

1990

Leon H. Saunders v. John C. Sharp and Geraldine Y. Sharp : Brief in Opposition to Certiorari

Utah Supreme Court

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BRIEF

900360

IN THE UTAH SUPREME COURT

LEON H. SAUNDERS; ROBERT FELTON; :
SAUNDERS LAND INVESTMENT CORP., :
a Utah corporation; WHITE PINE :
RANCHES, a Utah general :
partnership; WHITE PINE :
ENTERPRISES, a Utah general :
partnership; and KENNETH R. :
NORTON, dba Interstate Rentals, :
Inc., a Nevada corporation, :

Plaintiffs and Petitioners, :

Petition No. 900360

-v- :

JOHN C. SHARP and GERALDINE Y. :
SHARP, :

Defendants and Respondents. :

BRIEF IN OPPOSITION TO
PLAINTIFFS' PETITION FOR
WRIT OF CERTIORARI

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FILED

AUG 29 1990

Clerk, Supreme Court, Utah

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CITATIONS TO THE RECORD

Citations to the Record will be abbreviated as follows:

Record on Appeal	"R."
Trial Transcript	"Tr."
Exhibit	"Ex."
Findings of Fact	"F."
Conclusions of Law	"C."
Judgment	"J."

The Addendum includes the Findings of Fact and Conclusions of Law and the Judgment of the trial court and the decision of the Court of Appeals and shall be cited to as "Add." with the page number following the Record or Exhibit citation.

CONTROLLING LAW

The considerations governing the grant of review of certiorari are set forth in Rule 46, Utah R. App. P.:

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

- (a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;
- (b) When a panel of the Court of Appeals has decided a question in state or federal law in a way that is in conflict with a decision of the Supreme Court;

- (c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or
- (d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

(Emphasis added).

REPORT OF DECISION

The opinion of the Court of Appeals is reported in Saunders v. Sharp, 135 Utah Adv. Rep. 68 (Ct. App. June 5, 1990) (Add. 48-52).

QUESTIONS PRESENTED FOR REVIEW

Although plaintiffs/petitioners (sometimes collectively "White Pine") list three questions as being presented for review, those issues can be synthesized into one central issue: Did the Court of Appeals correctly hold that White Pine's appeal was simply an attempt to relitigate the factual issues determined by the trial court in the Sharps' favor?

STATEMENT OF THE CASE

Although White Pine asserts a plethora of alleged errors committed by the trial court and the Court of Appeals in its review of that decision, once its motivation in filing a complaint is revealed, this case becomes very simple. White Pine was a partnership of desperate men who ran out of the dollars needed to honor their obligations.¹ After years of paying under the parties' Contract without complaint, White Pine was forced to invent excuses for their non-performance and finally took the startling and aggressive posture of filing a Complaint against the Sharps, even though it admittedly had failed to pay property taxes, installment payments and to provide to the Sharps certain utility connections. As the trial court found, these excuses were never mentioned to the Sharps until immediately prior to the filing of their Complaint in September of 1986:

¹Felton testified "we have this construction loan that's in default and we're desperate at this point. Make no mistake about it. Everybody's going bankrupt at this point." (Tr. 309, R. 1643).

Significantly, as bearing upon the credibility of plaintiffs' [White Pine's] arguments is the fact un rebutted that plaintiffs made no claims whatsoever of breach by the Sharps until after their own admitted breaches of the Closing Documents.

(F. 53, R. 1342, Add. 17).

This action arose when White Pine filed a Complaint the day before a scheduled Trustee's Sale of certain property located in White Pine Canyon, Snyderville, Utah (the "Property"). (R. 2-89, F. 95; R. 1352, Add. 27). The Complaint sought to enjoin the scheduled Trustee's Sale, alleging inter alia, that the Sharps had breached the Contract between the parties² by failing to release Lot 6 and the roadway and 7.35 acres of the unplatted portion of the Property. (R. 2-89).

²The Contract between the parties includes a Memorandum of Closing Terms (hereinafter the "Memo") (Ex. 156), a Special Warranty Deed (Ex. 17), a Trust Deed Note together with an Addendum to the Trust Deed Note (Ex. 3) and a Trust Deed (Ex. 2) (collectively referred to as "the Contract"). (F. 10, R. 1330, Add. 5). The initial draft of a purchase agreement was prepared by counter-claim defendant, Paul H. Landes, a signatory to the final documents composing the parties' Contract. (Ex. 13, Tr. 728, R. 1645). Although White Pine claims, on page 3 of its Petition that the Contract was prepared by the Sharps' attorney, Jon C. Heaton, in fact, the parties extensively negotiated the terms of the contract. (Tr. 556, R. 1644). For instance, four drafts of the Earnest Money were discussed. (Tr. 729-730, R. 1645). The rule of construction that ambiguity in a contract is construed against its drafter is inapplicable where such contract is the result of extensive negotiations between the parties. Centennial Enter. v. Mansfield Dev. Co., 568 P.2d 58 (Colo. 1977). Additionally, the rule only functions after the court has considered all pertinent extrinsic evidence and is still uncertain as to the contract's interpretation. Wilburn v. Interstate Elec., 748 P.2d 582 (Utah Ct. App. 1988).

The case arose against the following background. The Property was purchased with a down payment at closing and a promise to make five annual installments payable on June 30 of each subsequent year in the amount of \$192,611.06 principal, together with accrued interest. (Ex. 3). The Property was intended to be promptly developed as a Planned Unit Development ("PUD") into twelve 4 or 5 acre lots, with an internal roadway dedicated to public use. (F. 5, R. 1329, Add. 4, Ex. 14 and 39). The dedication of the roadway was of such vital importance to the parties that an initial plat was attached as Exhibit "A" to the Memo. (F. 14 and 19, R. 1331, 1333, Add. 6, 8, Ex. 15). Paragraph 5 of the Memo further provides that "changes in the proposed plat and the Declaration of Covenants, Conditions and Restrictions when prepared shall be subject to the reasonable approval of the Seller [the Sharps]." (F. 18, R. 1332-33, Add. 7-8, Ex. 15). The Sharps were concerned that, in the event of default, they possessed access to the Property (Tr. 749-750, R. 1645) and Robert Felton ("Felton"), one of the general partners of White Pine, knew the Sharps "wanted the right to approve them [any changes] reasonably." (Tr. 138, R. 1642).

The Memo also provided after "the recordation of a PUD Plat and Declaration of Covenants, Conditions and Restrictions" ("CCRs") that White Pine would be entitled to the release of three PUD lots of its "choice together with said roadway" described in the proposed plat attached as Exhibit 'A.' (F. 17, R. 1332, Add. 7, Ex. 15) (emphasis added). For each \$140,000.00 in principal paid

thereafter and after recordation of the PUD, White Pine "shall be entitled to the release of one (1) lot of Buyer's choice." (F. 15 and 16, R. 1331-32, Add. 6-7, Ex. 15)(emphasis added). The Memo further provided the Sharps were entitled to one sewer connection and one culinary water connection in the PUD system for "a connection fee and service fee equal to the pro rata cost to the purchaser of a lot." (F. 22, R. 1334, Add. 9, Ex. 15).³

White Pine first defaulted on its June 30, 1983 payment, which default was subsequently cured in November of 1983. (F. 27, R. 1336, Add. 11, Ex. 22; F. 31, R. 1337, Add. 12, Ex. 4 and 44). In December of 1983, White Pine, with the written consent of the Sharps, recorded a plat, which platted only a portion of the Property, instead of the entire Property as originally intended. (F. 39-40, R. 1339, Add. 14, Ex. 51). The plat also differed from White Pine's original intent by including an Owner's Dedication for a private roadway in the PUD. (F. 19, R. 1333, Add. 8, Ex. 39; F. 34, R. 1337, Add. 12, Ex. 1). The Sharps were concerned about access to the Property in the event they were required to take it

³In both their Brief filed with the Court of Appeals and their Petition, White Pine failed to address the trial court's finding that they also breached the Contract "by failing to make available [to the Sharps who still owned adjoining lands] sewer and water connections at the same charge to purchasers of a PUD lot." (F. 100, R. 1354, Add. 29). Although construction primarily commenced in 1983 for the sewer and water systems, neither was completed or operational at the time of trial, nor had the sewer construction been approved by the Snyderville Basin Sewer Improvement District ("SBSID"). (F. 82, R. 1349-50, Add. 24-25, Ex. 83, 83(a), 99-108).

back in a foreclosure. (Tr. 748-750, R. 1645). Had the entire Property been platted as originally contemplated, access would not have been an issue since if the Sharps took it back in a foreclosure sale, they would be owners and purchasers of PUD lots entitling them to access under the CCRs recorded. (Tr. 757-759, R. 1645). Had the roadway remained public, their access also would have been assured. Accordingly, at the time the Sharps were asked to approve the plat and the CCRs, their continued right of access was confirmed with White Pine both orally and in writing (F. 35-39, R. 1338-39, Add. 13-14, Ex. 25, 25(a), 26, 26(a)).

White Pine again defaulted under the terms of the Contract in November of 1984 by failing to pay all of the property taxes due. The 1984 taxes and all subsequent property taxes remained unpaid (\$20,368.62) through the time of trial. (F. 48-49, R. 1341, Add. 16). The taxes were only paid on January 13, 1989 when the trial court, as a condition of approving the plaintiffs' supersedeas bond, ordered the plaintiffs to pay them. (R. 1687-1691). White Pine further defaulted under the terms of the Contract by failing to make all of the June 30, 1985 installment payment (only \$59,709.47 was paid) and the remaining installment payment due under the Contract in 1986. (F. 50, R. 1342, Add. 17, Ex. 44).

The Sharps recorded a Notice of Default on September 16, 1985. (F. 51, R. 1342, Add. 17, Ex. 55). After White Pine received the Notice of Default, Felton assured the Sharps "every attempt is being made to resolve the problem [of our non-payment]." (F. 52,

R. 1342, Add. 17, Ex. 31). As the trial court found: "No written or oral claim of default on the part of the Sharps under the Closing Documents was made by the plaintiffs until February 27, 1986, subsequent to plaintiffs' own defaults." (F. 71, R. 1347, Add. 22, Ex. 35; Tr. 200-201, R. 1643). Nor did White Pine request the release of Lot 6 and the roadway until long after their own defaults under the Contract.⁴

Judge Frederick held White Pine had materially breached the Contract and the Sharps had substantially complied with its terms. (F. 48, 50, 53, 57, 100, R. 1341-43, 1354, Add. 16-18, 29).

