

1990

Leon H. Saunders; Robert Felton; Saunders Land Investment Corp., a Utah corporation; White Pine Ranches, a Utah general partnership; and Kenneth R. Norton, dba Interstate Rentals, Inc., a Nevada corporation v. John C. Sharp and Geraldine Y. Sharp

Utah Supreme Court

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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,

vs.

JOHN C. SHARP and GERALDINE Y.
SHARP,

Defendants and Respondents.

Petition No. 900360

PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI

PETITION FOR REVIEW OF DECISION OF UTAH COURT OF APPEALS
AFFIRMING JUDGMENT OF THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

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Clerk, Supreme Court, Utah

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LIST OF ALL PARTIES

All parties to the proceeding in the Utah Court of Appeals are listed in the caption on the cover page of this petition.

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PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals held that where an appellate court concludes facts have not been marshaled, the marshaling doctrine precludes any appellate review whatsoever of legal arguments. Was this holding in conflict with decisions of this Court?

2. Was the Court of Appeals' refusal to address or rule on any of plaintiffs'/petitioners' (collectively "White Pine") legal arguments -- based upon that Court's misreading of the marshaling doctrine -- such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

3. Whether the Court of Appeals -- in affirming the judgment of the District Court without any analysis or discussion of the legal issues presented -- decided by default numerous heretofore unsettled and important questions of state law which have not been, and should be, settled by this Court.

REPORT OF DECISION

The opinion of the Court of Appeals is at 135 Utah Adv. Rep. 68 (June 5, 1990).

JURISDICTIONAL GROUNDS

a. The Utah Court of Appeals decision sought to be reviewed was entered on May 25, 1990.

b. An order of the Utah Court of Appeals denying rehearing was entered on June 26, 1990.

c. The statutory authority for exercise of jurisdiction is 78-2-2(5), Utah Code Annotated 1953, as amended.

CONTROLLING LAWS

There are no controlling constitutional provisions, statutes, ordinances, or regulations involved in this case.

STATEMENT OF THE CASE

NATURE OF THE CASE

White Pine sued Respondents (the "Sharps") for specific performance of a contract involving both platted and unplatted property in Summit County, Utah, and for damages arising from the Sharps' refusal to do so.

Statement of Facts

A. The Parties' Contract.

In 1980, certain petitioners, together with other persons not parties to this action, agreed to purchase from the Sharps 60.078 acres of unimproved real property near Park City, Utah (the "Property"), for the purpose of developing four- or five-acre residential lots. (F. para. 1, Ex. D-14, TR. 27,81, 341; F. para. 2, TR. 341).

At the closing of the sale (the "Closing"), the parties executed a Memorandum of Closing Terms ("Closing Memorandum"), a Trust Deed Note, a Trust Deed, and a Warranty Deed, collectively the "Contract", prepared by the Sharps' counsel, Jon C. Heaton. (Ex. D-15, D-3, D-2 and D-17; TR. 30-31, 88, 358; TR. 30-31).

White Pine agreed to pay the Sharps \$1,583,055.30 for the Property, \$620,000 of which was paid as a down payment at Closing. (Ex. D-14). Pursuant to the Trust Deed Note, White Pine agreed to pay the Sharps the remaining \$963,055.30 in five annual \$192,611.06 installments. (Ex. D-3, TR. 33, 88-89). At Closing, the Sharps conveyed fee title to the Property to White Pine subject to the Trust Deed securing payment of the Trust Deed Note. (F. para. 10, Ex. D-2, Ex. D-3, Ex. D-15 and Ex. D-17; TR. 32-33, 37, 90, 94-95). The Sharps agreed in the Closing Memorandum 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), [the Sharps] shall execute and deliver to [White Pine] a Partial Deed of Reconveyance for one (1) PUD lot.

(F. para. 15, Ex. D-15 para. 1) (emphasis added).

The Sharps also agreed that

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

(F. para. 16,, Ex. D-15 para. 2) (emphasis added).

