

1990

Lynda C. Baldwin and Paul H. Richins v. Willard D. Wood, Tonya Glazier Wood, Max D. Burton Sr., Emily A. Burton, Max D. Burton Jr., N.D. "Pete" Hayward, and Keith L. Buckner : Brief of Appellee

Utah Supreme Court

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Paul H. Richins; Pro Se.

David H. Schwobe; Perkins, Schwobe, and McLachlan; Attorney for Appellants.

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UTAH SUPREME COURT

BRIEF

900339

IN THE SUPREME COURT OF THE STATE OF UTAH

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LYNDA C. BALDWIN,

Plaintiff/Appellee,

PAUL H. RICHINS,

Substitute Appellee,

vs.

WILLARD D. WOOD; TONYA GLAZIER  
WOOD; MAX D. BURTON, SR.; EMILY  
A. BURTON; MAX D. BURTON, JR.;  
N.D. "PETE HAYWARD, Sheriff  
of Salt Lake County, Utah; and  
KEITH L. BUCKNER, Deputy Sheriff  
of Salt Lake County, Utah,

Defendants/Appellants,

Case No. 900339

Priority No. 16

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BRIEF OF SUBSTITUTE APPELLEE

Appeal from the Judgment of the Third Judicial District  
Court of Salt Lake County, State of Utah

Honorable Leonard H. Russon

David H. Schwobe  
PERKINS, SCHWOBE & McLACHLAN  
Attorney for Appellants  
343 South 400 East  
Salt Lake City, Utah 84101  
Telephone: (801) 521-0177

Paul H. Richins, Pro Se  
Substitute Appellee  
68 South Main, 8th Floor  
Salt Lake City, Utah 84101  
Telephone (801) 531-9510

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CLERK SUPREME COURT  
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David H. Schwobe  
PERKINS, SCHWOBE & McLACHLAN  
Attorney for Appellants  
343 South 400 East  
Salt Lake City, Utah 84101  
Telephone: (801) 521-0177

Paul H. Richins, Pro Se  
Substitute Appellee  
68 South Main, 8th Floor  
Salt Lake City, Utah 84101  
Telephone (801) 531-9510

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
CASES .....	ii
RULES .....	vii
STATUTES .....	vii
OTHER AUTHORITIES .....	viii
JURISDICTION .....	viii
DETERMINATIVE AUTHORITIES .....	viii
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	5
SUMMARY OF ARGUMENTS .....	13
ARGUMENT I .....	16
The Judgment Is Lien Only Against Unexempt Real Property Of The Judgment Debtor, Willard Wood, Owned At The Time	
ARGUMENT II .....	20
The Judgment Is Void Pursuant To Willard Wood's Bankruptcy; And Judgment Lien Did Not Survive The Bankruptcy	
ARGUMENT III .....	21
Burtons Had No Remedy To Levy Execution Against The Property Without A Valid Statutory Lien And An Enforceable Judgment	
ARGUMENT IV .....	23
Burtons Had No Remedy To Bring An Equitable Action To Attempt To Set Aside The Willard Wood Deed Without An Enforceable Judgment	
ARGUMENT V .....	25
The Burton Group Has Waived Any Claim Of Fraudulent Conveyance By Not Raising It As An Affirmative Defense In Their Answer	
ARGUMENT VI .....	28
Statute of Limitations Bars The Burton Group From Attacking Willard Wood Deed As Fraudulent Conveyance	
ARGUMENT VII .....	31
The Willard Wood Deed Is Valid, And Has Never Been Set Aside Or Properly Challenged In Any Equitable Action	
ARGUMENT VIII .....	35
Lynda Baldwin Was Deprived Of Her Property Without Due Process Under the Execution Proceedings	

ARGUMENT IX .....	36
<p>Lynda Baldwin Is A Bona Fide Purchaser For Value And Has Never Lost That Status</p>	
ARGUMENT X .....	40
<p>The Burton Group Wrongfully Levied Execution On Lynda Baldwins' Property Which Justified Setting Aside Execution Sale</p>	
ARGUMENT XI .....	41
<p>The Trial Court Correctly Awarded Lynda Baldwin Attorney Fees And Related Damages</p>	
<p>Actions Or Defenses Without Merit And Lacking</p>	
Good Faith .....	43
Wrongful Execution .....	47
Slander Of Title .....	49
Violation Of Rule 11, U.R.C.P. ....	50
Sanctions Under Rule 40(a), U.R.A.P. ....	52
Related Damages .....	54
ARGUMENT XII .....	57
<p>Summary Judgment Is Appropriate</p>	

## TABLE OF AUTHORITIES

### CASES

	<u>Page</u>
<u>Aires v. Palmer Johnson, Inc.</u> , 735 P.2d 1373 (Ariz. App. 1987) ..	55
<u>Allis-Chalmers Corp. v. Sygitowicz</u> , 571 P.2d 224 (Wash. App. 1977) .....	26
<u>American Buildings Company v. Wheeler's Stores</u> , 585 P.2d 845 (Wyo. 1978) .....	17
<u>Babcock v. Tam</u> , 156 F.2d 116 (1946) .....	30
<u>Ball v. Autry</u> , 427 P.2d 424 (Okla. 1966) .....	26
<u>Bank of Ephraim v. Davis</u> , 581 P.2d 1001 (Utah 1978) .....	35, 36
<u>Belnap v. Blain</u> , 575 P.2d 696 (Utah 1978) .....	17, 19, 21, 23
<u>Beuhner Block Co. v. UWC Assocs.</u> , 752 P.2d 892 (Utah 1988) ..	43, 54
<u>Bonford v. Socony Mobile Oil Co.</u> , 440 P.2d 713 (Okla. 1968) ....	35
<u>Butler v. Wilkinson</u> , 740 P.2d 1244 (Utah 1987) .....	33, 34, 39

<u>Cady v. Johnson</u> , 671 P.2d 149 (Utah 1983) .....	44, 46, 52
<u>Can-Am Petroleum Co. v. Beck</u> , 331 F.2d 371 (10th Cir. 1964) ...	44
<u>Cardon v. Harper</u> , 151 P.2d 99 (Utah 1944) .....	32
<u>Celebrity Club, Inc. v. Utah Liquor Control Com'n</u> , 657 P.2d 1293 (Utah 1982) .....	35
<u>Chaffin v. Solomon</u> , 465 P.2d 217 (Or. 1970) .....	31
<u>Chandler v. Madsen</u> , 642 P.2d 1028 (Mont. 1982) .....	26
<u>Clark v. Rossow</u> , 657 P.2d 903 (Ariz. App. 1982) .....	24
<u>Cody Finance Co. v. Leggett</u> , D. Wyo., 116 F.Supp. 700, (reaffirmed 214 F.2d 695) .....	39
<u>Coggins v. Wright</u> , 526 P.2d 741 (Ariz. App. 1974) .....	48
<u>Coranado Development Corporation v. Superior Court</u> , 678 P.2d 535 (Ariz. App. 1985) .....	29, 31
<u>Cox Corp. v. Vertin</u> , 754 P.2d 938 (Utah 1988) .....	16
<u>Dean v. McFarland</u> , 500 P.2d 1244 (Wash. 1972) .....	16
<u>De Laney v. City and County of Denver</u> , 185 F.2d 246 (10th Cir. 1950) .....	21, 21
<u>Eames v. Eames</u> , 735 P.2d 395 (Utah 1987) .....	44, 46, 52, 53
<u>E.F. Hutton &amp; Co. Inc. v. Anderson</u> , 596 P.2d 413 (Colo. App. 1979) .....	48
<u>Eastman v. Eastman</u> , 558 P.2d 514 (Utah 1976) .....	48
<u>Espinoza v. Safeco Title Ins. Co.</u> , 598 P.2d 346 (Utah 1979) ...	48
<u>Farmer's Insurance Co. v. Miller</u> , 549 P.2d 9 (Wash. 1976) .....	26
<u>Firestone Tire &amp; Rubber Co. v. Barnett</u> , 475 P.2d 167 (Okl. 1970) .....	27
<u>First Nat. Bank of South Glenn v. Energy Fuels Inc. Corp.</u> , 618 P.2d 1115 (Colo. 1980) .....	19
<u>Foley v. Audit Services, Inc.</u> , 693 P.2d 528 (Mont. 1985) .....	47
<u>Free v. Farnworth</u> , 188 P.2d 731 Utah 1948) .....	23
<u>Freed Fin. Co. v. Stoker Motor Co.</u> , 537 P.2d 1039 (Utah 1975) .....	42, 54
<u>Gayne v. Bailey</u> , 564 P.2d 348 (Wash. App. 1977) .....	33

<u>General Ins. Co. of America v. Carnicero Dynasty Corp,</u> 545 P.2d 502 (Utah 1976) .....	26
<u>Gill v. Timm,</u> 720 P.2d 1352 (Utah 1986) .....	26
<u>Greco v. Pullara,</u> 444 P.2d 383 (Colo. 1968) .....	28
<u>Gribble v. Gribble,</u> 583 P.2d 64 (Utah 1978) .....	35
<u>Hall v. Cole,</u> 412 U.S. 1, 93 S.Ct. 1943 (1973) .....	48
<u>Hannah v. Martinson,</u> 758 P.2d 276 (Mont. 1978) .....	18
<u>Hartley v. Liberty Park Associates,</u> 774 P.2d 40 (Wash. App. 1989) .....	17
<u>Hawkins v. Anheuser-Busch,</u> 697 F.2d 810 (8th Cir. 1983) ....	55, 56
<u>Hudson Trust Co. v. Davis,</u> 49 S.Ct. 179 .....	39
<u>Hurst v. D.P. Davis Properties,</u> 54 S.Ct. 857 .....	40
<u>In Re Sillani,</u> 9 B.R. 188 (S.D. Florida 1981) .....	20
<u>Jensen v. Eames,</u> 519 P.2d 236 (Utah 1974) .....	33
<u>Johnson v. Smith,</u> 455 P.2d 244 (Wyo. 1969) .....	39
<u>Lach v. Desert Bank,</u> 746 P.2d 802 (Utah App. 1987) .....	18
<u>Larson v. Wycoft Co.,</u> 624 P.2d 1151 (Utah 1981) .....	58
<u>Lea Co. v. North Carolina Bd. of Transp.,</u> 374 S.E.2d 868 (N.C. 1989) .....	55, 56
<u>Leach v. Anderson,</u> 535 P.2d 1241 (Utah 1975) .....	29
<u>Majewsky v. Empire Construction Company,</u> 467 P.2d 547 (Cal. 1970) .....	00
<u>Management Servs. Corp. v. Development Assocs.,</u> 617 P.2d 406 (Utah 1980) .....	52
<u>Mason v. Laramie Rivers Company,</u> 490 P.2d 1062 (Wyo. 1971) ....	29
<u>Matter of Tarnow,</u> 749 F.2d 464 (7th Cir. 1984) .....	21
<u>Matter of Winslow's Estate,</u> 636 P.2d 505 (Wash. App. 1981) ....	58
<u>McCasland v. Prather,</u> 585 P.2d 336 (N.M. App. 1978) .....	26
<u>McClanahan v. Hawkins,</u> 367 P.2d 196 (Wash. 1961) .....	18
<u>McHenry F.S., Inc. v. Clausen,</u> 491 P.2d 592 (Colo. 1971) .....	19
<u>Mervyn's Inc. v. Superior Court in and for Maricopia County</u>	

697 P.2d 690 (Ariz. 1985) .....	35
<u>Meyer v. General American Corporation,</u> 569 P.2d 1094 (Utah 1977) .....	32
<u>Mid Kansas Federal Savings and Loan Ass'n v. Binter,</u> 415 P.2d 278 (Kan. 1966) .....	39
<u>Montana Ass'n of Credit Management v. Hergert,</u> 593 P.2d 1059 (Mont. 1979) .....	33
<u>Moore v. Utah Technical College,</u> 727 P.2d 634 (Utah 1986) .....	35
<u>Mr. Donut of America, Inc. v. Harris,</u> 723 P.2d 670 (Ariz. 1986) .....	31
<u>Multi-moto v. ITT Commercial Finance,</u> 806 S.W. 2d 560 (Tex. App. 1991) .....	55, 56
<u>Nelson v. Jacobson,</u> 669 P.2d 1207 (Utah 1983) .....	35
<u>Newport v. Newport,</u> 759 S.W. 2d 630 (Mo. App. 1988) .....	55, 56
<u>Norton v. Blackam,</u> 669 P.2d 857 (1983) .....	58
<u>O'Brien v. Rush,</u> 744 P.2d 306 (Utah 1987) .....	44, 52
<u>Painter v. Olney,</u> 680 P.2d 1066 (Wash. App. 1984) .....	36
<u>Parsons v. Robinson,</u> 174 P.528 (Cal. 1926) .....	00
<u>Partlow v. Clark,</u> 653 P.2d 568 (Or. App. 1983) .....	18, 31
<u>Pender v. Dowse,</u> 265 P.2d 644 (Utah 1954) .....	49, 50
<u>Pennoyer v. Neff,</u> 95 U.S. 733 .....	35
<u>Peterson v. Montana Bank of Bozeman,</u> 657 P.2d 673 (Mont. 1984) .....	48
<u>Pratt v. Board of Education,</u> 564 P.2d at 298 (Utah) .....	26
<u>Radio Corp. of America v. Radio Station KYFM, Inc.</u> 424 F.2d 14, 10th Cir. (Wash. 1970) .....	27
<u>2-H Ranch Co., Inc. v. Simmons,</u> 658 P.2d 68 (Wyo. 1983) .....	41
<u>Ranch Homes, Inc. v. Greater Park City Corp.,</u> 592 P.2d 620 (Utah 1979) .....	47
<u>Reagan Outdoor Advertising, Inc. v. Lundgren,</u> 692 P.2d 776 (Utah 1984) .....	36, 58
<u>Rollins v. Leidold,</u> 512 P.2d 937 (Alaska 1973) .....	26
<u>Romeo v. State,</u> 642 P.2d 172 (N.M. 1982) .....	17



