

1990

In the Matter of the Estate of Edward Miller  
Grimm, Deceased. Maxine Tate Grimm,  
individually and as Supervised Personal  
Representative of the Estate of Edward Miller  
Grimm; Linda Grimm; Edward Miller Grimm II;  
and E. Lavar Tate, as Supervised Personal  
Representative of the Estate of Edward Miller  
Grimm v. Ethel Grimm Roberts, Rex Roberts,  
Juanita Grimm Morris and Juanita Kegley Grimm :  
Brief in Opposition to Certiorari

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**900082**

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of  
EDWARD MILLER GRIMM,

Deceased.

MAXINE TATE GRIMM, individually  
and as Supervised Personal  
Representative of the Estate of  
Edward Miller Grimm; LINDA GRIMM;  
EDWARD MILLER GRIMM II; and  
E. LAVAR TATE, as Supervised  
Personal Representative of the  
Estate of Edward Miller Grimm,

No. 900082

Plaintiffs-Appellants,

vs.

ETHEL GRIMM ROBERTS, REX ROBERTS,  
JUANITA GRIMM MORRIS and JUANITA  
KEGLEY GRIMM,

Defendants-Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

Utah Court of Appeals Case No. 880708-CA

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In the Matter of the Estate of  
EDWARD MILLER GRIMM,

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MAXINE TATE GRIMM, individually  
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EDWARD MILLER GRIMM II; and  
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### QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider the petition;
2. Whether the Court of Appeals erred in finding a Family Settlement Agreement enforceable without formal court approval; and
3. Whether the Court of Appeals erred in holding petitioners were not entitled to a jury determination of their equitable claims.

### REFERENCE TO OFFICIAL REPORT OF OPINION ISSUED BY THE COURT OF APPEALS

Matter of Estate of Grimm, 784 P.2d 1234 (Utah App. 1989).

### OBJECTION TO JURISDICTION

The Court of Appeals did not enter its decision on December 29, 1989, as petitioners assert. Rather, that Court entered its decision on December 20, 1989. See, official report of opinion, Matter of Estate of Grimm, 784 P.2d 1238 (Utah App. 1989).<sup>1</sup>

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<sup>1</sup>Despite the December 20, 1989 decision date set forth in the official reporter, petitioners assert the decision was entered on December 29, 1989. As more fully discussed herein, December 29, 1989 was the date the Court of Appeals amended its opinion to correct a typographical error. Rule 45, however, makes no mention of "opinion" or "amended opinion" but speaks only in terms of "decision". An opinion might undergo many changes before final publication, but the decision date remains the same. There is no basis in the rules for petitioners' assumption that a change in the textual "opinion" after a decision is rendered tolls the time for filing a petition.

Although petitioners obtained an ex parte Order purporting to extend the time for filing to February 28, 1990, or 38 days past the prescribed time, Rule 45(e) of the Rules of the Utah Supreme Court states in pertinent part: "No extension shall exceed 30 days past the prescribed time . . . ." The petition was finally filed on February 20, 1990, or 31 days past the prescribed time. Thus, the petition is jurisdictionally out of time.<sup>2</sup>

#### CONTROLLING PROVISIONS

Utah Code Ann. § 75-3-912: Private agreements among successors to decedent binding on personal representative.

Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. . . .

Utah Code Ann. § 75-3-1101: Effect of approval of agreement involving trusts, inalienable interests, or interests of third persons.

A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probated will, the rights or interests in the estate of the decedent, any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto, including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. . . .

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<sup>2</sup>Rule 45(b) states that the clerk will refuse any petition that is "jurisdictionally out of time."

Utah Code Ann. § 75-3-1102: Procedure for securing court approval of compromise.