The Closing Memorandum also provided that

at the time of execution of this Memorandum, [White Pine] have paid to [the Sharps] 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, [White Pine] shall be entitled to the release from the Deed of Trust of three (3) PUD lots of [White Pine's] choice together with the said roadway.

(F. para. 17, Ex. D-15 para. 3, TR. 46, 89-90, 352-53) (emphasis added).

It is undisputed White Pine paid the Sharps a total of \$1,546,400.00, consisting of the down payment, the 1982 through 1984 installments and part of the 1985 installment. (Ex. D-15, P-44, TR. 36-39, 53-55, 94-96, 353-358).

On December 23, 1983, the plat of White Pine Ranches Phase I (the "Plat") and the Declaration of Protective Covenants for White Pine Ranches, a Planned Residential Development (the "CCRs"), were recorded in the Office of the Summit County Recorder. (F. para. 40, Ex. D-1, Ex. P-51, TR. 90-91). Six (6) lots and the private, internal roadway ("White Pine Lane" or "Roadway") were described on the Plat and dedicated as Phase I of the project. (Ex. D-1). The remaining Property (approximately one-half), abutting the Roadway to the south, was not platted. (F. para. 33). The Plat

delineated the existence and location of certain utility easements, including those for water lines, a water tank and water system, including substantial portions of which were to be constructed on the unplatted property. (F. para 34, Ex. D-1). White Pine was prepared to plat the balance of the Property (the "unplatted property") at a later time and so advised the Sharps. (Ex. D-37, TR. 138, 202).

On December 23, 1983, White Pine had satisfied all conditions in the Closing Memorandum and paid sufficient principal to entitle them to the release of five (5) lots and the Roadway. (Ex. D-7, Ex. P-51, Ex. P-53, TR. 90-91, 96, 322-23). By June 30, 1984, they paid additional principal entitling them to the release of a sixth lot. (Ex. P-53, TR. 49-50, 95-96). As of June 30, 1985, White Pine had paid sufficient principal to entitle them to the reconveyance of 7.35 acres of the unplatted property. Id. The Sharps approved the recordation of the Plat and CCRs by executing a Consent to Record. (F. para. 39; EX. D-7; TR. 39-40).

After recording the Plat and CCRs, White Pine began construction of improvements benefiting all of the Property at a total cost of \$1,063,348.10. (Ex. P-60; TR. 102-103). The improvements included construction of the Roadway, on-site improvements (underground electrical, gas, water, fire hydrant and sewer systems) and off-site improvements, including lengthy sewer and utility systems. (TR. 138-39, 141-42, 249-50, 330). White Pine drilled on Lot 6 a culinary well to serve the Property, and

constructed on the unplatted property a large water storage tank for culinary purposes and fire protection.

Although the Contract entitled White Pine to the reconveyance of Lots 1 through 5 no later than January 20, 1984, a Partial Reconveyance, reconveying Lots 1 through 5, was not recorded until March 28, 1986, more than two years later. (P-45; TR. 68-70). The Sharps, however, never released or reconveyed the Roadway. (TR. 46, 457-59). Likewise, the Sharps never released Lot 6.

On November 30, 1984, property taxes for Lot 6 and the unplatted property of approximately \$4,725.00 became due and payable, of which White Pine paid \$1,515.24. (F. paras. 48 and 49, TR. 707-708). The Sharps never asserted White Pine was in default due to the non-payment of property taxes until the Sharps filed their Answer and Counterclaim; they never claimed prior to June 30, 1985 that White Pine defaulted. (TR. 50).

B. Respondents' Foreclosure Of The Unreleased Property.

The Sharps recorded a Notice of Default on September 16, 1985 and thereafter published numerous Notices of Trustee's Sale. Before the sale took place, White Pine filed suit and obtained a temporary restraining order enjoining the trustee's sale. (R. 50-51, 61). The parties subsequently stipulated to an injunction. (R. 96-97).