On appeal, the Court of Appeals reviewed the issues presented by plaintiffs, concluding that "Buyers are essentially challenging the trial court's findings of fact" and the legal issues raised by the appellants "strike at the trial court's determination of whether there was a material breach of contract and if so, when, and by whom." Saunders v. Sharp, 135 Utah Adv. Rep. 68, 69-70 (Utah Ct. App. May 25, 1990, Add. 48-52). White Pine's Petition for Rehearing was denied June 26, 1990.

⁴The district court found that "Plaintiffs' first requests" for release of Lot 6 and the roadway were "February 27, 1986 and May 7, 1986, respectively." (F. 59, R. 1343-1344, Add. 18-19). Also, White Pine did not request the release of 7.35 acres of the unplatted property until February 27, 1986. Id. The Contract, however, specifically provides that only "PUD lots" are to be released. Id. As the district court found, "[a]s of these dates, plaintiffs [White Pine] were still and are in of [sic] default." Id.

STATEMENT OF FACTS

Most of the omissions and misstatements of fact in plaintiffs' Petition for Writ of Certiorari ("Petition") relate entirely to their claim the Court of Appeals failed to address certain allegedly pure issues of law which they had raised. Plaintiffs claim they are arguing only matters of law, citing to various "undisputed" facts which form the foundation to their arguments. These facts, however, instead of being "undisputed," were actually resolved against them by the District Court. The Court of Appeals clearly saw through plaintiffs' veil, holding that "we are [not] thus obliged to consider the . . . evidence . . . from 'appellants' view of the way he or she believes the facts should have been found.'"⁵ Saunders at 70.

White Pine's attack upon the District Court's legal conclusions must fail when contrasted with the factual issues which were resolved against them at trial. Due to space limitations and to avoid redundancy, those facts pertaining to White Pine's claimed

⁵Further evidence of White Pine's efforts to relitigate the factual findings of the trial court can be found in their citations to the Record. The vast majority of their citations are solely to the testimony of the plaintiffs. The only Findings of Fact of the trial court cited by plaintiffs are in those instances concerning the background of the case about which there never has been any dispute, such as quotations of the language from the Contract, the fact that the Property was conveyed by the Sharps, and the fact that the deeds and the plat were recorded with the Summit County Recorder. All of the trial court's Findings of Fact relating to the issues of who breached and when the breach occurred are totally disregarded by the plaintiffs.

legal issues will be correctly set forth herein under Point I of the Sharps' Argument.

ARGUMENT

I

PLAINTIFFS' "LEGAL ISSUES" ARE SIMPLY
ATTEMPTS TO RELITIGATE THE FACTS
FOUND BY THE TRIAL COURT AGAINST THEM.

White Pine sets forth seven alleged "legal issues" on page 9 of its Petition which, it contends, the Court of Appeals failed to address. In the first alleged "legal issue," White Pine claims the Court of Appeals failed to address the argument the Sharps "breached the parties' Contract by failing to reconvey property under the Trust deed (sic) . . . [for which they] had [been] paid" This argument, as well as all the remaining arguments, must fail when an examination is made of the trial court's findings.

White Pine claims it satisfied all conditions to a release of 7.35 acres of the unplatted Property. Plaintiffs' Petition, p. 5. However, the parties' Contract specifically provides only for the release of platted PUD lots. The Memo provided:

Upon the recordation of the PUD plat and Declaration of Covenants, Conditions and Restrictions with the Summit County Recorder, Buyer shall be entitled to the release from the Deed of Trust of three (3) PUD lots of Buyer's choice together with the said roadway
. . . .

(Emphasis added.) (F. 17, R. 1332, Add. 7, Ex. D15).

White Pine also asserts, on page 5 of its Petition, that it

satisfied all conditions on December 23, 1983 to the release of five lots and the roadway. Lots 1-5, however, were reconveyed.⁶

Plaintiffs' argument regarding the roadway, which is also the subject of their second and seventh "legal issues," also must fail since it ignores the trial court's finding that execution by the Sharps of the Consent to Record constituted a release of the roadway pursuant to the language of the plat and CCRs which "reserved a non-exclusive easement for utilities and vehicular and pedestrian access over the private roadway" ⁷ (F. 39, R. 1339, Add. 14). Felton himself acknowledged in a letter to Heaton that "the deeds for the roads [sic] may be difficult to do." (F. 44, R. 1340, Add. 15, Ex. 30). The Sharps were never presented with a document in recordable form releasing the roadway from the Trust Deed. Felton testified that "Associated Title probably" would be the one to prepare the reconveyance. (Tr. 178).

⁶White Pine, on page 6 of its Petition, implies that because a partial reconveyance covering Lots 1-5 was not recorded until nearly two years later, the Sharps are, somehow, responsible. The Sharps, however, directed the Trustee, Associated Title to reconvey the lots on January 18, 1984, shortly after plaintiffs requested the release. (F. 42, R. 1340, Add. 15, Ex. 28). The Partial Reconveyance was not prepared by Associated Title until January 7, 1986, or recorded until March 26, 1986. (F. 43, R. 1340, Add. 15, Ex. 45). No explanation of the delay was provided at trial. Associated Title, named by the plaintiffs as a defendant in the action, was never served by plaintiffs and did not appear at trial. (F. 43, R. 1430, Add. 15).

⁷After recordation of the plat, the CCRs and the Consent to Record, plaintiffs proceeded without hesitation to construct the roadway and other improvements on the Property (F. 41, R. 1340, Add. 15).

Additionally, it ignores the finding that the parties subsequently modified their Contract to allow the Sharps access across the internal roadway in consideration of the Sharps' consenting to the recordation of a plat platting only one-half of the Property.⁸ (F. 39, R. 1338, Add. 14). Further, plaintiffs' contention, on page 6 of their Petition, that the Sharps never released the roadway is directly contrary to the trial court's finding that the Sharps gave repeated assurances, before and after trial, to White Pine they did not intend to interfere through their foreclosure with White Pine's

⁸White Pine in footnote 3 on page 14 of its Petition cites to its Court of Appeals Reply Brief in which it claimed there is no evidence White Pine agreed to an easement before the Sharps executed the Consent to Record. This assertion ignores the testimony of attorney Jon Heaton, accepted by the trial court. On November 18, 1983, Mr. Heaton prepared a letter to the Sharps as an embodiment of the representations White Pine was making or willing to make to the Sharps to secure their consent to the final plat. (Tr., 751, R. 1645). The letter indicated:

At a later time in the near future Hy [Saunders] has indicated he will seek release of Lots 1 through 5 of the platted subdivision along with his road (White Pine Lane). . . . When those releases are made pursuant to your [the Sharps'] instruction we will ensure that rights are reserved in White Pine Lane for access for the southern portions of the property purchased from you until your Deed of Trust is fully paid.

(F. 35, R. 1338, Add. 13, Ex. 25 and 25(a)). On November 21, 1983, Felton wrote Heaton a reply in which he stated "[i]t is perfectly acceptable to us [White Pine] that he [Mr. Sharp] retain an easement over Whit Pine Lane to the southern part of his property as well as to Lot 6 from White Pine Canyon Road up to the western boundary of Lot 6." (F. 36, r. 1338, Add. 13, Ex. 26). Heaton noted in the margin of a copy of the letter that Felton agreed "access over road [White Pine Lane] retained if Sharp develops undeveloped property Lots 7-12 White Pine Ranch." (F. 37, R. 1338, Add. 13, Ex. 26(a)).

access and utility easements⁹ (F. 88, R. 1351, Add. 26; see, also, Ex. 33, Tr. 22-25, 27-28, 43, R. 164).

White Pine finally asserts, on page 5 of its Petition, that it satisfied all conditions by June 30, 1984, to the release of Lot 6. This claimed fact is also the fourth "legal issue" relating to their failure to request a reconveyance. Such an argument ignores the specific language of the Contract requiring a "choice" by the Buyer (F. 16, 17, 61, R. 1332, 1344, Add. 7, 19) and the trial court's finding that the parties' course of conduct established the practice of requesting a reconveyance.¹⁰ (F. 47, R. 1341, Add.

⁹Although White Pine claims, on page 7 of its Petition, that the Sharps sought to foreclose the roadway, all notices of default and notices of trustee's sale subsequently recorded against the subject Property specifically provided that the notices were

SUBJECT TO easements, encroachments, restrictions, rights of way and matters of record enforceable in law [sic] equity.

(F. 56, R. 1343, Add. 18, Ex. 5, 36, 55, 56 and 58).

¹⁰White Pine asserts, at page 12 of its Petition, that the Contract is unambiguous and its interpretation is therefore a question of law. However, if a trial court finds facts respecting the intentions of the parties based on extrinsic evidence, review is strictly limited. Kimball v. Campbell (cited by plaintiffs), 699 P.2d 714, 716 (Utah 1985). This Court has consistently held that the meaning and intent of an agreement can be determined from the course of conduct and the action and performance of the parties to the agreement. Zeese v. Estate of Siegel, 534 P.2d 85 (Utah 1975); Bullfrog Marina, Int. v. Lentz, 501 P.2d 266 (Utah 1972). Additionally, the issue of whether a contract has been modified is a question of fact. Coonrod & Walz Const. Co. Inc. v. Motel Enterprises, Inc., 217 Kan. 63, 535 P.2d 971 (1975); Resource Eng. Inc. v. Siler, 94 Idaho 935, 500 P.2d 836 (1972). Finally, where several documents are executed simultaneously and are clearly interrelated, they must be construed together and harmonized if possible. Atlas Corp. v. Cloves Nat'l Bank, 737 P.2d 225 (Utah

16).