- (1) The procedure for securing court approval of a compromise is as follows:
  - (a) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons . . . which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts are unknown and cannot reasonably be ascertained.
  - (b) Any interested person, including the personal representative of a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.
  - (c) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trust, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interest of the persons represented by fiduciaries or other representatives is just and reasonable, may make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. . . . Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

STATEMENT OF THE CASE

For purposes of opposing this petition, respondents do not contest petitioners' recitation of the procedural history of this consolidated action. Petitioners' Statement of Facts, however,



is largely irrelevant, and in any case does not present a proper background for purposes of the instant petition.

For example, without arguing that the lower courts' findings were not supported by substantial evidence, petitioners include in their Statement of Facts much of the direct evidence contrary to the courts' findings without acknowledging the substantial evidence presented in support. Nevertheless, this Court must view the findings of the courts below favorably, and not substitute its own judgment except to prevent manifest injustice if the evidence clearly preponderates against those findings. Reid v. Mutual of Omaha, 776 P.2d 896, 899-900 (Utah 1989). Accordingly, respondents adopt by this reference the Findings of Fact entered by the district court as set forth at Appendix 2 to the Petition, and those facts found by the Court of Appeals as set forth in Appendix 1.

In addition, the following facts are of particular relevance to the issues presented:

1. With respect to the first question presented, the "decision" of the Utah Court of Appeals was rendered on December 20, 1989, as set forth in the official report of that decision at 784 P.2d 1238. Although the "opinion" that was finally published had been amended to correct typographical

errors on December 29, 1989, the judgment of December 20, 1989 was not changed or amended in any way.<sup>3</sup>

2. The Petition for Writ of Certiorari at issue was filed with the Court on February 20, 1990, or 31 days after the prescribed time for filing a petition. See Petition for a Writ of Certiorari to the Utah Court of Appeals, No. 900082.

3. To the extent facts relating to duress or failure of consideration are relevant to the second issue presented, the district court found the following:

32. By January 31, 1978, Mr. Salisbury [a partner in the firm of Van Cott, Bagley, Cornwall & McCarthy retained by Maxine] had been made aware by Maxine of an income tax case concerning Grimm's taxes pending before the U.S. Tax Court, Washington, D.C., which was being handled by Mr. Bert Rand for Grimm prior to Grimm's death.

33. In January and February of 1978, Mr. Salisbury was informed and discussed with Maxine the fact that for Philippine estate tax purposes, the estate of non-citizen domiciliaries of the Philippines included all property of the deceased, real or personal, tangible or intangible, where ever situated, except real estate located outside the Philippines and that the tax was 60%.

34. In January or February, 1978, Maxine retained a lawyer in the Philippine islands, Mr. Edgardo Angara. Mr. Salisbury and Mr. Angara exchanged telegrams and conversed by telephone about the numerous questions concerning the estate, including Grimm's domicile and the effect of Philippines domicile, the law of legitime by which children are compulsory heirs, and its effect on the trust, the civil doctrine of collation, the

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<sup>3</sup>The typographical error in the original opinion is found on page 10. Apparently, the subscript of footnote 9 was omitted from the text at the end of the second sentence of the first full paragraph of that page.

assets subject to taxation by the Philippines and the doctrine of renvoi as applied to succession from persons having citizenship different from their domicile.

. . .

At the time of Grimm's death, his estate, mostly personal property, was in excess of \$8 million, with assets situated in the Philippines, in Hong Kong and in the United States. There were numerous questions to be resolved. Mr. Salisbury also corresponded with an attorney in Reno, Nevada, concerning the validity of Grimm's divorce and hence the validity of his marriage to Maxine.

35. By February, 1978, Mr. Salisbury had concluded that it might be an advantage to work out a settlement for tax purposes if the trust could be left intact.

36. During March, 1978, Mr. Salisbury talked at least five times with Maxine about legal issues concerning this estate and the possibility of settlement. Mr. Salisbury made calculations as to what Ethel and Nita might receive under various assumptions. Maxine told Mr. Salisbury that Ethel had presented the paper outlining a settlement proposal and he had asked her to sign it. Mr. Salisbury advised Maxine not to sign, and upon his advice, she did not do so.