<u>Rowe v. Schultz</u> , 642 P.2d 881 (Ariz. App. 1982) .....	17, 31
<u>RST Service Mfg. Inc. v. Mussell White</u> , 628 P.2d 336 (Okla. 1981) .....	26
<u>Sackin v. Kersting</u> , 458 P.2d 544 (Ariz. 1969) .....	33, 34
<u>Sade v. Hemstrom</u> , 471 P.2d 340 (Kan. 1970) .....	26, 27
<u>Schmidt v. Sadri</u> , 601 P.2d 713 (New. 1979) .....	27
<u>Schwaller Lumber Co., Inc. v. Watson</u> , 505 P.2d 640 (Kan. 1973) .....	19
<u>Sebastian v. Texas Dept. of Corrections</u> , 558 F.Supp. 507 (1983) .....	55
<u>Shields v. Pirkle Refri. Trucking, Inc.</u> , 591 P.2d 1120 (Mont. 1979) .....	35
<u>Shinn Irr. Equipment, Inc. v. Marchard</u> , 462 P.2d 571 (Wash. App. 1969) .....	27
<u>Smith v. Edwards</u> , 17 P.2d 264 (Utah 1932) .....	29
<u>Sniadach v. Family Finance Corp.</u> , 89 S.Ct. 1820 (1969) .....	35
<u>South Sanpitch Co. v. Pack</u> , 765 P.2d 1279 (Utah App. 1988) ..	43, 55
<u>S.R. v. S.M.R.</u> , 709 S.W. 2d 910 (Mo. App. 1986) .....	55
<u>State In Interest of L.G.W.</u> , 638 P.2d 527 (Utah 1981) .....	35
<u>Strong v. Clark</u> , 352 P.2d 183 (Wash. 1960) .....	30
<u>Taylor v. Estate of Taylor</u> , 770 P.2d 163 (Utah App. 1989) .....	42, 43, 44, 50, 54
<u>Taylor Nat. Inc. v. Jensen Bros. Const. Co.</u> , 641 P.2d 150 (Utah 1982) .....	17
<u>Teed v. Ridco Reality, Inc.</u> , 655 P.2d 789 (Ariz. App. 1982) ....	18
<u>Thompson v. Hendricks</u> , 245 P.724 (Or. 1926) .....	18, 19
<u>Transamerica Ins. Co. v. Trout</u> , 701 P.2d 851 (Ariz. App. 1985) .....	29
<u>Turon State Bank v. Bozarth</u> , 684 P.2d 419 (Kan. 1984) .....	26
<u>United Finance Co. Gladstone v. King</u> , 590 P.2d 228 (Or. 1979) ..	18
<u>United States v. 442 Casks of Wine</u> , 26 U.S. 547 (U.S. La. 1828) .....	32, 33
<u>Valley Bank v. Malcolm</u> , 204 P.207 (Ariz. 1922) .....	30

<u>Valley Bank &amp; Trust Co. v. Wilken</u> , 668 P.2d 493 (Utah 1983) ...	27
<u>Villa National Bank v. Green</u> , 478 P.2d 681 (Colo. App. 1970) ..	28
<u>Warren v. Rodgers</u> , 475 P.2d 775 (N.M. 1970) .....	17
<u>Wester v. Sill</u> , 675 P.2d 1170 (Utah 1983) .....	58
<u>Western Gas &amp; Sur. Co. v. Marchant</u> , 615 P.2d 423 (Utah 1980) ..	48
<u>Wilson v. Willamette Industries, Inc.</u> , 569 P.2d 611 (Or. 1977) .....	18, 31

#### **RULES**

Rule 8(b), U.R.C.P. ....	26
Rule 8(c), U.R.C.P. ....	25
Rule 9(b), U.R.C.P. ....	25
Rule 11, U.R.C.P. ....	43, 50
Rule 12(h), U.R.C.P. ....	26
Rule 69, U.R.C.P. ....	22, 45, 47
Rule 40(a), U.R.A.P. ....	51, 52, 53

#### **STATUTES**

U.C.A. 25-1-13 .....	37, 38, 39, 40
U.C.A. 25-1-15 .....	32, 33, 34, 39, 40, 45
U.C.A. 57-1-3 .....	31
U.C.A. 57-4a-4(1) .....	31, 45
U.C.A. 78-12-26(3) .....	28, 45
U.C.A. 78-22-1 .....	16, 17, 18, 22, 45
U.C.A. 78-27-56 .....	43, 44
U.S.C. Title 11, Sec. 524(a)(1) .....	20, 45
U.S.C. Title 11, Sec. 506(d) .....	21

#### **OTHER AUTHORITIES**

30 Am. Jur. 2d, Executions, Sec. 763 .....	48
50 Am. Jur. 2d. Libel & Slander, Sec. 550 .....	50
33 C.J.S., Sec. 232 .....	41

33 C.J.S., Executions, Sec. 456(b)(2) .....	47
49 C.J.S., Judgments, Sec. 466(a) .....	17
49 C.J.S., Judgments, Sec. 466(b) .....	18
49 C.J.S., Judgments, Sec. 485 .....	18
53 C.J.S., Sec. 13 .....	
2 Freeman on Judgments (5th Ed.), Sec. 712 .....	17
2 Freeman on Judgments (5th Ed.), Sec. 950 .....	17
2 Freeman on Judgments (5th Ed.), Sec. 1017a .....	21, 23
10 A.G. Thompson on Real Property, Sec. 5308 .....	18
2A J. Moore, Federal Practice (2d Ed.), Sec. 8.27[3] .....	26, 27
5 C. Wright & A. Miller, Federal Practice & Procedure, Sec. 1271 (1969) .....	26
6 Moore, W. Taggart, J. Wicker, Moore's Federal Practice, Sec. 54.77[2] (2d Ed. 1976) .....	48
1A Barron and Holtzoff, Federal Practice & Procedure, Sec. 277 .....	27
Restatement Of The Law On Torts, Vol. 111, Secs. 624 and 626-7 .....	49

### **JURISDICTION**

The Utah Supreme Court has jurisdiction of this Appeal pursuant to Utah Code Annotated Section 78-2-2(j).

### **DETERMINATIVE AUTHORITIES**

The following authorities may be dispositive of certain issues of this Appeal:

**Rule 8, U.R.C.P. General rules of pleading.**

(c) **Affirmative defenses.** In pleading to a proceeding pleading, a party shall set forth affirmatively ... fraud ... and any other matter constituted an avoidance of affirmative defense.

**Rule 9, U.R.C.P. Pleading special matters.**

(b) **Fraud, Mistake, Condition of the Mind.** In all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity.

**Rule 11, U.R.C.P. Signing of pleadings, motions, and other papers; sanctions.**

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law... If a pleading, motion, or other paper is signed in violation of this rule, the court ... shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include ... a reasonable attorney's fee."

**Rule 12, U.R.C.P. Defenses and objections.**

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply ...

**Rule 69, U.R.C.P. Execution and proceedings supplemental thereto.**

(a) **Issuance of writ of execution.** Process to enforce a judgment shall be by a writ of execution unless the court otherwise directs ...

(b) **Contents of writ and to who it may be directed.** . . . it [the writ of execution] shall be directed to the sheriff of the county in which it is to be executed in cases involving real property and shall require the officer to proceed in accordance with the terms of the writ; provided that if such writ is against the property of the judgment debtor generally it may direct the constable to satisfy the judgment, with interest, out of the personal property of the [judgment] debtor and if sufficient personal property cannot be found then the Sheriff shall satisfy the judgment, with interest, out of his real property.

(d) **Service of the writ.** Unless the execution otherwise directs the officer must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient [property]; ...

(e) **Proceedings on sale of property.**

(6) **Real property.** Upon a sale of real property the officer shall give to the purchaser a certificate of sale, containing: ... (4) a statement to the effect that all right, title, interest and claim of the judgment debtor in and to the property is conveyed to the purchaser;

**U.C.A. 25-1-13. Bona fide purchasers not affected.**

The provisions of this chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

**U.C.A. 25-1-15. Rights of creditors with matured claims.**

Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser:

**U.C.A. 57-1-3. Grant of fee simple presumed.**

A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended.

**U.C.A. 57-4a-4. Presumptions.**

(1) A recorded document creates the following presumptions regarding title to the real property affected:

(a) the Document is genuine and was executed voluntarily by the person purporting to execute it;

(b) the person executing the document and the person on whose behalf it is executed are the persons they purport to be;

(d) delivery occurred notwithstanding any lapse of time between dates on the document and the date of recording;

(e) any necessary consideration was given;

(f) the grantee, transferee, or beneficiary of an interest created or described by the document acted in good faith at all relevant times; ...

**U.C.A. 78-12-26. Within three years -- Within three years.**

(3) An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggravated party of the facts constituting the fraud or mistake.

**U.C.A. 78-22-1. Lien of judgment.**

From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien. ...

**U.C.A. 78-27-56. Attorney's fees -- Award where action or defense in bad faith.**

In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

### STATEMENT OF THE CASE

This action involves quashal of an execution sale and quiet title to Plaintiff's real property. A judgment creditor of a prior joint tenancy owner, claiming a judgment lien, levied execution on and sold the property of Plaintiff, who was not a judgment or execution debtor. Under summary judgment, the trial court found that no lien attached, voided the sale, and awarded damages to Plaintiff.

Willard and Tonya Wood ("Woods") purchased certain real property ("Property") from Ralph and Elaine Kofoed in May 1979, pursuant to an installment real estate contract. The contract was subject to a first mortgage. For some unknown reason, in December 1979, Kofoeds delivered a warranty deed to Woods which was then recorded. In May 1980, Willard Wood conveyed his joint tenancy interest by a recorded warranty deed ("Willard Wood Deed") to his wife, Tonya Wood. In June 1981, a money judgment ("Judgment") was entered against Willard Wood in favor of appellants Max Burton [Sr.] and Emily Burton ("Burtons"). When it was docketed, Willard Wood had no interest in the Property, having previously conveyed his interest to Tonya Wood.

In September 1981, Gregory Baldwin and appellee Lynda Baldwin, ("Baldwins") purchased a home from Tonya Wood for \$215,000, pursuant to a recorded warranty deed. Immediately prior to Baldwins' purchase, Tonya Wood executed and recorded a trust deed ("Kofoed Trust Deed") in favor of Kofoeds, and Baldwins took fee simple title subject to it and the first mortgage. Willard Wood also signed the Kofoed Trust Deed, which gave the appearance on the public record that he had some naked interest in the Property, notwithstanding he had conveyed his estate to Tonya Wood in May 1980. Therefore, upon Baldwins' purchase from Tonya Wood, Willard Wood also signed the deed

to Baldwins to eliminate such naked interest. At the time, Baldwins had no notice of the Willard Wood Deed or the Judgment.

In December 1982, Gregory Baldwin conveyed his interest in the Property by recorded quitclaim deed to Lynda Baldwin. In April 1983, Willard Wood filed a Chapter 7 bankruptcy petition ("Wood's Bankruptcy") and listed and notified Burtons as his creditors. The Wood's Bankruptcy voided the Judgment to the extent of any personal obligation of Willard Wood thereunder.

In June 1987, the assignee beneficiary under the Kofoed Trust Deed foreclosed the interest of Lynda Baldwin pursuant to a trustee's sale. In October 1987, Lynda Baldwin reacquired the property from the purchaser at the trustee's sale. Prior to the trustee's sale, Burtons received notice of it and caused a writ of execution to issue under the Judgment. The writ was initiated by Burtons notwithstanding the Judgment had been voided and a bankruptcy stay order was in effect. The writ represented that the Judgment was enforceable and commanded the sheriff to levy on and sell the "unexempt real property of the said Willard D. Wood," the judgment debtor. The writ was issued, notwithstanding there was no valid lien on the Property.

Simultaneously, Burtons issued a praecipe to the sheriff directing him to levy on "the right, title and interest of Gregory Blake Baldwin and Lynda Baldwin, successors-in-interest of Willard D. Wood" in the Property. Pursuant to Burtons' instructions, the sheriff levied execution not on Willard Wood's alleged interest, the judgment debtor, but directly on Baldwins' interest. The sheriff advertised Baldwins' interest for sale, sold it at a sheriff's sale, and filed a notice of sale of such interest. The sheriff then recorded a certificate of sale of Baldwins' interest, and delivered



a sheriff's deed for such interest to Emily Burton and her son, Max Burton Jr. ("Burton, Jr."). Burtons caused the levy against Lynda Baldwin's property notwithstanding she was not a party to Burtons' prior lawsuit against Willard Wood, not a judgment debtor under the Judgment, and not an execution debtor under the writ of execution.

Burtons and Burton Jr. ("Burton Group") assert that the Willard Wood Deed was a fraudulent conveyance, notwithstanding they have never made a claim to void it; that Willard Wood had an estate in the Property, notwithstanding the conveyance, and a judgment lien attached to that interest; tha tBurtons could "disregarding the conveyance" and levy execution directly on the interest of Baldwins as alleged "successors-in-interest of Willard Wood"; and that the Burton Group was not required to take any equitable action or assert any claim to void the conveyance. The Burton Group also asserts that if Lynda Baldwin was a bona-fide purchaser for value from Tonya Wood, she lost that status because of the subsequent trustee's sale of her interest. Thus, the Burton Group asserts that Emily Burton and Burton Jr. now own all the interest of Lynda Baldwin in the Property.

Paul Richins, substitute appellee for Lynda Baldwin, asserts that the Willard Wood Deed was a prima facie valid conveyance that could only be voided, if at all, by an equitable action by Burtons if they thought it was fraudulent; that the Burton Group has not commenced an equitable action or made a claim for fraud to void the deed; that even if the deed was fraudulent, Baldwins purchased the property from Tonya Wood, not Willard Wood, without notice of any alleged fraud under the Willard Wood Deed, and thus Baldwins were bona-fide purchasers for value; that Lynda Baldwin did not loose that status because of the subsequent trustee's sale; and that following

the subsequent trustee's sale, Lynda Baldwin reacquired the Property and has fee simple title.

After reacquiring the property, Lynda Baldwin amended her complaint and moved for summary judgment to void the Judgment, quash the execution sale, void the sheriff's deed, quiet her title, recover her damages for Burtons' wrongful execution, and dismiss the Burton Groups' counterclaim. The Burton Group also moved for summary judgment on their counterclaim.

In its Memorandum Decision, and subsequent 1989 Order and Partial Summary Judgment, both dated June 21, 1989, the trial court held that the Willard Wood Deed was valid; that Willard Wood had no interest in the Property when the Judgment was entered; that the Judgment was voided by Wood's Bankruptcy; that Burtons' execution upon Lynda Baldwin's property was wrongful and void; and that Lynda Baldwin's damages resulting from the wrongful execution would be reserved for later determination. Lynda Baldwin's title was quieted and the Burton Groups' counterclaim was dismissed with prejudice. In its later 1990 Order and 1990 Judgment, both dated June 4, 1990, the trial court awarded damages to Lynda Baldwin of \$7,872.66, representing her "attorney's fees and related damages" in the matter.

After the Burton Group filed the appeal, Paul Richins became the assignee of appellee Lynda Baldwin's judgment and interest, and was later substituted as appellee in her place with the consent of appellants. Paul Richins asserts the trial court was justified in all respects because of the Burton Group's clearly wrongful execution on a void judgment, without a valid statutory lien or due process, and against the property of a person who was neither a judgment debtor or execution debtor nor party to that proceeding.

## STATEMENT OF MATERIAL FACTS

The following parties are hereinafter referred to as follows: Appellee Lynda C. Baldwin as "Lynda Baldwin"; Gregory B. Baldwin as "Greg Baldwin"; Lynda Baldwin and Greg Baldwin collectively as "Baldwins"; Willard D. Wood as "Willard Wood"; Tonya G. Wood as "Tonya Wood"; Willard Wood and Tonya Wood collectively as "Woods"; Appellant Max D. Burton, Sr. as "Burton, Sr."; Appellant Emily A. Burton as "Emily Burton"; Appellants Burton, Sr. and Emily Burton collectively as "Burtons"; Appellant Max D. Burton, Jr. as "Burton, Jr."; the Burtons and Burton, Jr. collectively as "Burton Group"; N.D. "Pete" Hayward as "Sheriff"; and Substitute Appellee Paul H. Richins as "Richins".

