to entertain such proceeding, to enter the ancillary judgment, and to provide for its enforcement unless such ancillary judgment is independently superseded.

(Footnote omitted.) Id. See also Dent v. Simmons, 61 Md. App. 122, 485 A.2d 270 (1985) (Trial court has jurisdiction to award attorney's fees after appeal of the case in chief; determination of issue within the sound discretion of the trial court); Venen v. Sweet, 758 F.2d at 120 (3rd Cir. 1985) (district court during pendency of an appeal is not divested of jurisdiction to determine an application for attorney's fees).

POINT IV

SUPPLEMENTATION OF THE JUDGMENT BY THE AMOUNT OF ATTORNEY'S FEES INCURRED BY THE SHARPS IS NOT CONTRARY TO THE JUDGMENT NOR THE TERMS OF THE CONTRACT.

In Utah where provided for by contract, the award of attorney's fees is left to the sound discretion of the trial court. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988); Turtle Mgt. v. Haggis Mgt., 645 P.2d 677 (Utah 1982). When the terms of the contract are determined to provide for an award of attorney's fees, they are to be awarded as a matter of legal right. Saunders v. Sharp, 135 Utah Adv. Rep. 68, 79 (Utah Ct. App. May 25, 1990). In its first appeal, White Pine argued, also, that the award of attorney's fees in the first Judgment was

improper. This Court, however, rejected that contention stating: "Based on the court's determination that buyers breached the trust deed, trust deed note, and the contract, the trial court properly ruled that sellers were entitled to their attorney fees [sic] reasonably incurred." Saunders at 70. The trial court then concluded: "At the court's instruction, sellers' counsel submitted an affidavit and supporting documents as evidence of reasonableness. We perceive no abuse of discretion in the trial court's determination that this affidavit, never rebutted, was sufficient to support an award of fees. Id. The Sharps' counsel followed the same procedure for the second award of fees. (R. 1791-1885)

White Pine argues in its Brief that somehow the Judgment limits the areas in which the Sharps can recover attorney's fees, ignoring, totally, the underlying Agreement upon which the Judgment is based. In this case, the attorney's fees can be awarded because they are authorized by the contractual terms to which White Pine agreed. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988) (Citing Golden Key Realty, Inc. v. Mantos, 699 P.2d 730, 734 (Utah 1985)). Contractual obligations to pay attorney's fees incurred in enforcing a contract include fees incurred on appeal. Redevelopment Agency v. Dasakalas, 119 Utah Adv. Rep. 70 (Utah App. October 11, 1989); Cobabe v. Crawford, 780 P.2d 834, 837 (Utah App. 1989); Management Servs. v. Development Assocs., 617 P.2d 406, 408-09 (Utah 1980).

The Trust Deed, the Trust Deed Note and the Memo, comprising the parties' Agreement in this case, all include clauses relating to awards of attorney's fees.

Three separate provisions of the Trust Deed alone provide for the recovery of attorney's fees. (Ex. 2, Add. 7-8) Paragraph 6 provides that the beneficiary (Sharps) "may commence, appear in and defend any action . . . and . . . employ counsel, and pay his reasonable fees." Paragraph 7 then requires trustor (White Pine Ranches) to "pay immediately" "all sums expended hereunder by Beneficiary," especially including sums expended in paragraph 6. Finally, under paragraph 16, the Sharps are entitled to "foreclose the Trust Deed [and] . . . recover in such proceeding all costs and expenses incident therein, including a reasonable attorney's fee."

The Trust Deed Note provides that if it "is collected by an attorney after default . . . the undersigned [White Pine Ranches] . . . agree to pay . . . a reasonable attorney's fee." (Ex. 3, Add. 10)

Finally, under the Memo, paragraph 11, "the defaulting party shall pay all expenses of enforcing the same or any right arising out of breach or default, including reasonable attorney's fees, whether incurred with or without suit and before and after Judgment." (Emphasis added.) (Ex. 15, Add. 14)

White Pine seems to assert that the language in the Judgment "and after prevailing in any appeal" somehow limits the recovery

of fees in the interim. The word "and" is used to connect words or phrases expressing the idea that the latter is to be added or taken along with the first in addition to that which immediately precedes. 3A CJS "And" (1979). Accordingly, the phrase "and after prevailing in any appeal" as stated in the Judgment is in addition to the other phrases "preparation of the Findings", "responding to any post-trial motions", and "collecting said Judgment" and not intended as a limitation to the language contained in the parties' Agreement.

This Court recently dealt with the scope of enforcement of a contract for which attorney's fees are recoverable. In Dasakalas, supra, the Redevelopment Agency of Salt Lake City condemned certain property in which tenants held a leasehold interest. The tenants made a claim for a portion of the condemnation award asserting they had a compensable interest in the property, which claim the owners contested. The trial court granted the owners' motion for summary judgment and ordered the tenants to pay the owners' attorney's fees pursuant to the terms of the lease agreements which provided as follows:

Lessee also agrees to pay all costs and attorney's fees and expenses that shall arise from enforcing the terms and provision of this lease.

This Court held that the owners were contractually entitled to the award of attorney's fees, stating:

Owners successfully resisted their [the Tenants] claim for compensation on the grounds that it was a violation of the "terms and

provisions of this lease". Thus the Owners are contractually entitled to collect attorney's fees and expenses incurred in defending against Tenants' claims because they were enforcing the lease terms.

Id. at 77.

In this case, the attorney's fees incurred post-judgment (all of which have been paid in full by the Sharps as of November 30, 1989, see Affidavit of Kathy A. F. Davis (R. 2050, 2052)) have arisen out of or are a result of the breach or default of White Pine, and have been incurred in enforcing the rights of the Sharps under the terms of the contract by successfully resisting the claims asserted by White Pine in its Complaint and on appeal. Redevelopment Agency v. Dasakalas, 119 Utah Adv. Rep. 70 (Utah App. October 11, 1989). Indeed, appellants' objections to the fees are a reflection of how litigious they are. The Sharps have been required, over the past four years, to litigate, defend and relitigate this matter in four separate forums and, now, twice in this Court.

J. Richard Rees claims an interest in the subject property (Ex. 46) and in order to proceed with a foreclosure of the property, it was necessary to obtain the release from the bankruptcy he filed of that interest in the property.³ In order

³In fact, it was Robert Felton, one of the plaintiffs herein, who filed an Objection to defendants' Motion for Relief from the Automatic Stay in the Rees Bankruptcy, which Objection will necessitate further legal action. Copies of the Order Modifying the Automatic Stay and Felton's Objection are attached hereto collectively as Addendum 11.

to obtain clear title to the property and successfully complete a foreclosure, it was necessary to obtain consents to judgment from junior lienholders.

The other categories to which White Pine objects, including drafting letters to California counsel regarding prospective buyers, preparing for and attending conferences regarding the development of White Pine Ski Resort and having telephone conversations about an interested buyer are all categories excluded from the award of attorney's fees in paragraph 3(a) of the Amended Order and taken under advisement by the district court. (R. 2200)

CONCLUSION

The Sharps agree they cannot compound interest and deny the Amended Order has that effect. Further, the Sharps have filed a Motion to amend the Amended Order and delete the language which White Pine finds objectionable. The issue of whether the district court could properly vacate a stay of execution has been rendered moot by the Stipulation of the parties. The district court has jurisdiction to supplement the Judgment by the amounts which continue to accrue on the obligation during the pendency of the appeal as well as to determine the sufficiency of the supersedeas bond which was security for the stay of execution. Attorney's fees are an item of damages included in the recovery under a supersedeas bond and the trial court appropriately considered attorney's fees in fixing the amount of the supersede-

as bond and supplementing the Judgment. Based upon the foregoing, the Sharps respectfully submit that the Amended Order entered by the trial court should be affirmed.

DATED this 14 day of November, 1990.

WINDER & HASLAM, P.C.

By Kathy A. F. Davis
Donald J. Winder
Kathy A. F. Davis
Attorneys for Appellees Sharp

CERTIFICATE OF SERVICE

I hereby certify that, on the 14 day of November, 1990, I caused eight true and correct copies of the foregoing APPELLEES' BRIEF to be mailed, first class, postage prepaid to:

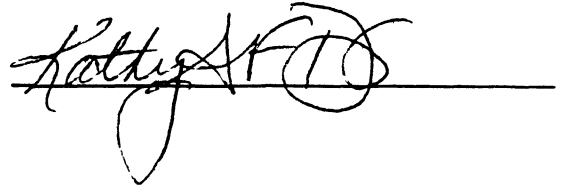
Clerk of the Court
Utah Court of Appeals
230 South 500 East, #400
Salt Lake City, Utah 84102

I further certify that I caused four copies of the same to be mailed, first class, postage prepaid, to each of the following:

Robert M. Anderson
Glen D. Watkins
ANDERSON & WATKINS
Valley Tower, Seventh Floor
50 West Broadway
Salt Lake City, Utah 84101-1018

John B. Anderson, Esq.
ANDERSON & HOLLAND
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Salt Lake City, Utah 84147

David L. Gladwell
Chapter 7 Trustee
Post Office Box 12069
Ogden, Utah 84412

A handwritten signature in black ink, appearing to read "Kathy A. F. D.", is written over a horizontal line.

skt WP6S SHRPCA.BRF

IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

LEON H. SAUNDERS; ROBERT FELTON;	:	
J. RICHARD REES; SAUNDERS LAND	:	
DEVELOPMENT CORP., a Utah	:	
corporation; WHITE PINE RANCHES,	:	
a Utah general partnership;	:	Case No. 900332-CA
and WHITE PINE ENTERPRISES,	:	
a Utah general partnership,	:	
	:	
Appellants,	:	
	:	
-v-	:	
	:	
JOHN C. SHARP, GERALDINE Y. SHARP	:	
and ASSOCIATED TITLE COMPANY, a	:	
Utah Corporation, as Trustee,	:	
	:	
Appellees,	:	

ADDENDA

Tab 1

rebutted" Bauey, 605 P.2d at 768.

Cite as
135 Utah Adv. Rep. 68

IN THE
UTAH COURT OF APPEALS

Leon H. SAUNDERS; Robert Felton;
Saunders Land Investment Corporation, a
Utah corporation; White Pine Ranches, a
Utah general partnership; and White Pine
Enterprises, a Utah general partnership,
Plaintiffs and Appellants,

v.

John C. SHARP and Geraldine Y. Sharp,
Defendants and Appellees.

John C. Sharp and Geraldine Y. Sharp,
Counterclaim-Plaintiffs and Appellees,

v.

Robert Felton; Leon H. Saunders; Saunders
Land Investment Corporation; White Pine
Ranches; White Pine Enterprises,
Counterclaim-Defendants and Appellees,

and

Kenneth R. Norton, d/b/a Interstate
Rentals, Inc.,

Counterclaim-Defendant and Appellant,
and

Commissioner of Financial Institutions,
receiver for Tracy Collins Bank and Trust
Company,
Surety and Appellant.

No. 880710-CA

No. 880711-CA

FILED: May 25, 1990

Third District, Salt Lake County
Honorable J. Dennis Frederick

ATTORNEYS:

Robert M. Anderson, Glen D. Watkins, and
Mark R. Gaylord, Salt Lake City, for
Plaintiffs

John B. Anderson, Salt Lake City, for
Kenneth R. Norton

Stanford B. Owen and Patrick L. Anderson,
Salt Lake City, for Surety

Donald J. Winder, Kathy A.F. Davis, and
Tamara K. Prince, Salt Lake City, for
Defendants

Before Judges Bench, Greenwood, and
Larson.¹

OPINION

BENCH, Judge:

Plaintiffs appeal from a judgment in favor

of defendants in an action for breach of contract and slander of title. Plaintiffs also appeal the district court's determination that a temporary restraining order was wrongfully issued, entitling defendants to damages from injunction bonds posted by, and on behalf of, plaintiffs. We affirm the judgment on the contract, but reverse the award of damages against the injunction bonds.

This dispute arises from the sale of approximately 60 acres of land near Park City, Utah, owned by John C. and Geraldine Y. Sharp ("sellers"). Plaintiff White Pine Ranches, a general partnership consisting of Leon H. Saunders, Robert Felton, Kenneth R. Norton, and Paul H. Landes ("buyers"), purchased the property on July 16, 1981, for the purpose of constructing a "Planned Unit Development" (PUD)² of four- or five-acre lots and an internal roadway. Buyers paid \$620,000 down on a total purchase price of \$1,583,055.30, and executed a trust deed and note providing for equal annual installment payments of \$192,611.06 on the balance due.

An "Offer to Purchase" and "Memorandum of Closing Terms" were also executed (hereafter referred to as the "contract"), and included the following provisions: (1) upon receipt of the down payment and recordation of a "PUD Plat and Declaration of Covenants, Conditions and Restrictions," three lots of buyers' choice together with the internal roadway connecting the lots to the county road would be released from the trust deed; (2) after recordation and upon receipt of each \$140,000 in principal, one PUD lot of buyers' choice would be released from the trust deed; (3) sellers would grant Summit County a strip of land to widen the county road, or, if the road was shown to be inaccurately platted, to grant to the county the road as it existed; (4) sellers would warrant marketable title subject only to easements and reservations of record; (5) buyers would provide sellers with a water and sewer connection at a pro rata cost, at such time as the connections became available; (6) buyers would sell 50 acre-feet of irrigation water to sellers for the discounted cost of \$100,000 cash; (7) buyers would be responsible for all taxes and assessments after assuming possession of the premises; (8) failure to make the annual installment payments within thirty days of the annual anniversary date would constitute a default; and (9) in the event of a breach or default, the defaulting party would pay all expenses, including reasonable attorney fees, incurred in enforcing any obligation or right under the contract.

Buyers made installment payments in 1982, 1983, 1984, and a partial payment in 1985. Buyers also made certain improvements to the property and the internal roadway at a cost of over a million dollars, funded in part by a construction loan from Tracy Collins Bank & Trust Company ("Tracy Collins"). On or

about November 23, 1983, sellers executed a "Consent to Record" with respect to buyers' plat describing "Phase I" of the project, which involved six lots and the roadway. The plat and a "Declaration of Protective Covenants" were officially recorded on December 23, 1983. The plat indicated that the internal roadway was to be private, in contravention of sellers' intent to have the roadway dedicated to public use.

Although sellers requested the trustee on January 18, 1984, to release and reconvey lots 1 through 5, no mention of the roadway was made, and no reconveyance was recorded until March 28, 1986. Meanwhile, property taxes for lot 6 and the unplatted property became due on November 30, 1984. Of the \$4,725 assessed for taxes, buyers paid only \$1,515.24. Buyers also paid only a portion of the installment payment due in June 1985.

Sellers subsequently recorded a notice of default on September 16, 1985, and gave notice of a trustee's sale of lot 6, the internal roadway, and all the unplatted property. Buyers filed this action on September 4, 1986, the day before the scheduled trustee's sale, and were granted an order temporarily restraining the sale. The initial temporary restraining order required a cash bond in the amount of \$2,400, which buyers posted. The parties thereafter stipulated to an injunction pending trial, and the district court imposed a \$50,000 injunction bond. The bond was posted by Tracy Collins acting as surety for buyers, in an attempt to protect its security interest on the construction loan issued to buyers.

In their complaint, buyers sought specific performance of certain obligations under the contract, specifically, the release of lot 6, the internal roadway, and 7.35 acres of the unplatted property. Buyers also sought damages arising from sellers' alleged breach of contract. Sellers counterclaimed, asserting that buyers had breached the contract. They sought dissolution of the injunction, damages for its wrongful issuance, an order of judicial foreclosure on the property, and recovery on the trust deed note.