COURSE OF PROCEEDINGS BELOW

A. The District Court Proceedings.

White Pine claimed the Sharps materially breached the Contract because the Sharps had never reconveyed the Roadway, Lot 6 or the

7.35 acres. White Pine contended the Sharps were required to release the Roadway on December 23, 1983 (or no later than January 20, 1984), Lot 6 on June 30, 1984 and the 7.35 acres on June 30, 1985. (Ex. D-53, TR. 96). The Sharps asserted, however, they were excused from reconveying this property because White Pine failed to request releases, or alternatively because the Consent to Record in effect released the Roadway. (R. 1650, p. 45-47). White Pine sought specific performance of the Contract (i.e., release of Lot 6, the Roadway and the 7.35 acres) as well as damages arising from the Sharps' breach of the Contract.

As a specific performance remedy, White Pine claimed the Sharps' failure to release and reconvey portions of the Property on or about January 20, 1984, excused White Pine's obligation to make further installment payments, and tolled the accrual of interest on the unpaid principal balance. White Pine further asserted the Sharps wrongfully refused to release and reconvey the Property, and White Pine accordingly was entitled to recover statutory damages under Utah Code Ann. § 57-1-33.

By counterclaim, the Sharps alleged White Pine materially breached the Contract, sought a dissolution of the injunction to permit the Sharps' non-judicial sale of the Property, and claimed damages for the wrongful issuance of the injunction. Before and throughout trial, the Sharps sought to foreclose Lot 6, all of the unplatted acreage and the Roadway. Although the Sharps offered a stipulation during closing argument that their non-judicial or judicial foreclosure of the Roadway would not extinguish the rights

of access of Lots 1 through 5 to the Roadway, the Sharps nonetheless sought the foreclosure of the Roadway. (R. 1641, p.27; R. 1650, p.43).

The district court, rejecting every claim of White Pine, ruled inter alia, that: (1) White Pine materially breached the Contract by failing to pay property taxes for Lot 6 and the unplatted acreage on November 30, 1984, (approximately \$3,200.00) (C. para. 2); (2) because this breach preceded any claimed breach of the Sharps, the Sharps were excused from releasing Lot 6, the Roadway and the 7.35 acres, notwithstanding White Pine's payment for the property; (3) White Pine was obligated to request and identify lots specifically for release (even though only one platted lot (Lot 6) remained to be released), but failed timely to do so prior to their breach on November 30, 1984, (C. paras. 8 and 9); and (4) the Sharps were entitled to foreclose and sell Lot 6 and all of the unplatted property. (C. paras 34-35). Judgment was entered against White Pine for \$742,984.67, which sum included interest and attorneys' fees, and the property was ordered sold at Sheriff's Sale. (R. 1370, C paras 31-34).

B. The Court Of Appeals Proceedings.

On appeal the Court of Appeals totally ignored the extensive legal issues before it, and addressed White Pine's arguments as if they presented only issues of fact. Without addressing a single legal argument raised by the parties, the Court of Appeals, without any discussion or analysis, affirmed the following legal conclusions of the district court:

- The Sharps did not breach the parties' contract by failing to reconvey property under the Trust deed, even though White Pine had paid for it and the parties' Contract required the reconveyances as payments were made.
- The Sharps legally reconveyed the Property under the Trust Deed by signing a document merely consenting to the recording of a plat of the Property even though the document contains no conveyance, release, or granting language.
- The Sharps' breach of contract was legally excused by their reliance upon advice of counsel.
- The Sharps were excused from their contractual obligation to reconvey because White Pine, after paying for the property, failed to request the reconveyance of specific property prior to White Pine's default under the contract.
- White Pine was not entitled to the legal remedy of receiving specific reconveyances of property for which White Pine had expressly contracted with, and paid, the Sharps; instead, the Sharps were entitled to retain the substantial sums paid for the reconveyances and to foreclose their lien on the property they were obligated to reconvey.
- White Pine first breached the contract by failing to pay approximately \$3,200.00 in real estate taxes even though White Pine had paid more than \$1,500,000.00 to the Sharps under the Contract.
- The Sharps -- solely as trust deed beneficiaries, and not as fee owners -- legally granted an easement to themselves over a roadway owned by White Pine.

