

1991

Louis L. Timm, John Neiuwland, and Floyd M.  
Childs, Precision Machine and Engineering  
Company Profit Sharing Trust, et al v. T. Lamar  
Dewsnap and Aletha Dewsnap : Brief of Appellant

Utah Supreme Court

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BRIEF

910157

IN THE UTAH SUPREME COURT

LOUIS L. TIMM, JOHN  
NEIUWLAND, and FLOYD M.  
CHILDS, Trustees of United  
Precision Machine and  
Engineering Company Profit  
Sharing Trust; et al.

Plaintiffs and  
Appellees,

vs.

T. LAMAR DEWSNUP and  
ALETHA DEWSNUP,

Defendants and  
Appellants

Docket No. 91-0157

Priority No. 16

BRIEF OF APPELLANTS T. LAMAR AND ALETHA DEWSNUP

APPEAL FROM AN ORDER OF  
THE FOURTH JUDICIAL DISTRICT COURT  
OF MILLARD COUNTY, UTAH  
HONORABLE RAY M. HARDING  
DATE OF ORDER: March 11, 1991  
Case No. 7191

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UTAH SUPREME COURT

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LOUIS L. TIMM, JOHN	)	
NEIUWLAND, and FLOYD M.	)	
CHILDS, Trustees of United	)	
Precision Machine and	)	
Engineering Company Profit	)	
Sharing Trust; et al.	)	
	)	
Plaintiffs and	)	
Appellees,	)	
	)	Docket No. 91-0157
vs.	)	
	)	
T. LAMAR DEWSNUP and	)	
ALETHA DEWSNUP,	)	Priority No. 16
	)	
Defendants and	)	
Appellants	)	

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BRIEF OF APPELLANTS T. LAMAR AND ALETHA DEWSNUP

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THE FOURTH JUDICIAL DISTRICT COURT  
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HONORABLE RAY M. HARDING  
DATE OF ORDER: March 11, 1991  
Case No. 7191

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PARTIES BELOW:

- A. Louis L. TIMM, JOHN NEIUWLAND, and FLOYD M. CHILDS,  
Trustees of United Precision Machine and Engineering  
Company Profit Sharing Trust
- B. ABCO Insurance Agency, Inc., a Utah corporation.
- C. JOSEPH L. HENROID, Trustee for the ANNETTE JACOB  
Trust
- D. T. LAMAR DEWSNUP
- E. ALETHA DEWSNUP
- F. ARROW INVESTMENT CO., a limited partnership
- G. THE FEDERAL LAND BANK OF BERKLEY, IMPERIAL  
LAND TITLE INC., as Trustee and EUGENE L. CARSON  
and ELAINE CARSON as Beneficiaries
- H. STRINGHAM, MAZURAN, LARSEN & SABIN, a  
Professional Corporation
- I. MINERAL FERTILIZER CO., INC.
- J. HARRY V. KAPS

The parties listed in F through J were defendants in  
the original complaint but are not parties to this appeal.

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### JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this appeal pursuant to Article VIII, Section 3, Constitution of Utah, Section 78-2-2(3)(j), Utah Code Annotated 1953, as amended and Rules 3(a) and 4(a), Utah Rules of Appellate Procedure.

### ISSUES PRESENTED FOR REVIEW

The following issues are presented for reviews:

1. Did the district court error in holding that T. Lamar and Aletha Dewsnums' (the "Dewsnums") counterclaim was "implicitly" disposed of by the summary judgment on the plaintiffs' claim.

2. Did the district court error in denying the Dewsnums' motion to either reconsider and set aside the summary judgment or to certify the summary judgment as final?

3. Did the district court error in denying the Dewsnums' motion to amend their counterclaim?

### STANDARD OF APPELLATE REVIEW

1. Issue 1 - Correctness Standard. The first issue appeals the district court's interpretation of the summary judgment. Although such an interpretation can be a "finding of fact" where extrinsic evidence is considered in interpreting the judgment, in this case, where the court's interpretation was based solely on the pleadings, it is a "conclusion of law." Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985); c.f. Williams v. Miller, 794 P.2d 23 (Utah App. 1990). Therefore, the appellate court will give no

deference to the trial court's interpretation of the summary judgment, but will review it for correctness. Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382 (Utah 1989).

