

2000

# Kathryn Collard v. Nagle Construction, Gary M. Nagle and Marilyn F. Nagle : Brief of Appellant

Utah Court of Appeals

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Ralph J. Marsh; Backman, Clark & Marsh; Attorney for Appellants.

Kathryn Collard; Attorney for Appellee.

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IN THE UTAH COURT OF APPEALS

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KATHRYN COLLARD, TRUSTEE  
of the LeRoy Collard Trust,

Plaintiff-Appellee,

vs.

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

Defendants-Appellants.

Case No. 20000976-CA

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GARY M. NAGLE,

Counterclaim Plaintiff-  
Appellant

vs.

KATHRYN COLLARD, TRUSTEE  
of the LeRoy Collard Trust,

Counterclaim Defendant-  
Appellee.

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BRIEF OF APPELLANT

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Appeal from the Judgment of the Third Judicial District Court  
of Salt Lake County, Honorable William B. Bohling

KATHRYN COLLARD (0697)  
The Law Firm of Kathryn Collard  
Nine Exchange Place, Suite 1111  
Salt Lake City, Utah 84111  
Attorney for Plaintiff-Appellee

RALPH J. MARSH (2092)  
Backman, Clark & Marsh  
800 McIntyre Building  
68 South Main Street  
Salt Lake City, Utah 84101  
Attorneys for Defendants-Appellants

**FILED** Argument Priority 15  
Utah Court of Appeals

AUG 10 2001

Paulette Stagg  
Clerk of the Court

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Nine Exchange Place, Suite 1111  
Salt Lake City, Utah 84111  
Attorney for Plaintiff-Appellee

RALPH J. MARSH (2092)  
Backman, Clark & Marsh  
800 McIntyre Building  
68 South Main Street  
Salt Lake City, Utah 84101  
Attorneys for Defendants-Appellants

Argument Priority 15

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## STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by §78-2a-3(2)(j), U.C.A. This is an appeal from a final judgment of the Third Judicial District Court of Salt Lake County, State of Utah, entered November 6, 2000. Notice of Appeal was filed November 8, 2000. This case was transferred to the Court of Appeals by the Supreme Court on January 19, 2001.

## STATEMENT OF ISSUES

### **POINT I. THE STATUTE OF LIMITATIONS DOES NOT BAR NAGLE FROM RECEIVING THE PURCHASE PRICE BEFORE HE IS OBLIGATED TO CONVEY TITLE.**

1. The Court should not have considered the statute of limitations defense asserted by Collard.
2. The lower court, having determined that both parties were barred by the statute of limitations, should also have denied Collard a remedy.
3. The lower court granted Collard specific performance, an equitable remedy, without requiring that Collard do equity.

4. A counterclaim barred by the statute of limitations may still be used as an offset against plaintiff's claim for delivery of title.

5. Under the express words of the contract, payment of the purchase price is a condition precedent to delivery of title.

6. The terms of the contract are not severable, either by separating the dependent promises or by dividing the consideration into three separate parts and applying the statute of limitations separately to each.

**Standard of Review:** Review of a summary judgment is based on correctness, according no deference to the court's legal conclusions. Thompson v. Jess, 979 P.2d 322, 325 (Utah 1999). The court must accept all facts and inferences in the light most favorable to the losing party. Winegar v. Froerer, 813 P.2d 104, 107 (Utah 1991).

**Preservation of issue for review:** Statute of Limitations raised in Collard's Motion for Summary Judgment [R. 139], opposed by Nagle in Reply Memorandum [R. 258], raised again by Collard in Plaintiff's Supplemental Memorandum [R. 357], opposed again by Nagle in Defendants' Supplemental Memorandum [R. 366-371], ruled on by lower court in Findings of Fact, Conclusions of Law and Order [R. 526-528], objected by Nagle in Objections to Plaintiff's Proposed Findings of Fact, Conclusions of Law and Order [R. 426-428] and considered extensively by the court in the oral arguments [R. 644, pp. 6-8, 14-17, 21, 23-24].

**POINT II. THE CONCLUSION THAT NAGLE WAIVED ASSUMPTION OF THE MORTGAGE IS NOT SUPPORTED BY THE FINDINGS AND IS A DISPUTED MATTER OF FACT WHICH COULD NOT BE DETERMINED ON A MOTION FOR SUMMARY JUDGMENT.**

**Standard of Review:** Review of a summary judgment is based on correctness, according no deference to the court's legal conclusions. Thompson v. Jess, 979 P.2d 322, 325 (Utah 1999). The court must accept all facts and inferences in the light most favorable to the losing party. Winegar v. Froerer, 813 P.2d 104, 107 (Utah 1991).

**Preservation of issue for review:** Raised and considered by the court in the hearing on August 30, 2000 [R. 645, pp. 7-9, 12-14, 20-22], ruled on by the lower court in the Findings of Fact, Conclusions of Law and Order [R. 526-528] and objected to by Nagle in Objections to Plaintiff's Proposed Findings of Fact, Conclusions of Law and Order [R. 426-428].

**Grounds for review of any issues not preserved:** The lower court committed plain error in ruling that the statute of limitations bars recovery of the purchase price and concluding, as a matter of law, that Nagle waived the assumption requirement, and the inequity of the result in this case is an exceptional circumstance allowing the appellate court



to review these matters to assure that manifest injustice does not result from a failure to consider these matters. State v. Irwin, 924 P.2d 5 (Utah App. 1996).

## **DETERMINATIVE STATUTES AND RULES**

### **78-12-1. Time for commencement of actions generally.**

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

### **78-12-23. Within six years - Mesne profits of real property - Instrument in writing.**

An action may be brought within six years;

- (1) for the mesne profits of real property;
- (2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

### **Rule 9. Pleading special matters.**

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

### **Rule 13. Counterclaim and cross-claim.**

(i) Cross demands not affected by assignment or death. When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other, except as provided in Subdivision (j) of this rule.

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**BRIEF OF APPELLANT**

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**STATEMENT OF THE CASE**

**Nature of the Case**

This is an action to enforce the terms of a Uniform Real Estate Contract between Nagle Construction, as Seller, and LeRoy Collard, as Buyer, dated March 30, 1978, for the sale of a condominium unit (hereinafter the "property"), which contract required that

the Buyer assume a mortgage loan on the property and convey to the Seller shares of stock or cash valued at \$85,000 "before seller conveys title to premises sold to buyer." The interests of the Seller were later conveyed to defendants Gary M. Nagle and Marilyn F. Nagle (hereinafter the "Nagles") and the interests of the Buyer were later conveyed to plaintiff Kathryn Collard, Trustee of the LeRoy Collard Trust, (hereinafter "Collard"). Neither Collard nor her predecessor ever assumed the mortgage on the property or conveyed to Nagle the shares or cash valued at \$85,000. LeRoy Collard, and later his son, took possession of the property and paid the monthly mortgage payments to the mortgage lender (without assuming the loan) until the time of suit. Because the shares or cash valued at \$85,000 were never conveyed to Nagles, title to the property was never conveyed to Collard.

### **Course of Proceedings**

Collard filed a complaint on July 28, 1999, alleging claims for breach of contract for failure to convey title to the property, adverse possession based on possession and payment of taxes and declaratory judgment to quiet title to the property based on an allegation that Collard had "fulfilled all of the Buyer's obligations under the Contract." Nagles filed an answer and counterclaim denying that Buyer had fulfilled its obligations under the contract, asserting defenses of failure to state a claim, waiver, estoppel and the statute of limitations of §§ 78-12-1 and 23, U.C.A. and asking in the alternative for a decree that Collard's interest in the property was forfeited, determining the amount due Nagles and for a decree of foreclosure against the property to satisfy the amount due and for a decree quieting title in Nagles. In her reply to the counterclaim Collard asserted various defenses including the statute of limitations but without referring to the statute "specifically and

definitely by section number" as required by Rule 9(h), Utah Rules of Civil Procedure. The Nagles file a Motion for Summary Judgment on February 24, 2000, and Collard filed a cross Motion for Summary Judgment on March 29, 2000.