37. Maxine was agreeable to and desirous of entering into an agreement, but wanted it consummated in Utah under Mr. Salisbury's supervision and wanted to receive her one-half free of tax.

. . .

39. In late February or early March, 1978, Ethel and Nita employed Mr. Donald Holbrook of Jones, Waldo, Holbrook and McDonough to represent their interests in Utah. Mr. Holbrook and others in his office and Mr. Salisbury and others in his office communicated over a period of several weeks. On April 4, 1978, Mr. Holbrook's office and Mr. Salisbury's office stipulated to the admission of the non-Philippine will to probate in Tooele County under certain conditions. Final negotiations, with Rex representing Ethel and Nita, and Pete representing Maxine and Linda, consumed at least five days, from April 20 through April 25, 1978. There

were at least four drafts of the first draft [of the Family Settlement Agreement] prepared by Mr. Salisbury. The final agreement was incorporated into two documents, the settlement agreement and the supplemental memorandum.

40. During the negotiations each side presented points and proposals to advance the positions of their clients. Pete and Mr. Salisbury were insistent that the first wife, Juanita, sign the agreement to relinquish any claim she might have in the estate. During the negotiations it was agreed that Maxine receive a guaranteed minimum of \$1,500,000 plus her two houses and certain bank accounts regardless of the eventual size of the estate. Pete and Mr. Salisbury also insisted that Maxine receive her share without reduction by way of death taxes. Negotiations also resulted in an agreement that Pete and Linda receive certain bank accounts and the Ethel and Nita be guaranteed a minimum.

41. Mr. Salisbury communicated at least twice in April with Maxine. Pete conferred with Mr. Salisbury on a continual basis between April 17 and April 25, 1978. On the morning prior to signing the family settlement agreement, Pete represented to Mr. Salisbury that he had discussed the agreement with his mother (Maxine) the night before and that she wanted to go ahead.

42. The agreement was signed on April 25, 1978, by Pete and Linda, by Pete as attorney-in-fact for Maxine and by Rex as attorney-in-fact for Ethel and Nita. It was also signed by both attorneys. Subsequently, a copy was signed by Nita in California and by Ethel and Maxine in the Philippine islands. Pursuant to the family settlement agreement, Mr. Salisbury was retained as attorney for the estate to represent all of the "heirs."

43. The family settlement agreement was not signed as a result of threats, duress or coercion. Maxine was represented by Mr. Salisbury who advised Mrs. Maxine Grimm that he had investigated the claims made by Nita and Ethel and she did not have to enter into a settlement agreement if she did not desire to do so.

. . .

47. Subsequent to the signing of the settlement agreement, all of the parties worked toward and pursuant to the agreement.

. . .

52. On September 20, 1978, Mr. Salisbury wrote to the beneficiaries again reaffirming the agreement. This letter is the first of a number of reports to the beneficiaries by Mr. Salisbury concerning the progress of the estate pursuant to the family settlement agreement. At no time did Maxine, Pete or Linda take exception to any of the reports of Mr. Salisbury.

. . .

54. Also in February, 1979, the U.S. estate tax return was signed by Maxine and filed. The estate tax issue was simplified and aided by the family settlement agreement in the opinion of Mr. Salisbury. Under the return, Maxine claimed the maximum marital deduction.

. . .

56. On May 23, 1979, \$800,000 of the Everett receivable was distributed in accordance with the family settlement agreement and in the percentages designated by the family settlement agreement: \$400,000 to Maxine and \$100,000 each to the four children. In addition, pearls and silver were distributed in accordance to the terms of the family settlement agreement.

57. In September, 1979, the Philippine estate taxes were paid. Because there were not sufficient liquid funds to pay all of the estate taxes due, the shortfall was paid by the respective beneficiaries in accordance with their shares under the family settlement agreement.

. . .

Findings of Fact and Conclusions of Law, Petition at Appendix 2  
(citations omitted).