The district court made numerous, fundamental legal errors respecting the contract and real property issues presented by this case. However, despite the parties' extensive briefing of controlling legal authority of this Court -- and relevant legal authority from other jurisdictions -- the Court of Appeals failed to address any of the legal arguments because it concluded those issues

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.

Opinion, p. 5. These are not issues of fact. Rather, they are issues of law which the Court of Appeals was required to address and fundamentally erred in not doing so.

ARGUMENT

THE COURT OF APPEALS DECIDED THIS CASE WITHOUT ADDRESSING ANY OF THE LEGAL ISSUES PRESENTED; THIS COURT SHOULD EXERCISE ITS CORRECTIVE AND SUPERVISORY POWER

In its May 25, 1990 Opinion, the Court of Appeals rendered a decision that erroneously departed from the accepted and usual course of judicial proceedings in its refusal even to consider or address any of the trial court's legal conclusions. It applied the marshaling doctrine in a way that is in direct conflict with numerous decisions of this Court. By doing so, the Court of Appeals tacitly affirmed, without any analysis whatsoever, the district court's determination of significant legal issues which have been heretofore undecided by any reported Utah appellate decision. In this extremely significant case, involving millions of dollars, the Court of Appeals reached a greatly inequitable result by failing to consider at all numerous legal authorities compelling a reversal of the trial court's judgment as a matter of law, irrespective of the correctness of the trial court's findings of fact. The Court of Appeals abdicated its duty -- imposed by many decisions of this Court -- to address the legal arguments

White Pine raised, and in so doing, announced a new and incorrect standard of appellate review.

I. ISSUES OF BREACH AND PERFORMANCE ARE NOT, UNDER THESE CIRCUMSTANCES, QUESTIONS OF FACT.

Its Opinion suggests the Court of Appeals affirmed the trial court because questions of breach "constitute issues of fact for the fact finder." This proposition, however, is directly contrary to controlling Utah law.

In Avgikos v. Lowry, 54 Utah 217, 179 P. 988 (1919), plaintiff/seller sued defendant/buyer for unpaid amounts allegedly owing under two contracts for the delivery of wool. Defendant admitted the contracts and that he had only paid a specified amount thereunder, but asserted a counterclaim alleging the plaintiff failed to deliver the total amount specified.

All claims went to trial before a jury, which returned a verdict in plaintiff's favor for the full amount. Defendant appealed on three bases, including that: (1) the trial court erred in submitting to the jury the question of whether the amount of wool delivered substantially complied with the contract; and (2) the trial court erred in instructing the jury that substantial compliance was a question of fact. Id. at 989-90.

In reversing the jury award, this Court held that where, as here, the facts are undisputed, "the question of whether or not they constitute a performance or a breach of the contract is one of law for the Court." Id. at 90 (quoting 13 C.J. 790 para. 1011) (emphasis added). Since the sufficiency of the amount of wool

delivered presented a question of law, this Court concluded that it was error to submit that issue to the jury. Id.

Avgikos, the only controlling Utah authority, is directly contrary to the Court of Appeal's statement that issues of breach and substantial performance are questions of fact.

II. EVEN IF WHITE PINE DID CHALLENGE FINDINGS OF FACT ON APPEAL, THE COURT OF APPEALS STILL HAD A DUTY TO CONSIDER THE PARTIES' LEGAL ARGUMENTS.

In its analysis, the Court of Appeals overlooked, and failed to apply correctly, two separate lines of controlling Utah authority which conclusively establish either that (1) none of the issues raised by White Pine on appeal presents a question of fact; or (2) even if White Pine did fail to marshal evidence -- a ruling White Pine respectfully submits is erroneous -- the Court of Appeals nevertheless had a duty to determine if the trial court correctly applied the law.