2. Issue 2 - Correctness Standard. The second issue appeals the district court's denial of the Dewsnums' motion to either reconsider and set aside the summary judgment or to certify it as final. The court based this denial on the conclusion of law that the Dewsnums' counterclaim had been "implicitly" disposed of by the summary judgment. (See the Memorandum Decision, attached hereto as Exhibit G).

Ordinarily, where a matter is in the discretion of the district court, the district court's decision will not be overturned on appeal unless there is an abuse of discretion. Chadwick v. Nielsen, 763 P.2d 817 (Utah App. 1988). This is not true, however, where the court's decision is based on an erroneous legal conclusion. In such a case, the court will not give deference to the district court's decision but will use the correctness standard. Atchison, Topeka and Santa Fe Railway Company v. Marzuola, 418 P.2d 625, 627 (Okla. 1966); Hornback v. Missouri-Kansas-Texas Railroad Co., 395 P.2d 379, 380 (Kan. 1964). In this case, because the district court's denial of the Dewsnums' motion was based on a legal conclusion, the correctness standard should be used.

3. Issue 3 - Correctness Standard. The third issue appeals the district court's denial of the Dewsnums' motion to amend their counterclaim. Again, this decision was based on

the legal conclusion that the Dewsnums' counterclaim had been disposed of. (See Memorandum Decision, attached hereto as Exhibit G). Consequently, as discussed above, the appellate court will not give deference to the district court's ruling, but will use the correctness standard.

#### STATEMENT OF CASE

The Dewsnums have suffered for 10 years for a debt which they did not owe. This is the first time that the Dewsnums will have their story heard. In 1978, the Dewsnums' attorney loaned the Dewsnums money secured by a trust deed on their farm. After they had paid the debt in full in 1980, their attorney refused to release the trust deed and sued them on the trust deed for a debt which they did not owe and which was not secured by the trust deed. Their attorney then recommended another attorney to represent them in the litigation, who did not make any appearance (written or otherwise) on plaintiffs' motion for summary judgment and summary judgment was granted against the Dewsnums.

In order to try to save their farm the Dewsnums' filed bankruptcy. However, the bankruptcy court sought only to eventually enforce a summary judgment that it presumed was correct. Since a state court decision is res judicate in bankruptcy court, the bankruptcy court could not reconsider the facts underlying the summary judgment. Sustained by the knowledge that they had paid off the mortgage, the Dewsnums persevered through 10 years of bankruptcy litigation,

believing that if they persevered long enough, somehow justice would prevail and they would get their farm back.

Unfortunately, in the bankruptcy court litigation, all of the issues were mere "technicalities" toward the eventual enforcement of the summary judgment. Even if the Dewsnums' win their current appeal before the United States Supreme Court in their bankruptcy case, they will lose their farm.

During the last 10 years the Dewsnums have not been able to farm their farm (on the advice of their bankruptcy counsel), have been reduced to poverty and have suffered enormously emotionally and physically. It is difficult to describe the emotional toll 10 years of bankruptcy litigation has had on this family, as they have tried to save the family farm. Many attribute LeMar Dewsnum's premature death in 1986 to the ongoing stress of this litigation. As a result of borrowing money to pay the ever mounting legal fees, two of the Dewsnum children were eventually unable to repay the money they had borrowed and were also forced into bankruptcy. Alone and penniless in 1988, and having lost below in the bankruptcy and district courts, Aletha Dewsnum went through the town of Delta, Utah with a tin cup raising the \$10,000 bond she needed to appeal to the Tenth Circuit. Sustained by the belief that if she tried hard enough, someday justice would prevail, Aletha Dewsnum never gave up hope. Aletha Dewsnum has tried hard enough, the Dewsnums never owed the debt for which they have been persecuted for 10 years,

and now is the time for justice to prevail.

After the plaintiffs had filed their complaint against the Dewsnums, the Dewsnums filed a counterclaim against the plaintiffs. The plaintiffs moved for summary judgment on their claim and summary judgment was granted, but the Dewsnums' counterclaim was never decided.