White Pine's assertion, on page 7, that only one platted lot, Lot 6, remained to be released, therefore, requiring no choice ignores the evidence on which the trial court based its Findings. White Pine was "land banking." That is, White Pine delayed recording a final plat because "[a]s soon as we file the plat, real estate taxes are going to go up significantly, which we would like to avoid until we have an actual buyer for one of the lots." (F. 28, R. 1336, Add. 11, Ex. 23). White Pine wanted to keep open its options as to the unplatted acreage, later requesting by letter the approval by the Sharps of a "multi-family development." (F. 45, R. 1340-41, Add. 15-16, Ex. 29). Accordingly, White Pine "may have chosen to prepare a plat of the then unplatted acreage and seek a release of a portion of it instead of Lot 6." (F. 61, R. 1344, Add. 19).¹¹

White Pine's third "legal issue" that the district court concluded "[t]he Sharps breach of contract was legally excused by their reliance on advice of counsel" is simply a misstatement of the ruling of the trial court. The trial court found only that the Sharps' reliance on the advice of counsel was in good faith and a defense to the statutory cause of action for failure to reconvey

1987).

¹¹As Felton testified: "Wait a minute, wait a minute. * * * I do believe the contract says lots of the buyer's choice and that would require a choice." (F. 61, R. 1344, Add. 19; Tr. 34, R. 1643).

asserted by plaintiffs under Utah Code Ann. Section 57-1-33. (F. 91, R. 1351, Add. 26; C. 23-24, R. 60, Add. 35). The Sharps never urged this defense except in reference to that statute.¹²

"Legal issue" number five wherein White Pine alleges the trial court erred by concluding it was not entitled to the legal remedy of specific performance relates back to the factual underpinnings of the first "legal issue," that is, issues of breach. A party to a contract, however, is not entitled to specific performance if he is, himself, in breach. Fischer v. Johnson, 525 P.2d 45 (Utah 1974); LHIW Inc. v. DeLorean, 753 P.2d 961 (Utah 1988). It was the specific finding of the trial court that it was the plaintiffs who were in breach of the Contract. (F. 53, R. 1342, Add. 17).

White Pine argues as its sixth "legal issue" that the trial court erred in determining White Pine breached the Contract by failing to pay approximately \$3,200.00 in property taxes even though it had paid \$1,500,000.00 to the Sharps. This argument ignores the fact that the Trust Deed requires the trustor (plaintiffs) to "pay at least ten days before delinquency all taxes and assessments affecting said property" (F. 48, R. 1341, Add. 16, Ex. 2) and the failure to pay real estate taxes is a material default precluding a release of property from a mortgage. City Bank Farmers Trust Co. v. Hickman, 164 Misc. 234, 297 N.Y.S. 592, 595

¹²Judge Frederick also found that the Sharps did request a reconveyance of Lots 1-5 from the trustee (F. 42, R. 1340, Add. 15, Ex. 30).

(Sup. Ct. 1937); Clason's Point Land Co. v. Swartz, 237 A.D. 741, 262 N.Y.S. 756, 760 (App. Div. 1933); Markowitz v. Republic National Bank, 651 F.2d 825, 827 (2nd Cir. 1981).

White Pine seems to imply on page 6 of its Petition that because there was no assertion of default regarding the failure of plaintiffs to pay the property taxes, somehow, their obligation to pay those taxes disappeared. A breach is a breach, however, at the time it occurs, regardless of whether the non-breaching party seeks to enforce the agreement. Bjork v. April Indus., 547 P.2d 219 (Utah 1976), appeal after remand, 560 P.2d 315, cert. den. 97 S.Ct. 2634, 431 U.S. 930, 50 L.Ed.2d 2456 (Damages began to accrue once defendant breached agreement. Plaintiffs not required to take steps to enforce agreement); see Quin Blair Enter. v. Julien Const. Co., 597 P.2d 945 (Wyo. 1979) (Parties free to ignore provisions of contract but must understand that they bear the consequences of such disregard when breach becomes fact of life).

Further, White Pine failed to pay any subsequent assessments of yearly property taxes (totaling \$20,368.62 at the time of trial). (F. 48-49, R. 1341-42, Add. 16-17). It also failed to pay the total amount due on the 1985 installment payment and failed to pay any portion of the 1986 installment payment. (F. 50, R. 1342, Add. 17). Although White Pine attempts to exploit the amounts paid under the Addendum to the Promissory Note, it omits to disclose the fact that Judgment was rendered against it in the amount of \$726,784.67 as of September 26, 1988 and interest has been accruing

since then on the principal alone in the per diem amount of \$183.32. (J. p. 3, Add. 42). White Pine further neglects to address the trial court's finding that plaintiffs also breached the parties' Contract by failing to make available sewer and water connections at the same charge to purchasers of a PUD lot. (F. 100, R. 1354, Add. 29).¹³

As demonstrated above, plaintiffs have sought to conjure up purported "legal issues" when, in fact, they have ignored or misstated the factual findings of the trial court. The special and important reasons for which a petition for a writ of certiorari should be granted ought not include a petitioner's attempted relitigation of the facts.

II

THE TRIAL COURT'S DETERMINATION OF WHETHER THERE WAS A MATERIAL BREACH OF CONTRACT CONSTITUTES AN ISSUE OF FACT FOR THE FACT FINDER.

Petitioners argue that the decision of the Court of Appeals is

¹³Plaintiffs make the claim, at page 5 of its Petition, that it constructed improvements at a cost of \$1,063,348.10 "benefiting all of the Property" The water and sewer systems, however, were not completed or operational at the time of trial nor had the sewer system been improved for use. (F. 82, R. 1349-50, Add. 24-25). Further, plaintiffs previously sued Summit County, the SBSID and various officials thereof because "the imposition of the requirement that plaintiffs construct an off-site sewer approximately one mile in length" means "the costs of developing the entire project became prohibitive." (F. 67, R. 1346, Add. 21, Ex. 116). In the SBSID litigation, plaintiffs blamed these defendants for the threatened foreclosure (F. 69, R. 1346-47, Add. 21-22) and claimed most of the "same damages they sought to recover from the Sharps in the present case." (F. 70, R. 1347, Add. 22).

contrary to the proposition set forth in Avgikos v. Lowry, 54 Utah 217, 179 P 988 (919), where this Court held: "[w]here the facts are undisputed, the question of whether or not they constitute a performance or breach of the contract is one of law for the Court." Id. at 990 (quoting 13 C.J. 790, paragraph 1011). (Emphasis added.) The converse proposition, however, has also been recognized in Schick v. Ashton, 7 Utah 2d 152, 320 P.2d 664, where this Court held "whether a promisor has made and kept his promise is a jury question where the evidence is in conflict." (Emphasis added.) Id. at 665. See also Commercial Security Bank v. Hodson, 18 Utah 2d 388, 393 P.2d 482 (1964) (Issue of whether bank entered into contract and whether it breached such contract are questions for the jury).

In the instant case, the facts are not only disputed, but have been hotly contested from the outset through the briefing on appeal. The trial court entered 104 extensive Findings of Fact after White Pine submitted and argued 132 pages of objections. (R. 926-1028). Since the facts are clearly disputed, Avgikos, the case cited by the petitioners as the only controlling Utah authority, is inapposite to this case and the standards set forth in the Schick and Commercial Security Bank cases should control.

The questions of who breached and when that breach occurred are to be determined by the fact finder. Here, Judge Frederick made the factual determination that White Pine breached the Contract and the Sharps did not, a finding that may not be set

aside unless clearly erroneous. Sweeney Land Co. v. Kimball, 786 P.2d 760 (Utah 1990); Utah R. Civ. P., Rule 52(a).

The following language in Schick v. Ashton is apt in the context of White Pine's Petition:

Plaintiffs urge that defendants violated their contract as a matter of law. Apparently plaintiffs base such contention on facts related in their brief which are most favorable to their own position. But such contention does not square with the familiar and oft-repeated principal that on review the evidence will be canvassed in a light most favorable to the approval of the jury's verdict.

Schick v. Ashton, 320 P.2d at 665.

III

THE COURT OF APPEALS CORRECTLY APPLIED THE MARSHALLING DOCTRINE.

In Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985), a case relied on heavily by plaintiffs, this Court set forth the former standard to be applied in reviewing the findings of fact made by a trial court, taking as a

starting point the trial court's findings and not Erickson's [appellant's] recitations of the facts. To mount a successful attack on the trial court's findings of fact, an appellant must marshall all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the finding. (Citations omitted).

(Emphasis added.) Id. at 1070.

The standard of review has been amended subsequent to the

Scharf decision and now sets forth a new, stronger standard of review.

Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

(Emphasis added.) Rule 52(a), Utah R. Civ. P.

Here, as noted by the Court of Appeals, the petitioners "failed to demonstrate that the findings are against the clear weight of the evidence." Saunders, 135 Utah Adv. Rep. at 70. (Add. 50). The Court then concluded, correctly under the marshalling doctrine, that the findings of fact as determined by the trial court must be accepted as valid.

Appellants argue the Court of Appeals failed to examine White Pine's "legal arguments" irrespective of White Pine's failure to marshal, a duty "implicit in all the marshalling cases." Plaintiffs' Petition at page 15. Plaintiffs' argument, however, disregards the language of the Court of Appeals implicitly stating that those issues of law had been examined and rejected. In beginning its analysis of the breach of contract issues raised on appeal, the Court of Appeals took note of the appellants' claim their issues on appeal were questions of law and concluded "after scrutinizing those issues, that buyers are essentially challenging the trial court's findings of fact." (Emphasis added.) Saunders at 69. (Add. 49). Additionally, courts are not obligated to examine every issue raised by an appellant but will affirm the

decision of the trial court whenever it can do so on a proper ground even if it was not the ground on which the trial court relied.¹⁴ Bill Nay & Sons Excavating v. Neeley Const. Co., 677 P.2d 1120 (Utah 1984).

Further, plaintiffs' Petition is nearly identical to the Petition for Rehearing filed by plaintiffs in the Court of Appeals, in which plaintiffs advanced the same claim that their "legal arguments" had not been analyzed. The denial of plaintiffs' Petition for Rehearing is a further indication by the Court of Appeals that White Pine's claimed "legal arguments" had been examined and found to be without merit. See, In Re: Shirk's Estate, 194 Kan. 671, 401 P.2d 297 (1965) (Motion for rehearing denied where motion presents "no issue not fully considered and determined in original opinion" (Emphasis added.))