### **Disposition in the Lower Court**

After oral arguments on July 17, 2000, the lower court, without making any findings of fact, ruled that "the statute of limitations operates to preclude both sides from exercising their rights under that contract" and asked the parties to brief the question of whether the court had "the equitable power . . . to order that the title be conveyed from Nagle to Collard." After briefing and further oral arguments on August 30, 2000, the lower court admitted difficulty in resolving this "perplexing problem" but ruled in favor of Collard and requested her counsel to prepare findings and conclusions acknowledging its decision "may well be subject to some question." Findings and conclusions and an order were prepared and objected to and after a hearing on those objections, Findings of Fact, Conclusions of Law and Order were entered on November 6, 2000. This appeal followed.

### **STATEMENT OF FACTS**

1. The real property involved in this action is a condominium unit located at 3842 South Quail Hollow Drive, Salt Lake City, Utah described as Lot B-24, Cove Point-Phase 1, a Planned Unit Development. [Complaint, ¶ 5; Nagle Affidavit, ¶ 1, Record 103].
2. Under date of March 30, 1978, Nagle Construction, as Seller, and LeRoy Collard, as Buyer, entered into a Uniform Real Estate Contract. [Complaint, ¶ 6; Nagle Affidavit, ¶ 2; included as Exhibit B in the Addendum].
3. Pursuant to that contract the total purchase price was \$100,500 payable \$10,000 down and the balance of \$90,500 was to be paid as follows:

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

Title of said premises shall be delivered to buyer when seller has verified marketability of stock, conveyed and verified a market value sufficient to cover the unpaid balance. Such time is to be determined by seller but will not be unreasonably delayed. [Addendum #1 to contract. See Exhibit A in Addendum.]

4. On April 12, 1978, Nagle Construction conveyed the property to Gary M. Nagle. [Nagle Affidavit, ¶¶ 6 & 7, Addendum, Exh. B; R. 112].

5. LeRoy Collard took possession of the property but did not assume the mortgage. Instead, he began making the mortgage payments directly to First Security Bank. [Nagle Affidavit, ¶ 9, Addendum, Exh. B; R. 104].

6. Later, LeRoy Collard tendered to Nagle 55,000 shares of stock but Nagle determined that the value of the stock was insufficient to cover the unpaid balance of the contract. [Nagle Affidavit, ¶¶ 6 and 7, Addendum, Exh. B; R. 104].

7. LeRoy Collard told Nagle that he was sure the stock would go up in value and asked Nagle to hold off on declaring a default under the contract and further told him that he (Collard) would guarantee Nagle \$85,000 from the sale of the stock if he would hold off on exercising his default remedies. [Nagle Affidavit, ¶¶ 12 and 13, Addendum, Exh. B; R. 105].

8. In furtherance of this guarantee, the parties executed Addendum #2 to the contract which provides as follows:

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

Should the value of the 55,000 shares conveyed not equal \$85,000 within 1 year, buyer agrees to convey additional shares of Utah Coal and Chemical Corp. stock or cash sufficient to bring the total value conveyed to seller to \$85,000 before seller conveys title to premises sold to buyer. [Nagle Affidavit, ¶¶ 14-17; Addendum, Exh. B; R. 105].

9. The value of the stock was never such that \$85,000 could be realized from the sale of the stock. [Nagle Affidavit, ¶ 18, Addendum, Exh. B; R. 106]. In fact, the value of the stock during this time period ranged from a high of 1 3/8 to a low of \$.05, never enough to realize \$85,000. [R. 256, 287-88].

10. LeRoy Collard never did tender stock or cash sufficient to realize the \$85,000. [Nagle Affidavit, ¶¶ 18-21, Addendum, Exh. B; R. 106].

11. Demand was made upon LeRoy Collard to deliver sufficient stock or the \$85,000 [R. 11-12] but he failed to do so.

12. LeRoy Collard, however, continued to pay the mortgage payments to First Security Bank leaving a balance due there of approximately \$30,000 at the time this suit was filed. [Counterclaim, ¶ 27; R. 32].

13. LeRoy Collard conveyed his interest in the property to Collard on January 3, 1997, and died on February 8, 1997. [Complaint, ¶¶ 15 and 19; R. 3].

14. Collard filed a complaint on July 28, 1999, alleging claims for breach of contract for failure to convey title to the property, adverse possession based on possession

and payment of taxes and declaratory judgment to quiet title to the property based on an allegation that Collard had "fulfilled all of the Buyer's obligations under the Contract." [R. 1-6].

15. Nagles filed an answer and counterclaim denying that Buyer had fulfilled its obligations under the contract, asserting defenses of failure to state a claim, waiver, estoppel and the statute of limitations of §§ 78-12-1 and 23, U.C.A. and asking in the alternative for a decree that Collard's interest in the property was forfeited, determining the amount due Nagles and for a decree of foreclosure against the property to satisfy the amount due and for a decree quieting title in Nagles. [R. 24-38].

16. In her reply to the counterclaim Collard asserted various defenses including the statute of limitations but without referring to the statute "specifically and definitely by section number" as required by Rule 9(h), Utah Rules of Civil Procedure. [R. 46-54].

17. Nagles file a Motion for Summary Judgment on February 24, 2000, [R. 84-85] and Collard filed a cross Motion for Summary Judgment on March 29, 2000. [R. 181-82].

18. After oral arguments on July 17, 2000, the lower court, without making any findings of fact, ruled that "the statute of limitations operates to preclude both sides from exercising their rights under that contract" and asked the parties to brief the question of whether the court had "the equitable power . . . to order that the title be conveyed from Nagle to Collard." [Transcript of Hearing on July 17, 2000, R. 644, p. 24, lines 8-13, Addendum, Exh. C].

19. After briefing and further oral arguments on August 30, 2000, the lower court admitted difficulty in resolving this "perplexing problem" but ruled in favor of Collard

and requested her counsel to prepare findings and conclusions acknowledging its decision "may well be subject to some question." [Transcript of Hearing on August 30, 2000, R. 645, pp. 25-6, lines 1, 14-15, 19-20; Addendum, Exh. D].

20. Counsel for Collard prepared some one-sided Findings of Fact, Conclusions of Law and Order which [See Addendum, Exh. E]:

(a) Attempted to sever the contract into three separate contracts or installments [See Finding #3];

(b) Failed to find that the contract had been amended by the addition of Addendum #2 to the contract requiring the payment of \$85,000 in value and not \$30,541.26 [See Addendum, Exh. A, Addendum #2];

(c) Attempted to show that the 55,000 shares of stock could have been sold for \$85,000 by submitting alleged brokerage information from a period of time (January-March, 1979) prior to the time the stock was delivered (September, 1979) [R. 257] [See Finding #14];

(d) Failed to include a finding or conclusion, as stated by the lower court [See ¶ 18, above], that the statute of limitations also barred Collard from enforcing the contract, based on her claim that she had performed all obligations under the contract in 1981 and knew that title had not been conveyed since at least 1986;

(e) Made a conclusion that Nagle waived the requirement that Collard assume the mortgage at First Security Bank (See Conclusion #8) without any finding of fact to support it and without any evidence before the court upon which such a finding could be based.



21. Nagles objected to the proposed findings, conclusions and order and, after a hearing on those objections, Findings of Fact, Conclusions of Law and Order were entered on November 6, 2000. [Addendum, Exh. E].

### **SUMMARY OF ARGUMENT**

#### **POINT I. THE STATUTE OF LIMITATIONS DOES NOT BAR NAGLE FROM RECEIVING THE PURCHASE PRICE BEFORE HE IS OBLIGATED TO CONVEY TITLE.**

##### **1. The Court should not have considered the statute of limitations defense asserted by Collard.**

Rule 9(h), U.R.C.P., requires that the statute of limitations be referred to in pleadings specifically and definitely by section number. Collard failed to do so and the cases hold that such failure bars the court from considering the statute. The lower court erred in holding that the inadequately pled statute applied in this case.