A bench trial was held on January 28-29 and March 22-25, 1988. The trial court held that buyers had materially breached the contract by failing to pay property taxes on lot 6 and the unplatted acreage, and by failing to satisfy their 1985 and 1986 installment obligations. The court further held that the contractual breach occurred before any alleged breach by sellers, and that further performance by sellers was excused after buyers' breach. Buyers also failed to request release of lots until after their own breach had already occurred, facts which the court believed affected the credibility of buyers' claims. In contrast, sellers were found to have substantially complied with the terms of the contract, and that the recordation of the Declaration of

Protective Covenants and the Consent to Record constituted a release of the roadway. Judgment was entered for sellers in the amount of \$759,415.63. This amount included \$144,088.75 in attorney fees, which were awarded under the terms of the trust deed and note and the contract.

After finding that buyers had breached the contract, the trial court determined that the temporary restraining order against sellers had been wrongfully issued. The court then determined that the appraised fair market value of the property upon which sellers were entitled to foreclose was \$728,445. That sum was deducted from the total judgment, leaving sellers undersecured in the amount of \$30,970.63. The court awarded sellers that amount against the bonds by entering judgment on the \$2,400 cash bond, in full, and \$28,570.63 against the bond posted by Tracy Collins. The court also determined that four percent of the attorney fees incurred in defense of the lawsuit could be attributed to defending against the wrongfully issued injunction, and awarded attorney fees against the bonds in the amount of \$5,763.55. Buyers and the surety have brought this consolidated appeal to challenge the respective judgments against them.

We first consider the appeal brought by buyers, who argue that the trial court erred in concluding that they, not sellers, breached the contract. Buyers claim entitlement to specific performance and damages, and argue that sellers are precluded from recovering attorney fees. Buyers also claim that the trial court erred in concluding that they granted to sellers an easement over the roadway and that the temporary restraining order had been wrongfully issued.

BREACH OF CONTRACT

At the conclusion of trial, the court made oral findings encompassing eight transcribed pages. Thereafter, the court issued its judgment accompanied by 104 separate findings of fact. Buyers' brief lists over two pages of issues and subissues. Although buyers state that "the issues presented in this appeal are questions of law reviewable by an appellate court for correctness," we conclude, after scrutinizing those issues, that buyers are essentially challenging the trial court's findings of fact.

Buyers argue that sellers breached the contract by failing to make all the required reconveyances and that this breach was never excused by buyers' failure to make specific requests for those releases. Buyers also dispute the trial court's finding that the evidence "established that the parties by both mutual intent and agreement granted to the Defendants the use of the roadway." Buyers further contest the finding that sellers substantially performed their obligations under the con-

ract. All of these "legal issues," however, strike at the trial court's determination of whether there was a material breach of contract, and if so, when, and by whom. Such questions constitute issues of fact for the fact finder. See *Sjoberg v. Kravik*, 759 P.2d 966, 969 (Mont. 1988); *Wasserburger v. American Scientific Chem., Inc.*, 267 Or. 77, 514 P.2d 1097, 1099 (1973) (en banc); see also *American Petrofina Co. v. D & L Oil Supply, Inc.*, 283 Or. 183, 583 P.2d 521, 528 (1978) (substantial performance under a contract is a question of fact).

Our standard for overturning factual findings is a rigorous one—we may not set aside such findings unless they are clearly erroneous. *Sweeney Land Co. v. Kimball*, 786 P.2d 760, 761 (Utah 1990); Utah R. Civ. P. 52(a). To establish clear error, "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,'" *In re Bartell*, 776 P.2d 885, 886 (Utah 1989) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). This burden "is a heavy one, reflective of the fact that we do not sit to retry cases submitted on disputed facts." *Id.* at 886. Accordingly, when an appellant fails to carry its burden of marshaling the evidence, "we refuse to consider the merits of challenges to the findings and accept the findings as valid." *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 553 (Utah Ct. App. 1989).

We are thus obliged to consider the findings from the standpoint of the supporting evidence and not from "appellant's view of the way he or she believes the facts should have been found." *Ashton v. Ashton*, 733 P.2d 147, 150 (Utah 1987). Since buyers have not marshaled the evidence in support of those findings, but merely argue that there is evidence contradicting them, they have failed to demonstrate that the findings are against the clear weight of the evidence. We must therefore accept the findings as valid and affirm the judgment.

ATTORNEY FEES

With respect to the award of attorney fees, "the court may award reasonable fees in accordance with the terms of the parties' agreement." *Cobabe v. Crawford*, 780 P.2d 834, 836 (Utah Ct. App. 1989) (quoting *Trayner v. Cushing*, 688 P.2d 856, 858 (Utah 1984) (per curiam)). Although the interpretation of unambiguous contractual terms is a question of law to which the trial court's ruling is afforded no particular deference on appeal, *Wilburn v. Interstate Elec.*, 748 P.2d 582, 584-85 (Utah Ct. App. 1988), *cert. dismissed*, 774 P.2d 1149 (Utah 1989), when those terms are determined to provide for an award of attorney fees, they are to be "awarded as a matter

of legal right." *Cobabe*, 780 P.2d at 836 (quoting *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1985)).

The contract provides that "the defaulting party shall pay all expenses of enforcing the same or any right arising out of breach or default thereof, including reasonable attorneys' fees, whether incurred with or without suit and both before and after judgment." We conclude, as the trial court implicitly did, that this provision is unambiguous. Based on the court's determination that buyers breached the trust deed, trust deed note, and the contract, the trial court properly ruled that sellers were entitled to their attorney fees reasonably incurred. See, e.g., *Dixon v. Stoddard*, 765 P.2d 879, 881 (Utah 1988).

The amount of such an award is within the trial court's discretion, *Cobabe*, 780 P.2d at 836, but must be reasonable, *Canyon Country Store v. Bracey*, 781 P.2d 414, 420 (Utah 1989), and supported by adequate evidence. *Barnes v. Wood*, 750 P.2d 1226, 1233 (Utah Ct. App. 1988). At the court's instruction, sellers' counsel submitted an affidavit and supporting documents as evidence of reasonableness. We perceive no abuse of discretion in the trial court's determination that this affidavit, never rebutted, was sufficient to support an award of fees. See *id.*; see also *Freed Fin. Co. v. Stoker Motor Co.*, 537 P.2d 1039, 1040 (Utah 1975).

THE INJUNCTION BONDS

The Commissioner of Financial Institutions ("Commissioner"), as receiver for Tracy Collins, appeals the judgment against the injunction bonds. The Commissioner seeks to avoid liability by arguing for the first time on appeal that the posting of the surety bond was an ultra vires act by Tracy Collins.

Although issues not raised below cannot generally be considered on appeal, see *James v. Preston*, 746 P.2d 799, 801 (Utah Ct. App. 1987), the Commissioner urges us to create an exception to this rule under the theory of "adverse domination." This theory provides that as long as a corporation is controlled or "dominated" by wrongdoers against whom a cause of action exists, the statute of limitations is tolled because the wrongdoers cannot be expected to bring an action against themselves. *Federal Deposit Ins. Corp. v. Hudson*, 673 F. Supp. 1039, 1042 (D. Kan. 1987).

Because Tracy Collins did not have the power to act as a surety, the Commissioner alleges, the bank's officers would have been subjected to liability had they asserted the ultra vires claim at trial. Therefore, so the argument goes, the Commissioner, as receiver, should now be permitted under the theory of adverse domination to assert the claim of ultra vires on appeal.

Although there are exceptions to the rule prohibiting consideration of issues for the first

time on appeal, they are few in number. See *State v. Webb*, 131 Utah Adv. Rep. 41, 47-48 (Utah Ct. App. 1990) (e.g., exceptional circumstances, plain error, liberty interests). It appears that such exceptions are to be applied only when gross injustice resulting from application of the rule overwhelms its purpose—that being to correct errors at trial, avoiding “a merry-go-round of litigation.” *Bundy v. Century Equip. Co.*, 692 P.2d 754, 758 (Utah 1984) (quoting *Simpson v. General Motors Corp.*, 24 Utah 2d 301, 303, 470 P.2d 399, 401 (Utah 1970)).

The Commissioner has brought to our attention no exceptional circumstance to support the carving out of yet another exception to the rules of appellate review. Although the Commissioner urges us to adopt its approach by noting that it was not a party below, buyers were likewise deprived of the opportunity to submit the *ultra vires* issue to the trial court and have it resolved without the necessity of this appeal. Since the Commissioner offers no authority for extending the theory of adverse domination beyond the limitation of actions against corporate wrongdoers, and we see no other reason to do so, we decline to consider its claim of *ultra vires*. *Accord Wallace Bank & Trust Co. v. First Nat'l Bank*, 40 Idaho 712, 237 P. 284, 287 (1925) (*ultra vires* may not be asserted for the first time on appeal).

We next address the Commissioner's claim that the trial court improperly awarded attorney fees incurred in resisting the temporary restraining order. The trial court accepted sellers' calculation that four percent of their total attorney fees of \$144,088.75 were spent defending against the “injunction.”³ The trial court then awarded \$5,763.55 of those fees against the bonds.

Utah R. Civ. P. 65A(c) provides that:

Except as otherwise provided by law, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Our supreme court has determined that “damages” subject to recovery under this rule include the attorney fees of the party wrongfully enjoined. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1262 (Utah 1984). We have since extended that recovery to attorney fees incurred as the result of a wrongfully issued temporary restraining order. See *Beard v. Dugdale*, 741 P.2d 968, 969 (Utah Ct. App. 1987). When attorney fees are incurred in defending against wrongfully obtained injunctive relief and also against an underlying

lawsuit, it is appropriate to determine how much of the total fees are attributable to resisting the injunction. See *id.*; see also *Artistic Hairdressers, Inc. v. Levy*, 87 Nev. 313, 486 P.2d 482, 484 (1971) (only the attorney fees directly related to dissolution of the wrongful injunction are recoverable). We therefore affirm the trial court's award of attorney fees against the bonds.

We last address the Commissioner's argument that the trial court used an incorrect measure in awarding damages under rule 65A(c) against the injunction bonds. The trial court calculated damages by adding principal (\$371,739.35), interest (\$203,664.50), late fees (\$14,869.57), taxes (\$20,368.62), attorney fees (\$144,469.75), trustee's fees (\$1,803.80), and costs (\$2,881.04) for a total of \$759,796.63. The court next considered the testimony at trial of a real property appraiser who determined that the fair market value of the un-conveyed property was \$17,500 to \$20,000 per acre at the time the temporary restraining order was imposed. The trial court then found that the value of the property on the date of judgment was \$20,000 per acre, totalling \$728,445.00. Since the value of the property as collateral was less than the total judgment, the trial court found that buyers were undersecured and awarded the difference (\$30,970.63) as damages for the wrongfully issued injunction.

The Commissioner claims that this calculation was erroneous, and asserts that the correct measure of damages is “the reduction or diminution in the value of the security during the period of restraint.” *Glens Falls Ins. Co. v. First Nat'l Bank*, 83 Nev. 196, 427 P.2d 1, 4 (1967). See also *Global Contact Lens, Inc. v. Knight*, 254 So. 2d 807, 809 (Fla. Dist. Ct. App. 1971). We agree. Although sellers were restrained from foreclosing the property for approximately two years, they retained both the trust deed note and the unconveyed property during that time. The trial court found that the value of the property did not diminish in those two years. Any measure of damages other than a comparison of the fair market value of the property before and after the injunction is thus incorrect.

Sellers argue, however, that buyers' argument ignores the concept of “present value.” They contend that the award of interest under the judgment is inadequate, under the assumption that they would have had available the interest earning capacity of the foreclosure sale proceeds had the sale been held as scheduled. Alternatively, they suggest that an appraisal showing the value of the property in 1988 to be the same as that in 1986 actually represents a decrease in value when the effect of inflation is taken into account. Aside from the speculative nature of such claims, sellers' interest losses on the trust deed note were taken into consideration and awarded as part of the total

judgment. Interest was awarded at the rate of twelve percent on the unpaid principal, eighteen percent on the payments in default, and also included a four percent late payment charge. Surely those charges more than compensated sellers for the interest-bearing potential of money or the effects of inflation during the two-year period.

In any event, the Commissioner is correct in asserting that "recoverable damages under such a bond are those that arise from the operation of the injunction itself and not from damages occasioned by the suit independently of the injunction." *Beard*, 741 P.2d at 969 (quoting *Lever Bros. Co. v. International Chem. Workers Union*, 554 F.2d 115, 120 (4th Cir. 1976)). On that basis, the interest accrued on the trust deed note during the delay in the sale of the property may be awarded in the judgment, as was done in this case, but cannot also be attributed as damages under the injunction bond. See *Glens Falls*, 427 P.2d at 4. Since sellers did not demonstrate any damages attributable to the imposition of the injunction other than a portion of their attorney fees, the award of damages against the bonds must be reversed.

In summary, we affirm the judgment on the contract. We reverse the award of damages against the injunction bonds, except for the attorney fees. Such fees are to be assessed against the bonds in a proportion to be determined by the trial court.

Affirmed in part, reversed in part, and remanded. No costs awarded.

Russell W. Bench, Judge

WE CONCUR:

Pamela T. Greenwood, Judge

John Farr Larson, Judge

1. John Farr Larson, Senior Juvenile Court Judge, sitting by special appointment pursuant to Utah Code Ann. §78-3-24(10) (Supp. 1989).

2. "Planned unit development" is generally defined as a private residential development on acreage of certain minimum size, usually large enough to constitute a new community. See *Stevens v. Essex Junction Zoning Bd.*, 139 Vt. 297, 428 A.2d 1100, 1103 (1981).

3. The reference to an "injunction" appears to refer to both the temporary restraining order and the stipulated preliminary injunction.

Tab 2

Specs Above This Line For Recorder's Use.

TRUST DEED

With Assignment of Rents

THIS TRUST DEED, made this 30th day of June, 1981
between PHIL H. LANDES, ROBERT PELTON, LEON H. SANDERS,
INTERSTATE RENTALS, INC., as tenants in common, as TRUSTOR,
whose address is 44 Exchange Place, Salt Lake City, Utah
(Street and number) (City) (State)
ASSOCIATED TITLE COMPANY, as TRUSTEE,* and
JOHN C. SHARP and GERALDINE Y. SHARP, as BENEFICIARY,

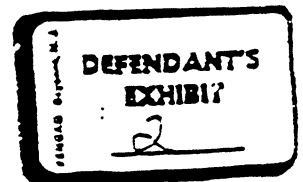
WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,
WITH POWER OF SALE, the following described property, situated in Summit
County, State of Utah:

SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS REFERENCE INCORPORATED HEREIN.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$ 967,055.70 made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.



TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, apportionment to or used in connection with said property; to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

IT IS MUTUALLY AGREED THAT:

8. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

9. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto" and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

10. As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner effect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

11. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

12. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

13. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

14. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold in satisfaction of the obligation hereof, and Trustor shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

default and notice of default and notice of sale having been given as then required by law. Trustee, without demand on Trustor shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

16. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

17. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

18. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

19. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

20. This Trust Deed shall be construed according to the laws of the State of Utah

21. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

Signature of Trustor

Paul H. Landes
PAUL H. LANDES
Robert Felton
ROBERT FELTON
Leon H. Saunders
LEON H. SAUNDERS
INTERSTATE RENTALS, INC.
BY Kenneth R. Norton
KENNETH R. NORTON, President

(If Trustor an individual) KENNETH R. NORTON, President

STATE OF UTAH,
COUNTY OF Salt Lake ss.

On the 16th day of July, A.D. 1981, personally

appeared before me PAUL H. LANDES, ROBERT FELTON, LEON H. SAUNDERS,
the signer(s) of the above instrument, who duly acknowledged to me that they executed the same.