4. Each of the findings set forth above was upheld by the Court of Appeals as not against the clear weight of the evidence. See Matter of Estate of Grimm, 784 P.2d 1238, 1248 (Utah App. 1989).

5. With respect to the third issue raised by this petition, the procedural posture of the case is relevant. Petitioners filed their Complaint seeking rescission of the Family Settlement Agreement on numerous equitable grounds including duress and failure of consideration. Respondents answered petitioners' Complaint contending that the Agreement was valid and enforceable, and filed a Counterclaim contending that in the alternative, if the Agreement was not specifically enforceable, petitioners had violated the terms of the Agreement thereby giving rise to a breach of contract claim. To this breach-of-contract claim petitioners asserted affirmative defenses of duress and failure of consideration.

The first issue to be decided by the district court was whether petitioners would prevail on their rescission claims or whether the Agreement could be enforced according to its terms. The court decided to enforce the Agreement. If the court had decided the Agreement could not be specifically enforced, then respondents would have sought a decision on their breach-of-contract counterclaim. That decision would have been made by the jury, as would the decision as to whether duress or failure of consideration constituted a defense. However, when the district

court made its decision on the equitable claims, there was no need for any decision, by the court or jury, on respondent's legal counterclaim, or on petitioners' affirmative defenses thereto. The statement of the district court before trial contained in the Petition for Writ of Certiorari must be examined in this procedural context:

Therefore, I grant you the benefit of having a jury trial, but so that everybody understands, the court will make the decision as to whether or not the family settlement agreement is valid or invalid, and then based upon that you may proceed on your counterclaim -- you may not proceed, but at that time the plaintiffs here cannot say that they didn't have the right for the jury to hear all of the defenses with regard to coercion, duress and other defenses. . . .

(Tr. at 22.)

#### ARGUMENTS AGAINST ISSUANCE OF A WRIT

1. The Petition for Writ of Certiorari at issue is jurisdictionally out of time.

To achieve finality after an already lengthy appellate review process, the Rules of the Utah Supreme Court require that a petition for writ of certiorari be filed within thirty (30) days after "decision" by the Court of Appeals. Rules of Utah Supreme Court, Rule 45 (1987).<sup>4</sup> The Rules go on to provide that in special circumstances, particularly "upon a showing of excusable neglect of good cause," the time for filing a petition may

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<sup>4</sup>As noted at Note 1, supra, the Rules make no mention of "opinion" or "amended opinion" but begin the running of the time period at the date of "decision."

be extended "not later than thirty days" beyond the original thirty day period. Id. However, the Rules specifically state "no extension shall exceed thirty days past the prescribed time or ten days from the date of the entry of the order granting the motion, whichever occurs later." Id.

In this case, the Utah Court of Appeals entered its decision on December 20, 1989. See, official report of opinion, Matter of Estate of Grimm, 784 P.2d 1238 (Utah App. 1989).<sup>5</sup> The time prescribed for filing any petition for writ of certiorari was thus thirty days later, on January 19, 1990.

On January 3, 1990, petitioners filed an ex parte Motion for Extension of Time to File Petition For a Writ of Certiorari, seeking the maximum 30 day enlargement allowed by the Rules. Pursuant to that motion, petitioners obtained an ex parte Order extending the time from January 19, 1990, to February 19, 1990. See Order Granting Plaintiffs-Appellants' Ex Parte Motion for Extension of Time to File Petition for Writ of Certiorari, dated January 3, 1990.

Nevertheless, on or about January 4, 1990, petitioners filed an Amended Ex Parte Motion for Extension of Time to File Petition

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<sup>5</sup>Consistent with this date of "decision", Rule 30(c) of the Rules of the Utah Court of Appeals provides that "entry by the clerk in the records of the court shall constitute the entry of judgment of the court." Clearly, a subsequent change in the text of an opinion in no way altered the court's judgment entered as of December 20, 1989.



for Writ of Certiorari, requesting additional time up to and including February 28, 1990, or 38 days past the prescribed time. As the sole grounds for the additional extension, petitioners stated in their motion that the Court of Appeals had entered an amended opinion, and "although the amended opinion is not substantively different from the original opinion, plaintiff/appellants schedule is such and the issues involved in this appeal are such that they need as much additional time as possible to prepare and file a petition." See, Amended Ex Parte Motion for Extension of Time to File Petition For Writ of Certiorari, filed January 4, 1990.