CONCLUSION

The questions of breach of contract and substantial performance are questions of fact where the evidence is in dispute. The Court of Appeals examined the claimed "legal issues" raised by the appellants and concluded, after scrutiny, that they were factually based and without merit. The decision of the Court of Appeals was in accord with case law as established by decisions of the Court of

¹⁴If, as White Pine argues, appellate courts have a duty to examine every single issue raised, the appellate process would be reduced to an issue raising contest which rewards appellants, like the instant ones, who presented more than two dozen argument headings in their Brief in the Court of Appeals.

Appeals and this Court and is not such a departure from the accepted and usual course of judicial proceedings as to require this Court to exercise its power of supervision. A writ of certiorari is to be granted only for special and important reasons, not for the redetermination of factual issues. For the reasons stated above, White Pine's Petition should be denied.

DATED this 28 day of August, 1990.

WINDER & HASLAM, P.C.

By Donald J. Winder
Donald J. Winder
Attorneys for Appellees Sharp

By Kathy A. F. Davis
Kathy A. F. Davis
Attorneys for Appellees Sharp

CERTIFICATE OF SERVICE

I hereby certify that, on the 28 day of August, 1990, I caused four true and correct copies of the foregoing BRIEF IN OPPOSITION TO PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI to be mailed, first class, postage prepaid, to the following:

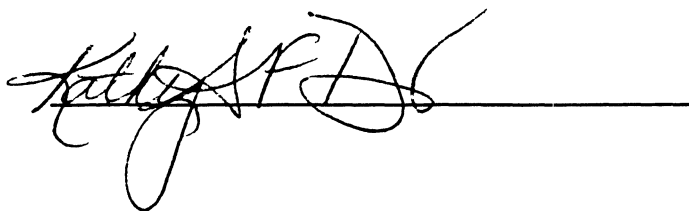
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Chapter 7 Trustee
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Ogden, Utah 84412

I further certify that, on the date listed above, I caused ten true and correct copies of the same to be mailed, first class, postage prepaid, to:

Clerk of the Court
Utah Supreme Court
332 State Capitol Building
Salt Lake City, Utah 84114

A handwritten signature, appearing to read "Kelly A. F. D.", is written over a horizontal line.

IN THE UTAH SUPREME COURT

LEON H. SAUNDERS; ROBERT FELTON; :
SAUNDERS LAND INVESTMENT CORP., :
a Utah corporation; WHITE PINE :
RANCHES, a Utah general :
partnership; WHITE PINE :
ENTERPRISES, a Utah general :
partnership; and KENNETH R. :
NORTON, dba Interstate Rentals, :
Inc., a Nevada corporation, :
:
Plaintiffs and Petitioners, :
:
-v- :
:
JOHN C. SHARP and GERALDINE Y. :
SHARP, :
:
Defendants and Respondents. :

Petition No. 900360

ADDENDUM

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

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

Plaintiffs,

vs.

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

Defendants.

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

Civil No. C87-1621

Judge J. Dennis Frederick

JOHN C. SHARP, and GERALDINE
Y. SHARP,

Counterclaim-Plaintiffs,

vs.

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

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

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

The Court, having heard the testimony of witnesses, having reviewed and received exhibits, having heard the arguments of counsel, having received stipulations of counsel, having reviewed memoranda presented by counsel, having presented its oral ruling on the issues involved in the case on March 30,

1988, having heard and ruled upon the Plaintiffs' Objections to Defendants' Proposed Findings of Fact and Conclusions of Law and Plaintiffs' Proposed Alternate and Additional Findings of Fact and Conclusions of Law and upon Plaintiffs' Objection to Affidavit in Support of Request for Attorneys' Fees (including a similar motion filed by Norton) on September 16, 1988, and for good cause appearing, hereby makes and enters the following:

FINDINGS OF FACT

1. On or about December 9, 1980, Leon H. Saunders, Robert Felton, Norton and Paul H. Landes entered into an Earnest Money Receipt and Offer to Purchase (hereinafter "Earnest Money") with the Sharps for the purchase of certain real property located in White Pine Canyon, Snyderville, Summit County, State of Utah (hereinafter "the Subject Property"). (Exhibit 14).

2. Plaintiffs' "development plans presently anticipated 12 to 15 four-acre to five-acre lots" and the Earnest Money provided "such plans shall be subject to the reasonable approval of Seller [the Sharps]."

3. The Earnest Money also provided, inter alia:

At a time desired by Seller, Purchaser shall allow Seller to hook into the culinary water system and sewer system developed by Purchaser on the subject Property at the same per-hook-up price charged by Purchaser to the buyers of lots developed on the subject Property.

4. The plaintiffs acted upon the understanding that before Summit County would approve any planned development,

they, as the developer, must provide to Summit County for approval an environmental impact statement, a plat map and, if a planned residential development, a declaration of protective covenants. The Snyderville Basin Sewer Improvement District ("SBSID") required all sewer design improvements be approved and construction must receive final approval.

5. Plaintiffs wanted to promptly develop the Subject Property and anticipated the approval process would be completed by June, 1981.

6. Prior to closing the transaction which was the subject of the Earnest Money, a Shared Water System Cost Estimate was prepared for Saunders by J. J. Johnson & Associates, engineers in Park City. The Estimate proposed two alternatives wherein 15 units at Saunders Ranch (subsequently White Pine Ranches), known herein as the "Subject Property", develop a water system sufficient for its needs and the needs of various adjacent properties in order to provide users of the water system an economy of scale resulting in lower water system costs to each user. (Exhibit 105). Although considered by him, Saunders never adopted any of these proposals.

7. In April, 1981, an Environmental Impact Statement (hereinafter "EIS") was prepared by J. J. Johnson for Saunders Land Investment Corporation concerning development of the Subject Property and was delivered to the Sharps prior to closing. (Exhibit 67).

8. The EIS provided the "sewer system will be connected to the Snyderville Basin Sewer Improvement District and a line

extension agreement with the Sewer Improvement District will be signed." The EIS also provided two alternative water storage systems for the development on the Subject Property which would be available to other proposed developments, including Ranch Place and Landmark Plaza, as well. The EIS further provided that the internal traffic circulation in the subject project would be via private road.

9. In April 1981, Felton, Norton, Saunders and Landes operated under the assumed name of White Pine Ranches. (Plaintiffs' Complaint, ¶¶1 and 5).

10. Thereafter, on or about July 16, 1981, the parties closed the sale of the Subject Property through the execution of a Memorandum of Closing Terms (Exhibit 15) executed by Saunders, Felton, Norton, Landes and the Sharps; a Special Warranty Deed (Exhibit 17) executed by the Sharps and conveying the title to the Subject Property to Landes, Felton, Saunders and Interstate Rentals, Inc.; a Trust Deed Note executed by Felton, Saunders, Landes, Norton and Interstate Rentals, Inc. by its president, Norton, in the amount of \$963,055.30, together with an addendum to the Trust Deed Note (Exhibit 3) outlining the schedule of payments, and a Trust Deed covering the Subject Property executed by Saunders, Landes, Felton and Interstate Rentals, Inc. by its president, Norton, and securing the Trust Deed Note (Exhibit 2) (hereinafter collectively referred to as "the Closing Documents").

11. A partnership agreement establishing White Pine Ranches was executed September 25, 1982 with Felton, Saunders,

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Dan Hunter and J. Richard Rees as general partners. (Exhibit 49). Saunders Land Investment Corporation subsequently assumed and bought out the interest of Dan Hunter in the White Pine Ranches partnership.

12. On June 30, 1982 White Pine Ranches and Howells Investment executed a Partnership Agreement of White Pine Enterprises for the purposes of "investing in, managing, leasing, developing, subdividing and selling unimproved real estate (Exhibit 48) described on Exhibit 'A' attached" thereto, which unimproved real estate was the approximately 27 southern acres of the Subject Property that was never platted.

13. Both partnerships, White Pine Ranches and White Pine Enterprises, are general partnerships.

14. Preliminary plats (Exhibits 18 and 19) of the Subject Property were prepared by J. J. Johnson & Associates for the development prior to closing, but were modified by plaintiffs because the County Commission was opposed to the private road concept. (Exhibit 109). These preliminary plats were not approved prior to closing because the County Attorney would not approve a private road system (Exhibit 114). A new plat was prepared for White Pine Ranches, a Planned Unit Development ("PUD") and attached as Exhibit "A" to the Memorandum of Closing Terms. This Exhibit "A" to the Memorandum of Closing Terms platted all of the Subject Property and was initialed by all the parties thereto except Felton. (Exhibit 20).

15. Paragraph 1 of the Memorandum of Closing Terms (Exhibit 15) provided as follows:

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

16. Paragraph 2 of the Memorandum of Closing Terms provided as follows:

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

17. Paragraph 3 of the Memorandum of Closing Terms provided as follows:

3. It is agreed that, at the time of execution of this Memorandum, Buyer has paid to Seller the sum of \$620,000.00 which will release from the Deed of Trust three (3) PUD lots. Upon the recordation of the PUD Plat and Declaration of Covenants, Conditions and Restrictions with the Summit County Recorder, Buyer shall be entitled to the release from the Deed of Trust of three (3) PUD lots of Buyer's choice together with the said roadway. (Emphasis added.)

18. Paragraph 5 of the Memorandum of Closing Terms provided as follows:

5. The proposed plat is attached hereto as Exhibit "A" and by this reference incorporated herein. Seller

hereby acknowledges and agrees to execute as a lienholder the original plat prior to recordation. Changes in the proposed plat and the Declaration of Covenants, Conditions and Restrictions when prepared shall be subject to the reasonable approval of Seller. (Emphasis added.)

19. The proposed plat, Exhibit "A" attached to the Memorandum of Closing Terms included a boundary description describing all of the Subject Property and an Owner's Dedication. The Owner's Dedication is a standard printed form used by J.J. Johnson, parallels dedications used in the city limits of Park City and is commonly used in plats to dedicate roads to public use, not as a dedication for a private road as originally contemplated in the EIS. The Owner's Dedication provides in pertinent part as follows:

Know all by these present that we the undersigned owners of the herein described tract of land, having caused the same to be subdivided into lots and streets to hereafter be known as White Pine Ranches Subdivision, do hereby dedicate for perpetual use of the public all parcels of land shown on this plat as intended for public use, and do warrant, defend, and save the city harmless against any easements or other encumbrances on the dedicated streets which will interfere with the city's use, operation, and maintenance of the streets and do further dedicate the easements as shown. (Emphasis added.)