A. THE INTERPRETATION OF AN UNAMBIGUOUS DOCUMENT IS A QUESTION OF LAW; THE CONSTRUCTION OF A DOCUMENT IS ALWAYS A QUESTION OF LAW.

The various breach issues on appeal involve unambiguous contractual language.¹ The trial court's interpretation of such unambiguous language is to be accorded no deference on appeal, but reviewed de novo.²

¹ Of all the Contract documents, the district court found only the phrase "pro rata cost to the purchaser", contained in paragraph 7 of the Closing Memorandum, to be ambiguous. (C. 16). The district court accordingly permitted extrinsic evidence to interpret that phrase, but made no finding that extrinsic evidence was necessary to interpret any other portion of the Contract. None of the trial court's legal conclusions, which the Court of Appeals affirmed without analysis in its Opinion, involved that phrase.

² See, e.g., Buehner Block Co. v. UWC Assoc., 752 P.2d 892, 895 (Utah 1988); Faulkner v. Farnsworth, 714 P.2d 1149, 1150 (Utah 1986); Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985); Bradshaw v. Burningham, 671 P.2d 196, 198 (Utah 1983); Jones v. Hinkle, 611 P.2d 733, 735 (Utah 1980); Crowther v. Carter, 767 P.2d 129, 131 (continued...)

Moreover, regardless of why a trial court admits extrinsic evidence, such extrinsic evidence is admitted solely for the purpose of interpreting the terms of an ambiguous contract. Once a contract has been interpreted, however, the construction of that contract "is always reviewed as a law issue." Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 25 (Ia. 1978) (emphasis added).

Consequently, to the extent Contract provisions were construed at all, questions involving (1) the Sharps' duty to reconvey; (2) the legal effectiveness of their purported reconveyances; (3) the effect of White Pine's failure to make specific requests; (4) White Pine's entitlement to the legal remedy of receiving specific reconveyances for which White Pine had already paid the Sharps; and (5) whether the Sharps -- who owned no fee interest -- were able to grant an easement to themselves, were all questions of law which should have been resolved de novo by the Court of Appeals.

B. TO THE EXTENT WHITE PINE CHALLENGED FINDINGS OF FACT, THOSE FINDINGS WERE IRRELEVANT TO THE BREACH ISSUES CENTRAL TO THIS APPEAL; FAILURE TO MARSHAL DOES NOT RELIEVE THE COURT OF APPEALS OF ITS DUTY TO DETERMINE (1) IF THE FINDINGS SUPPORT THE CONCLUSIONS, OR (2) WHETHER THOSE CONCLUSIONS CAN BE SUSTAINED UNDER ANY SET OF FACTS.

1. White Pine Challenged Only Findings Unrelated to the Breach and Reconveyance Issues.

White Pine did challenge some of the trial court's findings. None of these challenged findings, however, had any bearing on the

²(...continued)
(Utah App. 1989); Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357, 1358-59 (Utah App. 1987).

breach and reconveyance issues central to this appeal.³ No matter how much evidence may or may not support the trial court's findings, the Court of Appeals was nevertheless required to determine if the findings supported the legal conclusions challenged on appeal.

2. The Court of Appeals Misapplied the Marshaling Doctrine and Overlooked Its Duty to Determine Whether the Trial Court's Findings of Fact Support Its Conclusions of Law and Judgment, or If The Trial Court Applied Erroneous Principles of Law.

The marshaling doctrine provides:

To mount a successful attack on the trial court's findings of fact, an appellant must marshal 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 findings.

Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Unless the facts are marshaled, a trial court's findings of fact will not be disturbed. Id. Accordingly, in Scharf, where the appellant failed to marshal the evidence, this Court accepted the lower court's findings of fact. See, Id.