##### **2. The lower court, having determined that both parties were barred by the statute of limitations, should also have denied Collard a remedy.**

The lower court concluded that the statute of limitations barred both parties from pursuing their claims yet, inconsistently, allowed Collard a remedy while denying Nagle a remedy. That conclusion requires either that both parties be denied a remedy or that equity provide a remedy that is fair to both sides. The court erred in failing to do so.

##### **3. The lower court granted Collard specific performance, an equitable remedy, without requiring that Collard do equity.**

Because the lower court concluded that the statute of limitations barred both parties, it searched for an equitable remedy that would allow it to order title to be delivered to Collard. Its order required that Nagle specifically perform the contract by delivering title to Collard. Specific performance is an equitable remedy but it requires that equity be done

by the party receiving it. That would require Collard to pay the purchase price. The lower court erred in failing to order Collard to do equity in return for equity by paying the purchase price.

**4. A counterclaim barred by the statute of limitations may still be used as an offset against plaintiff's claim for delivery of title.**

There is a long history of cases which hold that a counterclaim which might otherwise be barred by the statute of limitations can still be asserted as an offset against the claim. This rule is obviously intended to avoid the inequity of allowing one party a remedy and denying a remedy to the other party when the claims arise out of the same transaction. That is exactly the case here where Collard is allowed to obtain title without requiring her to pay the purchase price for the property. The lower court erred in failing to require payment of the purchase price as an offset against the claim for title.

**5. Under the express words of the contract, payment of the purchase price is a condition precedent to delivery of title.**

The contract in this case expressly provided that the purchase price was to be paid before Nagle was required to convey title. Thus, payment of the purchase price was a condition precedent to conveyance of title. The law requires that the condition precedent be performed before the duty to convey title arises. The promise to convey title is dependent upon the promise to pay the purchase price. It was error for the lower court to separate one promise from the other. A condition precedent must precede. In this case it did not.

**6. The terms of the contract are not severable, either by separating the dependent promises or by dividing the consideration into three separate parts and applying the statute of limitations separately to each.**

The contract in this case is not severable. It required delivery of title only in return for payment of the purchase price. Those dependent promises could not be severed nor could the payment of the purchase price be severed into parts for the purpose of barring payment of a portion thereof. To sever this contract would destroy its entire purpose, that is payment of the purchase price before title is to be delivered. The lower court erred in severing the dependent promises in this contract.

**POINT II. THE CONCLUSION THAT NAGLE WAIVED ASSUMPTION OF THE MORTGAGE IS NOT SUPPORTED BY THE FINDINGS AND IS A DISPUTED MATTER OF FACT WHICH COULD NOT BE DETERMINED ON A MOTION FOR SUMMARY JUDGMENT.**

Waiver is the intentional relinquishment of a known right and mere silence is not a waiver. The intent to waive a right must be determined from the totality of the circumstances. That was impossible in this case where there was no evidence on the issue of waiver and the decision was based on a motion for summary judgment. No facts are before the court with respect to waiver and, if there were such facts, they and all inferences therefrom must be considered in a light most favorable to Nagle. The lower court failed to do so. Furthermore, if Nagle did waive his right to have Collard assume the mortgage, then Collard's right to a deed arose in 1981 and is barred by the statute of limitations.

**ARGUMENT**

**POINT I**

**THE STATUTE OF LIMITATIONS DOES NOT BAR NAGLE FROM RECEIVING THE PURCHASE PRICE BEFORE HE IS OBLIGATED TO CONVEY TITLE.**

The decision of the lower court in this case has effectively given the property to Collard without payment of the full purchase price. This windfall or gift is obviously unfair,

defeats the intent of the parties and is contrary to the terms of the contract and all principles of equity. It is no wonder that the lower court was "perplexed" and reluctant to rule in Collard's favor and confessed that its ruling "may well be subject to some question." [R. 645, p. 26, lines 19-20; Addendum, Exh. D]. Indeed, it is subject to many questions. Because the lower court ruled against Nagle on motions for summary judgment, it and this Court must "accept the facts and inferences in the light most favorable to the losing party." Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991), and it must determine that "no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law." S. W. Energy Corp. v. Continental Ins. Co., 974 P.2d 1239, 1241 (Utah 1999). This Court's review of the lower court's grant of summary judgment is "for correctness, according no deference to the court's legal conclusions." Thompson v. Jess, 979 P.2d 322, 325 (Utah 1999). Thus, although there were contradictory claims made as to the value of the stock, it must be accepted as a fact that the stock was not worth the \$85,000 the parties had agreed to<sup>1</sup> and, therefore, Collard did not perform this essential term of the contract and had not completed payment of the purchase price. Since the contract clearly required the delivery of "stock or cash sufficient to bring the total value conveyed to seller to \$85,000 before seller conveys title to premises sold to buyer," [Addendum, Exh. A, Addendum #2], one must wonder how the lower court could order the delivery of title before delivery of the \$85,000 in stock or cash? The answer, of course, is that the court did not correctly apply the law or equity to this case.

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<sup>1</sup> In fact, the lower court expressly refused to make a finding as to the value of the 55,000 shares of stock at any point in time. [Finding #15, Addendum, Exh. E].

The lower court based its decision on the statute of limitations claiming that Nagle could not enforce a claim of default years after the default occurred. This decision ignored several essential points of law and equity:

**1. The Court should not have considered the statute of limitations defense asserted by Collard.**

Collard had not properly raised the statute of limitations as a defense since she did not refer to the statute in her Reply to Counterclaim "specifically and definitely by section number" as required by Rule 9(h), Utah Rules of Civil Procedure. [R. 46-54]. That is an inadequate plea and should not have been considered by the lower court. Wasatch Mines Co. v. Hopkinson, 24 U.2d 70, 465 P.2d 1007 (Utah 1970), is a case in which a general plea of the statute of limitations was considered by the trial court resulting in a dismissal of plaintiff's claim, but that dismissal was reversed on appeal because the statute of limitations was not referred to "specifically and definitely by section number" as required by Rule 9(h). Likewise, the lower court here should not have considered the statute of limitations since it was not adequately pled. That is reason enough to reverse the lower court as did the court in Wasatch Mines.

**2. The lower court, having determined that both parties were barred by the statute of limitations, should also have denied Collard a remedy.**

Although Collard's attorney, in preparing and submitting written findings and conclusions to the court, failed to include a specific conclusion to that effect, the lower court made that conclusion in its ruling from the bench [R. 644, p. 24, lines 9-11; Addendum, Exh.

C].<sup>2</sup> It, therefore, should have also denied Collard a remedy and dismissed her claims. This inconsistency only underlines the unfairness and inequitable nature of its decision and suggests that the court misapplied the law.

It is interesting to note that Collard's attorney argued to the lower court that an equitable remedy was available in the event both were barred by the statute of limitations.

He said:

... the real question is that if we had performed back in 1981, and like Mr. Thurman's quotes from Kathryn Collard indicate, Mr. Collard said "I did everything I was suppose [sic] to do. I gave them the stock. I gave them the money. I did everything I was suppose [sic] to do under that contract." He argues that at that point, we had six years to then demand title. I believe the court in equity if the undisputed facts clearly showed that we paid the money, gave the stock and performed under the contract, this Court would probably not say, "Gosh, you only had six years to ask for title and now I'm not going to give it to you even though you received the full benefit of the performance." I think it's pretty clear the Court would be inclined to say, "You got what you bargained for. Give them the title." So I don't see that as you know, a tit for tat. If the statute applies to one it applies to the other. [R. 644, p. 15-16, lines 15-25, 1-5].

....

I'm just saying as equitable argument, it's kind of a stretch to say that if we had performed and we can show we performed, that because we didn't act in six years we don't deserve title. [R. 644, p. 16, lines 19-22].

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<sup>2</sup> Collard's attorney acknowledged that double finding as he commenced his argument to the lower court at the August 30, 2000, hearing. He stated, "In the prior motion for summary judgment hearing the Court determined that the 1979 Uniform Real Estate Contract between Collards and Nagles was, essentially **any claims of the parties were barred by the six year statute of limitations**. The Court then inquired of the parties whether or not under, given that ruling, whether or not the Court could compel Mr. Nagle to transfer title to Mr. Collard and asked for additional briefing, specifically addressing that issue." [R. 645, p. 1, lines 13-21].