Maicie Stephens
Notary Public residing at:
Salt Lake County

My Commission Expires: 5-18-85

(If Trustor a Corporation)

STATE OF UTAH,
COUNTY OF Salt Lake ss.

On the 16th day of July, A.D. 1981, personally

appeared before me KENNETH R. NORTON, who being by me duly sworn,

says that he is the President of Interstate Rentals, Inc.,
the corporation that executed the above and foregoing instrument and that said instrument was
signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution
of its board of directors) and said KENNETH R. NORTON acknowledged
to me that said corporation executed the same.

Maicie Stephens
Notary Public residing at:
Salt Lake County

My Commission Expires:
5-18-85

EXHIBIT "A"

Beginning at a point South 89° 43' 36" West along the North line of Lot 8, 175.42 feet from the corner of Lots 1 and 8, a brass cap set by the U. S. General Land Office, said brass cap also being South 00° 19' 46" West along section line 1336.14 feet from the Northeast corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; and running thence South 89° 43' 36" West along the North line of Lots 7 and 8 2948.98 feet to the Northwest corner of Lot 7; thence South 00° 13' 29" East along the West line of Lot 7, 1312.84 feet to the Southwest corner of Lot 7; thence North 89° 47' 41" East along the South line of Lot 7, 832.67 feet; thence North 61° 00' 00" East 1956.90 feet; thence North 47° 33' 15" East 462.75 feet; thence North 42° 44' 40" East 85.63 feet to the point of beginning.

SUBJECT TO Easements, Encroachments, Restrictions, Rights-of-W and matters of record enforceable in law or equity.



C. J. J. Sharp
7/16/81

TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

_____ June 20, 1931.

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of
_____ JOHN C. SHARP and GERALDINE Y. SHARP, _____

_____ DOLLARS (\$951,055.30),

together with interest from date at the rate of _____ per cent (12.0%) per annum on the unpaid principal, and principal and interest payable as follows:

SEE ACCORDION ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any such installment not paid when due shall bear interest thereafter at the rate of _____ per cent (12.0%) per annum until paid, and shall be subject to a late payment charge of 4% of such overdue payment.

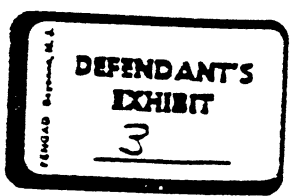
If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The maker, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of demand and acceptance of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without indorsement.

This note is secured by a Trust Deed of even date herewith.

WILSON REYNOLDS, JR.,
BY: Herbert A. Martin
HERBERT A. MARTIN, President
John C. Sharp
JOHN C. SHARP
Geraldine Y. Sharp
GERALDINE Y. SHARP



MEMORANDUM OF CLOSING TERMS

MEMORANDUM OF CLOSING TERMS dated June 30, 1981,
executed by JOHN C. SHARP and GERALDINE Y. SHARP (hereinafter "Seller"), and ROBERT WILSON, IRON E. SAMPSON, KENNETH R. WORTON, and PAUL E. LUNDIS (hereinafter collectively "Buyer").

This Memorandum is executed for the express purpose of describing those matters agreed upon by the parties hereto which survive the closing of the transaction.

1. It is mutually agreed and understood that after recordation of the PUD Plat and the Declaration of Covenants, Conditions and Restrictions, and upon receipt of each \$140,000.00 in principal (but not including the earnest money and down payment money), Seller shall execute and deliver to Buyer a Partial Deed of Reconveyance for one (1) PUD lot.

2. Upon the payment of the release price, Buyer shall be entitled to the release of one (1) lot of Buyer's choice upon receipt of the payment or at any time thereafter.

3. It is agreed that, at the time of execution of this Memorandum, Buyer has paid to Seller the sum of \$825,000.00 which will release from the Deed of Trust three (3) PUD lots. Upon the recordation of the PUD Plat and Declaration of Covenants, Conditions and Restrictions with the Summit County Recorder, Buyer shall be entitled to the release from the Deed of Trust of three (3) PUD lots of Buyer's choice together with the said roadway.

4. In the event Buyer should pay to Seller any principal sum in excess of the agreed upon release price, said sum shall be applied toward the next release price, i.e., should Buyer make a principal payment of \$160,000.00, the sum of \$20,000.00 (\$160,000.00 less \$140,000.00) shall be applied toward the next release price which shall require an additional principal payment of \$120,000.00 (\$20,000.00 plus \$100,000.00 equals \$120,000.00) to release the next lot.

5. The proposed plat is attached hereto as Exhibit "A" and by this reference incorporated herein. Seller hereby acknowledges and agrees to execute as a lienholder the original plat prior to recordation. Changes in the proposed plat and the Declaration of Covenants, Conditions and Restrictions when prepared shall be subject to the reasonable approval of Seller.

6. Seller agrees to grant to Summit County the ten and one-half (10-1/2) foot strip of land outlined in red on Exhibit "A". Said conveyance shall be for the sole purpose of widening the County roadway. If possible, such grant shall be in the form of an easement. The County indicates that it is possible that the County road as it exists is not where it is platted. If such proves to be a fact, Seller agrees that upon proper vacation, quit claim and abandonment of the platted road by the County, Seller shall grant to the County (by way of easement if possible) the County road as it exists as it is shown on Exhibit "A".

7. Buyer agrees to provide Seller with one (1) sewer connection and one (1) culinary water connection into Buyer's systems at such time as each is available, and Seller shall pay a connection fee and service fee equal to the pro rata cost to

the purchaser of a lot in Buyer's proposed PUD plus any charges of Summit Water Distributing Company. The sewer and water connection granted above can be used by Seller in new construction if allowed on the 8.5 acre parcel or for connection to the existing residence of Seller. Should Seller require another water and/or sewer connection, upon payment of the same charge set forth in the prior sentence, if well and sewer line capacity is available in Buyer's systems, and if Buyer shall convey to Seller whatever water rights the Board of Health would require for one (1) culinary connection (not to exceed one acre/foot) and the location of the residences to be located on the retained approximately 8.5 acre portion of Seller's property shall be subject to the reasonable approval of Leon H. Saunders and the residences to be constructed on the said 8.5 acre parcel shall be subject to the same restrictions as Buyer's residences are subject to under the Covenants, Conditions and Restrictions of White Pine Ranch PUD, Buyer shall grant to Seller another one (1) culinary connection and one (1) sewer connection. If Seller does not request the second culinary water connection and/or sewer connection, Seller is not subject to the conditions set forth in the immediately preceding sentence. The location through Buyer's property of the sewer line and culinary water line shall be designated by Buyer and Buyer will make such designation to the closest reasonable connection point to Seller's property.

8. Buyer and Seller agree that none of them have engaged a Real Estate Broker, Agent or Finder for the purposes of effecting this transaction and no commission, fee or other compensation shall be due and owing to any such Broker, Agent or Finder as a result of this closing.

9. This Memorandum and the closing documents executed simultaneously herewith contain all the understandings, warranties,

representations and agreements among the parties and the same are entered into after each party has personally and fully investigated all facts and circumstances concerning the transactions reflected by and contemplated herein and none of the parties are relying upon any statements or representations not embodied herein.


10. Time is of the essence of this Memorandum and it may not be orally changed, modified or terminated except in writing signed by the party against whom the same is sought to be enforced. The terms of this Memorandum shall apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

11. In the event of breach or default of any obligation under this Memorandum, the defaulting party shall pay all expenses of enforcing the same or any right arising out of breach or default thereof, including reasonable attorneys' fees, whether incurred with or without suit and both before and after judgment.

12. All warranties, covenants, obligations and agreements contained herein shall survive the closing of this transaction and any and all documents and instruments delivered in connection herewith and shall remain binding upon the parties hereto.

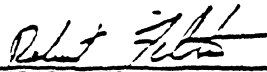
DATED this 16th day of July, 1981.

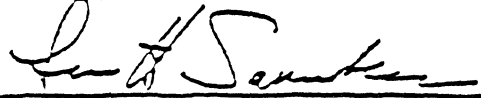
SELLER:


JOHN C. SHARP

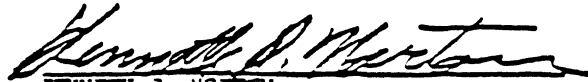

GERALDINE Y. SHARP

BUYER:


ROBERT FELTON


LEON A. SAUNDERS

BUYER:


KENNETH R. NORTON


PAUL H. LANDES

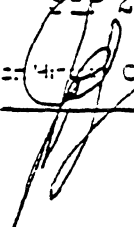
Tab 3

DECLARATION

FILED IN CLERK'S OFFICE
Salt Lake County Utah

Donald J. Winder, Esq. (#3519)
Kathy A. F. Davis, Esq. (#4022)
Tamara K. Prince, Esq. (#5224)
WINDER & HASLAM
175 West 200 South, Suite 4004
Salt Lake City, Utah 84101

SEP 20 1988

H. Oliver Hines Clerk 3rd Dist. Court
By  Deputy Clerk

Attorneys for Defendants Sharps

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

LEON H. SAUNDERS; ROBERT
FELTON; J. RICHARD REES;
SAUNDERS LAND INVESTMENT
CORPORATION, a Utah corpora-
tion; WHITE PINE RANCHES, a
Utah general partnership;
WHITE PINE ENTERPRISES, a
Utah general partnersnip,

Plaintiffs,

vs.

JOHN C. SHARP, and GERALDINE
Y. SHARP; ASSOCIATED TITLE
COMPANY, as Trustee, a Utan
corporation,

Defendants.

JOHN C. SHARP, and GERALDINE
Y. SHARP,

Counterclaim-Plaintiffs,

vs.

ROBERT FELTON, LEON H.
SAUNDERS; J. RICHARD REES;
SAUNDERS LAND INVESTMENT
CORPORATION, a Utah corpora-
tion; KENNETH R. NORTON dba

Bk 214 No. 2836
9-27-88-8:05 am

JUDGMENT

Civil No. C37-1621

Judge J. Dennis Frederick

00137

INTERSTATE RENTALS, INC., :
and PAUL H. LANDES, indivi- :
dually; WHITE PINE RANCHES, :
a Utah general partnership, :
and WHITE PINE ENTERPRISES, :
a Utah general partnership, :
: :
Counterclaim-Defendants.: :

This cause came on for trial before the Honorable J. Dennis Frederick on January 28, 1988 through January 29, 1988 and March 22, 1988 through March 25, 1988, with the defendants John C. and Geraldine Y. Sharp (hereinafter the "Sharps") appearing by counsel Donald J. Winder, Kathy A. F. Davis and Tamara K. Prince, the latter being admitted pro hac vice, and plaintiffs White Pine Ranches, White Pine Enterprises, Leon H. Saunders (hereinafter "Saunders"), Robert Felton (hereinafter "Felton"), J. Richard Rees and Saunders Land Investment Corporation appearing by counsel Robert M. Anderson, Glen D. Watkins and Mark R. Gaylord. Counterclaim defendant Kenneth R. Norton ("Norton") appeared through his counsel John B. Anderson, only to introduce a Stipulation and Indemnification Agreement between plaintiffs and counterclaim defendant Norton. Defendant Associated Title was never served in this action. Counterclaim defendant Paul H. Landes (hereinafter "Landes") was never served in this action.

Having heretofore made and entered its Findings of Fact and Conclusions of Law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' Complaint be dismissed, no cause of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Saunders, Felton, Interstate Rentals, Inc. and Norton are indebted, jointly and severally, to the Sharps in the following amounts:

a.	i.	Principal:	\$ 371,739.35
	ii.	Interest through March 22, 1988:	\$ 171,033.54
	iii.	Late payment charge:	\$ 14,869.57
		TOTAL:	\$ 557,642.46

together with interest thereon at the per diem rate of \$183.32 from and after March 22, 1988.

b.	i.	Trustee's fees:	\$ 1,803.80
	ii.	Court Costs:	\$ 2,881.04
	iii.	Attorneys' fees through August 31, 1988:	\$ 144,088.75

together with interest thereon at the rate of 10% per annum from the date of expenditure by the Sharps until paid by plaintiffs.

c.		Delinquent property taxes:	\$ 20,368.62
----	--	----------------------------	--------------

together with interest and penalties assessed thereon as provided by law, property taxes accruing for 1988, and post-judgment interest thereon at the rate of 12% per annum.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment shall be supplemented and augmented in the amount of the Sharps' reasonable attorney's fees as established by affidavit and as incurred after August 31, 1988 in preparation of the Findings, Conclusions and Judgment, in responding to any post-trial motions, in collecting said Judgment by execution or otherwise, and after prevailing in any appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Temporary Restraining Order entered in the above captioned matter by the Honorable Judith M. Billings on September 4, 1986 was wrongfully issued and it is hereby lifted and dissolved. The Sharps are hereby awarded judgment against the bond posted by plaintiffs with the Summit County Clerk in September, 1986 in the amount of \$2,400.00 and against the security posted by Tracy Collins Bank with the Clerk of this Court in the amount of \$28,570.63, and for which amounts the plaintiffs are not secured by the fair market value of the subject premises.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Lot 6 as described in the final recorded plat of White Pine Ranches Phase I and the unplatted property more particularly described on Exhibit "A" attached hereto or such portions thereof as may be sufficient to pay the amounts found to be due and owing under this Judgment, together with interest as set forth hereinabove and accrued costs herein, and expenses of sale, be sold at public auction by the Sheriff of Summit County, State of Utah, in the manner prescribed by law for such sales; that

said Sheriff, if and when the subject premises are sold by him, out of the proceeds of such sale shall retain first his costs, disbursements and commission, and then pay to the Sharps, or to their attorneys, the accrued and accruing costs of this action, then said sums for the Sharps' attorneys' fees, and the amount owing to the Sharps for principal, interest, costs and expenses of sale and maintenance, taxes, assessments and/or insurance premiums, together with accrued interest thereon, or so much of said sums as said proceeds will pay, and that the surplus, if any, shall be accounted for and paid over to the Clerk of this Court subject to this Court's further order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all persons having an interest in the subject premises shall have the right, upon producing satisfactory proof of interest, to redeem the same within the time provided by law for such redemption; that from and after the expiration of the period of redemption as provided by law, that the plaintiffs above named, and each of them, and all persons claiming by, through or under them, or any of them, shall be forever barred and foreclosed of all right, title, interest and estate in and to the subject premises, and that from and after the delivery of the Sheriff's Deed to the subject premises that the grantees named therein be given possession thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if a deficiency results after due and proper application of the

proceeds of such Sheriff's Sale, the Sharps are hereby awarded a personal judgment against Saunders, Felton, Norton and Interstate Rentals, Inc., and each of them, jointly and severally, for the full amount of such deficiency.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Sharps shall have the right, at their request, to one connection to both plaintiffs' culinary water and sewer systems on White Pine Ranches Phase I for a connection fee of \$2,000 each.

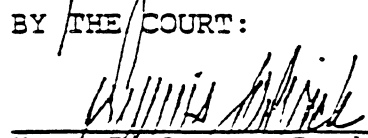
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a non-exclusive appurtenant easement shall run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of the unplatted acreage described on Exhibit "A" attached hereto and incorporated herein by reference and the owners and purchasers thereof (including the Sharps) and their invitees, guests, heirs and successors in interest, for utilities and for access to and the right to use as a means for ingress and egress for vehicular and pedestrian access over, under and across the private roadway (White Pine Lane) shown on the recorded final plat of White Pine Ranches Phase I, recorded with the Summit County Recorder; and a non-exclusive appurtenant easement to run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of White Pine Ranches

Phase I and the owners and purchasers thereof (including the Sharps) and their heirs and successors in interest for water lines, water tank and water systems over, under and across the subject premises near the southwest corner of the unplatted acreage as also shown on the final recorded plat of White Pine Ranches Phase I.