³ White Pine challenged (1) Finding No. 91 that the Sharps relied on the advice of counsel (Appellants' Brief ("AB") 22-24; Reply Brief ("RB") 23-24); (2) the findings pertaining to attorneys' fees (AB 47-48); and (3) the trial court's finding of market value (RB 12-13). Similarly, White Pine argues there is not evidence in the record to support certain legal conclusions made by the trial court (RB 20-21, 24). Obviously, it is impossible to marshal evidence when none exists. The only possible marshaling would be a citation to the entire trial transcript. An appellant simply cannot marshal the negative.

Of critical importance, however, the Scharf court did not merely affirm the judgment at that point; instead, it proceeded to consider and address appellant's specific challenges to the trial court's conclusions of law. Id. Thus, even where an appellant fails to marshal the evidence below, an appellate court still has a duty to examine "whether the trial court's findings of fact support its conclusions of law and judgment." Sampson v. Richins, 770 P.2d 998, 1002 (Utah App. 1988) (emphasis added). In its Opinion, the Court of Appeals announced a rule of law in direct conflict with the controlling decisions of this Court.

This Court has explicitly recognized this duty, implicit in all the marshaling cases, to examine legal argument irrespective of the failure to marshal. For example, in Ashton v. Ashton, 733 P.2d 147 (Utah 1987), the appellant failed to marshal all evidence supporting the trial court's findings of fact and thus accepted those findings. Id. at 150. This Court, however, immediately thereafter made explicit reference to an appellate court's "duty . . . to determine whether those findings [justified] the trial court's conclusion of law," and it then proceeded independently to review that conclusion for correctness. Id.⁴

⁴ This Court has applied this principle even where an appellant failed to provide the Supreme Court with any trial transcript at all. See, e.g., Powell v. Bastian, 541 P.2d 1127, 1128 (Utah 1975); Walker Bank & Trust Co. v. Neilson, 26 Utah 2d 383, 490 P.2d 328, 329 (Utah 1971). In both of those cases, this Court presumed that the trial court's findings were based upon competent and substantial evidence, and then automatically proceeded to determine whether those findings supported the trial court's conclusions of law. Id.

The following cases demonstrate the two-step nature of the required analysis: When an appellant fails to marshal evidence, the trial court's findings are presumed correct. See, State of Utah in Interest of P.H. v. Harrison, 783 P.2d 565, 570 (Utah App. 1989). The presumption is that the findings are supported by competent and sufficient evidence. See, e.g., Bennion v. LeGrand Johnson Const. Co., 701 P.2d 1078, 1085, n. 2 (Utah 1985). When "findings are supported by competent evidence, they will not be disturbed by the reviewing court, but if erroneous principles of law are applied to the facts, as they were in this case, judgment on such facts will not be upheld on review." Survey Eng'rs Inc. v. Zoline Foundation, 532 P.2d 748, 751 (Colo. App. 1975) (emphasis added), rev'd on other grounds, 546 P.2d 1257 (Colo. 1976).

The Indiana Court of Appeals succinctly described the appropriate two-step analytical process on appeal:

[T]his Court will employ a two-tier standard of review. First, it must be determined the evidence supports the findings. Then the Court must conclude the findings support the judgment.

Keystone Square Shopping Center Co. v. Marsh Supermarkets, Inc., 459 N.E.2d 420, 422 (Ind. App. 1984) (emphasis added).

By failing to use this two-tiered analytical process, the Court of Appeals denied the parties their entitlement to appellate review of purely legal issues. For example, White Pine argued that, as a matter of law, White Pine is still entitled to a reconveyance of the property for which it paid. (Appellants' Brief ("AB") 14-19; Reply Brief ("RB") 8-14, citing e.g., Columbia Dev.,

Inc. v. Watchie, 448 P.2d 360 (Ore. 1968); Burroughs v. Garner, 405 A.2d 301 (Md. App. 1979); Eldridge v. Burns, 76 Cal. App.3d 396, 142 Cal Rptr. 845 (1978); Leisure Campground & Country Club Ltd. Pship. v. Leisure Estates, 372 A.2d 595 (Md. App. 1977)). White Pine argued that under these authorities it was entitled to this remedy notwithstanding any of the trial court's findings, including its finding that White Pine first breached the parties' contract.