When the Dewsnums filed bankruptcy, their counterclaim became an asset of the bankruptcy trustee and the Dewsnums were not able to pursue it. On January 6, 1991, the bankruptcy trustee finally abandoned the counterclaim back to the Dewsnums.

Having regained control of their counterclaim, on January 22, 1991 the Dewsnums filed a motion to amend their counterclaim and a motion to either reconsider and set aside the summary judgment or to certify it as final, so that it could be appealed. Because the summary judgment had not disposed of all the claims in the case and had not been certified as final, under Rule 54(b) of the Utah Rules of Civil Procedure the summary judgment was still subject to revision. The court denied both motions, holding that the Dewsnums counterclaim had been "implicitly" disposed of by the summary judgment. From that holding the Dewsnums brought this appeal.

### FACTS

1. In the spring of 1980, the Dewsnums were farmers who owned a farm near Delta, Utah. LaMar Dewsnum's health was not good and the Dewsnums decided to purchase a motel as a way of eventually getting out of farming. (R. 90).

2. The Dewsnums approached their attorney, Joseph Henroid, and asked him if he knew anyone that would lend them \$119,000 as a down payment on a motel they were looking at. Joseph Henroid said that he would lend them part of the money from the Annette Jacob trust fund that he was trustee for and that he knew some other people that would lend them the rest. (R. 90-91).

3. The Dewsnums and Joseph Henroid had agreed that the loan would be secured by 160 acres of farm land and certain water rights that the Dewsnums owned outright. (R. 62, 91, 197).

4. In June 1980, the Dewsnums borrowed \$119,000 from Joseph Henroid, as trustee of the Annette Jacob Trust, and from the rest of the plaintiffs in this case (who were people that Joseph Henroid had contacted). (R. 91, 124, 199-200).

5. Joseph Henroid and Earl Peck, one of the attorneys at Joseph Henroid's law firm, drafted all of the loan documents. (R. 91, 125, 197).

6. On or about June 1, 1978, the Dewsnums executed three promissory notes (the "Promissory Notes") in favor of the plaintiffs totaling \$119,000. (R. 91, 124, 199-200).

7. At the same time, the Dewsnums executed a Trust Deed and an Amended Trust Deed (collectively, the "Trust Deed") to secure the Promissory Notes. (R. 91, 124, 199-200).

8. Although the Dewsnums signed the Trust Deed assuming that it reflected their agreement with Joseph Henroid, it did not. Unbeknowst to the Dewsnums, the Trust Deed also included 56.71 acres of land in Oak City, Utah that Aletha Dewsnum had been given as an inheritance. (R. 62, 91, 198).

9. Also unbeknowst to the Dewsnums, as additional security for the Promissory Notes the Dewsnums executed an Assignment of Contract (the "Assignment of Contract"), assigning to the plaintiffs a security interest in a purchase contract (the "Purchase Contract") by which the Dewsnums were purchasing additional farm land. (R. 62, 91, 198).

10. In 1976, the Dewsnums had entered into the Purchase Contract to purchase some additional farm land (sometimes referred to herein as the "Arrow Land") adjacent to the 160 acres the Dewsnums owned from LaMar Dewsnum's cousin, Richard Dewsnum (through his company--Arrow Investment Company), for \$400,000 with annual installments for twenty years due on January 2 of each year. (R. 91-92, 125, 198-99).

11. Title to the land being purchased under the Purchase Contract was held by an escrow agent under escrow instructions. (R. 183-84).

12. The Purchase Contract gave the Dewsnums the right to terminate the Purchase Contract by failing to make any of the

annual installments due under the Purchase Contract on January 2, by the following June 2 of that year:

If Buyers default on the payment falling due on January 2, 1977, or any payment thereafter falling due, and if such sum or any part thereof remains in default for a period of five months, then Buyers shall forfeit any and all right, title and interest that they otherwise would have in and to the property covered by this agreement, title to which has not passed to Buyers at that time, and this agreement shall terminate.

(Purchase Contract, pp. 5-6). (R. 153-54).

13. If a January 2 payment due under the Purchase Contract was not paid by the next succeeding June 2, the escrow agent was instructed to return title to the land to the seller:

Your instructions are to...release to the seller the warranty deed...if...the Buyers shall default in the payment of any sum falling due under the agreement and said sum or any part thereof remains in default for a period of five months.