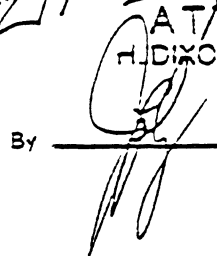
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the final plat and Declaration of Protective Covenants recorded for White Pine Ranches Phase I with the Summit County Recorder's Office and the non-exclusive easements set forth above shall remain in full force and effect, and not be affected by the foreclosure ordered herein, a purchase at the Sheriff's Sale, or a subsequent redemption of the subject premises, other than a complete redemption thereof by the plaintiffs herein coupled with plaintiffs' declaration for the extinguishment of the non-exclusive easement in favor of the unplatted acreage.

DATED this 26th day of Sept., 1988.

BY THE COURT:


Hon. C. Dennis Frederick

ATTEST
H. DIXON HINDLEY
Clerk

By 
Deputy Clerk

Beginning at a point South 39 degrees 43'36" West along the North line of Lot 3, 175.42 feet from the corner of Lots 1 and 3, a brass cap set by the U.S. General Land Office, said brass cap also being South 00 degrees 19'46" West along section line 1336.14 feet from the Northeast corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; and running thence South 89 degrees 43'36" West along the North line of Lot 7 and 3 2943.98 feet to the Northwest corner of Lot 7; thence South 00 degrees 13'29" East along the West line of Lot 7, 1312.84 feet to the Southwest corner of Lot 7; thence North 89 degrees 47'41" East along the South line of Lot 7, 832.67 feet; thence North 61 degrees 00'00" East 1956.90 feet; thence North 47 degrees 13'15" East 462.75 feet; thence North 42 degrees 44'40" East 85.63 feet to the point of beginning.

LESS and excepting White Pine Ranches, Phase I, a Planned Residential Development, according to the official plat thereof on file and of record in the Summit County Recorder's Office, State of Utah.

EXHIBIT "A"

Tab 4

Donald J. Winder (#3519)
Kathy A. F. Davis (#4022)
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

FILED FOR RECORD

MAY 14 1990

SALT LAKE COUNTY

Attorneys for Defendants Sharp

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

LEON H. SAUNDERS, et al.,	:	AMENDED
	:	ORDER RE: DEFENDANTS'
Plaintiffs,	:	SECOND MOTION TO SUPPLEMENT
	:	JUDGMENT AND MOTION TO
-v-	:	INCREASE LIABILITY ON BOND
	:	
JOHN C. SHARP, et al.,	:	
	:	
Defendants.	:	
	:	
JOHN C. SHARP, et al.	:	
	:	
Counterclaim-Plaintiffs,	:	
	:	Civil No. C87-1621
-v-	:	
	:	Judge J. Dennis Frederick
ROBERT FELTON, et al.,	:	
	:	
Counterclaim-Defendants.	:	

Defendants' Second Motion to Supplement Judgment and Motion to Increase Liability on Bond came on regularly for hearing before the Honorable J. Dennis Frederick on Monday, the 12th day of February, 1990 at the hour of 10:30 a.m. The Sharps were represented by their counsel Donald J. Winder and Kathy A. F. Davis. Plaintiffs were represented by their

counsel Robert M. Anderson and Mark Gaylord. The Court, having reviewed the pleadings and memoranda on file herein, having heard the arguments of counsel, having received the proffers of counsel for the Sharps, and good cause appearing therefor, IT IS HEREBY ORDERED:

1. Taxes on Lot 1 as described in the final recorded plat of White Pine Ranches Phase I in the principal amount of \$2,271.48 plus penalties and interest thereon be paid on or before March 15, 1990. If the plaintiffs fail to pay the taxes due and owing on Lot 1 by March 15, 1990, the Order Staying Proceedings dated January 31, 1989 shall be automatically vacated and defendants shall be allowed to proceed to execute on the Judgment and this Order entered herein. Subsequent to the Court's ruling, Plaintiffs filed a Notice of Payment or Property Taxes Pursuant to the Court's Order dated February 22, 1990.

2. The Judgment entered in this matter on September 26, 1988 is hereby supplemented through February 12, 1990 by the amount of \$231,636.97 for a total Judgment of \$938,053.02 as of February 12, 1990. The supplementation includes the following amounts:

a. Attorney's fees reasonably and necessarily incurred by the Sharps from September 1, 1988 through October 31, 1989 in the amount of \$79,967.34, which amount excludes the following categories set forth in the Summary of Plaintiffs' Objections to Attorney's Fees presented as Defendants'

Exhibit 2 at the hearing (the "Summary"): "Settlement" in the amount of \$473.38; "Attorney's fees" in the amount of \$84.00; "Tracy Collins Appeal" in the amount of \$24,381.51 (for a total of \$24,938.89);

b. The pre-judgment interest accrued on the Judgment from the date it accrued on the principal or the date the attorney's fees, court costs or trustee's fees were paid through September 26, 1988 as follows:

(1) Principal from 3/22/88 to 9/26/88:	\$34,464.16
(2) Attorney's fees:	\$ 5,800.77
(3) Court costs:	\$ 249.63
(4) Trustee's fees:	\$ 230.93
TOTAL:	\$40,745.49

c. The post-judgment interest, excluding interest on payments made after October 31, 1989, accruing on the Judgment from the date thereof (September 26, 1988) through February 12, 1990 as follows:

(1) Principal (\$183.32 x 504 days 9/26/88 - 2/12/90):	\$ 92,393.28
(2) Attorney's fees:	
<u>Paid Prior to Judgment</u>	
(i) (Second Affidavit of Albert D. Nystrom 9/27/88 - 10/31/89):	\$11,287.91
(ii) (\$28.20 x 104 days 10/31/88 - 2/12/90):	\$ 2,932.80
<u>Paid Post-Judgment</u> (9/26/88 - 2/12/90)	
(i) (Third Affidavit of Albert D. Nystrom \$5,446.29 - \$1,781.26, (interest backed out, 2/13/90 - 8/1/90, 169 days x \$10.54):	\$ <u>3,665.03</u> \$ 17,885.74

(3) Court costs	
(\$.79 x 504 days	
9/26/88 - 2/12/90):	\$ 398.16
(4) Trustee's fees:	
(\$.49 x 504 days	
9/26/88 - 2/12/90)	\$ 246.96
TOTAL:	\$110,924.14

3. The Order Re: Supersedeas Bond entered on March 17, 1989 is hereby supplemented through August 1, 1990 in the following amounts:

a. Attorney's fees reasonably and necessarily incurred by the Sharps from September 1, 1988 through October 31, 1989 in the amount of \$79,967.34, which amount excludes the following categories set forth in the Summary of Plaintiffs' Objections to Attorney's Fees presented as Defendants' Exhibit 2 at the hearing (the "Summary"): "Settlement" in the amount of \$473.38; "Attorney's fees" in the amount of \$84.00; "Tracy Collins Appeal" in the amount of \$24,381.51 (for a total of \$24,938.89);

b. The pre-judgment interest accrued on the Judgment from the date it accrued on the principal or the date the attorney's fees, court costs or trustee's fees were paid through September 26, 1988 as follows:

(1) Principal from 3/22/88	
to 9/26/88:	\$34,464.16
(2) Attorney's fees:	\$ 5,800.77
(3) Court costs:	\$ 249.63
(4) Trustee's fees:	\$ 230.93
TOTAL:	\$40,745.49

c. The post-judgment interest, excluding interest on payments made after October 31, 1989, accruing on the Judgment

from the date thereof (September 26, 1988) through August 1, 1990 as follows:

(1) Principal (\$183.32 x 674 days):		\$123,557.68
(2) Attorney's fees:		
<u>Paid Prior to Judgment</u>		
(Second Affidavit of Albert D. Nystrom)	\$11,287.91	
(\$28.20 x 274 days)	\$ 7,726.80	
<u>Paid Post-Judgment</u>		
(Third Affidavit of Albert D. Nystrom)	\$ 5,446.29	\$ 24,461.00
(3) Court costs (\$.79 x 674 days):		\$ 532.46
(4) Trustee's fees (\$.49 x 674 days):		\$ 330.26
TOTAL:		\$148,881.40

d. The Order Re: Supersedeas Bond is supplemented in the amount of \$136,800.99, through August 1, 1990 (\$976,009.98) less the security thereon (\$839,208.99). The Order Re: Supersedeas Bond awarding a supersedeas bond in the amount of \$79,793.36 (which was the anticipated interest accruing for one year post-judgment), together with the Tracy Collins bond in the amount of \$28,570.63, the cash bond of \$2,400 and Lot 6 and the unplatted property valued at \$728,445.00 previously secured the Judgment in the amount of \$839,208.99. See attached Exhibit "A," the Calculation of Supersedeas Bond.

4. The attorney's fees requested with regard to the "Settlement," in the amount of \$473.78, and "Tracy Collins Appeal," in the amount of \$24,381.51, as set forth on the Summary are taken under advisement.

5. Plaintiffs are ordered to post additional security as a supersedeas bond for the continued stay of the execution of the Judgment pursuant to the Order Re: Supersedeas Bond dated March 17, 1989 in the amount of \$136,800.99 on or before March 15, 1990. If Plaintiffs fail to do so by March 15, 1990, the Order Staying Proceedings dated January 31, 1989 shall be automatically vacated and the Sharps shall be allowed to proceed to execute on the Judgment entered in the above captioned matter.

DATED this 14 day of May, 1990.

BY THE COURT:

15
J. DENNIS FREDERICK, Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the foregoing proposed AMENDED ORDER RE: DEFENDANT'S SECOND MOTION TO SUPPLEMENT JUDGMENT AND MOTION TO INCREASE LIABILITY ON BOND to be mailed, first class, postage prepaid, on this 30 day of April, 1990, to the following:

Stanford B. Owen, Esq.
Patrick L. Anderson, Esq.
FABIAN & CLENDENIN
215 South State Street, 12th Floor
Post Office Box 510210
Salt Lake City, Utah 84151

Robert M. Anderson, Esq.
Glen D. Watkins, Esq.
ANDERSON & WATKINS
700 Valley Tower Building
50 West Broadway
Salt Lake City, Utah 84101-1018

John B. Anderson, Esq.
ANDERSON & HOLLAND
Post Office Box 11643
Salt Lake City, Utah 84147

David L. Gladwell
Chapter 7 Trustee
Post Office Box 3205
Ogden, Utah 84409

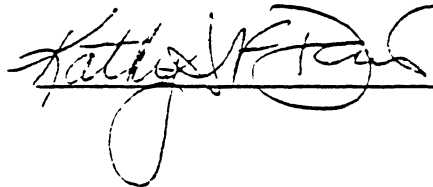
A handwritten signature in cursive script, appearing to read "Katie F. Hays", is written over a horizontal line.

EXHIBIT "A"
CALCULATION OF SUPERSEDEAS BOND

Trust Deed Note

(a)	Principal	\$371,739.35
(b)	Interest - March 22, 1988	171,033.54
(c)	Interest - March 22, 1988 through September 26, 1988 (\$183.32 x 188 days)	34,464.16
(d)	Late Payment Penalty	<u>14,869.57</u>
	SUBTOTAL:	\$592,106.62
(e)	Post-Judgment Interest -- September 26, 1988 through August 1, 1990 (\$183.32 x 674 days)	<u>123,557.68</u>
	SUBTOTAL:	\$715,664.30

Costs

(a)	Trustees Fees	\$ 1,803.80
(b)	Court Costs	2,881.04
(c)	Attorney's Fees	
	(i) Awarded in Judgment	144,088.75
	(ii) Third Affidavit plus fees requested in Motion less fees in amount of \$24,938.89 under advisement	<u>79,967.34</u>
	SUBTOTAL:	\$228,740.93

Interest

(a)	Legal Fees paid to August 1, 1990 (\$24,461.00 plus pre-judgment interest of \$5,800.77)	\$ 30,261.77
(b)	Trustees Fees to August 1, 1990 (\$.49 x 674 days plus pre-judgment interest of \$230.63)	560.89
(c)	Court costs to August 1, 1990 (\$.79 x 674 days plus pre-judgment interest of \$249.63)	<u>782.09</u>
	SUBTOTAL:	\$ 31,604.75
	<u>TOTAL:</u>	<u>\$976,009.98</u>

CALCULATION OF SUPERSEDEAS BOND
(Page 2)

Security

(a)	Lot 6 and Unplatted Property	\$728,445.00
(b)	Temporary Restraining Order Bonds	
	(i) Cash Bond	2,400.00
	(ii) Tracy Collins Bank and Trust Co. Bond	28,570.63
(c)	Supersedeas Bond	<u>79,793.36</u>
	TOTAL: (With Tracy Collins Bond)	\$839,208.99

Additional Security Necessary

(a)	As of August 1, 1990	\$976,009.98
(b)	<u>LESS:</u> Present Security	<u>839,208.99</u>
	ADDITIONAL SECURITY NEEDED:	
	(With Tracy Collins Bond)	\$136,800.99

Tab 5

Donald J. Winder (#3519)
Kathy A. F. Davis (#4022)
Tamara K. Prince (#5224)
WINDER & HASLAM
Suite 4004
175 West 200 South
Salt Lake City, Utah 84101
Telephone: (801) 322-2222

Attorneys for Defendants Sharp

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

LEON H. SAUNDERS, et al.,	:	
	:	
Plaintiffs,	:	AFFIDAVIT OF
	:	ALBERT D. NYSTROM
vs.	:	
	:	
JOHN C. SHARP, et al.,	:	
	:	
Defendants.	:	
	:	
	:	Civil No. C87-1621
JOHN C. SHARP, et al.,	:	
	:	Judge J. Dennis Frederick
Counterclaim-Plaintiffs,	:	
	:	
vs.	:	
	:	
ROBERT FELTON, et al.,	:	
	:	
Counterclaim-Defendants.	:	

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

I, Albert D. Nystrom, after being first duly sworn, depose and say that:

1. I am a licensed and certified public accountant in the State of Utah.

2. Based upon the Judgment entered by this Court in the above case, I have calculated interest on the principal from March 22, 1988 to the date of the Judgment, September 26, 1988. Such interest totals \$34,464.16. Interest continues to accrue at a per diem rate of \$183.32.

3. Based upon the payments made by the Sharps pursuant to the Winder & Haslam monthly billings for legal services attached to the affidavits filed with the Court, I have calculated interest on such legal fees at the Judgment rate of 10% since the date of each payment. Such interest totals \$5,800.77 from date of expenditure to the date of Judgment. Interest continues to accrue at a per diem rate of \$28.20 on such legal fees. See Exhibit "A" attached hereto.

4. I have also calculated interest on such legal fees of \$22,400.00 which were paid after the date of Judgment, September 26, 1988, to November 7, 1988. From date of expenditure to September 26, 1990, the end of a two-year appeal period, such interest totals \$4,240.65. Interest continues to accrue after November 7, 1988 at a per diem rate of \$6.14. See Exhibit "B" attached hereto.

5. Based upon the payments made by the Sharps for Trustee's fees (see the Affidavit of John C. Sharp), I have calculated interest on such Trustee's fees at the Judgment rate of 10% per annum since the date of each payment. Such interest totals \$230.93 from date of expenditure to the date

of the Judgment. Interest continues to accrue at a per diem rate of \$.49. See Exhibit "C" attached hereto.

6. Based upon payments made by the Sharps for Court costs (see the Affidavit of John C. Sharp and the affidavits of attorney's fees filed with the Court), I have calculated interest on such Court costs at the Judgment rate of 10% per annum since payment. Such interest totals \$249.63 from date of expenditure to the date of the Judgment. Interest continues to accrue at a per diem rate of \$.79. See Exhibit "D" attached hereto.