Collard was clearly arguing that if she was barred by the statute of limitations, in all fairness, the court would find an equitable way to require that title be delivered anyway. Why doesn't that same argument apply to Nagle? If he is barred by the statute of limitations from collecting the balance due under the contract, "it's kind of a stretch to say that if we had performed" by delivering title, "that because we didn't act in six years we don't deserve" to be paid the purchase price. "It's pretty clear the Court would be inclined to say, 'You got what you bargained for [the deed]. Give them [the purchase price].'" "Tit for tat. If the statute applies to one it applies to the other."

The lower court and the parties were looking for an equitable way to resolve this "painful and vexatious" [R. 644, P. 23, line 13; Addendum, Exh. C] issue. But equity requires equity in return, which is the next point.

**3. The lower court granted Collard specific performance, an equitable remedy, without requiring that Collard do equity.**

Because the court concluded that the statute of limitations also barred Collard's claims [R. 644, p.24, lines 9-11], it searched for an equitable way to require delivery of title. If both parties were legally barred from enforcing their claims and equity provided a remedy, that remedy must be equitable on both sides. Horton v. Horton, 695 P.2d 102 (Utah 1984) [Parties who seek equity must do equity]. Requiring Nagle to deliver title without requiring Collard to pay the purchase price is not equitable. The lower court's order that Nagle deliver title to Collard was, in effect, a decree of specific performance requiring Nagle to specifically perform the contract by delivery of title. As stated in Fischer v. Johnson, 525 P.2d 45, 46 (Utah 1974), where specific performance was denied because plaintiff had failed to tender his own performance:

". . . specific performance is a remedy of equity; and one who invokes it must have clean hands in having done equity himself. That is, he must take care to discharge his own duties under the contract; . . .

Collard is simply not entitled to delivery of a deed in this case where a substantial portion of the purchase price has not been paid. Equity demands that she pay the purchase price first rather than allow her to "steal" the property. The contract required payment of \$85,000 in value which has not been paid. She must do equity in order to receive it. Equity requires at least an offset [See Point 4 below], that in order to receive title to the property, she must pay the value of the portion of the property for which she has not paid, which might require an appraisal of the property, or she must pay the current value of the unpaid portion of the purchase price, that is, the \$85,000 plus interest thereon.

**4. A counterclaim barred by the statute of limitations may still be used as an offset against plaintiff's claim for delivery of title.**

A defendant may utilize a counterclaim, normally barred by the statute of limitations, to offset a plaintiff's claim. Thus, in Coulon v. Coulon, 915 P.2d 1069, 1072 (Utah App. 1996), a wife with a time-barred claim for unpaid child support was allowed to offset that claim against the husband's claim to collect a lien on the marital home. The court stated, at 1072:

A defendant may therefore utilize a counterclaim, normally barred by the statute of limitations, to offset a plaintiff's claim, but only to the extent the claims equal each other.

Likewise, in Jacobsen v. Bunker, 699 P.2d 1208, 1210 (Utah 1985), two sisters who had borrowed money from their father on promissory notes and inherited shares of the balance due on each note after the father's death, brought suit to collect the balance due. The claim of one was barred by the statute of limitations but she was, nevertheless, allowed to offset



that claim against the claim of the other. Further, Salt Lake City v. Telluride Power Co., 82 Utah 607, 17 P.2d 281 (Utah 1932), held that if a defendant had a counterclaim that otherwise would have been barred by a statute of limitations, the counterclaim could be set-off against the plaintiff's claim, notwithstanding the statute of limitations. The court in both of these latter cases relied upon what is now Rule 13(i), U.R.C.P., which provides:

When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other. . . .

Thus, Nagle's counterclaim is not barred by the statute of limitations since the claim for the purchase price may be offset against the claim for title. Since the claim for title is not monetary, the amount of the offset can be determined either by an evaluation of the property to determine the maximum amount of the offset or by determining the current value of the unpaid portion of the purchase price, that is, the \$85,000 plus interest. A more reasonable approach, however, is that the claims of the parties are equal and one does not exceed the other. The agreement of the parties was that Nagle would deliver title in return for payment of the full purchase price--the consideration on one side equalling the consideration on the other. Therefore, the counterclaim does not exceed the claim and can be offset against it. That simply requires payment of the balance due, with interest, in return for delivery of a deed.

**5. Under the express words of the contract, payment of the purchase price is a condition precedent to delivery of title.**

The contract in this case provides in Addendum #2 [See Addendum, Exh. A]:

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

conveyed to seller to \$85,000 **before seller conveys title to premises sold to buyer.** [Emphasis added].

The promise to deliver title under the contract is **dependent** upon payment of the purchase price and payment of the purchase price is a **condition precedent** to the obligation to deliver title. Payment of the purchase price must be made before the obligation to convey title arises. In Harper v. Great Salt Lake Council, Inc., 976 P.2d 1213, 1217 (Utah 1999), the Utah Supreme Court held that a condition precedent must be satisfied before a duty to perform arises. The court stated, at 1217:

Under well-established principles of contract interpretation, where the duty of the obligor to perform is contingent upon the occurrence or existence of a condition precedent, the obligee may not require performance by the obligor, because the obligor's duty, and conversely the obligee's right to demand performance, does not arise until that condition occurs or exists.

In this case, Collard was in breach of the contract by failing to pay the balance of the purchase price and failing to assume the mortgage. In Jackson v. Rich, 28 U.2d 134, 499 P.2d 279 (Utah 1972), the Utah Supreme Court held that the plaintiff could not sue because he was in breach of the contract himself. The court stated, at 280-1:

As a rule, a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform. At least, the party first committing a substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform if the promises are dependent. It has also been said that where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom rests all the liability for the nonperformance. [Quoting from 17 **Am.Jur.2d** Contracts §365].

On the other hand, a buyer who tenders his performance under a contract can obtain specific performance against a defaulting seller. Kelley v. Leucadia Financial Corp., 846

P.2d 1238 (Utah 1992), in which the court stated:

Neither party to an agreement "can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has tendered his own performance." Century 21, 645 P.2d at 56. In other words, "a party must make a tender of his own agreed performance in order to put the other party in default." Id.; see also Fischer v. Johnson, 525 P.2d 45, 46-7 (Utah 1974).

The tender cannot impose on the other party a new condition or requirement not already imposed by the contract. . . . If the law were otherwise, one could use a tender to compel the other party to comply with new contractual terms.

Nagle's obligation to deliver a deed simply does not arise until the purchase price has been paid in full. Since that obligation is dependent upon payment of the purchase price and payment of the purchase price is a condition precedent to delivery of the deed, that dependency and contingency cannot be eliminated by a one-sided application of the statute of limitations.

**6. The terms of the contract are not severable, either by separating the dependent promises or by dividing the consideration into three separate parts and applying the statute of limitations separately to each.**

Whether a contract is severable depends on the intent of the parties at the time they entered the contract. Estate Landscape and Snow Removal Specialists, Inc. v. Mountain States Telephone and Telegraph Co., 844 P.2d 322, 328 (Utah 1992) [Holding a contract for snow removal services for one year not severable into separate contracts related to each snowfall]. In Brown v. Board of Education of Morgan School District, 560 P.2d 1129, 1131 (Utah 1977), the court held a contract with a teacher who was to teach classes

and coach athletic teams was a contract for a teacher-coach and not a severable contract for a teacher or a coach. The court stated:

This court has repeatedly addressed itself to the question of severability of agreements and the enforceability of the parts if severable. Fundamental to such considerations are basic contract principles as to the parties' intent which is derived from looking at the entire contract and the relationship of the parts to the whole and whether it was intended that the total agreement be severable.

The Utah Supreme Court has even held that a contract which contains a severance clause is not severable if the primary purpose of the contract could not be accomplished following severance. Sosa v. Paulos, 924 P.2d 357, 363 (Utah 1996) [Holding that provisions of the contract were unconscionable and could not be severed from the contract because that would allow the defendant the benefit of his unconscionable behavior].