(Escrow Instructions, Paragraph 4). (R. 184).

14. At the time the Dewsnums entered into the Purchase Contract the Intermountain Power Project ("IPP") was coming into the area and had driven up land prices and the \$400,000 purchase price reflected the inflated real estate market at the time, which proved to be too high. (R. 92).

15. In 1980, two years after the \$119,000 loan had been made, LaMar Dewsnum's health was getting worse, and property values were declining. The Dewsnums decided to let the land they were purchasing under the Purchase Contract go back so LaMar would have less land to farm. (R. 92, 125, 200).

16. On June 2, 1980, the Dewsnums exercised their contractual right under the Purchase Contract and terminated the Purchase Contract by failing to make the January 2, 1980 payment by June 2, 1980. Therefore, the Purchase Contract terminated according to its terms, the escrow agent delivered title to the land back to LaMar Dewsnum's cousin as provided in the escrow instructions, and the Dewsnums voluntarily forfeited all of their right, title and interest in the Arrow Land. (R. 92, 125, 200-01).

17. Five days later, on June 7, 1980 and over the Dewsnums' objections, Joseph Henroid made the January 2, 1980 payment of \$49,966.21 on the Purchase Contract, even though it was too late. (R. 92, 125-26, 201). (See the Demand for Reimbursement attached hereto as Exhibit A).

18. The plaintiffs demanded that the Dewsnums reimburse them the \$49,966.21 that Joseph Henroid had paid on the Purchase Contract. (R. 92, 126, 201). (See Exhibit A).

19. The Assignment of Contract required the Dewsnums to reimburse the plaintiffs for payments made by the plaintiffs "under and pursuant to the Purchase Contract":

[The Dewsnums] agree that in the event they are in default that [plaintiffs] may make the payments due under and pursuant to [the Purchase Contract] and will be reimbursed for the same by [the Dewsnums].

(Assignment of Contract, Paragraph 4). (R. 145).

20. The Dewsnums refused to do so, believing that they were not legally required to do so since the Purchase Contract

had terminated before Joseph Henroid had made the payments and therefore Joseph Henroid's payments could not have been made "under and pursuant to" the Purchase Contract. (R. 92, 126).

21. On June 1, 1980, the \$119,000 loan came due. (R. 8-10).

22. On September 16, 1980, the plaintiffs filed a complaint against the Dewsnums to foreclose on the Trust Deed for the non-payment of the \$119,000 loan. (R. 1-7). (A copy of the complaint is attached hereto as Exhibit B).

23. About this time, Joseph Henroid told the Dewsnums that he could no longer be their lawyer and recommended a lawyer in Provo. The Dewsnums hired the lawyer he suggested, who filed an answer and counterclaim on November 21, 1980. (R. 59-63, 93). (A copy of the answer and counterclaim is attached hereto as Exhibit B).

24. The counterclaim alleged that Joseph Henroid and Earl J. Peck had breached their fiduciary duty to the Dewsnums by failing to disclose that the Trust Deed included more than the 160 acres agreed upon and that the Assignment of Contract assigned the plaintiffs a security interest in the Purchase Contract. The counterclaim requested a reformation of the Trust Deed and the Assignment of Contract to conform with the representations Joseph Henroid made to the Dewsnums as to the legal effect of those documents at the time the \$119,000 loan was made. (R. 61-63).

25. In December, 1980, the Dewsnums sold the motel and

paid in full all principal and interest due and owing on the \$119,000 loan (\$151,013.89) and asked that the Trust Deed be reconveyed. (R. 93, 126, 202).

26. The plaintiffs refused to release the Trust Deed unless they were reimbursed for the \$49,966.21 payment Joseph Henroid had made. (R. 93, 126-27, 202).

27. The Trust Deed only secured the Promissory Notes, and did not secure payments made under the Assignment of Contract:

[The] trustor conveys and warrants to trustee in trust with power of sale, following described property...for the purpose of securing payment of the indebtedness evidence by a promissory note of even date herewith, in the principal sums of \$33,000; 56,000 and 30,000, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as thereon set forth, and any extensions and/or renewals or modifications thereof.

(Trust Deed, p. 1). (R. 133, 138).