7. I have calculated the interest on the full Judgment at the applicable rate provided in the Judgment, for an estimated two-year appeal period, from September 26, 1988 to September 26, 1990. Such interest totals \$159,586.71. Thereafter, interest continues to accrue at a per diem rate of \$218.94. See Exhibit "E" attached hereto.

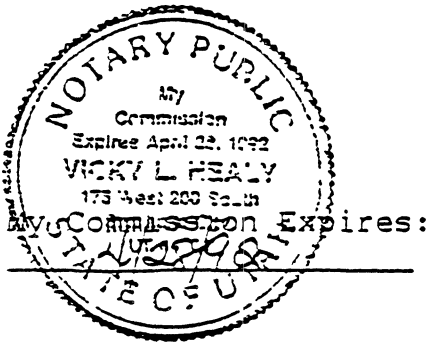
8. Based upon the current rate for a six-month Treasury Bill of 8.33%, I discounted the fair market value of the Property as found by the Court of \$728,445.00 to its present value assuming a one and one-half month foreclosure holding period and a six-month selling period. After the one and one-half month foreclosure period, the present value of the Property would be \$720,938.23 or \$7,506.77 of lost value. The present value after a six-month selling period would be \$699,318.39 or \$29,126.61 of lost value. See Exhibit "F" attached hereto.

DATED this 29th day of December, 1988.

Albert D. Nystrom

Albert D. Nystrom

SUBSCRIBED AND SWORN to before me this 29th day of December, 1988.



Vicki L. Healy
NOTARY PUBLIC
Residing in Salt Lake City,
Utah

EXHIBIT A
JOHN C. & GERALDINE SHARP
CALCULATION OF INTEREST DUE ON LEGAL FEES
PAID TO WINDER & HASLAM (For period from
date paid to September 26, 1988)

<u>Date Paid</u>	<u>Amount Paid</u>	<u>Interest Rate</u>	<u>Number of days out-standing to 9/26/88</u>	<u>Amount of Interest</u>	<u>Per Diem Interest Amount</u>
12/10/86	\$1,500.00	10%	656	\$ 269.59	\$.41
01/06/87	\$1,500.00	10%	629	\$ 258.49	\$.41
02/25/87	\$1,500.00	10%	579	\$ 237.95	\$.41
04/29/87	\$2,932.82	10%	516	\$ 414.61	\$.80
05/27/87	\$1,467.30	10%	488	\$ 196.18	\$.40
06/24/87	\$1,500.00	10%	460	\$ 189.04	\$.41
07/27/87	\$1,500.00	10%	427	\$ 175.48	\$.41
08/28/87	\$1,500.00	10%	395	\$ 162.33	\$.41
11/02/87	\$3,000.00	10%	329	\$ 270.41	\$.82
11/30/87	\$1,500.00	10%	301	\$ 123.70	\$.41
01/11/88	\$2,500.00	10%	259	\$ 176.91	\$.68
02/02/88	\$5,000.00	10%	237	\$ 323.77	\$1.37
03/10/88	\$25,126.99	10%	200	\$1,373.06	\$6.88
04/06/88	\$27,387.56	10%	173	\$1,294.55	\$7.50
08/08/88	<u>\$25,000.00</u>	10%	49	<u>\$ 334.70</u>	<u>\$6.85</u>
				(rounding adjustment)	(\$0.03)
Totals as of 9/26/88:	<u>\$102,914.67</u>			<u>\$5,800.77</u>	<u>\$28.20</u>

EXHIBIT B
JOHN C. & GERALDINE SHARP
CALCULATION OF INTEREST DUE ON LEGAL FEES
PAID TO WINDER & HASLAM AFTER JUDGMENT DATE
(For period from date paid to September 26, 1990,
assuming two-year appeal period) *

<u>Date Paid</u>	<u>Amount Paid</u>	<u>Interest Rate</u>	<u>Number of days out-standing to 9/26/90</u>	<u>Amount of Interest</u>	<u>Per Diem Interest Amount</u>
10/11/88	\$2,400.00	10%	716	\$ 470.79	\$.66
11/07/88	<u>\$20,000.00</u>	10%	688	<u>\$3,769.86</u>	<u>\$5.48</u>
Totals as of 9/26/90:	<u>\$22,400.00</u>			<u>\$4,240.65</u>	<u>\$6.14</u>

* Calculation includes attorney's fees paid by John and Geraldine Sharp through 11/07/88 only.

EXHIBIT C
JOHN C. AND GERALDINE SHARP
CALCULATION OF INTEREST DUE ON TRUSTEE'S FEES
AS OF SEPTEMBER 26, 1988

	<u>Date</u> <u>Paid</u>	<u>Amount</u>	<u>Interest</u> <u>Rate</u>	<u>Number</u> <u>of days</u> <u>out-</u> <u>stand-</u> <u>ing to</u> <u>9/26/88</u>	<u>Amount</u> <u>of</u> <u>Interest</u>	<u>Per</u> <u>diem</u> <u>Amount</u>
Trustee's Fees	1/23/87	200.00	10%	612	\$33.53	\$.05
Trustee's Fees	2/21/87	200.00	10%	583	\$31.95	\$.05
Trustee's Fees	4/23/87	200.00	10%	522	\$28.60	\$.05
Trustee's Fees	5/23/87	200.00	10%	492	\$26.96	\$.05
Trustee's Fees	6/22/87	200.00	10%	462	\$25.32	\$.05
Trustee's Fees	7/23/87	200.00	10%	431	\$23.62	\$.05
Trustee's Fees	8/24/87	200.00	10%	399	\$21.86	\$.05
Trustee's Fees	9/23/87	200.00	10%	369	\$20.22	\$.05
Trustee's Fees	10/24/87	203.80	10%	338	\$18.87	\$.06
				(Rounding adjustment)		\$.03
TOTALS		<u>\$1,803.80</u>			<u>\$230.93</u>	<u>\$.49</u>

EXHIBIT D
JOHN C. AND GERALDINE SHARP
CALCULATION OF INTEREST DUE ON COURT COSTS
AS OF SEPTEMBER 26, 1988

	<u>Date</u> <u>Paid</u>	<u>Amount</u>	<u>Interest</u> <u>Rate</u>	<u>Number</u> <u>of days</u> <u>out-</u> <u>stand-</u> <u>ing to</u> <u>9/26/88</u>	<u>Amount</u> <u>of</u> <u>Interest</u>	<u>Per</u> <u>diem</u> <u>Amount</u>
Court Costs	9/13/86	\$441.20	10%	744	\$89.93	\$.12
Court Costs	4/29/87	\$ 50.00	10%	516	\$ 7.07	\$.01
Court Costs	6/05/87	\$351.40	10%	479	\$46.12	\$.10
Court Costs	12/02/87	\$161.90	10%	299	\$13.26	\$.04
Court Costs	1/08/88	\$129.00	10%	262	\$ 9.23	\$.04
Court Costs	2/09/88	\$ 94.20	10%	230	\$ 5.92	\$.03
Court Costs	2/10/88	\$110.85	10%	229	\$ 6.94	\$.03
Court Costs	3/14/88	\$195.00	10%	196	\$10.44	\$.05
Court Costs	4/06/88	\$1,277.49	10%	173	\$60.38	\$.35
Court Costs	9/08/88	<u>\$ 70.00</u>	10%	18	<u>\$.34</u>	<u>\$.02</u>
TOTALS		<u>\$2,881.04</u>			<u>\$249.63</u>	<u>\$.79</u>

EXHIBIT E
JOHN C. AND GERALDINE SHARP

CALCULATION OF INTEREST DUE FOR A TWO-YEAR
APPEAL PERIOD, SEPTEMBER 26, 1988 to
SEPTEMBER 26, 1990 ON THE REMAINING PRINCIPAL BALANCE
OF THE PARK CITY LAND SALE CONTRACT,
ATTORNEY FEES PAID BY JOHN & GERALDINE SHARP*,
COURT COSTS AND TRUSTEE'S FEES

<u>Description</u>	<u>Balance</u>	<u>Interest Rate</u>	<u>Amount of Interest for the Two-Year Appeal Period</u>	<u>Per Diem</u>
Remaining balance of the Park City land sale contract	\$371,739.35	18%	\$133,826.16	\$183.32
Attorney's fees paid by John C. & Geraldine Sharp				
As of 9/26/88:	\$102,914.67	10%	\$ 20,582.94	\$ 28.20
From 9/26/88 to 11/07/88:	\$ 22,400.00	10%	\$ 4,240.65	\$ 6.14
Court costs	\$ 2,881.04	10%	\$ 576.20	\$.79
Trustee's fees	\$ 1,803.80	10%	\$ 360.76	\$.49
<u>Total Interest for a two-year appeal period:</u>				
			<u>\$159,586.71</u>	
<u>Total Per Diem Rate as of 11/7/88:</u>				<u>\$218.94</u>

* Calculation includes attorney's fees paid by John and Geraldine Sharp through 11/7/88 only.

EXHIBIT F
JOHN C. AND GERALDINE SHARP
CALCULATION OF PRESENT VALUE OF \$728,445.00
FOR A ONE AND ONE-HALF MONTH AND SIX MONTH PERIOD
AT THE INTEREST RATE OF 8.33%

Present Value
One and One-Half Month Period

Question:

What amount (the "Present Value Amount") invested at 8.33% would equal \$728,445.00 45 days from today?

Solution:

Interest Rate for 45 Day Period:

$$(45/360) (.0833) = .0104125$$

The Present Value Amount:

$$\frac{\$728,445.00}{1.0104125} = \underline{\$720,938.23}$$

Proof:

Interest for 45 Days:

$$(\$720,938.23) (.0833) (45/360) = \$7,506.77$$

Add the Present Value Amount: \$720,938.23

TOTAL: 728,445.00

Present Value
Six Month Period

Question:

What amount (the "Present Value Amount") invested at 8.33% would equal \$728,445.00 six months from today?

Solution:

Interest Rate for Six Month Period:

$$(6/12) (.0833) = .04165$$

The Present Value Amount:

$$\frac{\$728,445.00}{1.04165} = \underline{\$699,318.39}$$

Proof:

Interest for Six Months:

$$(\$699,318.39) (.0833) (6/12) = \$ 29,126.61$$

$$\underline{\text{Add Present Value Amount:}} \quad \underline{\$699,318.39}$$

$$\text{TOTAL:} \quad \underline{\underline{\$728,445.00}}$$

Donald J. Winder (#3519)
Kathy A. F. Davis (#4022)
Tamara K. Prince (#5224)
WINDER & HASLAM
175 West 200 South, Suite 4000
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

Attorneys for Defendants Sharp

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

LEON H. SAUNDERS, et al.,	:	
	:	
Plaintiffs,	:	SECOND AFFIDAVIT OF
	:	ALBERT D. NYSTROM
vs.	:	
	:	
JOHN C. SHARP, et al.,	:	
	:	
Defendants.	:	
	:	
	:	Civil No. C87-1621
JOHN C. SHARP, et al.,	:	
	:	Judge J. Dennis Frederick
Counterclaim-Plaintiffs,	:	
	:	
vs.	:	
	:	
ROBERT FELTON, et al.,	:	
	:	
Counterclaim-Defendants.	:	

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

I, Albert D. Nystrom, after being first duly sworn, depose and say that:

1. I am a licensed and certified public accountant in the State of Utah.

2. Based upon the Judgment entered by this Court in the above case, I have calculated interest on the principal from March 23, 1988 to October 31, 1989. Such interest totals \$107,792.16. Interest accrued at a per diem rate of \$183.32. See Exhibit "A" attached hereto.

3. I have also calculated interest on the principal from September 26, 1988, the date Judgment was entered by this Court, to October 31, 1989. Such interest totals \$73,328.00. Interest continues to accrue at a per diem rate of \$183.32. See also Exhibit "A" attached hereto.

4. Based upon the payments prior to the date of Judgment, September 26, 1988, made by the Sharps pursuant to the Winder & Haslam monthly billings for legal services attached to the affidavits filed with the Court, I have calculated interest on such legal fees at the Judgment rate of 10% since the date of each payment. Such interest totals \$17,088.68 from date of expenditure to October 31, 1989. From September 27, 1988 to October 31, 1989, such interest totals \$11,287.91. Interest continues to accrue at a per diem rate of \$28.20 on such legal fees. See Exhibit "B" attached hereto. Compare Affidavit of Albert D. Nystrom dated December 19, 1988 ("First Affidavit"), paragraph 3.

5. I have also calculated interest on such legal fees of \$63,403.50 which were paid after the date of Judgment, September 26, 1988 to October 31, 1989 at the Judgment rate of 10% since the date of each payment. From date of expenditure

to October 31, 1989, such interest totals \$3,619.73. Interest continues to accrue after October 31, 1989 at a per diem rate of \$17.37. See Exhibit "C" attached hereto.

6. Based upon the payments made by the Sharps for Trustee's fees (see the Affidavit of John C. Sharp), I have calculated interest on such Trustee's fees at the Judgment rate of 10% per annum since the date of each payment to October 31, 1989. Such interest totals \$428.60 from date of expenditure to October 31, 1989. From September 27, 1988 to October 31, 1989, such interest totals \$197.67. Interest continues to accrue at a per diem rate of \$.49. See Exhibit "D" attached hereto. Compare First Affidavit, paragraph 5.

7. Based upon payments made by the Sharps for Court costs (see the Affidavit of John C. Sharp and the affidavits of attorney's fees filed with the Court), I have calculated interest on such Court costs at the Judgment rate of 10% per annum since the date of each payment to October 31, 1989. Such interest totals \$565.63 from date of expenditure to October 31, 1989. From September 27, 1988 to October 31, 1989, such interest totals \$316.00. Interest continues to accrue at a per diem rate of \$.79. See Exhibit "E" attached hereto. Compare First Affidavit, paragraph 6.

8. I have attached a summarization of the interest and late payment charges on the full Judgment (excluding amounts paid by Plaintiffs for property taxes owed on the property at issue) at the applicable rates provided in the Judgment for

the period ended October 31, 1989 of \$315,397.91 with interest for the period September 27, 1988 to October 31, 1989 totaling \$88,749.31. For the period November 1, 1989 to September 26, 1990, assuming a further one year appeal period, interest would total \$75,956.10 for a combined total at September 26, 1990 of \$391,354.01. See Exhibits "F" and "G" attached hereto and First Affidavit.

DATED this 8th day of December, 1989.

Albert D. Nystrom
Albert D. Nystrom

SUBSCRIBED AND SWORN to before me this 8th day of December, 1989.