(Exhibit 20).

20. Paragraph 6 of the Memorandum of Closing Terms provided in part as follows:

6. Seller agrees to grant to Summit County the ten and one-half (10-

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1/2) foot strip of land outlined in red on Exhibit "A". Said conveyance shall be for the sole purpose of widening the County roadway. If possible, such grant shall be in the form of an easement. The County indicates that it is possible that the County road as it exists is not where it is platted.

21. The County roadway has not been widened, there are no current plans to do so, and Summit County has never requested such an easement from plaintiffs or the Sharps. (See Exhibit 107, p. 15; Exhibit 87, p. 8; and Exhibit 34).

22. Paragraph 7 of the Memorandum of Closing Terms provided in pertinent part as follows:

7. Buyer agrees to provide Seller with one (1) sewer connection and one (1) culinary water connection into Buyer's systems at such time as each is available, and Seller shall pay a connection fee and service fee equal to the pro rata cost to the purchaser of a lot in Buyer's proposed PUD plus any charges of Summit Water Distributing Company. The sewer and water connection granted above can be used by Seller in new construction if allowed on the 8.5 acre parcel or for connection to the existing residence of Seller....
(Emphasis added.)

23. Subsequent to closing, attorney Jon Heaton represented Saunders in continuing plaintiffs' attempts, begun prior to closing, to obtain County approval of a private road for the development. (Exhibit 127).

24. Before signing the Closing Documents, on June 16, 1981 and subsequently on November 1, 1983, Plaintiff White

Pine Ranches entered into sewer extension agreements with the SBSID to install a sewer trunk line up White Pine Canyon pursuant to which agreements White Pine Ranches would receive reimbursement for their construction costs of the sewer line to the development from connection fees charged to third parties connecting to that line:

Said third parties will be allowed to connect to such lines only upon payment to the District of the applicable number of connection fees. The District shall retain \$100 plus the actual costs of construction and inspection from each such connection fee and pay the balance of each such connection fee to Applicant [White Pine Ranches].

(Exhibits 80 ¶5(c) and 81 ¶5C).

25. At the time plaintiffs were trying to obtain County approval of the development and agreeing to run the sewer line to Subject Property, it was anticipated that additional developments by third parties would occur in the White Pine Canyon vicinity, including the development of a ski resort in White Pine Canyon and the development of adjoining parcels of land, all of which future developments would hook into the sewer trunk line plaintiffs were to construct, allowing plaintiffs the opportunity to recoup expenditures for the sewer system through the connection fees paid pursuant to the provisions of the line extension agreements. (Exhibits 104, 105, 107 and 117).

26. On June 30, 1982, White Pine Ranches paid the Sharps the installment payment of \$308,177.69, by check (Exhibit 44)

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enclosed with a cover letter from Felton stating: "Upon final plat approval, we will notify you to obtain the releases for the lots and the road as per the contract." (Exhibit 21).

27. On June 28, 1983 and June 30, 1983, Felton and Saunders Land Investment Corporation paid to the Sharps the sum of \$178,165.23 by two checks in the amount of \$71,266.09 and \$106,899.14 respectively. (Exhibit 44). The remaining portion of the June 30, 1983 installment payment due from plaintiffs, a check from Dan Hunter in the amount of \$106,849.14 was returned for insufficient funds, resulting in a default in the June 30, 19823 installment payment. (Exhibit 22).

28. On or about July 19, 1983, while the June 30, 1983 payment was in default and prior to the recordation of a final plat on the Subject Property, Felton wrote a letter to attorney Jon Heaton, inquiring about obtaining a release from the Sharps of the road and five lots. The letter further explained that a final plat had not been recorded because "[a]s soon as we file the plat real estate taxes are going to go up significantly, which we would like to avoid until we have an actual buyer for one of the lots." (Exhibit 23).

29. On or about September 23, 1983, a Notice of Default was filed pursuant to the Trust Deed on the Subject Property for the default in the June 30, 1983 payment. (Exhibit 24.)

30. Plaintiffs made no claim during 1983 that the Sharps had breached the Closing Documents.

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31. On or about November 14, 1983, the June 30, 1983 default under the Trust Deed was cured with a payment in the sum of \$118,397.39 from Saunders Land Investment Corporation (Exhibits 4 and 44).

32. On or about November 18, 1983, attorney Jon Heaton sent a letter to the Sharps enclosing for their approval a proposed final plat, which was later recorded with Summit County (hereinafter the proposed "final plat"), and a Declaration of Protective Covenants (hereinafter "CCRs"), which Declaration was prepared on behalf of Saunders by Heaton and which contained covenants, conditions and restrictions for use of respecting a portion of the Subject Property by lot owners. (Exhibit 25).

33. The proposed final plat enclosed with the November 18, 1983 letter did not plat the entire approximately 60 acre parcel as originally contemplated in the Earnest Money and the Memorandum of Closing Terms, but platted only the northern portion of the Subject Property into six PUD lots, leaving the southern portion (approximately 27 acres) of the Subject Property unplatted (hereinafter the "unplatted acreage"). (Exhibit 1).

34. The proposed final plat included an Owner's Dedication for a private road in the PUD and delineated the existence and location of the private road and certain utility easements, including easements for water lines, water tank and water systems. (Exhibit 1).

35. The November 18, 1983 letter from attorney Jon Heaton to the Sharps further provided in pertinent part that:

At a later time in the near future, Hy [Saunders] has indicated he will seek release of Lots 1 through 5 of the platted subdivision along with his road (White Pine Lane).... We will handle that matter when it is presented.... When those releases are made, pursuant to your instruction we will insure that rights are reserved in White Pine Lane for access for the southern portions of the property purchased from you until your Deed of Trust is fully paid. (Emphasis added.)

(Exhibit 25 and 25a).

36. On or about November 21, 1983, Felton mailed a letter to Jon Heaton regarding the November 18, 1983 letter to John Sharp. The letter provided in pertinent part: "It is perfectly acceptable to us that he [Mr. Sharp] retain an easement over White Pine Lane to the southern part of his property as well as to Lot 6 from White Pine Canyon Road up to the western boundary of Lot 6." (Exhibit 26).

37. On or about November 28, 1983, Felton had a telephone conversation with attorney Heaton memorialized by notes of attorney Heaton in the margin of Felton's November 21, 1983 letter (Exhibit 26). Felton agreed that "access over road [White Pine Lane] retained if Sharp develops undeveloped property Lots 7-12 White Pine Ranch." (Exhibit 26a).

38. On or about November 23, 1983, the Sharps authorized the recording of a Cancellation of Notice of Default relating to the June 30, 1983 payment (Exhibit 27).

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39. On or about November 23, 1983, the Sharps, in consideration of the agreement of plaintiffs to allow them access over the private roadway (White Pine Lane) in the event of foreclosure, and pursuant to their right of approval under paragraph 5 of the Memorandum of Closing Terms, also executed a Consent to Record Phase I of White Pine Ranches, which Consent after setting forth the metes and bounds description of Phase I of White Pine Ranches granted:

[A] non-exclusive easement for water lines, water tank and water systems over, under and across the property, shown here near the southwest corner of the subject property, and specifically described in the Declaration of Protective Covenants and reserving unto the owners, for granting to the owners of adjacent or nearby property, a non-exclusive easement for utilities and vehicular and pedestrian access over the private roadway shown on the plat and from the well sites as developed. (Emphasis added.)

(Exhibit 51). As additional consideration for signing the Consent to Record, the Sharps permitted the platting of only a portion of the Subject Property.

40. The proposed final plat of White Pine Ranches Phase I sent to the Sharps for approval on November 18, 1983 was recorded on December 23, 1983 in the office of the Summit County Recorder following the execution of the Consent to Record by the Sharps. (Exhibit 1). The CCRs were also recorded in the office of the Summit County Recorder on December 23, 1983 and the Consent to Record was attached as an exhibit thereto. (Exhibit 51).

41. After recordation of the final plat, the CCRs and the Consent to Record, plaintiffs proceeded with construction of the improvements on the Subject Property. However, instead of adopting any of the alternatives described in Finding No. 6, supra, plaintiffs constructed a small, private water system for this development.

42. On or about January 18, 1984, the Sharps executed a direction to the Trustee under the Deed of Trust to release from the Deed of Trust Lots 1 through 5 of White Pine Ranches (Exhibit 28).

43. The Partial Reconveyance of Lots 1 through 5 directed and authorized by the Sharps, was not prepared by Associated Title, the trustee under the Trust Deed, until January 7, 1986 and was recorded March 26, 1986 (Exhibit 45). No explanation of the delay in preparing the Partial Reconveyance was provided at trial. Plaintiffs, although naming Associated Title as a defendant in this action, chose not to serve or pursue and question Associated Title for such delay. No other request for reconveyance was authorized by the Sharps.

44. On or about January 20, 1984, Felton sent a letter to attorney Heaton expressing astonishment that the deeds to Lots 1 through 5 had not been received but stating, "I realize that the deeds for the road may be difficult to do." (Exhibit 30).

45. On or about January 17, 1984, Felton sent a letter to attorney Heaton requesting the approval by the Sharps of a "multi-family development" on the unplatted acreage, "which is

the only way it [the development] will be economically feasible." (Exhibit 29). A multi-family concept was never adopted.

46. Felton testified at trial and affirmed on May 7, 1986 in a letter sent to the Sharps that the plaintiffs "were in a position to prepare and obtain approval of that plat [for the unplatted acreage] immediately." (Trial Transcript, p. 110, hereinafter "R." 110 and Exhibit 37).

47. It was the actual practice of plaintiffs and a requirement of paragraph 2 of the Memorandum of Closing Terms to make specific requests for the release of specific PUD lots from the Sharps after required payments were made and provided no defaults existed under the Closing Documents. (R. 334).

48. Property taxes on the unreleased property (Lot 6 and the unplatted acreage) became delinquent pursuant to law on November 30, 1984 when plaintiffs failed to pay all of the 1984 property taxes due on the Subject Property (Stipulation of counsel at Trial) in violation of paragraphs 5 and 14 of the Trust Deed, which provided in paragraph 5 that the Trustor [plaintiffs] agrees "to pay at least 10 days before delinquency all taxes and assessments affecting said property...." (Exhibit 2).