In the contract in this case, there is no severance clause in the contract and the contract cannot be severed without destroying its entire purpose, that is, the sale of real property in return for payment of the full purchase price. As already indicated, the parties clearly provided that payment of the purchase price was to be made in full before title to the property was to be conveyed. [Addendum, Exh. A, Addendum #2]. The contract further contains this language in paragraph 18:

The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises . . . .

The intent of the parties, as determined from the entire contract, was clearly that title was to be conveyed only after payment of the entire purchase price and that entire purchase price, the consideration for conveyance of the title, could not be severed into separate parts or installments and apply the statute of limitations to those parts separately. Collard had

clearly not performed by paying the full purchase price both by failing to deliver the \$85,000 and by failing to assume the mortgage. She continued to make the payments on the mortgage and was not entitled to a deed during that entire period.<sup>3</sup> She can only support her position by dividing this non-severable contract into separate parts and claim the statute of limitations has expired with respect to those separate parts. But a contract for the purchase of real property providing for conveyance of title only after payment of the purchase price in full cannot be so divided. The purchase price has not been paid until all parts of it have been paid. Because Collard had not fully performed<sup>4</sup>, Nagle was entitled to wait until she wanted a deed and then insist on full and final performance of this non-severable contract. This argument only underscores the principles stated above:

- (a) that the statute of limitations, if it applies, it applies to both parties;
- (b) that the statute of limitations does not bar an offset, that is, that my consideration can be offset against your consideration, that my performance depends upon your performance, that your condition precedent must be performed before my performance is due;
- (c) that my obligation to deliver a deed cannot be severed from your obligation to pay the purchase price;

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<sup>3</sup> If she were entitled to a deed previously, she failed to assert that right until after the statute of limitations had expired with respect to that right. Thus, the lower court's conclusion that the statute of limitations barred both parties from asserting their rights would become relevant and conclusive against her position.

<sup>4</sup> The lower court recognized this when it required that Collard pay off the balance due on the First Security Mortgage before it could order delivery of title. [Findings of Fact, Conclusion of Law and Order, p. 9, ¶ 3; Addendum, Exh. D].

(d) that if you want equity, you must do equity, that, if you want specific performance, an equitable remedy, you must also perform and pay the consideration due for the deed.

## POINT II

### **THE CONCLUSION THAT NAGLE WAIVED ASSUMPTION OF THE MORTGAGE IS NOT SUPPORTED BY THE FINDINGS AND IS A DISPUTED MATTER OF FACT WHICH COULD NOT BE DETERMINED ON A MOTION FOR SUMMARY JUDGMENT.**

Conclusion No. 8 states that "Nagle's continued acceptance of Collard's method of performance . . . operated as a waiver of the strict assumption requirements of" the contract. While there is a finding that Collard made payments to First Security Bank, Finding No. 19, there is no finding that Nagle accepted or continued to accept that procedure. And there is no evidence before the Court to indicate that Nagle accepted or continued to accept that procedure. Since this case was decided on a motion for summary judgment, all facts which support that judgment must be without dispute and all facts and inferences must be considered in the light most favorable to the losing party. Energy Corp. and Winegar, *supra*. The absence of any testimony with respect to waiver bars the court from making findings and conclusions with respect to that issue. The Utah Supreme Court, in Soter's, Inc. v. Deseret Federal Savings, 857 P.2d 935 (Utah 1993) has held that:

Waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it. . . . We further clarify that the intent to relinquish a right must be distinct.

The Court went on to state that:

. . . intent may be more difficult to prove when waiver is to be implied from conduct or silence. Consistent with this point is the general principle in our case law that "[m]ere silence is not a waiver unless there is some duty or obligation to speak." Plateau Mining Co., 802 P.2d at 730, quoted in Rees, 808 P.2d at 1073.

....

. . . we indicated that a fact finder should assess the totality of the circumstances to determine whether the relinquishment is clearly intended. See Morgan, 704 P.2d at 578; see also Barnard v. Wassermann, 855 P.2d 243, 246-47 (Utah 1993).

Without some evidence in this case upon which the lower court could determine that Nagle had intentionally and distinctly relinquished his right to have Collard assume the mortgage, a conclusion to that effect was inappropriate. The court could not "assess the totality of the circumstances" without an evidentiary hearing on the matter. That would be impossible on a motion for summary judgment where that issue was not even raised until after the court made its decision.

Furthermore, if it were assumed that Nagle waived the requirement that Collard assume the mortgage, it does not necessarily follow that he agreed to an amendment of the contract that would allow Collard to just make payments to First Security Bank until the mortgage was paid off. It may be more logical to conclude that a waiver of the assumption requirement was simply that, a waiver of assumption, and that the mortgage would be treated as Collard's mortgage which he could pay as he determined and that his duty to Nagle was complete at that point in time. To hold otherwise is to create a new contract for the parties since their contract did not state that Collard would be allowed to simply pay the mortgage payments without assumption. This more logical position means that Collard's

duties under the contract<sup>5</sup> were complete in 1981 and that his right to a deed arose at that point in time. Therefore, the statute of limitations expired in 1987 with respect to his right to a deed. This is the dilemma the lower court found itself in when it determined that the statute of limitations barred the rights of both parties. It attempted to resolve this dilemma by concluding, without evidence to support that conclusion, that Nagle must have waived the assumption requirement of the contract and amended their contract so that payments to the bank would be considered payments to Nagle to keep only that portion of the contract alive. Nagle obviously would not have intended such a result<sup>6</sup> and it was totally inappropriate for the lower court to so conclude without an evidentiary hearing on those issues. On this motion for summary judgment, all inferences on these matters must be in favor of Nagle.

### CONCLUSION

The decision in this case must be reversed because the lower court erred in applying the law with respect to the statute of limitations. It should not have considered the statute which Collard failed to plead as required by the rules. If the statute applies to Nagle, it also applies to Collard, as the court concluded. The court granted an equitable remedy to Collard without requiring that she do equity by paying the full purchase price. Nagle's counterclaim, even if barred, may still be used as an offset against Collard's claim for title,

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<sup>5</sup> Ignoring the obligation to pay \$85,000 in value and the statute of limitations arguments in Point I.

<sup>6</sup> Nagle clearly had no intention to sever this assumption portion of the contract from the requirement that Collard pay the \$85,000 and keep the former alive while allowing the latter to die. This contract was not severable by its terms and there was no evidence to indicate an intent to sever. [See the argument in Point I (6), above]. Rather, because the contract clearly required payment of the purchase price as a condition precedent to delivery of a deed [See Point I (5), above], Nagle was not unreasonable in expecting that Collard would have to pay the purchase price at the time he wanted a deed.



thus requiring the consideration for the deed to be paid. Payment of the purchase price was a condition precedent to delivery of the deed and those dependent covenants may not be severed to force compliance with one without reciprocal compliance with the other.

The court's conclusion that Nagle waived the assumption requirement was without a supporting finding and without supporting evidence. There is no evidence on this issue and on a motion for summary judgment all material facts must be without dispute and all facts and inferences must be considered in a light most favorable to the losing party.

The lower court's decision in this case must be reversed.

DATED this 9 day of August, 2001.

Respectfully submitted,

BACKMAN, CLARK & MARSH

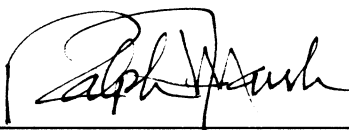
By 

Ralph J. Marsh  
Attorneys for Defendants-Appellants

CERTIFICATE OF MAILING

On the 10 day of August, 2001, I mailed a true and correct copy of the foregoing APPELLANTS' BRIEF, postage prepaid, to the following:

KATHRYN COLLARD  
The Law Firm of Kathryn Collard  
1111 Boston Building  
Nine Exchange Place  
Salt Lake City, Utah 84111



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## **ADDENDUM**

Exhibit A	Uniform Real Estate Contract
Exhibit B	Nagle Affidavit
Exhibit C	Partial Transcript of Hearing on July 17, 2000
Exhibit D	Partial Transcript of Hearing on August 30, 2000
Exhibit E	Findings of Fact, Conclusions of Law and Order

**Tab A**

# UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 26th day of March, A. D., 19 78  
by and between Nagle Construction Company Inc.  
hereinafter designated as the Seller, and LeRoy Collard 3842 Quail Hollow Dr.  
Salt Lake City, Utah 84109  
hereinafter designated as the Buyer, of one condominium unit (no. B-24) in Cove Point  
a Planned Community Development 3842 Quail Hollow Dr. SLC, UT

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

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

## Legal Description:

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

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

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

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

per attached:

## cont'd. Legal Description-

records of Salt Lake County, State of Utah.