Shirana K. Thomson
NOTARY PUBLIC
Residing in Salt Lake City,
Utah

My Commission Expires:
10-23-90

EXHIBIT A
JOHN C. AND GERALDINE SHARP
CALCULATION OF INTEREST DUE ON PRINCIPAL
For the Period March 23, 1988 to October 31, 1989

<u>Principal</u>	<u>Interest rate</u>	<u>Number of days</u>	<u>Per diem interest amount</u>	<u>Amount of interest</u>
\$371,739.35	18%	588	\$ 183.32	<u>\$107,792.16</u>

JOHN C. AND GERALDINE SHARP
CALCULATION OF INTEREST DUE ON PRINCIPAL
For the Period September 27, 1988 to October 31, 1989

<u>Principal</u>	<u>Interest rate</u>	<u>Number of days</u>	<u>Per diem interest amount</u>	<u>Amount of interest</u>
\$371,739.35	18%	400	\$ 183.32	<u>\$73,328.00</u>

EXHIBIT B
JOHN C. & GERALDINE SHARP
CALCULATION OF INTEREST DUE ON LEGAL FEES PAID TO WINDER & HASLAM
PRIOR TO JUDGMENT DATE OF SEPTEMBER 26, 1988
For the period from date paid to October 31, 1989

<u>Date Paid</u>	<u>Amount Paid</u>	<u>Interest Rate</u>	<u>Number of days to 10/31/89</u>	<u>Amount of Interest</u>	<u>Per Diem Amount</u>
12/10/86	\$1,500.00	10%	1056	\$ 433.97	
1/6/87	\$1,500.00	10%	1029	\$ 422.88	
2/25/87	\$1,500.00	10%	979	\$ 402.33	
4/29/87	\$2,932.82	10%	916	\$ 736.01	
5/27/87	\$1,467.30	10%	888	\$ 356.98	
6/24/87	\$1,500.00	10%	860	\$ 353.42	
7/27/87	\$1,500.00	10%	827	\$ 339.86	
8/28/87	\$1,500.00	10%	795	\$ 326.71	
11/2/87	\$3,000.00	10%	729	\$ 599.18	
11/30/87	\$1,500.00	10%	701	\$ 288.08	
1/11/88	\$2,500.00	10%	659	\$ 451.37	
2/2/88	\$5,000.00	10%	637	\$ 872.60	
3/10/88	\$25,126.99	10%	600	\$4,130.47	
4/6/88	\$27,387.56	10%	573	\$4,299.48	
8/8/88	<u>\$25,000.00</u>	<u>10%</u>	<u>449</u>	<u>\$3,075.34</u>	

Totals
as of

10/31/89: \$102,914.67 \$17,088.68 \$28.20

Date Paid - 9/26/88 <\$5,800.77>*

TOTAL 9/27/88 - 10/31/89 \$11,287.91

* Affidavit of Albert D. Nystrom dated December 19, 1988.

EXHIBIT C
JOHN C. & GERALDINE SHARP
CALCULATION OF INTEREST DUE ON LEGAL FEES PAID TO WINDER & HASLAM
AFTER JUDGMENT DATE OF SEPTEMBER 26, 1988
For the period from date paid to October 31, 1989

<u>Date Paid</u>	<u>Amount Paid</u>	<u>Interest Rate</u>	<u>Number of days to 10/31/89</u>	<u>Amount of Interest</u>	<u>Per Diem Amount</u>
10/11/88	\$ 2,400.00	10%	385	\$ 253.15	
11/7/88	\$20,000.00	10%	358	\$1,961.64	
12/19/88	\$ 1,167.00	10%	316	\$ 101.03	
1/19/89	\$ 1,167.00	10%	285	\$ 91.12	
2/17/89	\$ 1,167.00	10%	256	\$ 81.85	
3/17/89	\$ 1,167.00	10%	228	\$ 72.90	
4/17/89	\$ 1,167.00	10%	197	\$ 62.99	
5/15/89	\$10,000.00	10%	169	\$ 463.01	
6/14/89	\$ 1,167.00	10%	139	\$ 44.44	
6/21/89	\$ 500.00	10%	132	\$ 18.08	
7/13/89	\$ 1,167.00	10%	110	\$ 35.17	
8/16/89	\$20,000.00	10%	76	\$ 416.44	
9/20/89	\$ 1,167.50	10%	41	\$ 13.11	
10/16/89	\$ 1,167.00	10%	15	\$ 4.80	
Totals					
as of					
10/31/89:	<u>\$63,403.50</u>			<u>\$ 3,619.73</u>	<u>\$17.37</u>

EXHIBIT D
 JOHN C. AND GERALDINE SHARP
CALCULATION OF INTEREST DUE ON TRUSTEE'S FEES
For the Period from Date Paid to October 31, 1989

<u>Date Paid</u>	<u>Amount</u>	<u>Interest Rate</u>	<u>Number of days to 10/31/89</u>	<u>Amount of Interest</u>	<u>Per diem Amount</u>
1/23/87	200.00	10%	1012	\$55.45	
2/21/87	200.00	10%	983	\$53.86	
4/23/87	200.00	10%	922	\$50.52	
5/23/87	200.00	10%	892	\$48.88	
6/22/87	200.00	10%	862	\$47.23	
7/23/87	200.00	10%	831	\$45.53	
8/24/87	200.00	10%	799	\$43.78	
9/23/87	200.00	10%	769	\$42.14	
10/24/87	<u>203.80</u>	<u>10%</u>	<u>738</u>	<u>\$41.21</u>	
Totals as of 10/31/89	<u>\$1,803.80</u>			<u>\$428.60</u>	<u>\$.49</u>
		Date Paid- 9/26/88	<\$230.93>*		
	TOTAL	9/27/88 - 10/31/89	<u>\$197.67</u>		

* Affidavit of Albert D. Nystrom dated December 19, 1988.

EXHIBIT E
JOHN C. AND GERALDINE SHARP
CALCULATION OF INTEREST DUE ON COURT COSTS
For the Period from Date Paid to October 31, 1989

<u>Date Paid</u>	<u>Amount</u>	<u>Interest Rate</u>	<u>Number of days to 10/31/89</u>	<u>Amount of Interest</u>	<u>Per diem Amount</u>
9/13/86	\$441.20	10%	1144	\$138.28	
4/29/87	\$ 50.00	10%	916	\$12.55	
6/05/87	\$351.40	10%	879	\$84.62	
12/02/87	\$161.90	10%	699	\$31.00	
1/08/88	\$129.00	10%	662	\$23.40	
2/09/88	\$ 94.20	10%	630	\$16.26	
2/10/88	\$110.85	10%	629	\$19.11	
3/14/88	\$195.00	10%	596	\$31.84	
4/06/88	\$1,277.49	10%	573	\$200.55	
9/08/88	<u>\$ 70.00</u>	<u>10%</u>	<u>418</u>	<u>\$ 8.02</u>	<u>\$.79</u>
TOTALS	<u>\$2,881.04</u>			<u>\$565.63</u>	<u>\$.79</u>

Date Paid - 9/26/88 <\$249.63>*

TOTAL 9/27/88 - 10/31/89 \$316.00

* Affidavit of Albert D. Nystrom dated December 19, 1988.

EXHIBIT F
JOHN C. AND GERALDINE SHARP

SUMMARIZATION OF INTEREST DUE ON PRINCIPAL TO OCTOBER 31, 1989
AND INTEREST DUE ON LEGAL FEES, TRUSTEE'S FEES, AND COURT
COSTS TO OCTOBER 31, 1989, AND THE INTEREST DUE ON THE
PRINCIPAL, LEGAL FEES, TRUSTEE'S FEES, AND COURT COSTS FOR
THE PERIOD NOVEMBER 1, 1989 TO SEPTEMBER 26, 1990
(Assuming a Two Year Appeal Period)

<u>Description</u>	<u>Total Amount</u>	<u>Interest Rate</u>	<u>Interest and late payment charges</u>	<u>Per Diem amount</u>
Remaining balance of the Park City land sale contract	\$371,739.35	18%		\$183.32
Interest through March 22, 1988 per the Judgment			\$171,033.54	
Late payment charges per the Judgment			\$ 14,869.57	
Interest for the March 23, 1988 to October 31, 1989			<u>\$107,792.16</u>	
Total			\$293,695.27	
Legal fees paid prior to the Judgment date of September 26, 1988	\$102,914.67	10%	\$ 17,088.68	28.20
Legal fees paid after the Judgment date to October 31, 1989	\$ 63,403.50	10%	\$ 3,619.73	17.37
Trustee's fees	\$ 1,803.80	10%	\$ 428.60	\$.49
Court costs	\$ 2,881.04	10%	\$ <u>565.63</u>	\$ <u>.79</u>
Total as of October 31, 1989			<u>\$315,397.91</u>	<u>\$230.17</u>
Add interest for the period November 1, 1989 to September 26, 1990, assuming a two year appeal period:				
330 days at the per diem rate of 230.17			<u>\$ 75,956.10</u>	
Total as of September 26, 1990			<u>\$391,354.01</u>	

EXHIBIT G
JOHN C. AND GERALDINE SHARP

SUMMARIZATION OF INTEREST DUE ON PRINCIPAL
SEPTEMBER 27, 1988 TO OCTOBER 31, 1989 AND
INTEREST DUE ON LEGAL FEES, TRUSTEE'S FEES, AND COURT COSTS
SEPTEMBER 27, 1988 TO OCTOBER 31, 1989

<u>Description</u>	<u>Total Amount</u>	<u>Interest Rate</u>	<u>Interest</u>	<u>Per Diem amount</u>
Principal 9/27/88 to October 31, 1989	\$371,739.35	18%	\$ 73,328.00	\$183.32
Legal fees paid prior to the Judgment date of September 26, 1988	\$102,914.67	10%	\$ 11,287.91	28.20
Legal fees paid after the Judgment date to October 31, 1989	\$ 63,403.50	10%	\$ 3,619.73	17.37
Trustee's fees	\$ 1,803.80	10%	\$ 197.67	\$.49
Court costs	\$ 2,881.04	10%	\$ <u>316.00</u>	\$ <u>.79</u>
Total September 27, 1988- October 31, 1989:			<u>\$88,749.31</u>	

Attorneys for Defendants Sharp

LEON H. SAUNDERS, et al.,

vs.

Defendants.

Counterclaim-Plaintiffs,

vs.

Counterclaim-Defendants.

THIRD AFFIDAVIT OF
ALBERT D. NYSTROM

Civil No. C87-1621

Judge J. Dennis Frederick

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

I, Albert D. Nystrom, after being first duly sworn, depose and say that:

1. I am a licensed and certified public accountant in the State of Utah.

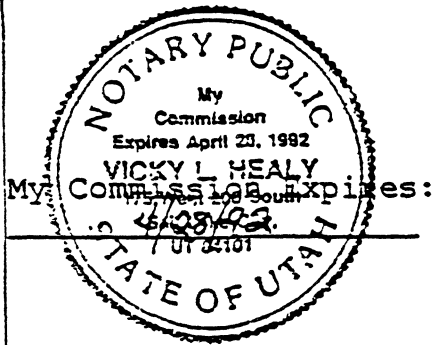
2. I have allocated the legal fees paid after the date of the Judgment, September 26, 1988, first to the amounts disallowed or taken under advisement by the Court (in the total amount of \$24,938.89) and then to those amounts allowed by the Court. Compare, Second Affidavit of Albert D. Nystrom ("Second Affidavit"), paragraph 5.

3. Based upon the Judgment entered by this Court in the above case and the above allocation, I have recalculated interest on the legal fees of \$38,464.61 which were paid after the date of Judgment, September 26, 1988, through August 1, 1990 at the Judgment rate of 10% since the date of each payment. From date of expenditure to August 1, 1990, such interest totals \$5,446.29. Interest continues to accrue after August 1, 1990 at a per diem rate of \$10.54. Compare, Second Affidavit, paragraph 5.

DATED this 7th day of March, 1990.

Albert D. Nystrom
Albert D. Nystrom

SUBSCRIBED AND SWORN to before me this 7th day of March, 1990.



Vicky L. Healy
Notary Public Residing in
Salt Lake City, Utah

Tab 6

FILED

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

JUL 13 1990

9/1/90
Mary T. Greenwood
Clerk of the Court
Utah Court of Appeals

Leon H. Saunders, Robert Felton,)
Felton, Saunders Land Investment)
Corporation, a Utah corporation;)
White Pine Ranches, a Utah general)
partnership; and White Pine)
Enterprises, a Utah general)
partnership,)

Plaintiffs and Appellants,)

v.)

John C. Sharp and Geraldine Y.)
Sharp,)

Defendants and Appellees.)

and)

Commissioner of Financial)
Institutions, Receiver for)
Tracy Collins Bank and Trust)
Company,)

Surety and Appellant.)

ORDER

Case No. 880710-CA


Case No. 880711-CA

Before Judges Greenwood, Bench, and Davidson (on Law and Motion).

This court having issued its remittitur and lacking jurisdiction to further consider the appeal, appellants' Motion for Stay of Remittitur Pending Review and For Approval of Supersedeas Bond is hereby DENIED.

DATED this 18th day of July, 1990.

FOR THE COURT:


Pamela T. Greenwood, Judge

0058

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

WHITE PINE RANCHES	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 870901621 CV
	:	DATE 08/01/90
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
SHARP, JOHN C.	:	COURT CLERK JAB
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE
NOTICE TO SUBMIT MOTION FOR DECISION DATED JULY 30, 1990 THE
COURT RULES AS FOLLOWS:

1. PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT OF JOHN C. BROWN
IS GRANTED.

2. PLAINTIFF'S MOTION FOR STAY OF REMITTITUR AND JUDGMENT
PENDING REVIEW AND FOR APPROVAL OF SUPERSEDEAS BOND IS DENIED
FOR THE REASONS SET FORTH IN DEFENDANTS' MEMORANDUM IN
OPPOSITION THERETO.

3. PLAINTIFFS' REQUEST FOR HEARING IS DENIED AS UNTIMELY
PER RULE 4-501(3)(F) C.J.A.

4. COUNSEL FOR DEFENDANTS IS TO PREPARE THE ORDER.

Tab 7

IN THE UTAH SUPREME COURT

LEON H. SAUNDERS; ROBERT FELTON;)	
SAUNDERS LAND INVESTMENT CORP.,)	Petition No. 900360
a Utah corporation; WHITE PINE)	
RANCHES, a Utah general)	
partnership; WHITE PINE)	
ENTERPRISES, a Utah general)	
partnership; and KENNETH R. NORTON,)	
dba Interstate Rentals, Inc., a)	
Nevada corporation,)	
)	
Plaintiffs and Appellants,)	
)	
vs.)	
)	
JOHN C. SHARP and GERALDINE Y.)	
SHARP,)	
)	
Defendants and Respondents.)	

MOTION FOR STAY PENDING ACTION ON PETITION
FOR CERTIORARI AND SUPPORTING MEMORANDUM

Robert M. Anderson, Esq. (0108)
Glen D. Watkins, Esq. (3397)
Bruce Wycoff, Esq. (4448)
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Attorneys for Appellants Leon H.
Saunders; Robert Felton; Saunders
Land Investment; White Pine Ranches
and White Pine Enterprises

Donald J. Winder, Esq.
Kathy A.F. Davis, Esq.
WINDER & HASLAM
175 West 200 South, #4000
Salt Lake City, Utah 84110
Attorneys for John C. and
Geraldine Y. Sharp

John B. Anderson, Esq.
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Telephone: (801) 363-9345
Attorneys for Appellant Kenneth R.
Norton dba Interstate Rentals, Inc.

Pursuant to Rules 8(a) and 36(b), Utah Rules of Appellate Procedure, Appellants, Leon H. Saunders, Robert Felton, Saunders Land Investment, White Pine Ranches, White Pine Enterprises and Kenneth R. Norton (collectively "White Pine") respectfully move this Court for a stay pending action by this Court on White Pine's Petition for Certiorari. As shown below, White Pine has first requested this stay and a hearing on a supersedeas bond from both the Court of Appeals and the trial court. Both of those courts have denied that request.

I. FACTUAL BACKGROUND

A. Facts Giving Rise to the Controversy. Basically, this Appeal involves the respective rights of the parties to approximately 38 acres of land in Summit County, Utah. The factual background of this case is generally set forth in the recent Opinion of the Court of Appeals reported at 135 Utah Adv. Rep. 68 (May 25, 1990) (A copy of that Opinion is attached hereto as Exhibit "A"). As a result of a bench trial, defendants received a judgment entitling them to foreclose and sell certain portions of real property developed in Summit County by White Pine, consisting of Lot 6 of the White Pine Ranches Subdivision and approximately 27 acres of unplatted but improved real property adjacent to that subdivision (the "Property").