The Court of Appeals, however, never even considered or addressed the issue of White Pine's legal entitlement to this remedy, a legal matter of first impression before the courts of this state. Thus, in effect, the Opinion transformed the marshaling doctrine into a doctrine of waiver by its requirement that legal argument will not be addressed if the facts are not marshaled, even if those facts are fundamentally irrelevant to legal issues on appeal. White Pine respectfully submits this approach has no precedent or foundation in the jurisprudence of Utah, and represents a radical misreading of the marshaling doctrine in direct conflict with the marshaling doctrine developed by this Court, warranting review and correction by this Court.⁵

⁵ The "advice of counsel" issue raised by White Pine illustrates this unjust and inappropriate foreclosure of legal argument. White Pine argued, as a matter of law, that reliance on a counsel's advice is no defense to a breach of contract action. (AB 22, citing, Mann v. Glens Falls Inc. Co., 418 F.Supp. 237, 251 (D. Nev. 1974)). White Pine argued that no matter what the facts are, advice of counsel provides no defense to a breach of contract action. Because of its incorrect one-step analysis, however, the Court of Appeals announced a rule holding that such purely legal issues will never be reviewed in the future.

CONCLUSION

The Court of Appeals' Opinion is in direct conflict with the decisions of this Court in three respects: (1) questions of breach and substantial performance are questions of law for the court when, as here, the facts are undisputed or presumed correct; (2) the interpretation of an unambiguous document presents only questions of law, and the construction of a document is always a legal issue; and (3) the marshaling doctrine applies only when findings are challenged, and in any event does not eliminate an appellate court's duty to review for correctness the trial court's application of the law to the findings made. These conflicts with this Court's decisions provide grounds for grant of certiorari so this Court can exercise its corrective powers.

The opinion departed from the accepted and usual course of judicial proceedings by refusing to analyze or consider any legal issues raised because White Pine purportedly failed to marshal evidence. Unless this Court reviews it, the Opinion of the Court of Appeals will establish a new and inappropriate condition for appellate review: all appellants will hereafter have to marshal all evidence to support all findings the appellants anticipate the appellate court may feel are disputed in order to avoid waiving their right to have their purely legal arguments considered. No reported Utah decision has ever so much as intimated that a failure to marshal evidence creates an absolute bar to appellate review of whether the facts found could support the resulting legal conclusions.

The refusal of the Court of Appeals to consider or rule on any legal arguments is a miscarriage of appellate review so far beyond the accepted and usual course of judicial proceedings that this Court should grant certiorari so as to exercise its inherent power of supervision. The scope of this Court's review of the Court of Appeals' action is very broad under a Writ of Certiorari and encompasses a reivew of whether the "proceedings were had in accordance with law and to correct errors in law affecting the substantial rights of parties'", Boggess v. Morris, 635 P.2d 39, 42 (Utah 1981) (certiorari is available in aid of an appellate court's supervision of the actions of inferior courts, citing Gilbert v. Board of P. and F. Comm'rs, 11 Utah 378, 389, 396, 40 P. 264 (1895); House v. Mayo, 324 U.S. 42, 44-45, 65 S. Ct. 517, 519-520, 89 L.Ed. 739 (1945); Rex v. Northumberland Compensation Appeal Tribunal, [1952] 1 K.B. 338, 346, 348.

Finally, the Court of Appeals has refused to review the district court's decision of numerous unsettled areas of law. The determination of these numerous unsettled issues should not occur by default, as happened in this case. The statute permitting this Court to refer appeals to the Court of Appeals does not contemplate that the Court of Appeals decide such unsettled issues by refusing to address them at all.