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

~~Possession of said premises shall be delivered to buyer on the \* \* \* \* \* day of \* \* \* \* \*, 19 \* \*~~

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

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

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

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

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

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

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

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

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

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

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

14. In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of  $\frac{1}{4}$  of one percent per month until paid.

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

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

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

B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorneys fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

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

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

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

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

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

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

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

Signed in the presence of

Charles A. Bullock

Nagle Construction Company Inc.

by James M. Spier  
Seller

James M. Spier  
Buyer

Approval Form:  
BLANK NO. 108 - © GCM PRINTING CO. - 1971 1000 CITY

Uniform Real Estate Contract

No.

To

Addendum #1

To Real Estate Contract between Nagle Construction Company and  
LeRoy Collard. Dated 22nd Dec. 1978

Paragraph 3.....

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

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

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

Robert Reich  
Witness

Nagle Construction Company  
by [Signature]  
Seller

[Signature]  
Buyer

Addendum #2

To Real Estate Contract between Nagle Construction Company and LeRoy Collard. Dated October 20, 1978

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

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

Curly G. Beluch  
Witness

Nagle Construction Company

by [Signature]  
Seller

[Signature]  
Buyer



**Tab B**

William Thomas Thurman (3269)  
Lynn B. Larsen (3906)  
**McKay, Burton & Thurman**  
600 Gateway Tower East  
10 East South Temple Street  
Salt Lake City, UT 84133  
Telephone: (801) 521-4135  
Attorneys for Defendants

FILED  
COURT  
JUL 24 PM 12:05  
*Burton*

---

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

---

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

Plaintiff,

vs.

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

Defendants.

**AFFIDAVIT OF GARY M.  
NAGLE IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

Civil No. 990907648

Judge William B. Bohling

---

**GARY M. NAGLE**,  
Counterclaim-Plaintiff,

vs.

**KATHRYN COLLARD, TRUSTEE** of the  
LeRoy Collard Trust,  
Counterclaim-Defendant.

---

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

I, Gary M. Nagle, being first duly sworn, depose and state;

I am a defendant and counter-claimant in this action. The following is based on my personal knowledge. I called upon to do so I would so testify under penalty in a court of law.

1. This is a quiet title action concerning a condominium unit located at 3842 South Quail Hollow Drive, Salt Lake City, Utah in the Cove Point condominiums, (the "Property") legally described as follows:

Lot B-24, COVE POINT - PHASE 1, a Planned Unit Development, according to the official plat thereof, as recorded in the office of the Salt Lake County Recorder.

Together with an easement for use and enjoyment in and to the common areas and facilities, including but not limited to roadways and access ways appurtenant to said lot, as provided in the Declaration of COVE POINT - PHASE 1.

Parcel identification: 16-36-306-006

2. On or about March 30, 1978, LeRoy Collard ("Collard") and I on behalf of Nagle Construction, Inc. executed the Uniform Real Estate Contract ("Contract"), attached hereto as Exhibit A.

3. Pursuant to the Contract, the total purchase price for the Property was to be the sum of \$100,500.00.

4. \$10,000 of the Original Purchase Price was paid at or prior to the closing on March 30, 1978, as noted in paragraph 2 of the Contract.

5. The remaining \$90,500 of the Original Purchase Price, as referenced in paragraph 2 of the Contract and as provided in Addendum #1 to the Contract, was to be paid as follows:

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

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

6. Shortly after entering into the Contract, Nagle Construction executed a Warranty Deed conveying the Property to Nagle, a copy of which is attached hereto as Exhibit "B".

7. This Warranty Deed was recorded in the office of the Salt Lake County Recorder on April 12, 1978 at Book 4654, Page 141.

8. On or about April 12, 1978, I and Marilyn F. Nagle, executed a Deed of Trust in favor of First Security Bank of Utah, NA in the principal amount of \$60,000.00 which was recorded on that same date.

9. Collard took possession of the Property. Thereafter Collard did not assume the mortgage but did began making the mortgage payments directly to First Security Bank. His family or someone on Collard is still making such payments, I believe.

10. Collard tendered 55,000 shares of stock to me in an apparent effort to comply with Addendum #1.

11. After some time had elapsed, I determined that I would not be able to realize \$30,541.26 from the 55,000 shares of stock ("Stock") Collard tendered to me in an effort to comply with the requirements of the Contract.

12. Collard told me that he was sure that the Stock would go up in value and asked me to hold off exercising any of his default remedies under the Contract.

13. Collard told me that he was so sure that the Stock would go up in value that he would guaranty me a realization of \$85,000 from the sale of the stock if I would just hold off on exercising my default remedies.

14. In furtherance of his proposal, Collard proposed Addendum #2 to the Contract.

15. I agreed to hold off on exercising my default remedies in exchange for the modification reflected in Addendum #2.

16. Both Collard and I executed Addendum #2 and thereby modified the terms of the Contract.

17. Addendum #2 modified the total purchase price of the Property and my obligation to deliver title to the Property as follows:

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

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

18. The value of the Stock never rose to the point that I could realize \$85,000 from the sale of the 55,000 shares.

19. At some point, as referred to in the 1981 letter from my counsel to Collard which the Plaintiff attached as an exhibit to her Complaint, Collard offered to purchase 55,000 shares of the Stock for \$85,000. Collard failed to honor this offer. He never provided the \$85,000.

20. In 1981, I made demand upon Collard to deliver additional shares of the Stock or cash sufficient to enable Nagle to realize \$85,000.

21. Collard never tendered sufficient Stock and/or cash to me so as to enable me to realize \$85,000.

22. Upon Collard's default under the Contract, I understand that I have the option of pursuing any of the three alternative remedies provided under paragraph 16:

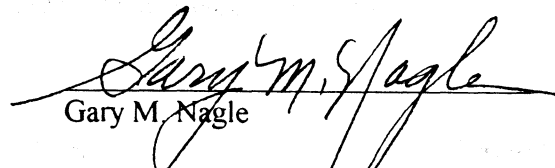
- A. if the Buyer fails to remedy the default within five days after written notice, the Seller has the right to be released from his obligations under the Contract, to have all prior payments forfeited by the Buyer as liquidated damages for non-performance, and the Seller "may at his option re-enter and take possession" of the Property without legal process, "the Buyer becoming at once a tenant at will of the Seller," see Contract ¶ 16(A);
- B. the Seller can bring suit and recover judgment for all delinquent installments, including costs and attorneys fees, see Contract ¶ 16(B); or
- C. the Seller has the right "at his option, and upon written notice to the Buyer, to declare the entire unpaid balance . . . at once due and payable, and may elect to treat th[e C]ontract as a note and mortgage, and pass title to the

Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah . . . ." see Contract ¶ 16(C).

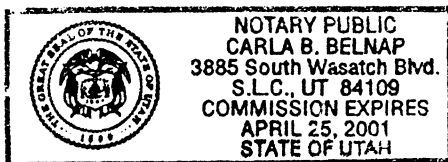
23. Collard never complied with the Contract and I never furnished a deed to Collard.

24. Pursuant to the option given in paragraph 16 A, I want the Property back.

Signed this 23 day of February, 2000.

  
Gary M. Nagle

SUBSCRIBED AND SWORN to before me by Gary M. Nagle this 23 day of February, 2000.