49. Except for \$1,515.24 in property taxes paid on the unplatted acreage in 1984, no taxes have been paid on the unreleased Subject Property (Lot 6 and the unplatted acreage) subsequent to November 30, 1984, and including 1985, 1986 and 1987 (Stipulation of counsel at Trial), and plaintiffs, there-

fore, remained in default under the provisions of paragraphs 5 and 14 of the Trust Deed.

50. Plaintiffs paid the 1984 installment payment. However, on or about June 27, 1985, the Sharps received only a portion of the June 30, 1985 installment payment in the form of a check from Felton in the amount of \$59,709.47 (Exhibit 44).

51. As a result of plaintiffs' defaults, a Notice of Default was recorded on September 16, 1985 covering the Subject Property as described in the Trust Deed, which description included Lots 1-5. (Exhibit 55).

52. On or about September 24, 1985, Felton sent a letter to Mr. Sharp acknowledging receipt of the September 1985 Notice of Default and assuring him "every attempt is being made to resolve the problem...." (Exhibit 31). Felton, in his letter made no allegation that the Sharps had slandered plaintiffs' title as a result of the inclusion of Lots 1-5 in the Notice of Default nor did Felton or any other plaintiff allege in 1984 or 1985 any breach of Closing Documents by the Sharps.

53. Significantly, as bearing upon the credibility of plaintiffs' arguments is the fact unrebutted that plaintiffs made no claims whatsoever of breach by the Sharps until after their own admitted breaches of the Closing Documents. (Exhibit 31).

54. On or about January 10, 1986, Felton wrote a letter to Blake G. Heiner of Associated Title Company, the Trustee under the Trust Deed, informing him that the Notice of Default

(Exhibit 55) and Amended Notice of Sale (Exhibit 56) covering the Subject Property included Lots 1 through 5 which were to have been released, pursuant to the Sharps' direction. (Exhibit 57).

55. In response to Felton's letter (Exhibit 57), Blake Heiner for Associated Title Company prepared and recorded an Amended Notice of Trustee's Sale against the Subject Property, excluding Lots 1 through 5. (Exhibit 58). Other Notices filed subsequently against the Subject Property also excluded Lots 1 through 5. (Exhibits 3 and 36).

56. All of the Notices of Default and Notices of Trustee's Sale recorded against the Subject Property specifically provided that such Notices are:

SUBJECT TO Easements, Encroachments,
Restrictions, Rights-of-Way and matters
of record enforceable in law (sic)
equity.

(Exhibits 5, 36, 55, 56, and 58).

57. No payment at all was made when the final installment under the Closing Documents was due on June 30, 1986.

58. The balance owing to the Sharps under the Trust Deed Note through March 22, 1988 is \$557,642.46, including \$371,739.35 principal; \$23,113.33 interest at 12%; \$147,920.21 default interest at 18%; and \$14,869.52 late payment charges of 4% on each overdue payment. Interest is accruing at a per diem rate of \$183.32. (Exhibit 122).

59. Plaintiffs made no written or oral request for the release of the roadway or Lot 6 prior to their default in

November 1984, when the 1984 property taxes became delinquent, and prior to their default in failing to make the entire 1985 installment payment when due. Plaintiffs' first requests were made for such releases on February 27, 1986 and May 7, 1986, respectively. (Exhibits 35 and 37). Also for the first time in the letter dated February 27, 1986, plaintiffs requested a release from the Sharps for 7.5 acres of the unplatted acreage, despite the provision in paragraphs 1-3 of the Memorandum of Closing Terms for the release by the Sharps of "PUD lots" only. As of these dates, plaintiffs were still and are in of default for the 1984 and 1985 property taxes and the payment a portion of the 1985 payment and the full 1986 payment required under the Addendum to the Trust Deed Note.

60. The Sharps perceived that the execution by them of the Consent to Record constituted substantial performance of any obligation to release the roadway pursuant to paragraphs 3 and 6 of the Memorandum of Closing Terms.

61. As plaintiff Felton testified, "the contract [Memorandum of Closing Terms] says lots of buyer's choice and that would require a choice." After the release of Lots 1-5, plaintiffs may have chosen to prepare a plat of the then unplatted acreage and seek a release of a portion of it instead of Lot 6.

62. Also in the letter of February 27, 1986, Felton demanded from the Sharps for the first time approximately \$73,000.00 as their "cost of the sewer and water hook-ups which are now available." (Exhibit 35). No demand for such

costs had been made of the Sharps prior to that time nor had plaintiffs provided an accounting of such costs. Before trial, plaintiffs claimed exorbitant expenses of \$1,638,753.61 for the complete costs for the construction of the improvements on and to the Subject Property (Exhibit 32a).

63. At trial, plaintiffs claimed costs for the construction of improvements on and to the Subject Property of \$1,063,348.10, (Exhibit 60) and plaintiffs modified their demand from the Sharps for water and sewer connection fees to \$43,706.00. (Exhibit 66).

64. Prior to actual construction of the sewer system, Saunders told the Summit County Planning Commission in a meeting on December 14, 1982 that they "would really like to have the septic tank system used because of the high cost of the sewer line but in the long run it may be the best way to go." (Exhibit 79). On or about September 16, 1983, Felton wrote Summit County challenging the requirement "to install a sewer line up the County road from Highway U-224 to the Project, a distance of about one and one-half (1-1/2) miles." (Exhibit 79). Felton concluded the letter by declaring: "In the event we are required to install the sewer line, we will test the validity of that requirement in court."

65. Plaintiffs made formal demand upon Summit County on or about July 26, 1984 for, inter alia, the following damages:

The sum of \$117,297.15 being the costs of off-site sewer which we were, under protest, required to install to service the subdivision.

[W]e [plaintiffs] have lost one sale or more sales and anticipate the damages, loss of profit and interest at between \$250,000 and \$500,000.

[D]amages for the loss of sale, reduction in business and damages suffered in reduction to profit

(Exhibit 84).

66. Soon thereafter plaintiffs brought suit in the United States District Court, District of Utah, Civil No. C84-2090W, against Summit County, the SBSID and various officials thereof to recover their claimed damages.

67. In answer to interrogatories dated December 28, 1984 in the Federal Court litigation, plaintiffs stated:

Because of the imposition of the requirement that Plaintiffs construct an off-site sewer approximately one mile in length, the costs of developing the entire project became prohibitive.

(Exhibit 116; see also, Exhibit 107, p. 7).

68. In further interrogatory answers on March 31, 1986, Saunders declared:

At the present time I have recently found out that the right-of-way servicing my property has been forfeited by Summit County contrary to law. This will not allow my development to proceed, will not allow me to recover costs for the capital improvement and significantly diminishes the value of the property.

(Exhibit 107, p. 15).

69. In Saunders' Federal Court affidavit dated March 17, 1986, he also swore:

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10. As a result of the various delays [caused by the County and the SBSID], which are detailed below, the market for exclusive building lots is now virtually non-existent, cost of improvements escalated to be several times what I had anticipated, and much of the real property in the project is threatened by foreclosure.

(Exhibit 86, p. 3).

70. Most of the damages sought to be recovered by the plaintiffs in the lawsuit against the SBSID and Summit County are the same damages plaintiffs sought to recover from the Sharps in the present case. (R. 252 and 263; cf. Exhibits 60 with 86; see also Exhibits 87, 88, 107, 116 and Plaintiffs' Verified Complaint herein).

71. No written or oral claim of default on the part of the Sharps under the Closing Documents was made by the plaintiffs until February 27, 1986, subsequent to plaintiffs' own defaults in failing to pay the 1984 and 1985 property taxes and failing to pay the full 1985 payment required under the Addendum to the Trust Deed Note.

72. The Sharps did not interfere with plaintiffs' attempts to market or sell the Subject Property.

73. Plaintiffs received only one invitation for an offer to purchase Lot 1 or Lot 6, which invitation was not consummated due to the failure of conditions imposed by the one, B. F. Sammons, and the failure of such conditions were unrelated to any actions or statements of the Sharps. (Exhibit 88).

74. One of the conditions of purchase by Sammons was an independent appraisal supporting a \$220,000 proposed sales price (Exhibit 88). The plaintiffs provided Sammons with a letter appraisal, dated August 8, 1986, which had been prepared by LeRoy Pia. (Exhibit 9a). This appraisal stated that Lots 1 and 6 had a fair market value of \$220,000. On or about November 11, 1986, while Sammons and Saunders were still negotiating, a letter appraisal was obtained by Steve Clyde, attorney for the plaintiffs from the same appraiser, valuing the lots at an average of only \$190,000.00 (Exhibit 9). The November 11, 1986 appraisal was not shown to Sammons. (R. 283-4).

75. Saunders had given Sammons "the impression" that plaintiffs could convey Lot 6 to him even though it had not been released from the Trust Deed. (R. 389; see also R. 284).

76. On or about March 24, 1987, Felton, pursuant to the request of the real estate agent, Steve Clegg, employed by plaintiffs to list Lots 1, 2 and 5, wrote a letter to Clegg for dissemination to other Park City real estate agents, which letter stated "[t]he current litigation does not affect the marketability or encumber that [Subject] property." (Exhibit 89.)

77. After the commencement of this action, the Sharps took all reasonable steps to facilitate the sale and marketing of the Subject Property as evidenced by a letter dated September 30, 1986, to plaintiffs' prior attorney, Steven Clyde, who was notified by Donald J. Winder, the Sharps' attorney, that

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the Sharps would take all steps reasonable to effect a sale of Lot 6 or the unplatted acreage (Exhibit 33), and the Sharps' Motion to Appoint a Receiver for the Subject Property in this proceeding dated May 14, 1987.

78. There have been no arms length sales to purchasers of PUD lots at the Subject Property wherein sewer and water connection and service fees have been assessed. The only conveyance of a PUD lot has been to Felton, a member of the partnerships. At trial, plaintiffs testified that they intended, at all times, to include the cost of the sewer and water connection and service fees within the sales price of lots. (R. 310-312).

79. Mr. Sammons was not to be charged any sum above and beyond a \$220,000 land price for sewer or water connection fees. (R. 285).

80. Felton testified that a purchaser of one of the PUD lots listed with real estate agent Clegg would only be charged "over and above ... the purchase price" "the hook-up fee to be charged by Snyderville Basin for sewer." (R. 310).