The following material facts are alleged in Lynda Baldwin's "Amended Complaint" ("Complaint"), (R. 288), and in her "Memorandum In Support Of Motion For Summary Judgment" ("Memorandum"), (R. 425), and "Supplemental Motion For Summary Judgment" ("Supplemental Motion"), (R. 472). Except for facts #10 in the Memorandum, these facts are substantially uncontroverted in the Burton Group's "Answer To Amended Complaint" ("Answer"), (R. 387), and in their responses to those Motions, (R. 488; R. 498). See Rule 4-501(5), C.J.A.:

1. On May 15, 1979, Kofoed, as sellers, and Woods, as buyers, executed a "Uniform Real Estate Contract" ("Kofoed Contract") for the Property. (R. 325) On December 19, 1979, Kofoeds, as grantors, executed a "Warranty Deed" ("Kofoed Deed") for the Property to Woods, as grantees, which was recorded on December 19, 1979. (R. 328; R. 289, #10; R. 389, #1) Under the Kofoed Deed, Woods acquired the Property as joint tenants. (R. 290, #11; R. 389, #1)

2. On May 1, 1980, Willard Wood, as grantor, executed a "Warranty Deed" ("Willard Wood Deed") for his joint tenancy interest in the Property to Tonya Wood, as grantee, a copy of which is attached as Exhibit "A", which was recorded on May 28, 1980. (R.329; R. 290, #12; R. 389, #1; R. 70, #3)

3. On February 20, 1981, Burtons, as plaintiffs, filed a "Verified Complaint" in another action against Clealon Mann and Willard Wood, as defendants ("Burton Lawsuit"). (R. 330; R. 290, #13; R. 389, #1)

4. On June 9, 1981, an in personam "Summary Judgment" ("Judgment") was entered in the Burton Lawsuit in favor of Burtons against Clealon Mann and Willard Wood, a copy of which is attached as Exhibit "B". (R. 333; R. 290, #13; R. 389, #1) The Judgment did not create a statutory lien on the Property under Section 78-22-1, U.C.A., because Willard Wood had no interest in it when the Judgment was docketed.

5. On September 30, 1981, Woods, as trustors, executed a "Trust Deed" ("Kofoed Trust Deed") covering the Property in favor of Kofoeds, as beneficiaries, which was recorded on October 2, 1981. (R. 334; R. 290, #15; R. 389, #1)

6. On September 30, 1981, Baldwins purchased the Property from Tonya Wood for \$215,000.00, all of which has been paid. (R. 89, #2; R. 85, #2; R. 290, #16; R. 389, #1; R. 409, #3) Tonya Wood was the only titled owner of record. (R. 158; R. 546; #6; R. 550) On the same day, Tonya Wood, as grantor, executed a "Warranty Deed" ("Woods' Deed") for the Property to Baldwins, as grantees, which was recorded on October 2, 1981. (R. 337; R. 291, #19; R. 389, #1) Notwithstanding Willard Wood also signed this deed, he had no

interest to convey because he had previously conveyed it to Tonya Wood under the Willard Wood Deed. (Ex. "A")

7. Upon acquiring the Property, Baldwins did not have any notice from any source of the Judgment itself, (R. R. 81; #3; R. 86, #3; R. 410, #4; R. 413, #4; R. 546, #8; R. 566, #3); no notice whatsoever of any alleged fraud under the Willard Wood Deed, (R. 546, #8); and no notice of anything that would cause them to know or believe that there was anything improper regarding the Willard Wood Deed or that would cause them to inquire further into that conveyance, (R. 410, #5; R. 413, #5; R. 566, #3). Baldwins believed Tonya Wood was the only titled owner of record, and Willard Wood executed the Woods' Deed only because he appeared as a trustor with Tonya Wood on the Kofoed Trust Deed and, consequently, might appear to have some naked interest of record notwithstanding his prior conveyance. (R. 410, #6; R. 413, #6)

8. On February 24, 1982, a "Partial Satisfaction of Judgement" was entered in the Burton Lawsuit, (R. 339; R. 291, #20; R. 389, #1). Under the Partial Satisfaction of Judgment, Willard Wood remained liable for \$4,323.73 on the Judgment, plus interest. (R. 291, #21; R. 389, #1)

9. On December 21, 1982, Greg Baldwin, as grantor, executed a "Quit-Claim Deed" for his interest in the Property to Lynda Baldwin, as grantee, which was recorded on December 21, 1982. (R. 340; R. 291, #22; R. 389, #1)

10. On April 21, 1983, Willard Wood, together with Tonya Wood, filed a "Petition For Voluntary Bankruptcy" ("Wood's Bankruptcy") under Chapter 7 in the United States Bankruptcy Code, a copy of which is attached as Exhibit "C". (R. 341; R. 470, #3; R. 567, #4; R. 291,

#23; R. 389, #1) Under the Wood's Bankruptcy, Burtons are listed as creditors of Willard Wood and were given notice of Wood's Bankruptcy. (R. 291, #24; R. 389, #1; R. 447, #3; R. 567, #4) Pursuant to 11 U.S.C., Section 524(a)(1), upon Willard Wood's discharge in bankruptcy in December 1983, (R. 470, #4; R. 567, #6), the Judgment was "void" and he was released from all personal liability thereunder. Burtons were thereafter stayed from collecting the Judgment.

11. On August 6, 1986, nevertheless, Burtons caused an "Execution" ("Execution") to issue on the Judgment against Willard Wood, a copy of which is attached as Exhibit "D". (R. 343; R. 291, #25; R. 389, #4.a.). Under the Execution, the Sheriff had apparent authority to levy on and sell only the unexempt property of Willard Wood, (R. 292, #29; R. 389, #1), but no authority to levy on and sell the real property of Baldwins. (R. 292, #30; R. 389, #4.b.)

12. On August 4, 1986, Burtons prepared a "Praecipe" ("Praecipe"), a copy of which is attached as Exhibit "E", which they later delivered to the Sheriff. (R. 344, R. 292, #31; R. 389, #1) Under the Praecipe, however, Burtons directed the Sheriff to levy upon the right, title and interest of Baldwins in the Property, (R. 292, #33; R. 390, #4.c.), rather than levy upon the nonexempt property of the judgment debtor, Willard Wood, as the Execution purportedly authorized, (R. 343; R. 292, #32). Baldwins are neither judgment debtors under the Judgment, (R. 333), or execution debtors under the Execution, (R. 343), nor parties to the Burton Lawsuit, (R. 330), referred to by the Judgment, Execution and Praecipe.

13. On August 11, 1986, the Sheriff prepared a "Notice of Real Estate Levy" ("Notice of Levy"), a copy of which is attached as Exhibit "F". (R. 346; R. 292, #34; R. 389, #1) Under the Notice of

Levy, the Sheriff levied upon all the right, title and interest of Baldwins (rather than Willard Wood) in the Property. (R. 346)

14. On August 12, 1986, the Sheriff prepared a "Notice of Real Estate Sale," ("Notice of Sale"), a copy of which is attached as Exhibit "G", which was filed on August 17, 1986. (R. 347; R. 293, #35; R. 389, #1) Under the Notice of Sale, the Sheriff stated he intended to sell the right, title and interest of Baldwins (rather than Willard Wood) in the Property. (R. 347; R. 293, #37) **15**

On August 15, 1986, the Sheriff caused to be published a "Notice of Real Estate Sale" ("Newspaper Notice"), a copy of which is attached as Exhibit "H". (R. 348; R. 293, #39; R. 389, #1) Under the Newspaper Notice, the Sheriff that he intended to sell all the right, title and interest of Baldwins (rather than Willard Wood) in the Property. (R. 348; R. 293, #41)

16. On September 9, 1986, the Sheriff conducted a sheriff's sale ("Execution Sale"), wherein the Sheriff sold all the right, title and interest of Baldwins in the Property, (R. 294, #44; R. 390, 4.d., 4.a., 4.b.), but did not sell the interest of Willard Wood. (R. 352; R. 353; R. 366; R. 294, #47; R. 390, #4.d.) At the Execution Sale, the Sheriff sold the interest of Baldwins to Burtons for \$8,760.10. (R. 352; R. 353; R. 366; R. 290, #45)

17. On or about September 8, 1986, Burton, Sr. signed the worksheet regarding the Execution Sale. (R. 294, #49; R. 389, #1) On September 9, 1986, Burton, Jr. purchased Burton, Sr.'s interest in the Judgment. (R. 265; R. 296, #61)

18. On September 12, 1986, the Sheriff prepared a "Real Estate-Execution Return" ("Execution Return"), a copy of which is attached as Exhibit "I", which was filed on September 12, 1986. (R. 352; R.

294, #50) Under the Execution Return, the Sheriff stated he sold the right, title and interest of Baldwins (not Willard Wood) in the Property, (R. 352; R. 294, #51), not the interest of Willard Wood. (R. 352; R. 294, #51)

19. On September 12, 1986, the Sheriff prepared a "Real Estate Certificate of Sale-Execution" ("Certificate of Sale"), a copy of which is attached as Exhibit "J", which was recorded on September 16, 1986. (R. 353; R. 294, #53) Under the Certificate of Sale, the Sheriff stated that he "... was commanded ... to satisfy the judgment in said action [Burton Lawsuit] by selling the unexempt real property of the said defendant [Willard Wood]." (Emphasis added.) (R. 353; R. 295, #54; R. 389, #1)

20. On May 7, 1987, the Sheriff executed a "Sheriff's Deed" ("Sheriff's Deed"), a copy of which is attached as Exhibit "K", which was recorded on May 8, 1987. (R. 366; R. 296, #63; R. 389, #1) Under the Sheriff's Deed, the Sheriff conveyed to Burton, Jr. and Emily Burton all the right, title and interest of Baldwins (not Willard Wood) in the Property. (R. 296, #s 63-64)

21. On June 10, 1987, the trustee under the Kofoed Trust Deed sold the Property at a trustee's sale ("Trustee's Sale"), and delivered a "Trustee's Deed" to Robert Rice, which was recorded on June 18, 1987. (R. 368; 296, #65; R. 389, #1) On June 18, 1987, Robert Rice, as grantor, delivered a "Warranty Deed" for the Property to Derald Tilley, as grantee, which was recorded on June 18, 1987. (R. 371, R. 296, #67; R. 389, #1)

22. On October 17, 1987, Derald Tilley executed a "Quit Claim Deed" for the Property to Lynda Baldwin, which was recorded on October 8, 1987. (R. 379, R. 297, #71; 389, #1)



23. On June 22, 1988, Lynda Baldwin, as grantor, executed a "Quit Claim Deed" for the Property to the Lynda C. Baldwin Trust, which was recorded on June 23, 1988. (R. 380; 297, #72; R. 389, #1)

24. The Burton Group has never sought or obtained a decree in any court voiding the conveyance of (i) Willard Wood to Tonya Wood under the Willard Wood Deed, or (ii) Tonya Wood to Baldwins under the Woods' Deed. (R. 433, #39; R. 298, #83; R. 299, #85)

25. The Burton Group has never obtained a decree in any court reviving the Judgment from Wood's Bankruptcy or authorizing the Sheriff to levy on and sell the interest of Baldwins in the Property. (R. 297, #74; R. 390, #4.e., 4.a. and 4.b.). They have never obtained a decree in any court foreclosing their judgment lien against the Property or the interest of Linda Baldwin therein. They have never had possession of the Property. (R. 409, #3; R. 412, #3)

26. Lynda Baldwin has never been personally served with a copy of the Execution, Praecipe, Notice of Levy or Notice of Sale regarding the levy on and sale of her property, and has never been served with process of any kind in the Burton Lawsuit. (R. 410, #7; R. 413, #7). She has never received notice of any hearing in the Burton Lawsuit, and has never waived her right to due process of law. (R. 410, #8; R. 413, #8)

27. After reacquiring the Property, Lynda Baldwin amended her complaint and filed a "Motion For Summary Judgment" ("Motion"), (R. 423), a "Supplemental Motion For Declaratory Or Summary Judgment" ("Supplemental Motion"), (R. 472), and a "Motion To Dismiss Counterclaim" of the Burton Group, (R. 477). The Burton Group also moved for summary judgment on their counterclaim. (R. 493)

28. In its "Memorandum Decision" ("Memorandum Decision"), dated May 25, 1989, (R. 572), and subsequent "Order" ("1989 Order"), (R. 590), and "Partial Summary Judgment" ("Partial Summary Judgement"), (R. 587), both dated June 21, 1989, copies of which are attached as Exhibits "L", "M", and "N", respectively, the trial court held that: (i) the Willard Wood Deed was valid; (ii) Willard Wood had no interest in the Property when the Judgment was entered; (iii) Burtons didn't have a lien against the Property; (iv) the Burton Group could have filed an action to attack the Willard Wood Deed as a fraudulent conveyance, but didn't; (v) the statute of limitations had run on asserting a claim for fraudulent conveyance; (vi) the Judgment was voided by Wood's Bankruptcy; (vii) Baldwins were bona fide purchasers for value; (viii) the Execution Sale was wrongful and violated Lynda Baldwin's due process rights; (ix) the Execution Sale and Sheriff's Deed were void; and (x) Lynda Baldwin's damages would be reserved for later determination. Title was quieted in Lynda Baldwin, and the Burton Groups' counterclaim was dismissed with prejudice.

29. In its "Order" ("1990 Order"), (R. 669), and "Judgment" ("1990 Judgment"), (R. 667), both dated June 4, 1990, copies of which are attached as Exhibits "O" and "P", respectively, the trial court awarded Lynda Baldwin damages against the Burton Group of \$7,872.66, representing her "attorney's fees and related damages" in the matter. The 1990 Judgment was granted based on the "Affidavit Of Attorney's Fees" filed by Lynda Baldwin's counsel. (R. 641) Burtons objected to the Affidavit, (R. 659), but did not file any opposing affidavit.

30. After the Burton Group appealed, Paul Richins became the assignee of appellee Lynda Baldwin's judgment and interest, and was later substituted as appellee with the Burton Group's consent.

## **SUMMARY OF ARGUMENTS**

### **ARGUMENT I**

#### **The Judgment Is Lien Only Against Unexempt Real Property Of The Judgment Debtor, Willard Wood, Owned At The Time**

The Judgment is a lien against only the unexempt real property of the judgment debtor, Willard Wood, owned by him at the time the Judgment is docketed, and not a lien against the property of any other person, particularly Lynda Baldwin who is not even a party to the Burton Lawsuit.

### **ARGUMENT II**

#### **The Judgment Is Void Pursuant To Willard Wood's Bankruptcy; And Judgment Lien Did Not Survive The Bankruptcy**

The Judgment is an void under 11 U.S.C., Section 524(a)(1), because of the bankruptcy of Willard Wood, and no lien survived Wood's Bankruptcy for the reason that there was never was a valid lien to begin with. Pursuant to Wood's Bankruptcy, Burtons were no longer creditors of Willard Wood.

### **ARGUMENT III**

#### **Burtons Had No Remedy To Levy Execution Against The Property Without A Valid Statutory Lien And An Enforceable Judgment**

A writ of execution may not lawfully issue under Rule 69(a) U.R.C.P., in absence of a valid lien supported by an enforceable and valid judgment. In this case, there was neither.