Significantly, however, there is no basis in the language of the Supreme Court rules or otherwise for the eight days requested beyond the original thirty-day extension. The rules specifically state that the period begins to run on the date the "decision" is entered, without any references to the opinion or whatever technical amendments to the opinion might be necessary. See Rules of Utah Supreme Court, Rule 45 (1987). The rules go on to provide "no extension shall exceed thirty days past the prescribed time or ten days from the date of entry of the Order granting the motion, whichever occurs later." Id.

Subsequent amendments to the text of the "opinion" notwithstanding, the "decision" in this case was entered on December 20, 1989. Thus, the Petition for Writ of Certiorari at issue, filed February 20, 1990, was filed thirty-one (31) days past the

prescribed time, and under the rules of this Court is jurisdictionally out of time.

2. The Court of Appeals did not err in holding a Family Settlement Agreement was enforceable without formal court approval.

Petitioners argue at length that Certiorari is necessary here because petitioners disagree with the Court of Appeals' reading of §§ 75-3-1101 and 75-3-1102 of the Utah Code, and with the Court of Appeals' reading of this Court's decision in The Matter of the Estate of Frank Chasel, 725 P.2d 1345 (Utah 1986). Petitioners' disagreement, however, in no way makes the Court of Appeal's reading of the applicable statutes or case law incorrect, and the Petition should be denied.

For example, petitioners argue that § 75-3-1101 requires court approval of a compromise settlement agreement before the agreement has any legal effect. See Petition for Writ of Certiorari, at pp. 12-14. However, neither that section, nor its legislative history, even reach the issue of whether a compromise agreement, entered into by competent adults represented by counsel and after extensive negotiation, but which has not been formally approved, has legal effect. Rather, that section deals with the effect of court approval under certain circumstances once it has been obtained:

Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons. A compromise of any controversy . . . if approved in a formal proceeding in the court for that purpose is binding on all of the parties thereto. . . . An

approved compromise is binding even though it may have effect the trust or inalienable interest.

Utah Code Ann. § 75-3-1101 (1975).

In fact, to read § 75-3-1101 as requiring court approval of all agreements, rather than stating the effect of such approval under certain circumstances, would be inconsistent with § 75-3-912. That section by its terms governs private agreements, and states as follows:

Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions.

Utah Code Ann. § 75-3-912 (1975).<sup>6</sup>

Interpreting § 75-3-1101 as simply stating the effect of approval without requiring approval is consistent with the only case cited by counsel which resolves the precise issue presented under a similar statutory scheme, In re Pecks Estate, 34 N.W.2d 533 (Mich. 1948). The court there stated:

It was not necessary to secure the consent of the probate court to the settlement as there were no minors or unknown heirs involved. The courts encourage settlements where there is no fraud or mistake and the parties are of age, particularly so where there is a

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<sup>6</sup>This section does not require that any compromise agreement be submitted to probate court for approval before it has legal effect.

full understanding of the provisions in the settlement and the parties are represented by able counsel.