81. If plaintiffs sold a lot to Sammons at \$220,000, they would not have been "compensated for those [sewer and water] improvement costs...." At a \$220,000 sales price it's "impossible" to recover the costs of sewer and water improvements to the Subject Property. "You have to take a loss." (R. 311-312).

82. The sewer system, as of the date of trial, is not completed or operational, nor has its construction been

approved by the SBSID. (Exhibits 83, 83a and 99 through 103). The culinary water system as of the date of trial is also not operational. Under paragraph 7 of the Memorandum of Closing Terms, the Sharps do not have to pay connection fees for these systems until they are "available." (Exhibit 15).

83. The sewer system constructed by plaintiffs has a capacity to handle between 2,000 and 3,800 connections. (Exhibit 86).

84. Under the line extension agreements with the SBSID, a connection fee "at the rate in effect at the time of connection" shall be determined by the SBSID for the system on the Subject Property (Exhibit 81, paragraph 4D; see Exhibit 80, paragraph 4(d)). The "connection fee shall be paid by the property owner" before issuance of a building permit, to the Application (the plaintiffs herein), except that the SBSID, shall be entitled to "the first \$100 of the connection fee."

85. The parties intended the language in the Earnest Money concerning "same per-hook-up price" to be synonymous with the language contained in paragraph 7, Memorandum of Closing Terms, regarding "pro rata cost" to a PUD lot purchaser.

86. Average and reasonable connection fees for culinary water and sewer systems in the Park City and Snyderville Basin area are \$2,000.00 each. (See Testimony of John C. Brown and Rex Ausburn, cf. Exhibit 86, p. 6).

87. The Sharps intended and wanted to be charged only what purchasers of a PUD lot would be charged as fees to connect to the culinary water and sewer systems on the Subject Property, and the plaintiffs should have understood that this was the intent of paragraph 7, Memorandum of Closing Terms.

88. The Sharps repeatedly assured plaintiffs that they did not intend, through their foreclosure, to interfere with access rights over the private roadway or to the utility easements shown on the Consent to Record which the Sharps signed. (R. 64; Exhibits 33 and 51; cf. Exhibits 25, 25a, 26 and 26a).

89. Correspondingly, it was both the mutual intent and agreement of the parties that the Sharps be granted use of the roadway in event of default (Exhibits 25, 25a, 26 and 26a), which agreement was later memorialized and recorded in the Consent to Record. (Exhibit 51).

90. The inclusion of Lots 1 through 5 in the September 1985 Notice of Default (Exhibit 55) and December 1985 Amended Notice of Trustee's Sale (Exhibit 56) was inadvertent, unintentional and without malice.

91. In refusing to reconvey Lot 6, the road, the unplatted acreage, the Sharps acted in good faith and relied on the advice of attorney Jon Heaton.

92. The Sharps have been charged trustees' fees by Associated Title in their efforts to foreclose the Subject Property in the amount of \$1,803.80 (Exhibit 42).

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93. Plaintiffs have not suffered any damages, special or otherwise, as a result of any act or failure to act by the Sharps.

94. Paragraph 13 of the Trust Deed provides that failure to promptly enforce any right thereunder does "not constitute a waiver of any other right or subsequent default." (Exhibit 2).

95. On September 4, 1986, the day before the scheduled Trustee's Sale, plaintiffs filed a Complaint commencing this action and obtained the issuance of a Temporary Restraining Order (TRO) from Judge Judith M. Billings to restrain the Sharps from conducting the Trustee's Sale of the Subject Property. The TRO required a bond in the amount of \$2,400. In a hearing held on January 4, 1988, this Court required that the bond be increased to \$50,000 "to protect the Sharps for the payment of such costs and damages as may be incurred or suffered if the Sharps are found to have been wrongfully enjoined or restrained...."

96. The Trust Deed Note provided that if it "is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned ... agree to pay ... a reasonable attorney's fee." (Exhibit 3)., Paragraph 16 of the Trust Deed provided: "Upon the occurrence of any default hereunder, Beneficiary [the Sharps] shall have the option to ... foreclose the Trust Deed ... and Beneficiary shall be entitled to recover ... a reasonable

attorney's fee...." (Exhibit 2; see also ¶11 thereof). Further, paragraph 6 of the Trust Deed provided that Beneficiary (the Sharps) may "commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights of [sic] powers of Beneficiary ... and in exercising any such powers ... employ counsel, and pay his reasonable fees." Additionally, paragraph 7 of the Trust Deed requires Trustor to "pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby." Paragraph 11 of the Memorandum of Closing Terms provided that "the defaulting party shall pay all expenses of enforcing the same or any right arising out of breach or default thereof, including reasonable attorneys' fees, whether incurred with or without suit and both before and after judgment." (Exhibit 15).

97. Legal services have been rendered to the Sharps by the law firm of Winder & Haslam in the nature of time expended by individual members, through August 31, 1988, in the amount of \$144,469.75.

98. The foregoing amount does not include any services performed on or after August 31, 1988, including those services of Winder & Haslam necessary for finalizing the Findings of Fact, Conclusions of Law and Judgment and preparing for, responding to and arguing any post trial motions. The legal fees for such matters may be supplemented later.

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99. The services rendered by the law firm of Winder & Haslam, excluding legal research related to attorney's malpractice, were reasonably necessary for the development of the case and protection of the rights of the Sharps; and the rates charged are reasonable and are in accordance with those rates generally charged by attorneys in this area for similar services.

100. Plaintiffs breached the Memorandum of Closing Terms by, inter alia, failing to make the payments intended thereby to the Sharps and by failing to make available sewer and water connections at the same charge to purchasers of a PUD lot.

101. Pursuant to paragraph 12 of the Memorandum of Closing Terms, all "agreements contained [t]herein shall survive the closing of this transaction...." (Exhibit 15).

102. The Sharps' defense of plaintiffs' Complaint was an action purporting to affect the security under the Trust Deed and the rights and powers of the Sharps; related to collecting the Promissory Note after default; related to foreclosing the Trust Deed; and related to enforcing the Memorandum of Closing Terms and rights arising out of a breach or default thereof.

103. After closing the sale on the Subject Property, on or about July 16, 1981, attorney Heaton represented White Pine Ranches relating to the development of the Subject Property (R. 789) until the filing by Associated Title of a Notice of Default on or about September 16, 1985. (R. 836; Exhibit 55). Attorney Heaton did not represent the Sharps between the closing of the sale and the filing of the first Notice of Default

on or about September 23, 1983. (R. 791; Exhibit 24). For a period of time after the filing of the first Notice of Default on or about September 23, 1983, and after the filing of the Notice of Default on September 16, 1985 (R. 793), attorney Heaton did represent the Sharps.

104. The Sharps have incurred costs of court in this action.

Having made the above Findings of Fact, the Court herewith makes and enters the following:

CONCLUSIONS OF LAW

1. The Closing Documents, which term is defined in Finding No. 10 above, are the operative documents relating to the parties' closing of the sale of the Subject Property by the Sharps to the plaintiffs, and this transaction constitutes the Contract between the parties (hereinafter the "Contract").

2. Plaintiffs, by their failure to pay the 1984, 1985, 1986 and 1987 property taxes on Lot 6 and the unplatted acreage on November 30 of each respective year, are thereby in breach of the Trust Deed.

3. Plaintiffs' failure to pay the entire June 30, 1985 installment payment and the 30, 1986 final installment payment required pursuant to paragraph 1D and 1E of the Addendum to the Trust Deed Note constitutes a breach of the Trust Deed Note, Trust Deed and Memorandum of Closing Terms.

4. Plaintiffs' breaches were material, significant and continuing and were uncured when plaintiffs releases were first requested by plaintiffs for the roadway and Lot 6 on February 27, 1986 and again on May 7, 1986.

5. The breaches by plaintiffs of the Contract occurred prior in time to any alleged breaches by the Sharps, and this Court specifically holds there were no material or significant breaches on the part of the Sharps of their obligations under the parties' Contract.

6. The Sharps have substantially complied with all of their obligations under the terms of the parties' Contract.

7. Plaintiffs were obligated, under the terms of the Memorandum of Closing Terms and pursuant to their own practice, to specifically request and identify lots, including Lot 6, for release by the Sharps.

8. Because the plaintiffs' material and continuing breaches of the parties' Contract preceded timely plaintiffs' requests for reconveyance of Lot 6, the roadway and the unplatted acreage, defendants were not obligated to reconvey Lot 6, the roadway and the unplatted acreage.

9. The Sharps were justified in and were excused from performance under the Contract to reconvey Lot 6, the roadway or the unplatted acreage shown on the final plat of to the plaintiffs because the plaintiffs were in breach of the parties' Contract at the time such reconveyances were requested.

10. Alternatively, the Sharps' execution of the Consent to Record the final plat of and the CCRs constituted a release of the roadway shown on such plat in accordance with paragraphs 3 and 5 of the Memorandum of Closing Terms.

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11. The execution of the Consent to Record by the Sharps and the subsequent recordation of the final plat and the CCRs created a non-exclusive appurtenant easements to run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of the unplatted acreage and the owners and purchasers thereof (including the Sharps), and their invitees, guests, heirs and successors in interest, for utilities and for access to and the right to use as a means for ingress and egress for vehicular and pedestrian access over, under and across the private roadway (White Pine Lane) shown on the recorded final plat, and a non-exclusive appurtenant easement to run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of White Pine Ranches Phase I and the owners and purchasers thereof (including the Sharps) and their heirs and successors in interest for water lines, water tank and water systems over, under and across the Subject Property near the southwest corner of the unplatted acreage as shown on the final recorded plat of White Pine Ranches Phase I.

12. The Sharps are estopped to deny the dedication of White Pine Lane, pursuant to the final recorded plat, for the private use of the parcel owners, their invitees and guests, subject to the CCRs and the non-exclusive appurtenant easement for the use and benefit of the unplatted acreage described in Conclusion No. 11 above. Further, the Sharps are estopped to

deny the non-exclusive utility easement also described in Conclusion No. 11 above.