In connection with their Complaint, White Pine requested a temporary restraining order enjoining a trustee's sale of the Property as well as the internal roadway serving the White Pine Subdivision. The trial court conditioned the issuance of that restraining order upon the posting of a cash bond in the amount of \$2,400.00. Thereafter, upon the parties' stipulation to an injunction pending trial, the trial court imposed a \$50,000.00 injunction bond, which remained in place until the trial was concluded.

B. Outcome of the Trial. A bench trial occurred on January 28-29 and March 22-25, 1988. The trial court generally found in favor of Defendants/Respondents (the "Sharps"). Once all relevant post-trial motions had been disposed of, White Pine filed its appeal, which was decided in the Sharps' favor in the Court of Appeals on May 25, 1990.

C. The Initial Supersedeas Bond. The September 26, 1988 Judgment calculated White Pine's liability to the Sharps to total \$759,415.63, inclusive of accrued interest, attorneys' fees, costs and taxes. The Court ruled the fair market value of the real property foreclosed was \$728,445.00. Accordingly, the Judgment awarded the Sharps \$30,970.63 against the bond already posted.

On December 16, 1988 White Pine moved the trial court for a stay of the judgment pending appeal and for approval of supersedeas

bond in the amount of \$65,158.77, which included the shortfall calculated in the judgment, along with interest through June 30, 1989. The Sharps opposed that motion, arguing the supersedeas bond should be \$310,287.13. On January 20, 1989 White Pine posted a supersedeas bond in the amount of \$79,793.36 pursuant to the trial court's order, a copy of which is attached hereto as Exhibit "B".

D. Events Giving Rise to This Request. On November 1, 1989, in accordance with para. 3 of the March 17, 1989 Order permitting Lot 1 to be used as security for increases, if any, in the supersedeas bond amount, the Sharps filed their Request for Hearing on (1) a previously filed Motion to Supplement Judgment; (2) their request for additional attorneys' fees; and (3) their request for an increase in the supersedeas bond amount. A copy of that Request is attached hereto as Exhibit "C". On December 6, 1989, the Sharps filed their Second Motion to Supplement Judgment and Motion to Increase Liability on Bond, in which the Sharps again requested, inter alia, the trial court increase the amount of the supersedeas bond. A copy of that Second Motion is attached hereto as Exhibit "D". At no time did the Sharps request the trial court to order White Pine to post additional, or different, security. At the conclusion of the February 12, 1990 hearing on that Motion, the trial court granted the Sharps' Motion "as prayed". See,

February 12, 1990 Minute Entry, a copy of which is attached hereto as Exhibit "E".

When the Sharps finally presented their proposed Order on the Sharps' Second Motion to White Pine's counsel, however, the Order said nothing about increasing the amount of the supersedeas bond; instead it required White Pine "to post additional security" in the amount of \$136,800.99 on or before March 15, 1990. That Order on the Sharps' Second Motion was entered on March 16, 1990, the same day White Pine filed its objections to the Order. A copy of that March 16, 1990 Order is attached hereto as Exhibit "F"

That Order further vacated the trial court's March 17, 1989 Order Staying Proceedings if such additional security was not posted by March 15, 1990. In other words, the prior stay was in effect vacated before the order vacating it was entered. Furthermore, the Sharps never requested that the stay be vacated and that issue was neither raised nor ruled on at the February 12, 1990 hearing.¹

E. White Pine's First Request For A Stay In the Trial Court. On March 16, 1990, White Pine filed its Motions for Continuance of Order Staying Enforcement of Judgment Pending Appeal and Approval of Supersedeas Bond. A copy of that pleading is attached hereto

¹ The propriety of these actions is currently before the Utah Court of Appeals in a second appeal, designated No. 900332-CA.

as Exhibit "G". As set forth in that Motion, the surety had theretofore filed a financial statement with the trial court indicating that the net worth of the surety in March, 1989 totaled \$220,000.00, more than the sum of the initial shortfall calculated in the Judgment and the increase ordered by the trial court. That \$220,000.00 figure represents the value of Lot 1. Accordingly, White Pine requested the trial court enter an Order (1) staying enforcement of the judgment pending final determination by the Court of Appeals; and (2) declaring that the existing security be considered adequate, and in full compliance with the Judgment and stay.

On April 30, 1990, six weeks after that Order had been entered, the Sharps filed their memorandum in opposition to that Motion and, for the first time, objected to the sufficiency of the bond. A copy of that objection is attached hereto as Exhibit "H". On May 7, 1990, White Pine filed its reply, a copy of which is attached hereto as Exhibit "I", (1) pointing out that the Sharps never objected to the sufficiency of the bond until April 30, 1990, and (2) requesting an evidentiary hearing to determine whether the real property presently posted as security was sufficient security pending appeal.

White Pine further demonstrated in Exhibit "I" that the Sharps were merely re-litigating arguments they had already made in their

January 1989 objection to the initial bond. As pointed out in White Pine's reply, "the form and nature of the security has been approved by the Court, and its acceptability is now the law of the case. The only issue remaining is whether the security is sufficient to guarantee the payment of unsecured fees, costs and interest, which the Court has found to be \$216,594.34 as of August 1, 1990." On May 7, 1990, White Pine also filed its Notice to Submit that motion for decision. The trial court denied White Pine's Motion in its June 22, 1990 Order, without ever holding a hearing. A copy of the Court's Order is attached hereto as Exhibit "J".

F. White Pine's First Request For a Stay in the Court of Appeals.

Before then, however, on June 5, 1990, White Pine received the trial Court's Minute Entry denying its motion. Accordingly, on June 6, 1990, White Pine filed its Motion for Stay Pending Appeal and for Approval of Supersedeas Bond and supporting Memorandum with the Court of Appeals. A copy of that memorandum -- without exhibits -- is attached hereto as Exhibit "K." On June 15, 1990, White Pine also filed its Petition for Rehearing on the Court of Appeals' May 25, 1990 Opinion. The Court of Appeals never reached the merits of White Pine's Motion for Stay Pending Appeal, however. Instead, in its June 26, 1990 Order Denying Rehearing and Remittitur, the Court of Appeals (1) denied White Pine's Petition

for Rehearing; (2) granted a temporary stay for 30 days of all further proceedings in the district court; (3) immediately remitted the matter to the trial court; and (4) denied White Pine's Motion for a Supersedeas Bond as moot. A copy of that Order is attached hereto as Exhibit "L".

G. White Pine's Second Request for a Stay in the Court of Appeals. After studying Utah R. App. P. 36(b), and going so far as to discuss the meaning of that Rule with the Chairman of the Advisory Committee on Appellate Rules, White Pine filed its Motion for Stay of Remittitur and Judgment Pending Review, and for Approval of Supersedeas Bond with both the Court of Appeals and the trial court, on July 12, 1990. Copies of the memoranda supporting those two motions are attached hereto as Exhibits "M" and "N" respectively. In connection with those two motions, counsel for White Pine sent a letter explaining the dual filing to the presiding judge of the Court of Appeals, with a copy to the trial court judge. A copy of that letter is attached hereto as Exhibit "O".

H. The Court of Appeals' Action on White Pine's Second Request for a Stay. On July 18, 1990, the Court of Appeals denied White Pine's request on the grounds it lacked jurisdiction to further consider the appeal. A copy of that July 18, 1990 Order is attached hereto as Exhibit "P".

I. The Trial Court's Action on White Pine's Second Request for a Stay. On August 2, 1990, the trial judge's clerk advised counsel for White Pine that the trial court had denied White Pine's motion for a stay and its request for a hearing. See Affidavit of Glen D. Watkins, dated August 2, 1990, filed herewith. Contrary to that decision, White Pine was entitled to a stay as a matter of right and to a hearing due to the dispositive effect of the trial court's denial of White Pine's Motion.

II. NECESSITY FOR STAY

When the temporary stay granted by the Court of Appeals lapsed on July 26, 1990, the Sharps became free to foreclose the Property. Accordingly, on July 26, 1990, counsel for the Sharps wrote the Summit County Sheriff requesting him to sell the Property as soon as possible. A copy of that letter is attached hereto as Exhibit "Q". In a telephone conversation, the Summit County Sheriff's Office advised White Pine's counsel that the sale is scheduled for August 27, 1990. See, para. 4, Affidavit of Glen D. Watkins.

If the requested stay is not granted, the property will be subject to sale, and perhaps sold, before this Court has had an opportunity to consider White Pine's Petition for Certiorari and the Sharps' response. In a case such as this, there is a "particular danger of dismissal for mootness, and thus a special

need for seeking a stay [in the appellate court] when the district court refuses to enjoin an impending sale of property." See 9 J. Moore, B. Ward Moore's Federal Practice (2d ed.) para. 208.03 at pp. 8-11.

III. REASONS WHY A STAY SHOULD BE GRANTED IN THIS CASE.

A. White Pine is Entitled to a Stay as of Right. Under Utah Rules of Appellate Procedure 8(a) and 36(b), an appellant may apply to the Supreme Court for a stay of the judgment after such relief has been denied by an inferior court. See Jensen v. Schwendiman, 744 P.2d 1026, 1027 (Utah App. 1987) (interpreting former Utah R. Ct. App. 8). In ruling upon a Rule 8 motion, the appellate court applies the same standard trial courts apply in motions brought under Utah Rule of Civil Procedure 62. Id. "Thus, a money judgment will be stayed as a matter of right upon posting a supersedeas bond." Id. (emphasis added), citing American Manufacturers' Mut. Ins. Co. v. American Broadcasting - Paramount Theatres, Inc., 385 U.S. 931 (1966) (interpreting substantially similar federal rules). Nevertheless, on four separate occasions, the trial court and the Court of Appeals have denied White Pine's Motions for Stay despite White Pine's willingness to post a supersedeas bond.

If this Court does not grant a stay pending its action on White Pine's Petition for a Writ of Certiorari, White Pine will be

irreparably harmed and White Pine's Petition for Certiorari will be rendered moot. The judgment in this case is for slightly less than One Million Dollars. If a stay is not granted, a million dollar issue will have been decided, as pointed out in White Pine's Petition for Certiorari, without any appellate court review of the merits of that judgment.

On the other hand, the stay sought by White Pine will have little effect, if any, on the Sharps. Their brief in reply to White Pine's Petition is due on August 27, 1990, the very date of the sale. Once their brief has been filed, Rule 50(e), Utah R. App. P., provides that this Court will immediately begin consideration of the Petition. White Pine now requests a stay only until that determination is made. If this Court denies certiorari, White Pine's appellate rights are extinguished, and no further basis exists for a stay. On the other hand, if White Pine's Petition is granted, it then would be appropriate for White Pine to petition this Court for approval of a supersedeas bond to protect the Sharps during the pendency of the briefing, argument and decision-making process. White Pine stands ready, and at all material times has stood ready, to post such a bond, but no court has addressed the amount and form of such a bond.

Although White Pine does not know the amount of time typically taken by this Court to act upon a Petition for Certiorari, it

believes such a decision may be made by October 1, 1990. This slight delay in the scheduled sale causes no prejudice to the Sharps compared to the devastating effect of the Sharps' execution on a million dollar judgment against White Pine and the resulting mooted of White Pine's appeal without any appellate review.

This result is especially tragic in light of refusals by the trial court and the Court of Appeals on four different occasions to grant White Pine a hearing on a bond White Pine has been trying to post for five months.

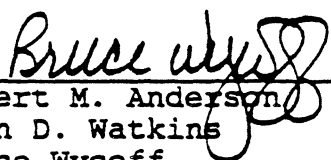
IX. CONCLUSION

White Pine has attempted for the past five months to post a supersedeas bond in this case if a court would only hold a hearing in this matter and determine the amount. Because of these refusals by the lower courts to hold such a hearing, it has become essentially impossible for White Pine to post a supersedeas bond before the scheduled August 27, 1990 Sheriff's Sale of the property at issue in this case. White Pine is therefore forced to make its present motion that this Court issue a stay of execution in this case until such time as it acts on White Pine's Petition for Certiorari. The stay will not hurt the Sharps and will prevent a severe injustice.

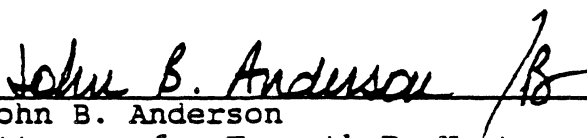
DATED: August 2, 1990.

Respectfully submitted,

ANDERSON & WATKINS



Robert M. Anderson
Glen D. Watkins
Bruce Wycoff
Attorneys for Appellants Leon H. Saunders;
Robert Felton; Saunders Land Investment;
White Pine Ranches and White Pine
Enterprises



John B. Anderson
Attorney for Kenneth R. Norton,
dba Interstate Rentals, Inc.

Tab 8

STATE OF UTAH

SALT LAKE CITY, UTAH

AUGUST 14, 1990

OFFICE OF THE CLERK

Donald J. Winder, Esq.
Kathy A. F. Davis, Esq.
WINDER & HASLAM
175 West 200 South, #4000
Salt Lake City, Utah 85110.

Leon H. Saunders; Robert Felton;
Saunders Land Investment Corp.,
a Utah corporation; White Pines Ranches,
a Utah General partnership; White Pine
Enterprises, a Utah general
partnership; and Kenneth R. Norton,
dba Interstate Rentals, Inc., a
Nevada corporation,
Plaintiffs and Appellants, No. 900360
v.
John C. Sharp and Geraldine Y.
Sharp,
Defendants and Appellees

Motion for Stay Pending action on Petition for Certiorari is
granted. The case is remanded to the district court for the limited
purpose of fixing the amount of the bond to be posted.

Geoffrey J. Butler

Tab 9

ANDERSON & WATKINS
Robert M. Anderson, Esq. (#0108)
Glen D. Watkins, Esq. (#3397)
Bruce Wycoff, Esq. (#4448)
700 Valley Tower
50 West Broadway
Salt Lake City, Utah 84101-2018
Telephone: (801) 534-1700
Attorneys for Plaintiffs/Appellants

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

LEON H. SAUNDERS; ROBERT	:	
FELTON; J. RICHARD REES;	:	
SAUNDERS LAND INVESTMENT CORP.,	:	STIPULATION RE:
a Utah corporation; WHITE PINE	:	SUPPLEMENTAL
RANCHES, a Utah general	:	SUPERSEDEAS BOND
partnership; and WHITE PINE	:	
ENTERPRISES, a Utah general	:	
partnership,	:	
	:	
Plaintiffs/Appellants,	:	Civil No. C87-1621
	:	
vs.	:	Court of Appeals
	:	No. 900332-CA
JOHN C. SHARP; GERALDINE Y.	:	
SHARP; and ASSOCIATED TITLE	:	
COMPANY, a Utah corporation,	:	
as Trustees,	:	
	:	
Defendants/Appellees.	:	
	:	
JOHN C. SHARP; and GERALDINE Y.	:	
SHARP,	:	
	:	
Counterclaim-Plaintiffs,	:	
	:	
vs.	:	
	:	

ROBERT FELTON; LEON H. :
 SAUNDERS; J. RICHARD REES; :
 SAUNDERS LAND INVESTMENT :
 CORPORATION, a Utah corporation; :
 KENNETH R. NORTON dba :
 Interstate Rentals, Inc.; and :
 PAUL H. LANDES, individually; :
 WHITE PINE RANCHES, a Utah :
 general partnership; and WHITE :
 PINE RANCHES, a Utah general :
 partnership; and WHITE PINE :
 ENTERPRISES, a Utah general :
 partnership, :
 :
 Counterclaim-Defendants. :

The Plaintiffs and Defendants, through counsel, hereby stipulate as follows:

1. On August 14, 1990, the Supreme Court of Utah issued that certain order attached hereto as Exhibit "A" (the "Order"). The Order provides that

Motion for Stay Pending action on Petition for Certiorari is granted. The Case is remanded to the district court for the limited purpose of fixing the amount of the bond to be posted.