28. Notwithstanding the fact that the \$49,966.21 debt, even if valid, was not secured by the Trust Deed, on March 3, 1981 the plaintiffs filed a motion to foreclose on the Trust Deed, for the \$49,966.21 payment and filed an affidavit in support thereof. (R. 66-70). (Copies of the Motion for Summary Judgment and the Affidavit of Louis L. Timm are attached hereto as Exhibits D and E, respectively).

29. Neither plaintiffs' motion for summary judgment nor the affidavit filed in support thereof either mentioned the counterclaim or any of the issues raised in the counterclaim.

(R. 66-70). (See Exhibits C and D).

30. When the plaintiffs' motion for summary judgment was scheduled to be heard, the Dewsnums' new attorney failed to appear at the hearing and summary judgment was granted against the Dewsnums. (R. 73-74).

31. On April 22, 1981, Judge Harlan Burns signed the Summary Judgment and Decree of Foreclosure (sometimes referred to herein as the "summary judgment"). (R. 75-79) (A copy of the Summary Judgment and Decree of Foreclosure is attached hereto as Exhibit F).

32. The Summary Judgment and Decree of Foreclosure did not mention the counterclaim or any of the issues raised in the counterclaim. (R. 75-79) (See Exhibit F).

33. The Summary Judgment and Decree of Foreclosure also did not specify that it was a final judgment for purposes of Rule 54(b) of the Utah Rules of Civil Procedure. (R. 75-79). (See Exhibit F).

34. With the summary judgment in hand, the plaintiffs began proceedings to foreclose on the Dewsnums' farm to recover the \$49,966.21 payment. Because the plaintiffs refused to release the Trust Deed, the Dewsnums were unable to finance the farm debts which were coming due. The Dewsnums' new lawyer advised them that their only hope to save the family farm was to file for bankruptcy, which they did. It was not until many years later that the Dewsnums reviewed the court records and learned that their new lawyer had never

appeared at the hearing on plaintiffs' motion for summary judgment. (R. 93-94).

35. Although the bankruptcy allowed the Dewsnums to forestall foreclosure on their farm, upon filing bankruptcy, their counterclaim became the property of the bankruptcy trustee and the Dewsnums were barred from pursuing it. (R. 95-97).

36. As a result of summary judgment being erroneously granted 10 years ago and plaintiffs' refusal to reconvey the Trust Deed, the Dewsnums have suffered enormous financial, emotional and physical losses through 10 years of bankruptcy litigation. Many attribute LaMar Dewsnum's premature death in 1986 to the ongoing stress of this litigation. Aletha Dewsnum has been reduced to a virtual pauper. She now works odd jobs to try to pay the enormous legal bills that have accumulated. For nearly 10 years now, the farm has lain dormant. The Dewsnums have not farmed the land on the advice of their bankruptcy counsel. (R. 94, 203).

37. The Dewsnums' bankruptcy case is finally nearing an end. Their case is currently before the United States Supreme Court on a bankruptcy issue and will be heard during October term. Even if the Dewsnums win their appeal before the United States Supreme Court they will probably still lose their farm, since they will have to redeem the farm for \$39,000 which they currently do not have. (R. 262-282).

38. On December 14, 1990, the bankruptcy trustee published a notice of intention to abandon the Dewsnums' counterclaim and on January 6, 1991, the bankruptcy trustee abandoned the Dewsnums' counterclaim. (R. 103-105).

39. With the counterclaim abandoned, on January 22, 1991, the Dewsnums filed a motion to amend the counterclaim, in order to proceed forward to a final adjudication of the counterclaim. (R. 194-207).

40. On January 22, 1991, the Dewsnums also filed a motion to either reconsider and set aside the Summary Judgment and Foreclosure Decree, or to certify it as final pursuant to Rule 54(b) so that the Dewsnums could appeal it. (R. 107-109).

41. On February 21, 1991, Judge Ray M. Harding denied both motions, holding that the Summary Judgment and Foreclosure Decree had "implicitly" disposed of the Dewsnums' counterclaim. (R. 348-349). (A copy of the Memorandum Decision is attached hereto as Exhibit G).