  
NOTARY PUBLIC

AFF.SJ

CERTIFICATE OF SERVICE

I hereby certify that on the 23<sup>rd</sup> day of February, 2000, I mailed a true and correct copy of the AFFIDAVIT OF GARY M. NAGLE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, postage prepaid, as follows:

Bradley R. Helsten  
NELSON, RASMUSSEN & CHRISTENSEN  
576 East South Temple  
Salt Lake City, Utah 84102

L. Schneider



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

# UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 16<sup>th</sup> day of March, A. D. 1978  
by and between Nagle Construction Company Inc.  
hereinafter designated as the Seller, and LeRoy Collard 3842 Quail Hollow Dr.  
Salt Lake City, Utah 84109  
hereinafter designated as the Buyer, of one condominium unit (no. B-24) in Cove Point  
a Planned Community Development 3842 Quail Hollow Dr. SLC, UT

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

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

## Legal Description:

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

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

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

payable at the office of Seller, his assigns or order \* \* \* \* \*

strictly within the following times, to-wit: Ten Thousand Dollars (\$10,000.00)

cash, the receipt of which is hereby acknowledged, and the balance of \$90,500.00 shall be paid as follows:

per attached:

## cont'd. Legal Description-

records of Salt Lake County, State of Utah.

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT "A"

109

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

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

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

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

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

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

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

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

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

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

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

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

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

Signed in the presence of

Curly C. Bullock

Nagle Construction Company Inc.

by W. J. Nagle

Seller

John J. Bullock

Buyer

Approved Form:  
BLANK NO. 106—

Uniform

Addendum #1

To Real Estate Contract between Nagle Construction Company and  
LeRoy Collard. Dated 2276256 30 1978

Paragraph 3.....

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

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

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

Conrad C. Raleigh  
Witness

Nagle Construction Company

by [Signature]

Seller

[Signature]  
Buyer

Addendum #2

To Real Estate Contract between Nagle Construction Company and LeRoy Collard. Dated March 30 1978

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

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

Carly A. Redman  
Witness

Nagle Construction Company

by [Signature]  
Seller

[Signature]  
Buyer

111

Loan No. 24687-01-A  
Gary M. Nagle  
3842 South Quail Hollow Rd., SLC, UT 84109

First Security Bank of Utah, NA.  
Fourth South Office  
P.O. Box 720, SLC, UT 84110

24687

APR 12 1978

Recorded at Request of GUARDIAN TITLE CO.

at 258 M. Fee Paid \$ 460 Katie L. Dixon, Salt Lake County Recorder

by Patricia Brown Dep. Book Page Ref.

Mail tax notice to Address

2091625

## WARRANTY DEED

[CORPORATE FORM]

NAGLE CONSTRUCTION COMPANY

organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, of County of Salt Lake, State of Utah, grantor, hereby CONVEYS AND WARRANTS to

GARY M. NAGLE

of Salt Lake City, County of Salt Lake, State of Utah  
TEN DOLLARS (\$10.00) and other good and valuable consideration  
receipt of which is hereby acknowledged,  
the following described tract of land in Salt Lake County,  
State of Utah:

All of Lot B-24, COVE POINT PHASE ONE, a planned unit development, according to the official plat thereof, dated May 13, 1976, filed and recorded May 26, 1976, in Book 76-5 at Page 118, records of Salt Lake County, State of Utah.  
TOGETHER WITH all rights and responsibilities of membership in the Cove Point Homes Association, a nonprofit corporation, as provided in the Articles of Incorporation, Bylaws, Declaration of Covenants, Conditions and Restrictions dated May 13, 1976, and recorded May 26, 1976 in Book 4212, Pages 277-287, records of Salt Lake County, and amended in Book 4451, Page 209.  
SUBJECT TO all of the covenants, restrictions and conditions and easements contained and set forth in the Declaration of Covenants, Conditions and Restrictions dated May 13, 1976 and recorded May 26, 1976 in Book 4212, Page 277, and amended in Book 4451, Page 209, records of Salt Lake County, Utah.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this day of A. D. 19

Attest:  
*Gary M. Nagle*  
Secretary.

[CORPORATE SEAL]

NAGLE CONSTRUCTION Company

By *Gary M. Nagle*  
Gary M. Nagle President.

STATE OF UTAH,

County of SALT LAKE

On the day of April 1978, A. D.  
personally appeared before me Gary M. Nagle  
who being by me duly sworn did say, each for himself, that he, the said Gary M. Nagle  
is the president,  
Nagle Construction Company, and that the within and foregoing  
instrument was signed in behalf of said corporation by authority of a resolution of its board of  
directors and said Gary M. Nagle  
acknowledged to me that said corporation executed the same and that the seal of said corporation  
is the seal of said corporation.

My commission expires 3-26-81 My residence is Salt Lake City, Utah

2091625 rec 141

24920

EXHIBIT "B"

112

**Tab C**

**FILED DISTRICT COURT**

Third Judicial District

IN THE THIRD JUDICIAL DISTRICT COURT

OCT 10 2000

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY

By Sharon Blackman  
Deputy Clerk

KATHRYN COLLARD, et al,

: Case No. 990907648

Plaintiffs,

v

NAGLE CONSTRUCTION, INC.,  
et al.,

Defendants.

SUMMARY JUDGMENT ARGUMENT JULY 17, 2000

BEFORE

THE HONORABLE WILLIAM B. BOHLING

**ORIGINAL**

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

652 West Jefferson Cove

Sandy, Utah 84070

801-567-1157

1 see if the actor or the default that they're declaring occurred  
2 within the period time and now that we've kind of battled  
3 through the legal aspects of this case, they're now saying that  
4 the forfeiture was automatically elected or elected by  
5 operation - or their inaction of returning the down payment and  
6 that kind of flies in the face of the 1981 letters which says  
7 that we're electing the remedy of foreclosure which would  
8 require a claim anytime after September of 1987.

9 Let me briefly look at latches as a defense as well.

10 Well, let me back up and address the situation that  
11 you gave said that if the statute of limitations applies to  
12 Collard's ability to request title then it also applies to your  
13 ability to enforce title, we run into a stalemate. I think the  
14 options that I've given you under the law and the undisputed  
15 facts, preclude that but the real question is that if we had  
16 performed back in 1981, and like Mr. Thurman's quotes from  
17 Kathryn Collard indicate, Mr. Collard said "I did everything I  
18 was suppose to do. I gave them the stock. I gave them the  
19 money. I did everything I was suppose to do under that  
20 contract." He argues that at that point, we had six years to  
21 then demand title. I believe the court in equity if the  
22 undisputed facts clearly showed that we paid the money, gave  
23 the stock and performed under the contract, this Court would  
24 probably not say, "Gosh, you only had six years to ask for  
25 title and now I'm not going to give it to you even though you



1 received the full benefit of the performance." I think it's  
2 pretty clear the Court would be inclined to say, "You got what  
3 you bargained for. Give them the title." So I don't see that  
4 as you know, a tit for tat. If the statute applies to one it  
5 applies to the other.

6 THE COURT: Your suggestion then if I find that the  
7 statute of limitations applies because there was no forfeiture  
8 and there was a waiver of forfeiture and they're out of luck  
9 under the contract to enforce the stock provision, then you're  
10 suggesting that you're entitled to demand title, not because of  
11 the contract but because of some equitable right in the courts?

12 MR. HELSTON: I was just assuming that if they were  
13 unable to enforce the default that they've declared, what the  
14 Court is really saying, is you're excusing that non-  
15 performance. I mean the statute of limitations operates to say  
16 "you had a contract. If you breached it, basically we're  
17 excusing your failure to perform because the other side has  
18 failed within the proper period of time to deliver what they  
19 were suppose to do". I'm just saying as equitable argument,  
20 it's kind of a stretch to say that if we had performed and we  
21 can show we performed, that because we didn't act in six years  
22 we don't deserve title.

23 THE COURT: I'm looking for the legal basis that the  
24 Court can - the legal right from the basis the Court can find  
25 that you're entitled to title when you didn't enforce your

1 my own brief, and I don't believe it's accurate. I think I  
2 deserve a chance to just mention it. My argument that  
3 forfeiture, election of forfeiture is automatically elected  
4 applies to the fact that this forfeiture was declared in  
5 September, 1999. It doesn't go back to the argument with  
6 respect to that forfeiture being automatically declared in  
7 1981. That's it.