### **ARGUMENT IV**

#### **Burtons Had No Remedy To Bring An Equitable Action To Attempt To Set Aside The Willard Wood Deed Without An Enforceable Judgment**

Wood's Bankruptcy prohibited the Burton Group from bringing a new claim to attack the Willard Wood Deed as a fraudulent conveyance, since they were no longer creditors of Willard Wood. The Fraudulent Conveyance Act does not create a "new claim" following a bankruptcy.

## **ARGUMENT V**

### **The Burton Group Has Waived Any Claim Of Fraudulent Conveyance By Not Raising It As An Affirmative Defense In Their Answer**

The Burton Group did not raise fraud as an affirmative defense in their Answer, as required by Rule 8(c), U.R.C.P., nor pled it with particularity, as required by Rule 9(b), U.R.C.P. They have waived that defense and are precluded from later making or asserting a claim for fraudulent conveyance in response to a motion for summary judgment. If the Burton Group believed the Willard Wood Deed was a fraudulent conveyance, they were compelled to plead and proved it.

## **ARGUMENT VI**

### **Statute of Limitations Bars The Burton Group From Attacking Willard Wood Deed As Fraudulent Conveyance**

Burtons were chargeable with "constructive notice" of the allegedly fraudulent conveyance under the Willard Wood Deed at least when they became judgment creditors of Willard Wood, and the three-year statute of limitation began to run on June 9, 1981, the date the Judgment was docketed. Other facts may establish constructive notice prior to or slightly later than that date. The Burton Group is time-barred in asserting a claim for a fraudulent conveyance.

## **ARGUMENT VII**

### **The Willard Wood Deed Is Valid, And Has Never Been Set Aside Or Properly Challenged In Any Equitable Action**

The recorded Willard Wood Deed is prima facie genuine and valid. A conveyance which is fraudulent as to creditors is not absolutely void, but only voidable upon some affirmative action by an interested person. The Burton Group could have challenged the deed as a fraudulent conveyance prior to Wood's Bankruptcy, but didn't. They deemed it "unnecessary". Burtons wrongfully invoked the remedy of Section 25-1-15(2), U.C.A.

### **ARGUMENT VIII**

#### **Lynda Baldwin Was Deprived Of Her Property Without Due Process Under the Execution Proceedings**

Under the execution proceedings, Lynda Baldwin was deprived of a substantial property right without due process of law. She was not a party to the Burton Lawsuit, nor a judgment or execution debtor, nor a fraudulent transferee under any conveyance. There was no order authorizing a sale of her property.

### **ARGUMENT IX**

#### **Lynda Baldwin Is A Bona Fide Purchaser For Value And Has Never Lost That Status**

When Lynda Baldwin and Greg Baldwin purchased the Property from Tonya Wood, they were bona fide purchasers for value. Lynda Baldwin is not required to prove in the first instance that she was a bona fide purchaser. The burden was on Burtons to plead and prove she was not. She never lost that status, notwithstanding a trustee's sale.

### **ARGUMENT X**

#### **The Burton Group Wrongfully Levied Execution On Lynda Baldwins' Property Which Justified Setting Aside Execution Sale**

The Burton Group acquired a writ of execution without an enforceable judgment and without a valid statutory lien. They levied execution on Lynda Baldwin's property, who was not a judgment or execution creditor, or fraudulent transferee under any conveyance.

### **ARGUMENT XI**

#### **The Trial Court Correctly Awarded Lynda Baldwin Attorney Fees And Related Damages**

The trial court correctly awarded Lynda Baldwin damages of "attorney's fees and related damages" under (i) Section 78-27-56, U.C.A., (ii) wrongful execution, (iii) slander of title, (iv) Rule 11, U.R.C.P., or (v) a combination of them.

## **ARGUMENT XII**

### **Summary Judgment Is Appropriate**

The Burton Group may not avoid Lynda Baldwin's motions for summary judgment, which are supported by affidavits, by resting on mere assertions, allegations and factual conclusions. They have not set forth specific facts under the issues of the pleadings showing a genuine issue of material fact that would preclude summary judgment.

## **ARGUMENT I**

### **The Judgment Is Lien Only Against Unexempt Real Property Of The Judgment Debtor, Willard Wood, Owned At The Time**

The Burton Group's main response to Lynda Baldwin's Motions for Summary Judgment and throughout their Brief is the claim that when the Judgment was docketed, a judgment lien attached to the Property pursuant to Section 78-22-1, U.C.A.; that the lien survived Wood's Bankruptcy; that the lien had priority over the subsequent purchase by Baldwins; and that Burtons were entitled to satisfy the Judgment by levying execution on and selling the interest of Baldwins, as alleged "successors-in-interest of Willard Wood". However, Willard Wood conveyed his joint tenancy interest in the Property to Tonay Wood under the recorded Willard Wood Deed (Ex. "A") over one year before the Judgment (Ex. "B") was docketed. Therefore, Willard Wood had no interest in the Property, and no lien attached. Regardless of anything Willard Wood later signed, that conveyance has never been set aside and conclusively conveyed his estate at that time!

"The creation, legal effect, and extent of a judgment are set out in Utah Code Ann., Section 78-22-1." Cox Corp. v. Vertin, 754 P.2d 938, 939 (Utah 1988). The rule of strict construction must be employed in determining whether one is authorized to have a statutory lien. Dean v. McFarland, 500 P.2d 1244 (Wash. 1972). The scope

cannot be extended. American Buildings Company v. Wheeler's Stores, 585 P.2d 845 (Wyo. 1978). Section 78-22-1 provides for "whose" property the lien attaches, and "when" the lien attaches:

"From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time, or by him thereafter acquired during the existence of said lien."

Under the facts of this case, only the unexempt real property of the "judgment debtor", Willard Wood, "owned by him at the time" is exposed to a lien imposed by a judgment in personam. Belnap v. Blain, 575 P.2d 696, 698 (Utah 1978); Taylor Nat. Inc. v. Jensen Bros. Const. Co., 641 P.2d 150, 155 (Utah 1982). A judgment lien commences from the date the judgment is entered. Hartley v. Liberty Park Associates, 774 P.2d 40, 42 (Wash. App. 1989); 49 C.J.S., Judgments, Sec. 466(a), p. 902.

But Willard Wood had effectively divested himself of his interest before Burtons recorded the Judgment, and the Property was no longer "real property of the judgment debtor" under the statute. Rowe v. Schultz, 642 P.2d 881, 882 (Ariz. App. 1982). "Under no circumstances will a judgment or decree take effect upon rights not then existing." 2 Freeman on Judgments (5th Ed.) Sec. 712, p. 1503. "The court views this section as requiring that the judgment debtor shall be the owner, or have a vested interest, in the real estate." Warren v. Rodgers, 475 P.2d 775, 776 (N.M. 1970). If the Property was not owned by him at the time, then no lien attached. Belnap, at 698, citing Majewsky v. Empire Construction Company, 467 P.2d 547 (Cal 1970). See also Romeo v. State, 642 P.2d 172, 176 (N.M. 1982); citing 2 A.C. Freeman On Judgments, Sec. 950 (5th ed. 1925).

In this case, the judgment lien was clearly subordinate to the Willard Wood Deed, and did not attach to any interest of Willard Wood conveyed to Tony Wood thereunder. Where a judgment debtor no longer owns property, filing of a judgment cannot relate back and make the judgment a lien on property theretofore owned by the judgment debtor. 49 C.J.S. Judgments, Sec. 466(b), p. 903. "A judgment creditor cannot place a lien against the property of a judgment debtor's grantee." Lach v. Desert Bank, 746 P.2d 802, 804 (Utah App. 1987). A judgment lien is not effective as to property conveyed from a judgment debtor prior to recording of the judgment. Lack, at 804-05. See also Teed v. Ridco Reality, Inc., 655 P.2d 798, 800-01 (Ariz. App. 1982); Rowe, supra, at 883; citing 10 A. G. Thompson on Real Property, Sec. 5308, at 662 (1957); McClanahan v. Hawkins, 367 P.2d 196 (Wash. 1961). Hannah v. Martinson, 758 P.2d 276, 278-79 (Mont. 1978); and 49 C.J.S. Judgments, Sec. 485, at p. 929 (1947).

Nothing in 78-22-1, U.C.A., imposes a lien on the real property of any person other than the judgment debtor, including an alleged "successor-in-interest". The statute is intended to limit the lien to property of the judgment debtor only, and not give a lien on some other person's property". See Thompson v. Hendricks, 245 P. 724, 726 (Or. 1926); United Finance Co. Gladstone v. King, 590 P.2d 228, 229 (Or. 1979); Partlow v. Clark, 653 P.2d 568, 569 (Or. App. 1983); and Wilson v. Willamette Industries, 569 P.2d 609, 611 (Or. 1977). Lynda Baldwin is not "judgment debtors", nor a "successors-in-interest" of Willard Wood. Baldwins are transferees of Tonya Wood. Nor does the statute does not authorizes a lien on Tonya Wood's independent, joint tenancy interest. "Even though a judgment creditor held a lien on one joint tenant's undivided one-half interest in the real property,



no lien existed on the second joint tenant's interest in the property." First Nat. Bank of South Glenn v. Energy Fuels Inc. Corp., 618 P.2d 1115 (Colo. 1980).

Willard Wood delivered the Willard Wood Deed to Tonya Wood, but later executed the Kofoed Trust Deed, thus creating the appearance on the public record that he still had some "naked interest" in to the Property. Whenever one has no beneficial interest "there is nothing to which the judgment lien can attach". Belnap, at 699. A judgment lien attaches only to actual and not to apparent interest of judgment debtor; for the protection of equities, a judgment lien is confined to actual interest which judgment debtor had at the time the lien attached. Thompson, at 725-26.

Nor did a judgment lien attach to the independent, one-half interest Tony Wood acquired from directly from Kofoeds and later conveyed to Baldwins. If a non-judgment debtor is the owner of one-half, joint tenancy interest in property, and conveyance thereof vests in the transferee a title unassailable as fraudulent as to creditors of the judgment debtor who hold the other one-half interest. See McHenry F.S., Inc. v. Clausen, 491 P.2d 592, 594 (Colo. 1971); and Schwaller Lumber Co., Inc. v. Watson, 505 p.2d 640, 645 (Kan. 1973).

It is clear from Section 78-22-1, U.C.A., that a judgment lien is confined to the "actual interest" in the Property which the "judgment debtor", Willard Wood, "owned at the time" the Judgment was docketed. Since Willard Wood had no interest in the Property at the time the Judgment was docketed, no valid judgment lien attached.

## ARGUMENT II

### **The Judgment Is Void Pursuant To Willard Wood's Bankruptcy; And Judgment Lien Did Not Survive The Bankruptcy**

In April 1983, Willard Wood filed a Chapter 7 petition for voluntary bankruptcy together with with Tonya Wood, (Ex. "C"), was discharged in August 1983, and the case was closed in December 1983, (R. 470, #4). Burtons were listed as judgment creditors and given notice of Wood's Bankruptcy, (R. 291, #24; R. 389, #1), and never denied it. In August 1983, Willard Wood was discharged in bankruptcy, and his case was close in December 1983, (R. 470, #4). Therefore, under 11 U.S.C., Section 524(a)(1), the Judgment is "void" to the extent of the personal liability of Willard Wood:

**"Effect of discharge. (a) A discharge in a case under this title --**

**(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor ..."**

The Judgment [was] an **unsecured claim**, fully dischargeable under that bankruptcy statute. Section 524(a)(1) merely voids judgments to the extent they are unsecured, and a judgment creditor cannot seek recovery in his judgment other than that obtainable against his security. In Re Sillani, 9 B.R. 188, 189 (S.D. Florida 1981). The Burton Group claims a valid judgment lien attached to the Property prior to Wood's Bankruptcy. But as "lien claimants", they never filed a proof of claim. (R. 567, #5) Therefore, they must rely solely on their "alleged" lien. De Laney v. City and County of Denver, 185 F.2d 246, 251 (10th Cir. 1950).

In their Brief, page 44, the Burton Group state that, notwithstanding the discharge of Willard Wood's personal liability under the Judgment, "Burtons' judgment lien was upon the property,

which passed to Baldwins upon Wood's execution of the September 30, 1981 Warranty Deed." They further argue that 11 U.S.C., Section 506(d) "... expressly excludes from discharge liens which have not been made a part of the bankruptcy proceeding, either by the filing of a proof of claim or by being made an "allowed secured claim". They cite the legislative history, Matter of Tarnow, 749 F.2d 464 (7th Cir. 1984), and De Laney, supra, as supporting authority.

However Matter of Tarnow and DeLaney are distinguishable because both concern statutory liens that attached to the property prior to the debtor's bankruptcy. In this case, a valid lien never attached to the Property prior to Wood's Bankruptcy! If there was no lien, it certainly couldn't be "passed to Baldwins" under any scenerio.

### ARGUMENT III

#### **Burtons Had No Remedy To Levy Execution Against The Property Without A Valid Statutory Lien And An Enforceable Judgment**

Rule 69(a), U.R.C.P., provides that the "[p]rocess to enforce a judgment shall be by a writ of execution unless the court otherwise directs ..." The statute seems to confine the legal process to enforcement of a "judgment". It says nothing about enforcement of a "judgment lien". Arguably, a writ of execution is not the legal process for enforcement of a "lien", in and of itself, in absence of a valid and an enforceable judgment to support it. "... Ordinarily, a judgment lien is enforced by a levy or sale under the judgment creating it." But, "... the lien generally terminates when the judgment ceases to be enforceable ..." Belnap v. Blain, 575 P.2d 696, 700 (Utah 1978); quoting 2 Freeman On Judgments (5th Ed.), Sec. 1017a, p. 2123. In any event, for issuance of a writ of execution on real property, a valid lien must attach whether or not an enforceable judgment is required. But neither is present in this case.

Nonetheless, just as Section 78-22-1, U.C.A., specifically confines the lien to the unexempt real property of the judgment debtor, Rule 69(b), U.R.C.P., also limits the writ of execution to the property of the judgment debtor, and does not authorize execution on some other person's property. The Rule states that " [u]less the execution otherwise directs, the officer must execute the writ against the property of the judgment debtor ..." Even if there was a valid lien on the Property supported by an enforceable judgment under which a writ of execution may duly issue, the Execution (Ex. "D") authorizes a levy on and sale of only the unexempt real property of Willard Wood, the judgment debtor, not that of Baldwins:

"THESE ARE THEREFORE, to command you to .. levy on and sell .. the unexempt real property of the said Willard D. Wood."

Following a ordinary execution sale, Rule 69(e)(6), U.R.C.P., authorizes the sheriff to convey " .. all right, title, interest and claim of the judgment debtor in and to the property", but not that of a non-judgment debtor, and Rule 69(d), U.R.C.P. provides that "[a]ny excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor unless otherwise directed by the judgment or order of the court." Thus, Rule 69, U.R.C.P., clearly limits the process of enforcing a judgment by writ of execution to the property of the "judgment debtor", unless otherwise directed. The Judgment contains no decree authorizing or directing a levy on the property of Lynda Baldwin, a non-judgment debtor, nor an order of sale having such effect. Therefore, even if Willard Wood hadn't been discharged in bankruptcy, the Judgment is not one upon which a writ of execution may duly issue for the purpose of levying on and selling the property of Lynda Baldwin.