42. On March 11, 1991, Judge Ray M. Harding entered a Order Denying Defendant Dewsnums Motion to Amend Counterclaim, Reconsider or Certify as Final. (R. 350-51). (A copy thereof is attached hereto as Exhibit H).

#### SUMMARY OF ARGUMENT

The Dewsnums counterclaim was not disposed of by the summary judgment because it was not mentioned in the motion for summary judgment, in the affidavit in support of the

motion for summary judgment or in the summary judgment itself. Furthermore, any disposition of the Dewsnums' counterclaim would have been without notice to the Dewsnums and therefore would have been in violation of due process and in violation of Rule 56(c) of the Utah Rules of Civil Procedure.

Because the Dewsnums' counterclaim was not disposed of, and because the summary judgment was not certified as final at the time it was entered, under Rule 54(b) of the Utah Rules of Civil Procedure the summary judgment was not a "final judgment" and is subject to revision. Because the summary judgment was erroneously granted, it should be set aside. If not set aside, it should be certified as final pursuant to Rule 54(b) so that it can be appealed.

Finally, under Rule 15 of the Utah Rules of Civil Procedure the Dewsnums' should have been allowed to amend their counterclaim toward a final adjudication thereof.

#### ARGUMENT

##### I

THE DEWSNUMS' COUNTERCLAIM HAS NOT BEEN ADJUDICATED.

A. UNDER RULE 54(b) OF THE UTAH RULES OF CIVIL PROCEDURE, THE DEWSNUMS' COUNTERCLAIM WAS NOT DISPOSED OF BY THE SUMMARY JUDGMENT.

The summary judgment only granted judgment on the plaintiffs' complaint and never mentioned the counterclaim or any of the issues raised in the counterclaim. Nevertheless, Judge Harding held that the counterclaim was "implicitly" disposed of by the summary judgment.

That holding is contrary to Rule 54(b) of the Utah Rules of Civil Procedure which governs the disposition of multiple claim cases. Rule 54(b) of the Utah Rules of Civil Procedure allows for the partial disposition of claims in a multiple claims case. However, Rule 54(b) of the Utah Rules of Civil Procedure also requires that such claims be "expressly" disposed of:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties....

Prior to the 1946 amendments to Rule 54(b) of the Federal Rules of Civil Procedure, Rule 54(b) of the Federal Rules of Civil Procedure provided for partial disposition of claims in a multiple-claim case, but did not require that such a disposition had to be "express." Rule 54(b) of the Federal Rules of Civil Procedure only provided that "[t]he judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed on the remaining claims." 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, Section 2653, at 20 (1983).

The problem that arose was that whenever one claim in a multiple claim case was disposed of, the claimants did not know whether other claims had been implicitly disposed of. Consequently, the claimants had to either appeal the judgment, or risk losing the right of appeal if their claim had been implicitly disposed of:

Several problems arose in interpreting the original language of Rule 54(b) .... An order striking one of several counts of a complaint, although it might appear to be merely a pleading ruling, could turn out to have been a judgment terminating the action with respect to a separate claim. The party adversely affected by the order was forced either to appeal immediately and run the risk of having it dismissed as premature or to proceed with the action and take a chance on losing the right to have the order reviewed because of the expiration of the time for appeal.

10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, pp. 21-22 (1983).

Consequently, in 1946 Rule 54(b) of the Federal Rules of Civil Procedure was amended to require the court to make an "express" determination so that the parties would know which claims had and had not been disposed of.

In this case, to hold that the Dewsnums' counterclaim was "implicitly" disposed of by the summary judgment would put every claimant in the untenable position of having to appeal every disposition of any claim in a multiple claim case on the chance that a court would later hold (as Judge Harding did) that their claim had been implicitly disposed of and the time for appeal had run. This is exactly the problem the 1946

amendments to Rule 54(b) were designed to eliminate.