34 N.W.2d, at 538.

By contrast, petitioners rely upon their own novel interpretation of In re Estate of Chasel, 725 P.2d 1345, 1348 (Utah 1986), for the proposition that section 1101 requires approval of a settlement agreement before it has any effect. In Chasel, however, the settlement agreement at issue had been approved by the court. The Supreme Court, consistent with § 75-3-1101, simply stated that "if approved in a formal proceeding in the court for that purpose [a compromise agreement] is binding on all the parties thereto." The Court simply did not decide the issue present here, whether an unapproved compromise agreement between competent adults is binding, and thus its statement relied on by petitioners is, as stated by the Court of Appeals, dictum.<sup>7</sup>

Petitioners also argue in this regard that the Court of Appeals was mistaken to hold that the compromise agreement at issue was enforceable in spite of a spendthrift trust provision:

The FSA was either subject to the court approval requirements of §§ 1101 and 1102 and therefore not binding prior to court approval or it was not subject to the court approval provisions of §§ 1101 and 1102 and therefore invalid and void from its inception because it materially altered and terminated a spend-

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<sup>7</sup>And it is not at all clear, as petitioners assert, that the parties in Chasel would have been able to alter the agreement at issue if it had not been approved by the court. See, Petition for Writ of Certiorari, at p. 16. That is, in fact, the completely different issue presented by this case.

thrift trust. The Court of Appeals cannot have it both ways.

See Petition for Writ of Certiorari, at p. 17.

Petitioners are incorrect, however, because the Family Settlement Agreement was a legally binding document with or without court approval. There was nothing that made the Agreement invalid and void from its inception. When, through the course of this lawsuit, the parties went through all of the procedures necessary to obtain court approval pursuant to § 75-3-1102 and the court saw fit to approve the Agreement, pursuant to § 75-3-1101 petitioners cannot complain that it is invalid for affecting a spendthrift trust provision. Thus, as stated by the Court of Appeals:

We have found the FSA to be a valid contract, even without court approval. However, the trial court in its judgment approved the FSA. Under § 75-3-1101 it is thus binding, even though it may affect a trust or inalienable interest.

784 P.2d, at 1245.

3. The Court of Appeals did not err in denying petitioners a jury trial on their equitable causes of action.

The only legal cause of action presented in petitioners' Complaint was a claim for intentional infliction of emotional distress. The Court of Appeals found that the trial court denied plaintiffs a jury trial on this issue when it decided the Family Settlement Agreement was valid and enforceable and dismissed the jury. See, 784 P.2d, at 1248.

Petitioners also argue, however, that they were denied a right to a jury trial on the issues of duress and failure of consideration. "Once Respondents asserted the breach of contract counterclaim and proceeded to trial on that claim, Petitioners had a constitutional right to a jury trial on the issues of duress and failure of consideration." See, Petition for a Writ Certiorari, at p. 19.

Petitioners' argument, however, ignores the procedural posture of this case and the issues actually presented to the court for resolution. At the close of the evidence when the district court determined petitioners' equitable rescission claims against them, there was no need for any decision to be made on respondents' legal breach of contract claim, and thus no need for any jury determination of either the legal claim or the affirmative defenses to the claim. As the Court of Appeals stated "such affirmative defenses became moot." 784 P.2d at 1246. Simply put, petitioners were not denied a jury determination of any issue that were not equitable except their claim for intentional infliction of emotional distress.

Nor is this Court's holding in International Harvester Credit Corp. v. Pioneer Tractor and Implement, Inc., 626 P.2d 418 (Utah 1981), to the contrary. International Harvester simply holds that Utah Constitution, Article I, § 10 is unambiguous in guaranteeing a right to trial by jury. But that case in no way entitles any claimant to a jury trial of equitable issues. See

e.g., Coleman v. Dillman, 624 P.2d 713 (Utah 1981) and Bradshaw v. Kershaw, 529 P.2d 803 (Utah 1974).

CONCLUSION

After an already lengthy appellate review, the Petition for Writ of Certiorari at issue should be denied by this Court because it is jurisdictionally out of time. Even if the Petition were not out of time, the decision of the Court of Appeals was in no way erroneous and does not require additional appellate review by this Court. Thus respondents respectfully request that the Petition for Writ of Certiorari be denied.

DATED this 30<sup>th</sup> day of March, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By



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RCK436

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 1990, I caused to be mailed, first class, postage prepaid, four true and correct copies of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the following:

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