#### ARGUMENT IV

##### Burtons Had No Remedy To Bring An Equitable Action To Attempt To Set Aside The Willard Wood Deed Without An Enforceable Judgment

"A levy of execution is ordinarily the only proper method to enforce a judgment lien, unless the case involves special circumstances .." Belnap v. Blain, 575 P.2d 696, 700 (Utah 1978); citing Free v. Farnworth, 188 P.2d 731 (Utah 1948). Even if the Willard Wood Deed was a fraudulent conveyance, this case involves special circumstances such that execution under Rule 69(a) did not lie. Belnap, at 700-01. "... [W]here for some reason execution does not lie, the procedure for enforcement is an equitable action to foreclose the judgment lien", Belnap at 701, and "have the court control the sale of the property after determining the priority of liens". Belnap, at 700, citing the general rule set forth in 2 Freeman On Judgments, 5th Ed., Section 1017a, p. 2123, which is:

"... Ordinarily a judgment lien is enforced by a levy or sale under the judgment creating it. And since the lien generally terminates when the judgment ceases to be enforceable, there would be no occasion for resorting to equity in most cases. Nevertheless, if for any reason there is no remedy at law, or the remedy provided by statute is inadequate, ... the general jurisdiction of equity may be invoked to enforce the lien ..."

Regardless of whether a writ of execution could issue under these facts or not, the only conveyable way a judgment lien could ultimately attach to the Property was for the Willard Wood Deed to be set aside. As long as the deed was valid, no lien could ever attach or have priority. Prior to Wood's Bankruptcy, Burtons could have attempted to set aside the Willard Wood Deed if they thought it was fraudulent and foreclose the lien in an equitable action. But Wood's Bankruptcy voided the Judgment, and since a fraudulent conveyance complaint is predicated on an obligation that no longer exists, there

can be no "new claim" for fraudulent conveyance. The Fraudulent Conveyance Act does not create a new claim. "If no new claim exists, there is no remedy. ... Only a creditor, that is no having a claim ... may attack a conveyance as fraudulent." Clark v. Rossow, 657 P.2d 903, 904 (Ariz. App. 1982).

In Clark, the plaintiffs, Clark and Frizzell, brought a separate action to set aside a conveyance as fraudulent made by defendants, Rossows. Clark and Frizzell had obtained a money judgment against Rossows and attempted to collect the judgment from Rossows' grantee, Consociation, by garnishment proceedings. In a second action, Clark and Frizzell alleged that Rossows had made a fraudulent conveyance to Consociation and sought to have the conveyance set aside so they could execute on the real property. Consociation responded with a motion to have the judgment declared void since Mr. Rossow had been adjudged bankrupt in Minnesota, and, therefore, the judgment was discharged. That motion was granted and the trial court declared the judgment null, void, and of no force or effect.<sup>1</sup> Clark said at 904:

"[Consociation] moved for summary judgment on the theory that the prior judgment was void. Since the fraudulent conveyance complaint is predicated on an obligation claimed to be owing from the appellees Rossows to the appellants ... [Clark and Frizzell] ... and there is no such obligation, the trial court properly dismissed the complaint. The fraudulent conveyance act, A.R.S., Section 44-1001, et seq., does not create a **NEW CLAIM**. If a claim does not exist, there is no remedy. (Citing cases) The appellees Rossows were no longer creditors of the appellants [Clark and Frizzell]. Only a creditor, that is one having a claim ... may attack a conveyance as fraudulent." (Emphasis added)

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<sup>1</sup> Lynda Baldwin made a similar motion as Consociation under the "Supplemental Motion For Declaratory Judgment", dated March 15, 1989. (R. 472) Therein, she sought to have the Judgment declared void for purposes of her prior "Motion For Summary Judgment".

Therefore, Wood's Bankruptcy effectively discharged any fraudulent conveyance claim that might be asserted by Burtons, and prohibited them from ever bringing an equitable action to foreclose the lien. Burtons were no longer creditors of Willard Wood and could not attach the Willard Wood Deed. Without being able to bring a claim to void the deed, there is no remedy under any Utah law. Thus, Burtons could never, and did not, acquire a lien on the Property superior to the interest of Lynda Baldwin.

#### **ARGUMENT V**

##### **The Burton Group Has Waived Any Claim Of Fraudulent Conveyance By Not Raising It As An Affirmative Defense In Their Answer**

In its Memorandum Decision, page 6, the trial court correctly found that the Burton Group has never made a claim to set aside the Willard Wood Deed as a fraudulent conveyance. Their Counterclaim does not evidence such claim, (R. 391), and they did not raised fraud as an affirmative defense in their Answer as required by Rule 8(c), U.R.C.P, (R. 387 to 388), much less plead it with particularity as required by Rule 9(b), U.R.C.P. Therefore, they waived that defense and are precluded from making it in response to a motion for summary judgment. "In pleading to a proceeding pleading, a party shall set forth affirmatively .. fraud .. and any other matter constituting an avoidance or affirmative defense." Rule 8(c), U.R.C.P. "In all averments of fraud .. the circumstances constituting fraud .. shall be stated with particularity." Rule 9(b), U.R.C.P. Burtons' Answer fails under both Rules.

The statutory requirement of pleading an affirmative defense, such as fraud, is supported by many decisions in Utah and other states. Any new matter that does not tend to controvert the opposing party's prima facie case shall be pleaded and is not put in issue by

a denial made pursuant to Rule 8(b), U.R.C.P. General Ins. Co. of America v. Carnicero Dynasty Corp., 545 P.2d 502, 504 (Utah 1976), citing 2A Moores' Federal Practice (2d Ed.), Sec. 8.27[3], p. 185.). Affirmative defenses must be set forth in responsive pleadings, Rule 8(c), and are usually waived if not pleaded, Utah R. Civ. P. 12(h); Gill v. Timm, 720 P.2d 1352, 1354 (Utah 1986), citing Pratt v. Board of Education, 564 P.2d at 298.

Lynda Baldwin is not bound to prove in the first instance or at the outset in support of her action that the Willard Wood Deed is valid and genuine. Ball v. Autry, 427 P.2d 424, 428 (Okla. 1966); Rollins v. Leidold, 512 P.2d 937, 941 (Alaska 1973); 5 C. Wright & A. Miller, Federal Practice & Procedure, Section 1271 (1969); 2A J. Moore's Federal Practice, Sec. 8.27 [3] (2nd Ed. 1972). If the Burton Group believes the deed is fraudulent, the burden is them to raise the "new matter" which might constitute an avoidance or an affirmative defense of Lynda Baldwin's complaint. McCasland v. Prather, 585 P.2d 336 (N.M. App. 1978). Any alleged fraud under the Willard Wood Deed, an affirmative defense, affects the substantial rights of Lynda Baldwin and will not be abrogated. Allis-Chalmers Corp. v. Sygitowicz, 571 P.2d 224, 225 (Wash. App. 1977), citing Farmer's Insurance Co. v. Miller, 549 P.2d 9 (Wash. 1976). The fraud also be plead fraud with particularity by setting out specific facts constituting the alleged fraud. Sade v. Hemstrom, 471 P.2d 340, 345 (Kan. 1970).

Thus, failure to plead the affirmative defense results in waiver of it and exclusion of the issue from the case. Turon State Bank v. Bozarth, 684 P.2d 419 (Kan. 1984); Chandler v. Madsen, 642 P.2d 1028 (Mont. 1982); and RST Service Mfg. Inc. v. Mussell White, 628 P. 2d



366 (Okla. 1981). Upon such failure "... no evidence can be submitted relevant to that issue." Schmidt v. Sadri, 601 P.2d 713 (Nev. 1979).

An alleged fraudulent conveyance "is not put at issue by a general denial" of Lynda Baldwin's prima facie case. See Shinn Irr. Equipment, Inc. v. Marchard, 462 P.2d 571, 572 (Wash. App. 1969), citing 1A Barron and Holtzoff Fed. Prac. & Proc., Sec. 277, at 147, and 2A Moore's Fed. Prac., Sec. 8.27[3]k. The Burton Group cannot "make a demand for affirmative relief by filing an answer defensive in nature which tends only to establish a defense or interpose a bar to plaintiff's right to recover", See Firestone Tire & Rubber Co. v. Barnett, 475 P.2d 167, 170 (Okla. 1970).

In response to the motions for summary judgment, the Burton Group submitted affidavits attacking the Willard Wood Deed, trying "to establish a defense or interpose a bar to plaintiff's right to recover." Firestone Tire & Rubber, at 170. But defenses that have not been raised by the answer or proper motion may not be raised in an affidavit in opposition to a motion for summary judgment, and do not create a genuine issue of material fact precluding summary judgment. Valley Bank & Trust Co. v. Wilken, 668 P.2d 493-94 (Utah 1983). See also Sade, at 346. See also Radio Corp. of America v. Radio Station KYFM, Inc., 424 F.2d 14 10th Cir. (Wash. 1970); and 2A J. Moore, Fed. Prac., Sec. 8.27[3] (2d Ed. 1975).

Therefore, an alleged fraudulent conveyance is an affirmative defense that affects the substantial rights of Lynda Baldwin, and must be plead and with the required particularity. "Belated affidavits" filed by Burtons in response to the motions for summary judgment are insufficient. Thus, even if such a claim had survived Wood's Bankruptcy, the Burton Group has waived it.

## ARGUMENT VI

### Statute of Limitations Bars The Burton Group From Attacking Willard Wood Deed As Fraudulent Conveyance

The trial court correctly found that the Burton Group was barred from attacking the Willard Wood Deed as a fraudulent conveyance under the three year limitations period imposed by Section 78-12-26(3), U.C.A., which states:

"78-12-26. Within three years -- Within three years:

(3) An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggravated party of the facts constituting the fraud or mistake."

So when did Burtons discover facts constituting the alleged fraud? The "conveyance" was made in May 1980. Burtons had "constructive notice" of the alleged fraudulent conveyance at three different dates: (i) in May 1980, when the Willard Wood Deed was recorded, (ii) in June 1981, when the judgment was entered in the Burton Lawsuit; and (iii) in September 1981, when the Kofoed Trust Deed and Wood's Deed were recorded and Baldwins took "open and notorious possession" of the Property. While separately any of these facts might be insufficient to establish "constructive notice" of the alleged fraud, in the aggregate they are compelling.

Regarding the "constructive notice" given to Burtons when the Judgment was docketed in June 1981, in Villa National Bank v. Green, 478 P.2d 681, 682-83 (Colo. App. 1970), it was held, under facts substantially the same as this case, that a general creditor obtains "constructive notice" of the alleged fraudulent deed when he becomes a judgment creditor, and the statute of limitation begins to run when the final judgment is obtained. Citing Greco v. Pullara, 444 P.2d 383, 384 (Colo. 1968). Thus, the statute of limitations began to run

in June 1981, when the Judgment was docketed. But the statute of limitations might begin to run when the deed is recorded. In their Brief, page 26, Burtons cite Smith v. Edwards, 17 P.2d 264, 272 (Utah 1932) and Leach v. Anderson, 535 P.2d 1241 (Utah 1975) as authority opposing that proposition.

However, the facts in Smith and Leach are distinguishable from those here. The words "until the discovery by the aggravated party of the facts constituting the fraud or mistake" within Section 78-12-26(3) mean from the time the fraud was known or could have been discovered in exercise of reasonable diligence, and do not necessarily mean from the time the party complaining had actual notice of the fraud. Mason v. Laramie Rivers Company, 490 P.2d 1062 (Wyo. 1971). Burtons' claim for a fraudulent conveyance accrued, for statute of limitation purposes, when they, by exercise of "reasonable diligence", might have discovered it. Transamerica Ins. Co. v. Trout, 701 P.2d 851 (Ariz. App. 1985); and Coronado Development Corporation v. Superior Court, 678 P.2d 535 (Ariz. App. 1985).

"Reasonable diligence" in collecting a money judgment would require that at the time of or some time after acquiring the Judgment, Burtons would research the public record for any real property owned or recently transferred by Willard Wood, particularly his residence. Had they done so, Burtons would have discovered not one, but three deeds: (i) the Willard Wood Deed, recorded in May 1980, (ii) the Kofoed Trust Deed, recorded in September 1981, and (iii) the Woods' Deed, recorded in September 1981. Armed with such information, Burtons could have easily deposed Willard Wood to discover why he executed the two deeds in 1981 after he had conveyed his estate in 1980. If Burtons then believed the 1980 deed was

fraudulent in light of the 1990 deeds, Burtons could have challenged it then, in 1981, or within three years thereafter. Therefore, the statute of limitations could begin to run no later than September 1981, when the Kofoed Trust Deed and Wood's Deed were recorded, and the Willard Wood Deed was clearly evident.

As creditors with a matured claim, Burtons could have also researched the public record prior to entry of the Judgment and found and attacked the Willard Wood Deed. A creditor who has a cause of action for an unliquidated demand may attack a conveyance in fraud of his rights prior to entry of judgment. The three-year limitations period accrues from the time the creditor has a claim or cause of action for an unliquidated demand, because he could attach the conveyance in fraud of his rights prior to entry of the judgment as he is held to be within the protection of the statutes against fraudulent conveyances. Babcock v. Tam, 156 F.2d 116, 121 (1946), citing Valley Bank v. Malcolm, 204 P. 207, 214 (Ariz. 1922). Thus, an action by a judgment creditor to set aside for fraud a conveyance of property by a debtor to his wife is barred by the three-year statute of limitations where the action was brought more than three years after the conveyance was recorded. Babcock, supra.

In their Brief, Burtons suggest that the Willard Wood Deed was given for "nominal consideration", if any at all. Thus, the contents of the deed allegedly disclose the fraud. If that be true, the statute of limitations might begin to run when that deed was recorded in May 1980. When facts under which fraud is predicated are contained in written instrument placed on public record, there is constructive notice of its contents and the statute of limitations runs from date of recording. See Strong v. Clark, 352 P.2d 183, 184

(Wash. 1960). As such, it could begin to run even before a person has actual knowledge of the fraud or even all the underlying details of the alleged fraud. See Coronado Development Corporation, at 537; and Mr. Donut of America, Inc. v. Harris, 723 P.2d 670 (Ariz. 1986). Had Burtons used "reasonable diligence" in researching the title to Willard Wood's own residence, all three deeds would be discovered.

Furthermore, Baldwins purchased the Property in September 1981, and were in open, exclusive and notorious possession from then on. "Open and notorious possession" is constructive notice to third parties of an outstanding equity, and a judgment creditor is thereby informed of sufficient facts to put him on inquiry by which he can ascertain the existence of the equity. Partlow v. Clark, 653 P.2d 568, 570 (Or. App. 1983). Chaffin v. Solomon, 465 P.2d 217, 220 (Or. 1970); and Wilson v. Willamette Industries, Inc., 569 P.2d 611 (Or. 1977). Burtons are clearly time-barred from bringing a new claim for fraudulent conveyance under any one or more of the above scenarios.