In Lamp v. Andrus, 657 F.2d 1167 (10th Cir. 1981), the Tenth Circuit considered whether a claim could be "implicitly" disposed of under Rule 54(b) of the Federal Rules of Civil Procedure. In that case, the plaintiff had filed claims against multiple defendants, and the claims against one defendant had been dismissed. The other defendants later argued that the dismissal had implicitly dismissed the claims against them as well. The Tenth Circuit rejected that argument, stating that Rule 54(b) does not contemplate the "implicit adjudication" of claims:

First, Rule 54(b) requires an "express determination" and "express direction" for entry of a judgment adjudicating fewer than all the claims of the parties. Any other judgment, "however designated" will not satisfy Rule 54(b)'s requirement. Second, the purpose of Rule 54(b) is to limit ambiguity as to the appealability of the judgments entered during the course of litigation involving multiple claims or multiple parties. To require a reviewing court to consider the intentions of the district judge, in the face of and contrary to an explicit judgment, would not help to further maintain clearly defined rules of appellate jurisdiction. Rule 54(b), therefore, does not contemplate "implicit adjudication" of claims.

Id. at 1169. (Emphasis added).

Rule 54(b) of the Utah Rules of Civil Procedure is patterned after Rule 54(b) of the Federal Rules of Civil Procedure. The Utah courts often look to the intent behind the Federal Rules of Civil Procedure in interpreting Utah Rules of Civil Procedure that have been patterned thereafter.

State v. Kay, 717 P.2d 1294, 1299 (Utah 1986); Nelson v. Stoker, 669 P.2d 392-93 (Utah 1983).

To hold that the Dewsnums counterclaim had been "implicitly" disposed of would create the very problem that 1946 amendment to Rule 54(b) of the Federal Rules of Civil Procedure was intended to eliminate. Under Rule 54(b) of the Utah Rules of Civil Procedure, which is identical to Rule 54(b) of the Federal Rules of Civil Procedure, the Dewsnums' counterclaim could not have been "implicitly" disposed of by the summary judgment.

B. UNDER THE GENERAL RULES GOVERNING THE  
INTERPRETATION OF JUDGMENTS, THE DEWSNUMS'  
COUNTERCLAIM WAS NOT DISPOSED OF BY THE  
SUMMARY JUDGMENT.

The summary judgment only grants judgment on the claim made in plaintiffs' complaint, and never mentions the counterclaim or any of the issues raised in the counterclaim. Nevertheless, Judge Harding held that the summary judgment had "implicitly" disposed of the Dewsnums counterclaim.

That holding is contrary to the general rules governing the interpretation of judgments. A judgment is subject to "construction according to the rules that apply to all written instruments." Park City Utah Corp. v. Ensign Co., 586 P.2d 446, 450 (Utah 1978). Consequently, where the language of a judgment is "clear and ambiguous" it will be interpreted "as it speaks." Id. In this case, it is "clear and ambiguous" that the summary judgment did not dispose of the

Dewsnups' counterclaim because the summary judgment never purported to adjudicate the Dewsnups' counterclaim, never even mentioning the counterclaim or any of the issues raised therein.

In Redding v. Powell, 452 So.2d 132 (Fla. Dist. Ct. App. 1984), the court held that where the counterclaim was not "specifically mentioned or referred to" in the summary judgment on the plaintiffs claim, the counterclaim was not disposed of:

[W]e hold that summary judgment did not dispose of appellant's counterclaim because the record indicates that neither appellee's motion for summary judgment nor the court's order specifically mentions or referred to the counterclaim.

Id. at 135.

In this case, neither the motion for summary judgment, the affidavit in support of the motion for summary judgment nor the summary judgment itself "specifically (or unspecifically) mention or refer to the counterclaim."

Furthermore, where a document is "clear and unambiguous", a party cannot "create" an ambiguity through the introduction of extrinsic evidence. The ambiguity, if it exists, must be evident from the instrument itself. Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989). The fact that an instrument is silent on one particular issue does not by itself create an ambiguity, rather it is presumed that the instrument was not intended to address that issue. Hal Taylor Associates v. Union America, Inc. 657 P.2d 743, 749

(Utah 1982). The existence of the Dewsnums' counterclaim does not by itself create an ambiguity in the summary judgment. Rather, the presumption is that the summary judgment was not intended to address the Dewsnums' counterclaim.