13. The Sharps, by the execution of the Consent to Record, are estopped to deny the operative and legal effect of the recordation of the final plat and CCRs and the rights and obligations of the owners of PUD lots as set forth in the recorded final plat and CCRs for White Pine Ranches Phase I. The final recorded plat and CCRs and the non-exclusive easements set forth in Conclusion No. 11 above shall remain in full force and effect, and not be affected by the foreclosure ordered herein, a purchase at the Sheriff's Sale, or a subsequent redemption of the subject premises, other than a complete redemption thereof by the plaintiffs herein coupled with plaintiffs' declaration for the extinguishment of the non-exclusive easement in favor of the unplatted acreage.

14. Owners and purchasers of the unplatted acreage (including the Sharps), and their successors in interest are entitled to use of the private roadway (White Pine Lane) for access to the unplatted acreage of the Subject Property as set forth in the legal description attached hereto as Exhibit "A" and incorporated by reference herein, as a result of the mutual intent and agreements between the parties to grant to the Sharps the use of the roadway, which agreement was memorialized by the letters of Heaton and Felton and evidenced by the part performance and reliance of the Sharps on such letters and agreements in executing the Consent to Record.

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15. General partners in a partnership are bound by the actions of other partners taken on behalf of the partnership and by the actions of the partnership itself.

16. The language in paragraph 7 of the Memorandum of Closing Terms "pro rata cost to the purchaser" is ambiguous, necessitating the use of extrinsic evidence to interpret the same.

17. The extrinsic evidence presented at trial demonstrated that the parties intended to allow the Sharps, at their request, one connection each to both the culinary water and sewer systems when and if such systems are available and operational.

18. The construction costs of the culinary water and sewer systems claimed by the plaintiffs are not reasonable, in violation of the reasonable value rule.

19. Seven years is an unreasonable time within which to complete the culinary water and sewer systems and require the Sharps to mandatorily hook into these systems, which systems still are not yet operational. The Sharps are not obligated, but have the option, to hook into the culinary water and sewer systems should such systems become operational.

20. It is an unreasonable interpretation of the language "pro rata costs" in the Memorandum of Closing Terms and the earlier language in the Earnest Money delineating "the same per-hook-up price" to require the Sharps to pay 1/13 of the exorbitant construction costs for culinary water and sewer hook-ups. Such an interpretation would recast the Sharps as

developers rather than the mere sellers of Subject Property that they were and intended to be in this transaction.

21. A reasonable fee to be paid by the Sharps to the plaintiffs for a connection to the culinary water and sewer systems is \$2,000.00 each.

22. The inclusion of Lots 1-5 in the initial Notice of Default (Exhibit 55) and Notice of Trustee's Sale (Exhibit 56) on behalf of the Sharps was inadvertent, unintentional and without malice.

23. There was no improper holding by the Sharps of any requested reconveyance, but even if there were, it was not done in bad faith. The Sharps acted in reliance on the advice of their counsel, and did so in good faith.

24. Alternatively, the Sharps did not improperly withhold reconveyances and plaintiffs have failed to establish a cause of action for failure to reconvey under U.C.A. §57-1-33. U.C.A. §57-1-33 is applicable only when a beneficiary refuses to request a reconveyance within 30 days after written demand therefor is made by the Trustor. The Sharps requested the Trustee to reconvey Lots 1-5 on or about January 18, 1984, and because of plaintiffs' subsequent breaches were under no obligation to reconvey the remainder of the Subject Property.

25. As a result of plaintiffs' breaches of the Contract, the Sharps were entitled to record all of the Notices of Default and Notices of Sale described in the Findings against the Subject Property.

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26. The Sharps acted in good faith and not maliciously in having recorded the Notices of Default and the Notices of Sale and in refusing to reconvey Lot 6 and the unplatted acreage.

27. The plaintiffs have not established a cause of action for slander of title against the Sharps. The Sharps did not act maliciously or cause any special damages to the plaintiffs.

28. All of the damages, including, without limitation, those under U.C.A. §57-1-33, claimed by the plaintiffs are too remote, conjectural and speculative. The plaintiffs have failed to establish they have suffered actual damages resulting from any alleged breach by the Sharps, and this Court concludes no such breach by the Sharps occurred.

29. The attorney's fees incurred by the Sharps in this matter through August 31, 1988 in the amount of \$144,469.75 are reasonable and the Sharps are entitled to an award of the same. Further, the Sharps are entitled to supplement and augment this amount by affidavit for their reasonable attorney's fees incurred after August 31, 1988 in preparation of the Findings, Conclusions and Judgment, in responding to any post-trial motions, in collecting said Judgment by execution or otherwise, and, if necessary, after prevailing on any appeal.

30. The Sharps are entitled to their costs of court in the amount as assessed or taxed pursuant to U.R.C.P. 54 and to post-judgment interest as provided by law.

31. By virtue of the significant and material breaches of the Contract by the plaintiffs, the Sharps are entitled to

judgment against Saunders, Felton, Interstate Rentals, Inc. and Norton, jointly and severally, in the following amounts:

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

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

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

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

c. Delinquent property taxes:	\$ 20,368.62
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together with interest and penalties assessed thereon as provided by law, property taxes accruing for 1988, and post-judgment interest thereon at the rate of 12% per annum.

32. As a result of the significant and material breaches of the Contract by the plaintiffs, the Temporary Restraining Order entered in the above captioned matter by the Honorable Judith M. Billings on September 4, 1986 was wrongfully issued and the Sharps are entitled to have it lifted and dissolved.

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33. The Sharps are entitled to be paid the bond posted by plaintiffs with the Summit County Clerk in September, 1986 in the amount of \$2,400 and to be paid from the security posted by Tracy Collins Bank in the amount of \$28,570.63 for their interest, attorney's fees and other damages incurred as a result of the issuance of the wrongful Temporary Restraining Order, and for which amounts the Sharps are not secured by the fair market value of the Subject Property.

34. The Sharps are entitled to have Lot 6 as described in the final recorded plat of White Pine Ranches Phase I and the unplatted property more particularly described on Exhibit "A" attached hereto or such portions thereof as may be sufficient to pay the amounts found to be due and owing under the Judgment, together with interest as set forth hereinabove and accrued costs herein, and expenses of sale, sold at public auction by the Sheriff of Summit County, State of Utah, in the manner prescribed by law for such sales; that said Sheriff, if and when the subject premises are sold by him, out of the proceeds of such sale shall retain first his costs, disbursements and commission, and then pay to the Sharps, or to their attorneys, the accrued and accruing costs of this action, then said sums for the Sharps' attorney's fees, and the amount owing to the Sharps for principal, interest, costs and expenses of sale and maintenance, taxes, assessments and/or insurance premiums, together with accrued interest thereon, or so much of said sums as said proceeds will pay, and that the surplus, if any, shall be accounted for and paid over to the Clerk of this

Court subject to this Court's further order.

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

36. If a deficiency results after due and proper application of the proceeds of such Sheriff's Sale, the Sharps are entitled to be awarded a personal judgment against Saunders, Felton, Norton and Interstate Rentals, Inc., and each of them, jointly and severally, for the full amount of such deficiency.

37. The Sharps are entitled to have the right, at their request, to one connection to both plaintiffs' culinary water and sewer systems on White Pine Ranches Phase I for a connection fee of \$2,000 each.

38. The Sharps are entitled to have the Complaint of the plaintiffs dismissed, no cause of action.

DATED this 16th day of Sept, 1988.

BY THE COURT:

Hon. J. Dennis Frederick

ATTEST
H. DIXON HINDLEY
Clerk

By [Signature]
Deputy Clerk

JUL 16 1988

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

Attorneys for Defendants Sharps

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, UTAH

SEP 9 1988
H. DENNIS FREDERICK
BY _____
Deputy Clerk

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

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

Plaintiffs,

vs.

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

Defendants.

JOHN C. SHARP, and GERALDINE
Y. SHARP,

Counterclaim-Plaintiffs,

vs.

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

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

JUDGMENT

Civil No. C87-1621

Judge J. Dennis Frederick

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

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

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

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

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

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

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

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

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

c.		Delinquent property taxes:	\$ 20,368.62
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together with interest and penalties assessed thereon as provided by law, property taxes accruing for 1988, and post-judgment interest thereon at the rate of 12% per annum.

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

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

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

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

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

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

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

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

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

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

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

DATED this 26th day of Sept., 1988.

BY THE COURT:

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT
THIS 29 DAY OF SEPTEMBER, 19 88
H. DIXON HINDLEY, CLERK
BY [Signature] DEPUTY

[Signature]
Hon. J. Dennis Frederick

ATTEST
H. DIXON HINDLEY
Clerk

By [Signature] Deputy Clerk

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Beginning at a point South 89 degrees 41'36" West along the North line of Lot 3, 175.42 feet from the corner of Lots 1 and 3, a brass cap set by the U.S. General Land Office, said brass cap also being South 00 degrees 19'46" West along section line 1336.14 feet from the Northeast corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; and running thence South 89 degrees 41'36" West along the North line of Lot 7 and 8 2948.98 feet to the Northwest corner of Lot 7; thence South 00 degrees 11'29" East along the West line of Lot 7, 1312.84 feet to the Southwest corner of Lot 7; thence North 89 degrees 47'41" East along the South line of Lot 7, 832.67 feet; thence North 61 degrees 00'00" East 1956.90 feet; thence North 47 degrees 11'15" East 462.75 feet; thence North 42 degrees 44'40" East 85.63 feet to the point of beginning.

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

EXIST "A"

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

Cite as
135 Utah Adv. Rep. 68

IN THE
UTAH COURT OF APPEALS

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

v.

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

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

v.

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

and

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

**Counterclaim-Defendant and Appellant,
and**

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

No. 880710-CA

No. 880711-CA

FILED: May 25, 1990

Third District, Salt Lake County
Honorable J. Dennis Frederick

ATTORNEYS:

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

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

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

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

**Before Judges Bench, Greenwood, and
Larson.¹**

OPINION

BENCH, Judge:

Plaintiffs appeal from a judgment in favor

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

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

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

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

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

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

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

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

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

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

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

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

BREACH OF CONTRACT

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

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

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

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

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

ATTORNEY FEES

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

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

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

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

THE INJUNCTION BONDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Russell W. Bench, Judge

WE CONCUR:

Pamela T. Greenwood, Judge

John Farr Larson, Judge

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

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

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