## ARGUMENT VII

### **The Willard Wood Deed Is Valid, And Has Never Been Set Aside Or Properly Challenged In Any Equitable Action**

In the 1989 Order, the trial court correctly determined that the Willard Wood Deed was valid and enforceable. (Ex. "M", #1) Under Section 57-4a-4(1), U.C.A., a recorded deed is presumed genuine, and, under Section 57-1-3, is presumed to pass a fee simple title unless otherwise stated. Thus, the recorded Willard Wood Deed is prima facie valid and conveyed his entire estate to Tonya Wood. Not only is the deed prima facie valid as between the parties, it is valid as to creditors. "The holdings imply that [a] .. conveyance 'good as between the parties' cannot be void as to a creditor of the transferor". Rowe v. Schultz, 642 P.2d 881, 884 (Ariz. App. 1982).

Notwithstanding any document Willard Wood signed after his delivery of the deed to Tonya Wood, the deed is valid as to Burtons in absence of it being voided, if at all, in an equitable action.

In the Memorandum Decision, page 6, (Ex. "L"), the trial court correctly found that "[n]o action has been filed to set that conveyance aside .." In response, the Burton Group asserts in its Brief, pages 18-22, that no action was "necessary" because, in their opinion, the conveyance was "void in toto" under Section 25-1-8, U.C.A. The Burton Group further states on page 29, that:

"Burtons have not requested that any fraudulent conveyance be set aside because such request is unnecessary, inasmuch as Burtons' judgment lien is of record. .. The fraudulent conveyance issue was first raised by Baldwins as a defense to Burtons' execution."

Thus, Burtons allege they could simply disregard the conveyance and levy execution directly against Baldwin's property under Section 25-1-15(2), U.C.A., without ever taking any action to void the conveyance. In their Brief, page 19, the Burton Group asserts that "a fraudulent conveyance is not merely voidable, but is "void in toto". They cite Meyer v. General American Corporation, 569 P.2d 1094, 1098 (Utah 1977), and Cardon v. Harper, 151 P.2d 99, 102 (Utah 1944). But Meyer and Cardon involve conveyances that were "decreed" void after an equitable action by the creditor, and those facts are distinguishable from this case were the Burton Group has never received a decree or found it "necessary" to take any such action.

Notwithstanding the "shall be void" language of Section 25-1-8, U.C.A., if a recorded deed is prima facie valid, "[a] conveyance which is fraudulent as to creditors is not absolutely void, but is only voidable by the creditors." United States v. 442 Casks of Wine,

26 U.S. 547 (U.S. La. 1828).<sup>2</sup> Burtons' argument for the remedy otherwise is contrary to this Court's holding in Butler v. Wilkinson, 740 P.2d 1244, 1262 (Utah 1987): "The remedy provided by the Act for a fraudulent conveyance is the voiding of the conveyance. Section 25-1-8." This implies the deed is not "void", but merely "voidable".

It is clear from Butler, United States, and the cases footnoted below that a deed which secures the private rights of the parties interested is not "void", as if it never had any effect, without some affirmative action to avoid it. But Burtons claim it was "unnecessary" to take such action, and, therefore, didn't. Adopting Burtons' theory would shift the burden under an alleged fraudulent conveyance from the creditor to the transferee. Section 25-1-8 does not have that intent.

The Burton Group asserts on page 20 of their Brief that because the Willard Wood Deed was void, they had the right to disregard it and levy on the Property under Section 25-1-15(2), U.C.A. They claim that: "This statute expressly allows creditors to disregard a fraudulent conveyance, and to execute upon property which is under the name of the fraudulent transferee". In relying on that remedy, the Burton Group cites Jensen v. Eames, 519 P.2d 236 (Utah 1974); Gayne v. Bailey, 564 P.2d 348 (Wash. App. 1977), Montana Ass'n of Credit Management v. Hergert, 593 P.2d 1059 (Mont. 1979), and Sackin v. Kersting, 458 P.2d 544 (Ariz. 1969).

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<sup>2</sup>. The question of "void" or "voidable" was addressed in detail in Doney v. Laughlin, 94 N.E. 1027, at 1028, and in Mutual Benefit Life Ins. Co. v. Winne, 49 P. 446, at 488. (No deed which secures the private rights of the parties interested is ever "void", but merely "voidable" upon the proper action by an interested party.) See Footnote No. 4 on pages 21-23 of Lynda Baldwin's "Reply Memorandum Regarding Plaintiff's Motions For Summary Judgment" for a summation of that authority.

In those cases, however, after obtaining the judgment, the judgment creditors took appropriate action against the "transferee" within an equitable proceeding to set aside the fraudulent conveyance. But Burtons never did that. Even then, to invoke the remedy of Section 25-1-15(2), the property must be in the "hands of a fraudulent transferee". Butler v. Wilkinson, 740 P.2d 1244, 1262, (Utah 1987). But when Burtons levied execution directly on the interest of Lynda Baldwin, the Property was not in the "hands of a fraudulent transferee", it was in the hands of Lynda Baldwin. Tonya Wood was the alleged "fraudulent transferee" under the Willard Wood Deed, not Lynda Baldwin who acquired her interest from Tonya Wood. Moreover, Butler, at 1262, implies that when a creditor looks to the fraudulently conveyed property under Section 25-1-15(2), the transfer must be "held" void as a fraudulent conveyance.

Thus, prior to Wood's Bankruptcy, Burtons might have levied execution when the Property was in the hands of Tonya Wood, but didn't. They waited 5 years and then levied execution on property in the hands of Lynda Baldwin, and Lynda Baldwin certainly contested. And the Jensen court, at 428, held that "... once contested the burden is upon the one alleging the fraudulent conveyance to prove by clear and convincing evidence that the transfer was in fact fraudulent." When Lynda Baldwin brought her prima facie case to dismiss the levy, the Burton Group could not dispense with their burden of pleading and proving the conveyance was fraudulent. Sackin v. Kersting, 458 P.2d 544, 547 (Ariz. App. 1969). The evidence shows they did nothing, relying instead on their assertion that the conveyance was "void", and any action was "unnecessary".



## ARGUMENT VIII

### Lynda Baldwin Was Deprived Of Her Property Without Due Process Under the Execution Proceedings

Any procedure which deprives an individual of a significant property interest must satisfy due process of law. Mervyn's Inc. v. Superior Court in and for Maricopia County, 697 P.2d 690 (Ariz. 1985). See Bank of Ephriam v. Davis, 581 P.2d 1001, 1005 (Utah 1978); State In Interest of L.G.W., 638 P.2d, 527, 528 (Utah 1981) and Celebrity Club, Inc. v. Utah Liquor Control Com'n, 657 P.2d 1293, 1296 (Utah 1982). "Implicit in the due process clause of our state Constitution is that persons be afforded a hearing to determine their rights under the law." Gribble v. Gribble, 583 P.2d 64, 67 (Utah 1978). A hearing is constitutionally required when an action taken by this State deprives a person of a property interest protected by the Fourteenth Amendment. Moore v. Utah Technical College, 727 P.2d 634, 637 (Utah 1986). A writ of execution may not issue against the property of Lynda Baldwin without a prior hearing. See Sniadach v. Family Finance Corp., 89 S.Ct. 1820 (1969). A hearing must be prefaced by a timely notice which adequately informs Lynda Baldwin of the specific issues she must prepare to meet. Nelson v. Jacobson, 669 P.2d 1207, 1213 (Utah 1983).

To give the execution proceedings validity, she must be brought within the jurisdiction of the court by service of process within the State, or by her voluntary appearance. Pennoyer v. Neff, 95 U.S. 733; Bonford v. Socony Mobile Oil Co., 440 P.2d 713 (Okla. 1968). Lynda Baldwin was not served with process in the manner provided by law. Jurisdiction cannot be acquired without strict compliance with the statute governing service of process in civil actions. Shields v. Pirkle Refri. Trucking, Inc., 591 P.2d 1120 (Mont. 1979). First

and basic to jurisdiction is service of process. Painter v. Olney, 680 P.2d 1066 (Wash. App. 1984). A levy on Lynda Baldwin's property, deprived her of a significant property interest without due process.

The constructive seizure, initiated by Burtons under a void judgment without a valid lien, encumbered the Property with a lien and inhibited Lynda Baldwin's right to dispose of or encumber her asset. Bank of Ephriam, at 1005.

#### ARGUMENT IX

##### **Lynda Baldwin Is A Bona Fide Purchaser For Value And Has Never Lost That Status**

Under the facts and law of this case, Lynda Baldwin is not required in the first instance to prove she is a bona fide purchaser for value ("BFP") under Section 25-1-13, U.C.A. Moreover, the Burton Group never made a claim to defeat Lynda Baldwins BFP status in their answer or counterclaim, and could not so in response to a motion for summary judgment. Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 779 (Utah 1984). Nevertheless, Baldwins were BFPs in September 1981, when they purchased the Property from the only titled owner of record, Tonya Wood, (R. 158; R. 550; R. 546, #6). They had no notice of the Judgment or any alleged fraud under the Willard Wood Deed. (R. 546, #8)

Burtons argue in their Brief, page 31, that Lynda Baldwin is not a BFP because "[a] purchase is not made in good faith if it is made with notice of a prior adverse interest in the property". They argue that "docketing of a judgment operates as constructive notice of the existence thereof". This argument has no merit because there was no "prior adverse interest", in that no lien attached to the Property.

Burtons also argue in their Brief, page 33, that Lynda Baldwin is not a BFP because she had "actual knowledge" of the Judgment

through her alleged agent, Western States Title Company ("Western"). This argument as well has no merit because the Judgment did not create a lien against the Property. Nonetheless, Western was not the agent for Baldwins. Baldwins never employed Western to research the title, nor did they ever pay Western to do so. (R. 545, #2)

Upon acquiring the Property, Baldwins had no "actual knowledge" of the Judgment from Western or anyone else. (R. 410, #4; R. 413; R. 546, #6, 7, 8 & 9) Burtons, however, argue on page 33 of their Brief that Western's "failure to discover or disclose Burton's judgment lien .. is no defense to Burton's lien." Once again, no judgment lien ever attached, so there was nothing to disclose. Although Western knew of the Judgment against Willard Wood, (R. 138, #7), they also knew of his prior conveyance under the Willard Wood Deed, (R. 138, #8). Moreover, the question in determining Lynda Baldwin's BFP status under Section 25-1-13 is whether Lynda Baldwin, through Western or otherwise, had previous notice of any fraudulent intent of her immediate grantor, Tonya Wood, or of any fraud rendering void the title of Tonya Wood. Knowledge of a "judgment" is irrelevant under Section 25-1-13, which states:

**"25-1-13. Bona fide purchasers not affected. The provisions of this chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."**

Notwithstanding Western knew of the Judgment, there is no evidence that even remotely suggests that Western had previous notice of any alleged fraud under the Willard Wood Deed. Baldwins purchased the Property without any previous notice whatsoever of any alleged fraudulent intent under any conveyance, believing in good faith that

it belonged to Tonya Wood. As evidenced in their affidavits, no one ever told Baldwins anything that would cause them to know or believe there was anything improper regarding the Willard Wood Deed. (R. 410, #5; R. 413, #5; R. 546, #s 8-9; R. 566, #3) These facts are undisputed in any document or affidavit submitted by Burtons.

In their Brief, page 33, the Burton Group argues that Baldwins personally had at least constructive notice of the fraudulent nature of the Wood's Deed delivered to them on September 30, 1991. The fact that Willard Wood signed the Woods' Deed does not affect title to the Property because he had no interest then. Willard Wood's signature on the Woods' Deed does not put Baldwins on notice to inquire further or question the validity of the Willard Wood Deed, since Tonya Wood was the only titled owner of record. (R. 550) Baldwins clearly provided the reason that Willard Wood signed Woods' Deed, i.e., because he appeared to have some "naked interest of record". (R. 410, #6; 413, #6) That "naked interest of record", if any, resulted presumptively from his signature on the Kofoed Trust Deed.

In their Brief, page 34, the Burton Group argues that even if Lynda Baldwins was a BFPs at the time of her initial purchase, she subsequently lost that status because of the foreclosure of the Kofoed Trust Deed, notwithstanding she later reacquired the Property from Derald Tilley. (R. 379) But a loss of Lynda Baldwin's interest under the Kofoed Trust Deed foreclosure in 1986 doesn't change the fact that she was a BFP in 1981 when she purchased from Tonya Wood. Under Section 25-1-13, if she had no previous notice of any fraudulent intent of her immediate grantor, Tonya Wood, or of any fraud rendering void the title of Tonya Wood, she was a BFP.

Burtons also claim that when they levied the Execution, they

were relying on Section 25-1-15(2), U.C.A. But the remedy of that statute is not available when the alleged fraudulent conveyance is to a BFP "one who has derived title immediately or mediately from such a purchaser". There is no evidence that Tonya Wood, the transferee under the Willard Wood Deed, is anything but a bona fide purchaser, and Baldwins derived their title through her. In Butler v. Wilkinson, 740 P.2d 1244, 1262 (Utah 1987), this Court determined the "BFP" issue and the availability of the remedy under Section 25-1-8 under facts similar to ours. Butler, at 1262, held that:

"The remedy provided by the Act for a fraudulent conveyance is the voiding of the conveyance. Section 25-1-8. That remedy is not available, however, when the property has been transferred from the fraudulent transferee to a third-party purchaser for value without 'notice of a fraudulent intent' of his immediate grantor, or of the fraud rendering void the title of such grantor. Section 25-1-13. Since Christensens did not have that intent, the conveyance to them cannot be voided."

\* \* \* \* \*

"Generally, when a transfer is [held] void as a fraudulent conveyance, the creditors look to the fraudulently conveyed property under Section 25-1-15. In this case, however, the land was not in the hands of a fraudulent transferee [Tonya Wood], but was owned by the Christensens [third-party grantees of the transferees]. Section 25-1-13 deals with property that is fraudulently conveyed, but held by innocent third persons. That section provides that the provisions of the Act do not affect the title of a purchaser for value without notice of the fraud. The trial court expressly found Christensen to be a bona fide purchaser, and we have affirmed that ruling."

See also Johnson v. Smith, 455 P. 2d 244, 245 (Wyo. 1969); Cody Finance Co. v. Leggett, D. Wyo., 116 F. Supp. 700, 705 (reaffirmed 214 F.2d 695); 53 C.J.S., Sec. 13; and Hudson Trust Co. v. Davis, 49 S.Ct. 179, 278 U.S. 655. "... [A] conveyance obtained through fraud and deceit is not a nullity, but a conveyance from a fraudulent grantee [Tonya Wood] to a third person [Baldwins], who purchased the property in good faith and for a consideration, will be held valid as against the first grantor [Willard Wood]." Mid Kansas Federal

Savings and Loan Ass'n. v. Binter, 415 P.2d 278, 282 (Kan. 1966). Until a debtor's creditors have acquired some "lien" on his property, he may dispose of it and give a good title to bona fide purchasers without regard to such creditors. Hurst v. D.P. Davis Properties, 54 S.Ct. 857, 292 U.S. 648.