2. The occurrence of the following actions by plaintiffs on or before August 24, 1990, shall constitute full and complete compliance with the bond requirement set forth in the Order:

a. Subject to the provisions of this Stipulation, the sum of \$136,800.99 shall be deposited in the name of Shwilde Bewedo, Inc. (hereinafter "Surety") in the following amounts

in interest bearing accounts in the following financial institutions (collectively, the "Banks"):

West One Bank -- \$68,000.00

First Security Bank of Utah, N.A. -- \$68,800.99

(The funds deposited in accordance with this paragraph, together with such interest as may accrue thereon during the period that such funds are so deposited, are hereinafter referred to as the "Funds.")

b. Certificates of deposit issued by the Banks (the "Certificates") shall be signed in blank by the Surety and deposited by the Surety with the escrow agent mutually selected by the parties and identified in Exhibit "B" attached hereto (the "Escrow Agent"), who shall thereafter hold the Certificates for delivery subject to and in accordance with the terms and conditions of this Stipulation. Copies of the Certificates shall be delivered to Winder & Haslam, counsel for the defendants.

c. The Surety shall execute this Stipulation as provided below for the purposes of acknowledging its agreement (i) that the Funds and the Certificates shall be held in accordance with the Stipulation for the sole and express purpose of securing the Supplemental Supersedeas Bond attached

hereto as Exhibit "C" (the "Supplemental Bond"); and (ii) to each and every other term and condition of this Stipulation.

d. The Surety shall execute and deliver to Winder & Haslam a UCC-1 Financing Statement in the form attached hereto as Exhibit "D" (the "Financing Statement"), subject to the terms and conditions of paragraph 4 below.

e. The Supplemental Bond is fully executed and filed with the Clerk of the Third Judicial District Court in and for Salt Lake County, State of Utah.

Immediately on the occurrence of these events, plaintiffs shall be entitled to deliver the letter attached hereto as Exhibit "E" for the purpose of instructing the Summit County Sheriff in writing that the Sheriff's Sale, presently scheduled for August 27, 1990, pursuant to that certain Notice of Sheriff's Sale dated August 1, 1990, and attached hereto as Exhibit "F," has been stayed by the Order and such sale shall be cancelled.

3. By executing this Stipulation below, Escrow Agent agrees to hold the Certificates in trust for defendants ~~and Surety~~ subject to the terms and conditions of this Stipulation and agrees to deliver the Certificates

a. to defendants, upon the entry of an order of the Third Judicial District Court determining that Surety is obligated to pay costs and damages to defendants pursuant to

the terms and conditions of the Supplemental Bond, fixing the amount of such costs and damages and directing Escrow Agent to deliver such Certificates to defendants;

b. to Surety or to such person or entity as the Surety may direct in writing, if the Supplemental Bond shall become void according to its terms;

c. to the Clerk of the Third Judicial District Court, in the event that Escrow Agent, acting in good faith, determines that it has received conflicting written instructions from plaintiffs, defendants or the Surety respecting Escrow Agent's holding and/or delivery of the Certificates, whereupon any such dispute concerning the Certificates shall be resolved by an interpleader action in the Third Judicial District Court.

4. The Surety acknowledges and hereby grants defendants a security interest in the Certificates and agrees to deliver the Financing Statement for the sole and express purpose of securing Surety's performance under the Supplemental Bond. This security interest is given for no other reason or purpose whatsoever. The parties expressly agree that neither the Funds nor the Certificates shall secure the performance of the Surety's obligations under that certain Supersedeas Bond in the amount of \$79,793.36 previously

filed with the Clerk of the Court in this action (the "Original Bond"), which remains in effect.

5. The Funds and the Certificates shall not be assigned, transferred, cashed, or conveyed except as permitted by this Stipulation, and shall not be encumbered unless such encumbrance is expressly subordinated to the Surety's obligations under the Supplemental Bond and is given by Surety no later than five (5) days after the date of this Stipulation. Defendants hereby acknowledge their approval of the form and amount of the Supplemental Bond.

6. If the Petition (as that term is defined in the Supplemental Bond) is granted, then the stay of execution of the Judgment (as that term is defined in the Supplemental Bond) shall continue in effect until the District Court has (i) determined the amount of any additional supersedeas bond (if any) required to continue the stay in effect during the pendency of the appeal before the Supreme Court of Utah; (ii) entered an order continuing such stay and establishing the amount of any such additional bond; and (iii) the period of time established in such order for the filing of such additional bond shall have expired without the filing of such additional bond. The parties stipulate that, if requested of defendants by plaintiffs, the parties shall jointly request the Third Judicial District Court to conduct an evidentiary

hearing concerning the necessity of any such additional bond and the amount thereof.

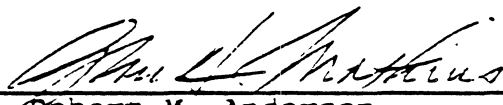
7. Defendants have advised plaintiffs that if the Utah Supreme Court does not grant or deny the Petition prior to October 1, 1990, defendants may thereafter file a motion seeking an order requiring plaintiffs to post an additional supersedeas bond as a condition for the stay of execution remaining in effect during the pendency of the Petition before the Utah Supreme Court. Plaintiffs have advised defendants that under the terms of the Order, the defendants are not entitled to seek or require the posting of such additional bond during the pendency of the Petition and that the posting of any such additional bond is not required for the continuance of the stay of execution during such period. The parties are presently unable to resolve this dispute. Accordingly, plaintiffs and defendants hereby stipulate that (i) defendants shall not file any such motion seeking any additional supersedeas bond or other security prior to October 1, 1990; and (ii) this Stipulation shall not prejudice the position above of any party respecting the posting of additional security during the pendency of the Petition after October 1, 1990; and (iii) notwithstanding any motion defendants shall file to require an additional bond as a condition for the continuance after October 1, 1990, of the stay of execution, the stay of execution

shall continue in effect until the District Court has determined the amount of any such additional supersedeas bond (if any) required to continue the stay in effect; (ii) entered an order continuing such stay and establishing the amount of any such additional bond; and (iii) the period of time established in such order for the filing of such additional bond shall have expired without the filing of such additional bond. The parties stipulate that, if requested of defendants by plaintiffs, the parties shall jointly request the Third Judicial District Court to conduct an evidentiary hearing concerning the necessity of any such additional bond and the amount thereof.

8. Any obligations of the Plaintiffs and/or the Surety pursuant to this Stipulation shall automatically cease upon the Supplemental Bond becoming void according to its terms.

DATED: August 24, 1990.

ANDERSON & WATKINS

By 
Robert M. Anderson
Glen D. Watkins
Bruce Wycoff
Attorneys for Plaintiffs/Appellants

ANDERSON & HOLLAND

By John B. Anderson / g:sd
John B. Anderson
Attorneys for Counterclaim-Defendant
Kenneth R. Norton

WINDER & HASLAM

By Donald J. Winder
Donald J. Winder
Kathy A. F. Davis
Attorneys for Defendants/Appellees

ACKNOWLEDGEMENT

The terms and conditions of the foregoing Stipulation are hereby accepted and agreed to by Shwildie Bewedo, Inc., this 23rd day of August, 1990:

SHWILDIE BEWEDO, INC.

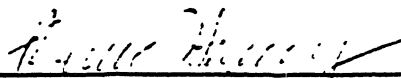
By [Signature]
Its pres.

ACKNOWLEDGEMENT

The terms and conditions of the foregoing Stipulation are hereby accepted and agreed to by the undersigned, as the Escrow Agent named therein:

Dated this 24th day of March, 1990.

FLANNERS TITLE COMPANY

By 
Its VICE PRESIDENT

CERTIFICATE OF SERVICE

On this 20th day of August, 1990, I hereby certify that I caused to be mailed, via first-class United States mail, postage prepaid, a true and accurate copy of the foregoing STIPULATION RE: SUPPLEMENTAL SUPERSEDEAS BOND, to the following:


John B. Anderson, Esq.
ANDERSON & HOLLAND
623 East 100 South
P. O. Box 11643
Salt Lake City, Utah 84147
Attorneys for Counterclaim-Defendant
Kenneth R. Norton dba Interstate Rentals, Inc.

Stanford B. Owen, Esq.
FABIAN & CLENDENIN
215 South State Street, Suite 1200
P. O. Box 510210
Salt Lake City, Utah 84151
Attorneys for Tracy-Collins and the
Commissioner of Financial Institutions

Robert Felton, Esq.
310 South Main Street, Suite 1305
Salt Lake City, Utah 84101

and I caused to be hand delivered, a true and correct copy of the foregoing document to:

Donald J. Winder, Esq.
WINDER & HASLAM
175 West 200 South, Suite 4000
Salt Lake City, Utah 84110
Attorneys for Defendants/Appellees



(K:\CLIENTS\WPR87245\0817STIP.75A)

Tab 10

Donald J. Winder (#3519)
Kathy A. F. Davis (#4022)
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

Attorneys for Defendants Sharp

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

LEON H. SAUNDERS, et al.,	:	
	:	
Plaintiffs,	:	MOTION TO AMEND AMENDED
	:	ORDER RE: DEFENDANTS'
-v-	:	SECOND MOTION TO
	:	SUPPLEMENT JUDGMENT AND
JOHN C. SHARP, et al.,	:	MOTION TO INCREASE
	:	LIABILITY ON BOND
Defendants.	:	
	:	
<hr/>		
JOHN C. SHARP, et al.,	:	
	:	
Counterclaim-Plaintiffs,	:	
	:	
-v-	:	Civil No. C37-1621
	:	Judge J. Dennis Frederick
ROBERT FELTON, et al.,	:	
	:	
Counterclaim-Defendants.	:	

Come now, John C. Sharp and Geraldine Y. Sharp (the "Sharps"), by and through their undersigned counsel, and hereby move the Court for an order amending paragraph 2 of the Amended Order Re: Defendants' Second Motion to Supplement Judgment and Motion to Increase Liability on Bond dated May 14, 1990 (the "Amended Order") to delete the phrase ". . . for a total judgment of \$938.053.02 as of February 12, 1990."

As grounds for this Motion the Sharps state as follows:


1. Plaintiffs, in their appeal of the Amended Order pending in the Court of Appeals, Case No. 900332-CA, have argued that the phrase at issue results in compounding of interest, despite the specific itemization of each calculation of interest.

2. The Sharps deny that the language has that effect and agree that interest should not be compounded on the Judgment. The issues on appeal can be simplified by the deletion of the language at issue.

3. This Court has jurisdiction to amend the Order to conform to the decision and rulings of the Court actually made and to aid in the presentation of the proceedings on appeal. Wasatch Mining Co. v. Jennings, 14 Utah 221, 46 P. 1106 (1896); Peterson v. Ohio Copper Co., 71 Utah 444, 266 P. 1050 (1928).

DATED this 9 day of November, 1990.

WINDER & HASLAM, P.C.

By 
Kathy A. F. Davis
Attorneys for Defendants Sharp

CERTIFICATE OF SERVICE

I hereby certify that, on the 9 day of November, 1990, I caused a true and correct copy of the foregoing MOTION TO AMEND AMENDED ORDER RE: DEFENDANTS' SECOND MOTION TO SUPPLEMENT JUDGMENT AND MOTION TO INCREASE LIABILITY ON BOND to be hand-delivered to

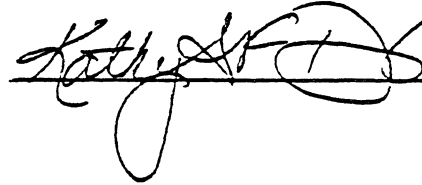
the office of:

Glen D. Watkins, Esq.
Robert M. Anderson, Esq.
ANDERSON & WATKINS
Valley Tower, Seventh Floor
50 West Broadway
Salt Lake City, Utah 84101-1018

and a copy of the same to be mailed, first class, postage prepaid,
to the following:

John B. Anderson, Esq.
ANDERSON & HOLLAND
623 East 100 South
Post Office Box 11643
Salt Lake City, Utah 84147

David L. Gladwell
Chapter 7 Trustee
Post Office Box 12069
Ogden, Utah 84412

A handwritten signature, appearing to be "Kathy Anderson", is written over a horizontal line.

Tab 11

Kathy A. F. Davis (#4022)
WINDER & HASLAM, P.C.
Suite 4004
175 West 200 South
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

Attorneys for John C. Sharp
and Geraldine Y. Sharp

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH, NORTHERN DIVISION

In re	:	Case No. 88B-03720
	:	Chapter 7
J. RICHARD REES	:	
	:	ORDER
Debtor.	:	

The Motion for Relief from the Automatic Stay filed by the Sharps came on for hearing before the Honorable Judith A. Boulden on the 14th day of November, 1988, at the hour of 11:00 a.m. The Sharps were represented by their attorneys, Donald J. Winder and Kathy A. F. Davis, and the Trustee David L. Gladwell appeared. Counsel for the debtor did not make an appearance.

Based upon the Stipulation of the parties and good cause appearing therefore,

IT IS HEREBY ORDERED that the automatic stay imposed is hereby modified to allow the Sharps to proceed with their

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Robert Felton, 1056
310 South Main Street
Suite 1309
Salt Lake City, Utah 84101
Phone: 801-359-9216

**In The United States Bankruptcy Court
District of Utah, Central Division**

IN RE:)	
)	Case No. 88B-03720
J. RICHARD REES)	Chapter 7
)	
Debtor)	

**MOTION TO VACATE ORDER GRANTING RELEASE
FROM THE AUTOMATIC STAY**

Robert Felton, an interested party, as a Creditor of the above Debtor action moves this Court to vacate its Order Granting Relief from the Automatic Stay to John Sharp and Geraldine Sharp, and as grounds for this Motion states:

1. Moveant filed a timely Proof of Claim for both himself and White Pine Ranches, a partnership.

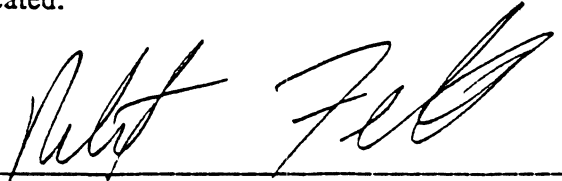
2. That a Request for Notice of all proceedings was duly filed in September 1988, a copy of which is attached hereto. Notice was not given to this Party.

3. Moveants failed to give this Creditor notice which has deprived him of the right to object or be heard at the hearing and is in direct contradiction of Rule 27(d)(e) of the Rules of this Court.

The Relief from the Automatic Stay was improperly granted and this Creditor believes that the factors set forth *In Re Curtis* (Bnkr. Utah) 40 BR 795 dictates that relief should not be granted and the estate of the Debtor, J.

Richard Rees, will be substantially depleted or impaired by said Order being granted.

NOW, WHEREFORE Robert Felton moves this Court that the Order granting Relief from the Automatic Stay in the above entitled action in favor of Geraldine Sharp and John Sharp be vacated.



Robert Felton

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MOTION TO VACATE ORDER GRANTING RELIEF FROM AUTOMATIC STAY by United States first-class mail, postage prepaid to Philip Patterson, 427 27th Street, Ogden, Utah 84401; David L. Gladwell, Trustee, 4185 Harrison Blvd., Ogden, Utah 84403; Donald Dean Allen, 2870 Zanker Road, Suite 200, San Jose, California 95134; James Milton, PO Box 3900, Dept. N., Wayne, Pennsylvania, 19087; Mark Gaylord, Attorney 15 West Broadway, Salt Lake City, Utah 84101; Donald Winder, 175 West 200 South, Suite 4004, Salt Lake City, Utah 84101 on this the 16 day of November.