White Pine was entitled to an appeal of the district court's legal conclusions either to this Court or to the Court of Appeals. Long ago, Chief Justice John Marshall set forth the duties and obligations of an appellate court in reviewing appeals:


It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decide the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty.

Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed. 257, 291, (1821).

The Court of Appeals failed to perform its appellate function in the foregoing three aspects. Accordingly, a Writ of Certiorari should be granted; the Opinion of the Court of Appeals should be reviewed and reversed; and either this Court or the Court of Appeals should address the numerous legal issues raised by the parties.

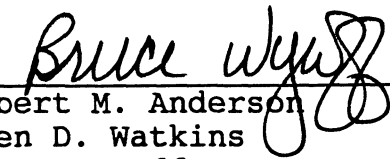
DATED: July 26, 1990

ANDERSON & HOLLAND


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Interstate Rentals, Inc.

Respectfully submitted,

ANDERSON & WATKINS


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Pine Ranches and White Pine
Enterprises

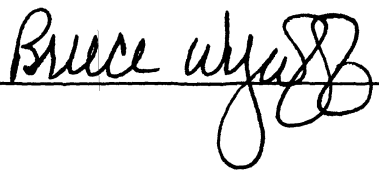
CERTIFICATE OF SERVICE

On this 26th day of July, 1990, I hereby certify that I caused to be mailed, via first-class United States mail, postage prepaid, four true and accurate copies of the foregoing Petition for Writ of Certiorari, to the following:

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IN THE UTAH COURT OF APPEALS

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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.

OPINION
(For Publication)

Case Nos. 880710-CA
880711-CA

FILED

MAY 25 1990

Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

EXHIBIT A

Third District, Salt Lake County
The 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

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.

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).

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 contract. 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),

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

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 unconveyed 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.

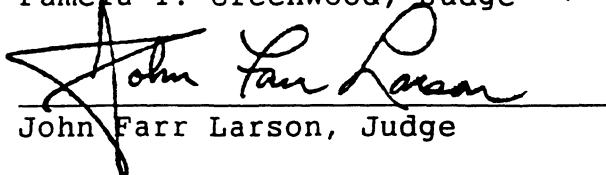
In summary, we affirm the judgment on the contract. We reverse the award of damages against the injunction bonds, except for the attorney fees. Such fees are to be assessed against the bonds in a proportion to be determined by the trial court.

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

FILED

IN THE UTAH COURT OF APPEALS

JUN 26 1990

Mary Stover
Clerk of the Court
Utah Court of Appeals

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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,)

ORDER DENYING REHEARING
AND REMITTITUR

Case No. 880710-CA

Case No. 880711-CA

Plaintiffs and Appellants,)

v.)

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

Defendants and Appellees,)

and)

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

Surety and Appellant.)

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

Upon consideration of Appellants' Petition for Rehearing, Motion for Stay and to approve a supersedeas bond, and Motion for Expedited Hearing, it is hereby ORDERED as follows:

1. Appellants' Petition for Rehearing is denied and this matter is immediately remitted to the district court, pursuant to Rule 36(a), Utah R. App. P.

2. Based upon appellants' representations of irreparable harm and an agreement to provide a supersedeas bond on appeal, appellant is granted a temporary stay for thirty days of all further proceedings in the district court, including any

1. Judge John Farr Larson, Senior Juvenile Court Judge, acting by special appointment on the Petition for Rehearing, along with Judges Bench and Greenwood. The remaining provisions of the order are decided by the Court's Law and Motion panel, Judges Bench, Greenwood, and Davidson.

EXHIBIT B

execution sale or further proceedings to enforce or satisfy the judgment. This stay shall expire on Thursday, July 26, 1990.

3. Appellants' motions for approval of a supersedeas bond and for an expedited hearing are hereby rendered moot and, therefore, are denied.

DATED this 26th day of June, 1990.

FOR THE COURT:

Russell W. Bench
Russell W. Bench, Judge