Thus, the protection under Section 25-1-13 is available to Lynda Baldwin if she was a "purchaser for a valuable consideration" who purchased the Property without "previous notice of the fraudulent intent of [her] immediate grantor or of the fraud rendering void the title of such grantor". Conversely, the remedy under Section 25-1-15(2) is not available to Burtons if Lynda Baldwin was a "purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser".

#### **ARGUMENT X**

##### **The Burton Group Wrongfully Levied Execution On Lynda Baldwin's Property Which Justified Setting Aside Execution Sale**

The Execution (Ex. "D") which was prepared by Burtons, was wrongfully sought and issued without a valid lien and enforceable judgment. It states "... the amount actually due thereon is \$4,323.73 and interest ..." It authorized a levy on and sell the unexempt real property of the judgment debtor, Willard Wood. But Burtons issued a "Praecipe" (Ex. "E") directing a "levy on all right, title and interest of Gregory Blake Baldwin and Lynda Baldwin, successors-in-interest of Willard D. Wood, defendant in the above-entitled action". Pursuant to the Praecipe, the Sheriff prepared a Notice of Levy (Ex. "F") and "levied upon the right, title, claim and interest of Gregory Blake Baldwin and Lynda Baldwin, successors-in-interest of Willard D. Wood..." Under the Notice of Sale (Ex. "G") and Newspaper Notice

(Ex. "H"), the Sheriff intended to sell Baldwins' property. The Certificate of Sale (Ex. "J") and Sheriff's Deed (Ex. "K") evidence the levy on and sale of Baldwins' property. Under all such documents subsequent to the Execution, it is clear Burtons intended to levy on and sell the property of Baldwins to satisfy the unenforceable debt of Willard Wood out of their property.

Thus, there were substantial prejudicial irregularities both in the acquiring the Execution and in causing the Execution Sale, and the Burton Group deliberately caused all of it. The trial court correctly found that: "... Burton has obtained Baldwin's property by improperly prepared documents, all in violation of the rights of Baldwin". (Ex. "L", p. 5). In the 1989 Order, the trial court correctly determined that all documents subsequent to the Execution "... were wrongfully and erroneously prepared, issued and carried out without legal justification .." (Ex. "M", #5) The Burton Group's actions did not conform to statutory requirements, and deprived Lynda Baldwin of her property without due process.

"Where the property sold was not subject to sale, the sale should be set aside .. as only the execution debtor's interest in the property is affected by the sale." 33 C.J.S., Sec. 232, p. 491. A sheriff's sale of real property should be set aside when the sale fails to conform to statutory requirements. 2-H Ranch Co., Inc. v. Simmons, 658 P.2d 68 (Wyo. 1983). The Sale was justly set aside.

#### **ARGUMENT XI**

##### **The Trial Court Correctly Awarded Lynda Baldwin Attorney Fees And Related Damages**

Under the 1989 Order granting partial summary judgment to Lynda Baldwin, the trial court reserved for later determination "... the issues of damages under such claims, including attorney's fees

incurred by Baldwin in regards to her having the Execution Sale and Sheriff's Deed voided .." (Ex. "M", #7) Dwight Epperson, Esq., counsel for Lynda Baldwin, then filed his "Affidavit Of Attorney's Fees" ("Damages Affidavit"), (R. 641), requesting \$12,715.25 in damages. In response, Burtons filed an objection ("Objection") to the Damages Affidavit. (R. 659) Following a hearing on May 14, 1990, the trial court allowed only 60% of the total damages requested by the Damages Affidavit. (R. 666) Subsequently, under the 1990 Order and 1990 Judgment, the trial court awarded \$7,829.66 to Lynda Baldwin, representing "attorney's fees and related damages" incurred by her in the matter. (Ex. "O"; Ex. "P"; R. 669, 667.)

The detailed facts of the Damages Affidavit are uncontroverted by any affidavit of the Burton Group. Rule 56, U.R.C.P., "is no different where the subject of the summary judgment is a claim for attorney fees". Taylor v. Estate of Taylor, 770 P.2d 163, 169 (Utah App. 1989). "[W]here attorney fees are awarded to a prevailing party on summary judgment, the undisputed, material facts must establish, as a matter of law, that (1) the party is entitled to the award and (2) the amount awarded is reasonable." Taylor, at 169. Notwithstanding they filed the Objection, the Burton Group did not file any opposing affidavit controverting either the damages requested or their reasonableness. Taylor, at 172. "Thus, there was no dispute of material fact regarding the damages requested or their reasonableness." Taylor, at 169. Therefore, attorney's fees may be awarded on summary judgment if the record contains an unrebutted affidavit, or evidence supporting the reasonableness of the award. Freed Fin. Co. v. Stoker Motor Co., 537 P.2d 1039, 1040 (Utah 1975). Uncontroverted testimony concerning the amount of a reasonable fee



provides an adequate basis for the fee award. South Sanpitch Co. v Pack, 765 P.2d 1279, 1283 (Utah App. 1988).

In their Brief, pages 36-39, the Burton Group argues the trial court erred in awarding any damages. They claim the trial court didn't indicate the "legal basis" for the award, but did acknowledge it could be under either (i) Section 78-27-56, U.C.A., (ii) slander of title, or (iii) wrongful execution. To affirm the damage award this Court must conclude, in light of the undisputed facts, that a "legal basis" exists. Taylor, at 168. Although the exact legal basis is not specifically set out as such in the Memorandum Decision, 1990 Order, or 1990 Judgment, the 1989 Order does shed some light on the mind of the trial court in this regard. (Ex. "M", #s 5 & 7) But there is no transcript of the hearing in the record or written memorandum informing this Court of the trial court's legal view of the matter. However, this Court "can affirm the judgment if any legal basis exists to justify the trial court's award of damages." Beuhner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988).

The legal basis for the award of "attorney's fees and related damages" can be found under (i) Section 78-27-56, U.C.A., (ii) wrongful execution, (iii) slander of title, (iv) Rule 11, U.R.C.P., or (v) a combination of any or all of them, as discussed hereafter.

#### **Actions Or Defenses Without Merit And Lacking Good Faith**

One such legal basis for affirmation of the damage award falls under Section 78-27-56, U.C.A., which provides:

"In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith."

"In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." Taylor, at 170. "The standard in that section specifically includes an examination into the good faith of a litigant." O'Brien v. Rush, 744 P.2d 306, 310 (Utah 1987). "Lack of good faith for purposes of 78-27-56 turns on subjective intent." Taylor, at 170; Cady v. Johnson, 671 P.2d 149, 151-52 (Utah 1983).

Cady, at 151, held that two elements are required under Section 78-27-56 in addition to being a prevailing party: (i) the claim must be "without merit"; and (ii) the losing party's conduct must be "lacking in good faith". Cady, at 151, then defined both elements. First, "without merit" means "bordering on frivolity", citing Can-Am Petroleum Co. v. Beck, 331 F.2d 371 (10th Cir.1964), or "of little weight or importance, having no basis in law or fact." Second, "lacking in good faith" means the inverse of "good faith". "Good faith" means: "(1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay or defraud others". Eames v. Eames, 735 P.2d 395, 397 (Utah 1987), citing Cady, at 151. "Lacking in good faith" is found when one of the three above elements is lacking. Cady, at 151. There is substantial evidence in the record that the Burton Group's conduct and defenses thereof were both "without merit" and "lacking in good faith", as shown by the following facts more fully discussed elsewhere in this brief.

As detailed throughout this brief, the claims and defenses of the Burton Group have no basis in law or in fact and are "without merit" because: (i) the Willard Wood Deed was prima facie valid under 57-4a-4(1), U.C.A., avoidable only upon a successful equitable attack; (ii) there was no valid lien against the Property under 78-22-1, U.C.A.; (iii) Burtons only lien rights were against the unexempt real property of Willard Wood; (iv) the Judgment was no longer enforceable because of 11 U.S.C., Section 524(a)(1); (v) no lien survived Wood's Bankruptcy because there was never a valid lien to begin with; (vi) an affirmative action to foreclose the lien and set aside the alleged fraudulent conveyance was necessary to establish lien priority over the interest of Lynda Baldwin; (vii) title to the Property was clearly in the name of Lynda Baldwin when Burtons levied execution; (viii) all execution documents were improperly prepared and irregular, and violated Lynda Baldwins due process rights; (ix) an execution proceeding under Rule 69, U.R.C.P., where no lien attached cannot be used as a substitute for an action to foreclosure an alleged judgment lien; (x) 11 U.S.C., Section 524(a)(1) prohibited a claim for fraudulent conveyance, and the Fraudulent Conveyance Act did not create a "new claim"; (xi) there was no remedy under Section 25-1-15(2) because Burtons were no longer judgment creditors and had lost their ability to attack the Willard Wood Deed; (xii) there was no remedy under Section 25-1-15(2) against a person other than a "transferee", nor against a bona fide purchaser; (xiii) legal process under Rule 69(a), U.R.C.P., was not available absent a valid lien and an enforceable judgment; (xiv) the statute of limitations under 78-12-26, U.C.A., had run a claim for fraudulent conveyance; (xv) Lynda Baldwin was not a party to the

Burton Lawsuit, had not been served with legal process, and that court had no jurisdiction over her or her property; (xvi) Lynda Baldwin was not a judgment or execution debtor, nor a "successor-in-interest" to Willard Wood, nor a "transferee" of him; (xvii) the execution proceeding was conducted with erroneously and wrongfully prepared documents; (xviii) Lynda Baldwin was a BFP; and (xix) all the other reasons detailed throughout this brief. The Burton Group's arguments against in support of their claims and defenses contradict the law of this case and every material finding of the trial court. Thus, their claims and defenses are "without merit".

The conduct of the Burton Group is "lacking in good faith" because: (i) they could not have had "an honest belief in the propriety of the activities in question", in that they were represented by counsel with full knowledge of the facts and law on the issues and there was no legal basis whatsoever for anything they did; (ii) they clearly "intended to take unconscionable advantage" of Lynda Baldwin's financial plight under the Kofoed Trust Deed foreclosure by implementing the wrongful levy on and sale of her property without justification; and (iii) they intended to defraud the court and ultimately Lynda Baldwin of her property by representing to the court clerk, upon delivering the Execution for the court's issuance; that the Judgment was enforceable against Willard Wood when they knew it was not; i.e., by inference, they purposely concealed the fact that the personal obligation shown in the Execution was discharged in Wood's Bankruptcy and Willard Wood was no longer liable to Burtons for the amount shown therein. Proof of any one of these facts establishes the second element, "lack of good faith". See Eames v. Eames, at 397; citing Cady, at 151.

## Wrongful Execution

Another legal basis for affirmation of the damage award falls under "wrongful execution". Attorney's fees may be an item of consequential damages flowing from the wrongful execution. There is simply no excuse for the Burton Group's cavalier conduct regarding Lynda Baldwin's property, particularly in absence of a statutory lien and enforceable judgment. The wrongful execution proceedings under Rule 69 were conducted under the direction and participation of Burtons. After acquiring the Execution (Ex. "D") against Willard Wood which they themselves prepared, Burtons issued the Praecipe (Ex. "E") directing the Sheriff to levy on and sell the property of Baldwins, rather than Willard Wood. Such wrongful execution was not only "lacking in good faith", but in direct violation of Utah law.

The general rule of law regarding wrongful executions is that "... if it is shown that the execution creditor advised, directed or assisted in the commission of the unlawful act he will be liable with the officer for the injury sustained." Foley v. Audit Services, Inc., 693 P.2d 528, 531 (Mont. 1985); citing 33 C.J.S. Executions, Sec. 456(b)(2). "Liability is generally premised upon direct participation, such as advising the sheriff to seize certain assets not belonging to the judgment debtor or ratification of the sheriff's wrongful acts." Foley, at 531; citing several cases. "Moreover, if the creditor authorized the unlawful act, the creditor would be liable in its own capacity for wrongful execution." Foley, at 531.

The general rule in Utah "... is that attorney's fees are not recoverable unless allowed by statute or contracted for by the parties unless, of course, equity permits otherwise." Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, 625-26 (Utah 1979);

citing Eastman v. Eastman, 558 P.2d 514 (Utah 1976). Attorney's fees incurred in a legitimate and reasonable attempt to secure the return of property by an order to quash the writ of execution are a reasonable, probable, and foreseeable consequence of a wrongful execution and are recoverable. Coggins v. Wright, 526 P.2d 741, 743 (Ariz. App. 1974); 30 Am.Jur.2d, Executions, Section 763. "... [T]hey are a legitimate item of damages caused by the other party's wrongful acts." Western Gas. & Sur. Co. v. Marchant, 615 P.2d 423, 427 (Utah 1980); citing Espinoza v. Safeco Title Ins. Co., 598 P.2d 346 (Utah 1979), and 20 Am.Jur. 2d., Costs, Sec. 72. Such damages are allowed when the party performing the execution has acted in bad faith. Peterson v. Montana Bank of Bozeman, 657 P.2d 673, 681 (Mont. 1984).

Attorney's fees may be awarded under the so-called "obdurate behavior" doctrine, where the losing party is shown to have acted in bad faith or for oppressive reasons. Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed. 2d 702 (1973); E.F. Hutton & Co. Inc. v. Anderson, 596 P.2d 413, 416 (Colo. App. 1979). "This exception applies to bad conduct relating to the prosecution or defense of the action." E.F. Hutton & Co. Inc., at 416; citing 6 Moore, W. Taggart, J. Wicker, Moore's Federal Practice, Sec. 54.77[2] (2d ed. 1976). "[T]he dissolution of the writ of execution is conclusive that the writ was wrongfully obtained." Coggins, at 743; citing cases.

In their Brief, page 39, the Burton Group assert that Lynda Baldwin should not have been awarded damages because "... Burtons' execution upon the property caused no damage to Baldwin". They claim Lynda Baldwin was in default under the Kofoed Trust Deed and about to lose her interest anyway. Moreover, they claim any conflict between the interests of Burtons under their alleged judgment lien and those

represented by the Kofoed Trust Deed constitutes a conflict as to "lien priority", not a wrongful execution. This argument has no merit because there was no conflict in "lien priority". The fact is, Burtons had no valid lien under which to assert any priority.

By initiating the wrongful execution, the Burton Group merely took unconscionable advantage of Lynda Baldwin in her financial plight. They did all this in direct violation and willful disregard of Lynda Baldwin's due process rights. Their cavalier conduct can best be summed up by their assertion that the Willard Wood Deed was "void", and they could simply "disregard" it. Accordingly, Burtons are liable for damages where such execution is caused by their disregard for the rights of others and their own misconduct, direct participation and bad faith.

#### **Slander of Title**

Another legal basis for affirmation of the damage award falls under "slander of title". To be liable for slander of title, the Burton Group must "publish matter which is untrue and disparaging" to Lynda Baldwin's interest in the Property. Pender v. Dowse, 265 P.2d 644, 649 (Utah 1954). Pender, at 649-50, held that the publisher of the matter is liable under Restatement Of The Law On Torts, Vol. 111, Secs. 624 and 626-7, if the disparaging matter, dealing with a statement of fact, is "untrue", or "if an expression of opinion is dishonestly made".