8 THE COURT: You get the last word.

9 MR. THURMAN: Well, Your Honor, and I think you  
10 should (inaudible).

11 THE COURT: Counsel, I appreciate it. This is a  
12 rather - I'm sure it's not interesting to the parties, it's  
13 painful and vexatious, but to the Court it raises some  
14 questions which are unusual and require some, I think some,  
15 thought and analysis and clearly there's no clear black letter  
16 way of ruling on this case.

17 It's my view that the stature of limitations applies.  
18 I believe that there the letter in 1981 did not satisfy the  
19 strict requirements of forfeiture and even were it to do so, I  
20 think that the conduct of the parties would have indicated a  
21 waiver so I simply cannot find a basis on which to find  
22 forfeiture under the facts which I think are undisputed in this  
23 matter and that leads us to the question that we've been  
24 discussing, what happens then? And it's my view that there is  
25 certainly an argument that can be made that out of equity, the

1 Court can require conveyance of title, but I'm not satisfied,  
2 because the parties were shooting at a lot of different  
3 targets, that that has been fully addressed from either side,  
4 so what I'm going to do is limit the issue to that single point  
5 and invite the parties to further brief that matter and we'll  
6 have one more argument on this, hopefully to be resolved on  
7 where it goes.

8 But it seems to me the real question is whether I  
9 have a power of equity, given the fact that I think the statute  
10 of limitations operates to preclude both sides from exercising  
11 their rights under that contract. Do I have the equitable  
12 power given the status of this matter, to order that the title  
13 be conveyed from Nagle to Collard based on what has happened?  
14 And there's certainly a lot of support from my view of it but I  
15 don't know that I'm fully informed about it.

16 So let's look at it this way. I think that's the  
17 argument that you're making now Mr. Helston, so what I'm going  
18 to ask you to do is file a brief and allow Mr. Thurman to reply  
19 to that and then you file the reply brief. Let's set a  
20 schedule and perhaps even a date. I think the parties want to  
21 get this behind them.

22 So how long would it take you to brief me on that  
23 subject?

24 MR. HELSTON: I can have something next Monday.

25 THE COURT: Can you get yours the week after that?

**Tab D**

**FILED DISTRICT COURT**  
Third Judicial District

IN THE THIRD JUDICIAL DISTRICT COURT

OCT 10 2000  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

By Sharon Blackburn  
Deputy Clerk

KATHRYN COLLARD, et al,

: Case No. 990907648

Plaintiffs,

v

NAGLE CONSTRUCTION, INC.,  
et al.,

Defendants.

HEARING HELD AUGUST 30, 2000

BEFORE

THE HONORABLE WILLIAM B. BOHLING

**ORIGINAL**

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

652 West Jefferson Cove  
Sandy, Utah 84070  
801-567-1157

1 payments, there was a waiver of that type of performance.

2           Number two with respect to the notice of default I  
3 think we addressed and resolve this last time, but the notice  
4 said we are going to hold you, you are in default and we are  
5 going to foreclose it as a mortgage which is the second or  
6 third remedy under the three available remedies which created  
7 an ambiguity as to whether or not the person became a tenant at  
8 will but not withstanding that, they continued to accept the  
9 performance of the payments on the First Security obligation.

10           So, I think clearly the contract can be legally said  
11 to still be in force with only those stale claims barred and if  
12 there are any stale claims that we should have raised, barred.  
13 But I believe that our right - on that issue, our right to  
14 title and our right to ask for title because of the performance  
15 of the obligation to First Security still has not accrued and  
16 will not accrue until the day we finish paying off that  
17 mortgage or at least can say to them, here is our check for  
18 \$30,000 please bring a deed to the title company so we can  
19 refinance the loan and I think the order ought to say, you  
20 know, within so many days of notice, that they would deliver a  
21 deed to their counsel or to the title company that we direct,  
22 quit claiming any interest that any of the defendants have in  
23 the property. I think that addresses the three things raised.  
24 I'll submit it.

25           THE COURT: Thank you counsel. This is a very

1 perplexing problem. It's unique to the Court's experience and  
2 doesn't seem to have a lot of precedent behind it. Having now  
3 heard the argument of counsel and had the benefit of briefing  
4 and supplemental briefing, I'm going to rule in favor of the  
5 Plaintiff based on the argument that has been articulated which  
6 would be that as to the claims that are stale, those claims are  
7 barred by the Statute of Limitations but that the payments that  
8 have been made and are current keep, in effect, the contract of  
9 the parties as modified by the conduct of the parties, namely  
10 that those payments are the responsibility of the plaintiff and  
11 as long as they're made, that maintains the underlying  
12 obligation and that upon the payment off of that obligation,  
13 then title will be conveyed.

14           Mr. Helston, I'd be interested in your preparing some  
15 findings and conclusions which detail the argument that you've  
16 successfully made to the Court. It seems like that's the best  
17 rationale that I've heard as I've listened to both sides. As  
18 to how this matter needs to be resolved and we think we need a  
19 clear record on it because of the uniqueness of it, it may well  
20 be subject to some question. Thank you. We'll be in recess.

21           (Whereupon the hearing was concluded.)  
22  
23  
24  
25

**Tab E**



**FILED DISTRICT COURT**  
Third Judicial District

NOV 06 2000

By SALT LAKE COUNTY  
Deputy Clerk

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

---

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

---

KATHRYN COLLARD, Trustee of the  
LeRoy Collard Trust,

Plaintiff,

vs.

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

Defendants.

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GARY M. NAGLE,

Counterclaim Plaintiff,

vs.

KATHRYN COLLARD, Trustee of the  
LeRoy Collard Trust,

Counterclaim Defendant.

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FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

Civil No. 990907648

Judge William B. Bohling

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

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

#### **FINDING OF UNDISPUTED FACTS**

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### CONCLUSIONS OF LAW:

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

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

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

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

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

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

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

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

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

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

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

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



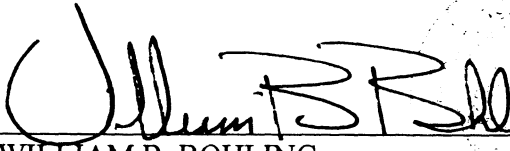
ORDER:

1. Defendants' *Motion for Summary Judgment*, dated February 23, 2000 is DENIED.
2. Plaintiff is entitled to Summary Judgment against Defendants on Defendants' Counterclaim. All claims and causes of action set forth in the Counterclaim are dismissed against Defendants with prejudice.
3. Plaintiff's *Cross-Motion for Summary Judgment*, dated March 29, 2000 on its cause of action for Declaratory Relief-Quiet Title is GRANTED and Plaintiff is entitled to delivery of fee title subject to and conditioned upon payment of the remaining balance owed on the FSB Obligation, subject to the following:
  - A. Within 15 business days of the final entry of this Order, Defendants are to deliver to an Escrow Agent designated by Plaintiff, a Special Warranty Deed granting and transferring the Property to Plaintiff and to provide for a policy of Title Insurance in the form and as required by Section 19 of the Contract.
  - B. Plaintiff is to tender to the Escrow Agent all funds necessary to pay off the FSB Obligation within 10 days of delivery of the Deed by Defendants.
  - C. The Escrow Agent shall, upon payment of the remaining balance of the FSB Obligation, issuance of the Title Policy and transmittal of confirmation of the same to the Parties, release the Deed to Plaintiff for recording.
  - D. The Parties shall execute any other and further documents as may be required by the Escrow Agent to effect the payment of the remaining balance of the FSB Obligation and the transfer of fee title to the Plaintiff.

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

ORDERED this November 3, 2000.

BY THE COURT:

  
WILLIAM B. BOHLING,  
DISTRICT COURT JUDGE

Approved as to Form:

**MCKAY, BURTON & THURMAN**

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

**NELSON RASMUSSEN & CHRISTENSEN, P.C.**

By: \_\_\_\_\_  
Bradley R. Helsten  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

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

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

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

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