All of the documents under the execution proceedings recorded against the title to Lynda Baldwin's property were "untrue" because they tell the public the Property was sold to the Burton Group, when in fact it wasn't. They tell the public Lynda Baldwin was a "successor-in-interest" of Willard Wood, when in fact she wasn't.

The Burtons created the Execution document which dishonestly represented that they were still creditors of Willard Wood and he was still liable for the debt, when in fact he wasn't. They initiated, participated in, and condoned the preparation of erroneous documents that stated her property had been sold, when in fact it hadn't. Such documents were "disparaging" to Lynda Baldwin's substantial property interest because they created a frivolous cloud on her title that required this action. Pender, implies that attorney's fees may be appropriate if the above facts are present. (Cf. 50 Am.Jur.2d, Libel and Slander, Sec. 550.)

#### Violation Of Rule 11, U.R.C.P.

Another legal basis for affirmation of the damage award falls under Rule 11, U.R.C.P. In Taylor v. Estate of Taylor, 770 P.2d 163, 170-72 (Utah App. 1989), it was held:

"Finally, we turn our attention to Rule 11, U.R.C.P., providing, in part, as follows:

"The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law... If a pleading, motion, or other paper is signed in violation of this rule, the court ... shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include ... a reasonable attorney's fee."

This rule, which mirrors Fed.R.Civ.P. 11, "requires some inquiry into both the facts and the law before the paper is filed; the level of inquiry is tested against a standard of reasonableness under the circumstances." 5 C. Wright & Miller, Federal Practice and Procedure, Sec. 1333 at 177 (1987 Supp.). This objective approach allows sanctions to be imposed in a greater range of circumstances than did the pre-amendment, subjective "bad faith" approach. [Citing cases.]

\* \* \* \* \*



However, in a number of cases this court has imposed sanctions pursuant to our rules, including R. Utah Ct.App. 40(a) which imposes a similar duty on litigants and their counsel. [Citing cases.]

\* \* \* \* \*

Rule 40(a) is to this court what Rule 11 is to the trial courts. Both rules require attorney's and parties to reasonably inquire as to the facts and law before a document is signed and filed. Rule 40(a) is substantially similar to Rule 11 .."

\* \* \* \* \*

These cases establish that Rule 40(a) imposes a duty to investigate the factual and legal basis of an appeal or appellate document before filing. [Citing cases.] Subjective intentions are essentially irrelevant; the determination of whether the rule has been violated is made on an objective basis. Id. Except to the extent that a somewhat less forgiving approach should perhaps be employed at the appellate level, we find that this analysis is equally applicable to the similarly worded Rule 11.

\* \* \* \* \*

Whether specific conduct amounts to a violation of Rule 11 is a question of law. [Citing case.] If a Rule 11 violation is shown, an appropriate sanction is mandated, and we will affirm the particular sanction imposed by the trial court, including the reasonableness of any fee award, absent an abuse of discretion. [Citing case.] We are mindful that Rule 11 gives trial courts great leeway to tailor the sanction to fit the requirements of the particular case. [Citing case.]"

Applying the forgoing analysis of Taylor to this case, the award of fees to Lynda Baldwin must be affirmed. Clearly, a "reasonable inquiry" at the time by Burtons or their attorney, as contemplated by Rule 11, should have reasonably disclosed that their defense to Lynda Baldwin's Complaint, their counterclaim, their opposition to Lynda Baldwin's motions for summary judgment, and their own motion for summary judgment were not "well grounded in fact" nor "warranted by existing law or a good faith argument". Substantially none of the defenses, claims and assertions in their pleadings have any basis in law or in fact. The Burton Group had a duty to investigate the factual and legal basis of their pleadings before filing.

By failing to conduct this inquiry, the Burton Group and their counsel violated Rule 11. This neglect caused Lynda Baldwin to incur

legal expense in researching the legal basis and validity of their actions, and initiating and maintaining this lawsuit to void the execution proceedings and remove the cloud from her title. This is precisely the type of case Rule 11 is intended to address, and the facts mandate the sanctions awarded by the trial court.

The imposition of \$7,827 in "attorney's fees and related damages" as a sanction for violating Rule 11 is not an abuse of discretion. It was appropriate for the trial court to consider and include the damages incurred by Lynda Baldwin in consequence of the Burton Group's conduct and their pleadings. Accordingly, under Rule 11, there is a legal basis and undisputed factual support for an the damage award.

#### **Sanctions Under Rule 40(a), U.R.A.P.**

Substitute Appellee requests sanctions for having to respond to this Appeal. When sanctions are awarded in the trial court, they should be awarded to that same party if successful on appeal. See Dixon v. Stoddard, 765 P. 879, 881 (Utah 1988); and Management Servs. Corp. v. Development Assocs., 617 P.2d 406, 409 (Utah 1980). Sanctions are awarded in situations where the "totality of defendant's argument compels this Court to find that he is attempting to take unconscionable advantage .." which evidences a frivolous appeal. Eames v. Eames, 735 P.2d 395, 398 (Utah Ct.App. 1987). See also Cady, at 397. The Utah Court of Appeals defines a frivolous appeal "as one having no reasonable legal or factual basis as defined in Rule 40(a)." O'Brien v. Rush, 744 P.2d 306, 310 (Utah Ct.App. 1987). This Court equated frivolous with being without merit." O'Brien, at 310. That alone meets the technical requirements of Rule 40(a).

Substitute Appellee recognizes the right of a party to argue in

an attempt to correct what that party thinks is error in the trial court. But when there is no basis for the argument presented and when the evidence or law is mischaracterized and misstated and the claims have no merit, the Court must question the party's motives. See Eames, at 397-398. The facts and law of the case clearly show that no judgment lien ever attached to the Property under 78-22-1; that the execution proceedings were clearly wrongful and violated Lynda Baldwin's due process rights; and that an affirmative action was necessary to defeat the prima facie valid Willard Wood Deed. The trial court found no merit in any contentions or defenses of the Burton Group. Nevertheless, they continue to argue right into this appeal against substantially all of the trial court's findings, and further assert that all they did to Lynda Baldwin under the execution proceedings was merely that done by "any reasonable creditor under the circumstances." The simple fact is, they never acquired a valid lien and were no longer creditors. Thus, the Burton Group has misstated the facts and law on several issues.

It should have been equally obvious that the appeal has no reasonable legal or factual basis. The record shows that the trial court ruled against the Burton Group on every material issue they raised and dismissed their counterclaim with prejudice. The record further shows the trial judge carefully fashioned and reduced the attorney's fees and related damages after a fair opportunity for hearing. The Burton Group's claims on appeal simply controvert the findings of the court. They are not only without merit, but are also without basis in law or fact. Substitute Appellee is entitled to the benefit of Rule 40(a). This is exactly the type of case calling for their award. The case should be remanded for the limited purpose of

determining sanctions against the Burton Group for bring this appeal, with an order requiring payment of them to Substitute Appellee.

#### Related Damages

Substitute Appellee performed certain paralegal services in the trial court for Dwight Epperson, Esq., attorney for Lynda Baldwin. Copies of the Itemized Statements submitted to Mr. Epperson by Paul H. Richins & Co., Inc., are attached to the Damages Affidavit. (R. 644-658) In their Brief, pages 39-43, the Burton Group asserts the trial court erred in awarding Lynda Baldwin \$4,597.60 in "secretarial fees and/or paralegal costs". However, the trial court did not specify any amount of the damage award as "secretarial fees and/or paralegal costs". In the 1990 Judgment, the court identified the \$7,872.66 damage award as "... payment for attorney's fees and related damages incurred by plaintiff in this matter", but did not allocate the award. To the extent any part of the "related damages" are secretarial fees and/or paralegal costs, the trial court must have concluded that each was an element of damages and recoverable.

In regards to the element of "related damages", this Court "can affirm the judgment if any legal basis exists to justify the trial court's award of damages." Beuhner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988). The Burton Group did not file any opposing affidavit controverting this element of damages or their reasonableness. See Taylor, at 172. "Thus, there was no dispute of material fact regarding the damages requested or their reasonableness." See Taylor, at 169. This element of the attorney's fee may be awarded on summary judgment if the record contains an unrebutted affidavit, or evidence supporting the reasonableness of the award. See Freed Fin. Co., at 1040. Uncontroverted testimony concerning the

amount of a reasonable fee provides adequate basis for the fee award. South Sanpitch Co. v Pack, 765 P.2d 1279, 1283 (Utah App. 1988).

Although not specifically addressed in this Court, several other courts have held that the services of paralegals and secretaries acting as paralegals under the supervision of the attorney are recoverable. Lea Co. v. North Carolina Bd. of Transp., 374 S.E.2d 868 (N.C. 1989); Multi-moto v. ITT Commercial Finance, 806 S.W.2d 560 (Tex. App. 1991); Hawkins v. Anheuser-Busch, Inc., 697 P.2d 810 (8th Cir. 1983), citing numerous federal cases; Aires v. Palmer Johnson, Inc., 735 P.2d 1373 (Ariz. App. 1987); Newport v. Newport, 759 S.W.2d 630 (Mo. App. 1988); Sebastian v. Texas Dept. of Corrections, 558 F. Supp. 507 (1983); S.R. v. S.M.R., 709 S.W. 2d 910 (Mo. App. 1986).<sup>3</sup>

A "paralegal" includes "paralegals, legal assistants and law clerks". Aries, at 1384. "A paralegal is an assistant that 'act[s] for the lawyer in the rendition of [his] professional services' and is under his direct supervision." Newport, at 636. A legal assistant does "those things that an attorney does not necessarily need to do." Multi-Moto, at 571. "Paralegals .. may perform legal services properly considered as a component in an award of attorney's fees". Aires, at 1384. "A trial judge, acting within his discretion, may consider and include in the sum he awards as attorney's fees the services expended by paralegals and secretaries acting as paralegals if, in his opinion, it is reasonable to do so." Lea Co., at 871. "In cases in which attorney's fees may be recovered, reasonable

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<sup>3</sup>. In Alaska, paralegal fees are recoverable as an item of costs, pursuant to Alaska Civil Rule 79(b). Paralegal fees are routinely allowed by the Federal Courts in claims brought under federal statutes which provide for an award of attorney's fees. Hawkins v. Anheuser-Busch, 697 F.2d 810 (8th Cir. 1983); Sebastian v. Texas Dept. of Corrections, 558 F.Supp. 507 (Dist. Tex. 1983).

paralegal fees are allowable." Newport, at 637; citing Hawkins, at 817, and S.R., at 916. "A party may separately assess and include in the award of attorney's fees compensation for a legal assistant's work, if that assistant performs work traditionally done by an attorney." Multi-Motto, at 570. "Paralegal fees should be allowed if reasonable and not duplicative of other legal fees." Hawkins, at 817, citing numerous federal cases.

The rationale behind the above cases is that the use of paralegals may result in savings to clients and lower overall fee awards. Lea, at 871. As this case clearly demonstrates, Mr. Epperson's use of Paul H. Richins & Co., Inc., as the paralegal resulted in a substantial savings to Lynda Baldwin. As complex and fact intensive as this case is, the total amount of \$7,872.66 for attorney's fees and related damages is not unreasonable regardless of its allocation. Considerable research was required covering many legal issues. Based upon the hourly rates of both, it was more economical for the paralegal to do that research and other routine work than the higher priced attorney. Because of the indepth, pretrial work done by the paralegal for the attorney, this case never went to a long, expense trial that would have undoubtedly cost Lynda Baldwin and the state far more. In a trial, attorney's fees can escalate dramatically, and would have if this case had gone to trial.

The paralegal performed the work under the direct supervision and control of the attorney, and billed the attorney for the services. The paralegal paid his own overhead and office expenses out of the hourly rate charged to the attorney. In his billing statement, the paralegal identified the nature of the work performed for the attorney, his hourly rate, and the number of hours expended

by him. The work was obviously necessary, and the attorney must have considered the paralegal's qualification acceptable or the attorney or would not have employed him. But the qualifications of the paralegal were never objected to in the Objection, (R. 659), or put at issue in the trial court, although the Burton Group now attempts to put them at issue for the first time on appeal.

Paralegal services are an adjunct of attorney's fees, rather than an item of costs. Treating paralegal expenses as an item of attorney's fees insures that such expenses are related to legal services and are performed under the auspices of an attorney. The Burton Group suggests that "[a]llowing paralegal costs in the present case would encourage paralegals to act outside of the direction or control of a licensed attorney, in potential violation of Utah Code Annotated Section 78-51-25. However, Burtons have submitted no evidence whatsoever that the paralegal acted outside the direction or control of the attorney. In fact, the Damages Affidavit evidences such direct supervision and control. (R. 602)

Presumably, the trial judge found facts to support the award of "attorney's fees and related damages". The fact that the Damages Affidavit, which allegedly included reasonable paralegal fees, was uncontroverted by any opposing affidavit from Burtons, coupled with the presumptive expertise of the trial judge in assessing the facts and the Burton Group's overall conduct, claims and defenses, constitutes sufficient justification for affirming the award.

## **ARGUMENT XII**

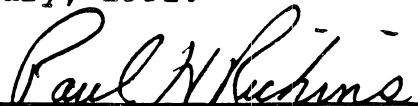
### **Summary Judgment Is Appropriate**

The Burton Group submitted several affidavits containing mere assertions, allegations and factual conclusions that an issue of fact

exists without a cause of action or proper evidentiary foundation to support them, and are insufficient to preclude granting of a summary judgment motion. To raise a genuine issue of fact, the affidavit must do more than reflect the affiant's opinions and conclusions, and must 'set forth specific facts' showing a genuine issue for trial. An assertion that an issue of fact exists without proper evidentiary foundation in support is insufficient to preclude summary judgment. See Reagan Outdoor Advertizing, Inc. v. Lundgren, 692 P.2d 776, 779 (Utah 1984), citing Norton v. Blackam, 669 P.2d 857 (1983); Wester v. Sill, 675 P.2d 1170 (Utah 1983); citing several cases; and Matter of Winslow's Estate, 636 P.2d 505, 508 (Wash. App. 1981).

Burtons made their best showing under the pleadings and affidavits submitted. Burtons have not presented affirmative factual evidence or otherwise impeached the evidence presented in Baldwins' affidavits in their opposition to the motions for summary judgment. The only issue Burtons raised is whether the Willard Wood Deed was a fraudulent conveyance. But that issue is barred by (i) the statute of limitations, (ii) the discharge of the Judgment under Willard Wood's bankruptcy, and (iii) their failure to plead fraud as an affirmative defense. Therefore, there is no genuine issue of fact regarding a fraudulent conveyance, and the trial court correctly granted summary judgment. Summary judgment is appropriate and serves its intended purpose of avoiding fruitless court proceedings with their attendant cost in time and money. Larson v. Wycoft Co., 624 P.2d 1151, 1153 (Utah 1981).

DATED this 11th day of February, 1992.

  
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Paul H. Richins  
Substitute Appellee



**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of February, 1992, I personally hand-delivered a true copy of the foregoing instrument to the law offices of David H. Schwobe, Esq., attorney for Appellants, at PERKINS, SCHWOBE & MCLACHLAN, 343 South 400 East, Salt Lake City, Utah 84111.

  
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