If the summary judgment is determined to be ambiguous, "the entire record" may be resorted to for the purpose of construing the judgment. Park City Utah Corp. v. Ensign Co., 586 P.2d 446, 450 (Utah 1978). In this case, when the entire record is resorted to the record shows that plaintiffs did not request summary judgment on the Dewsnums' counterclaim, and that the plaintiffs' did not mention any of the issues raised in the Dewsnums' counterclaim in their motion for summary judgment or in the affidavit in support thereof. Given this, how can the summary judgment (which does not mention the counterclaim) be construed to have disposed of the counterclaim when a motion for disposition of the counterclaim was never made and when neither the counterclaim nor any of the issues raised in the counterclaim were before the court? When the "entire record" is reviewed, it is clear that the summary judgment did not dispose of the counterclaim.

Finally, a well recognized rule of construction is that a "document...drawn up by [a party] through their attorney...should be strictly construed against them." Guinand v. Walton 450 P.2d 467, 469 (Utah 1969). In this case, the summary judgment was drafted by the plaintiffs' attorney. Had the plaintiffs thought that the counterclaim

was disposed of by the summary judgment, surely they would have so stated in the summary judgment which they drafted. Plaintiffs should not now be allowed to benefit by arguing that the summary judgment (which they drafted) is ambiguous and thus deprive the Dewsups of their counterclaim.

C. ANY DISPOSITION OF THE DEWSUPS' COUNTER-CLAIM WOULD HAVE BEEN WITHOUT NOTICE, AND THEREFORE IN VIOLATION OF DUE PROCESS.

Both Amendment XIV, Section 1 of the United States Constitution and Article I, Section 7 of the Utah Constitution provide that no person shall be deprived of "life, liberty or property, without due process of law." The Dewsups counterclaim is "property" within the meaning of those sections. Buttrey v. Guaranteed Securities, 300 P. 1040, 1045, (Utah 1931); 16C C.J.S. Constitutional Law, Section 984 nn. 92-93 (1985). Consequently, the Dewsups cannot be deprived of their counterclaim without due process of law.

Due process requires that before a person can be deprived of their property, they must be given notice of any action that will deprive them of their property and that notice must be "reasonably calculated" to "apprise [that person] of the pendency of the action and afford them an opportunity to present their objections:"

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the

required information and it must afford a reasonable time for those interested to make their appearance [Citations omitted].

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L.Ed. 865 (1950).

Consequently, the Utah Supreme Court has held that notice of a hearing must "adequately inform the parties of the specific issues they must be prepared to meet:"

To satisfy an essential requisite of procedure due process, a 'hearing' must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet. [Citation omitted].

Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983).

"Thus, where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or her, a party is deprived of due process." W. & G. Co. v.

Redevelopment Agency, 802 P.2d 755, 762 (Utah App. 1990).

For example, in Nelson v. Jacobsen, 669 P.2d 1207, 1213-14 (Utah 1983), the court held that where notice was given for a "hearing" instead of for a "trial", the notice was inadequate to satisfy due process and the subsequent trial was invalid.

In this case, no notice at all was given to the Dewsnums that their counterclaim was to be adjudicated. Neither the motion for summary judgment nor the affidavit in support of the motion for summary judgment mentioned the Dewsnums' counterclaim. Similarly, neither the motion for summary nor the affidavit in support of the motion for summary judgment mentions any of the issues raised in the counterclaim.

Plaintiff's motion for summary judgment did not "inform the [Dewsnups] of the specific issues they must prepare to meet." Nelson at 1213. The counterclaim wasn't even mentioned. The notice in this case wasn't even "ambiguous or misleading", it was silent. If a notice is insufficient in Nelson because it gives notice for a "hearing" rather than a "trial", then the notice in this case is insufficient where it gives no notice at all that the Dewsnups counterclaim was to be adjudicated. In Nelson, the court stated that "[t]imely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness." Id. at 1211. In this case, the Dewsnups had no notice and consequently no opportunity to be heard on their counterclaim. Consequently, even if the summary judgment did dispose of the Dewsnups' counterclaim, the adjudication of the counterclaim must be reversed since it was done in violation of due process.

D. ANY DISPOSITION OF THE DEWSNUPS' COUNTER-CLAIM WOULD HAVE BEEN WITHOUT NOTICE, AND THEREFORE IN VIOLATION OF RULE 56(c) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 56(c) of the Utah Rules of Civil Procedure provides that where a motion for summary judgment is filed with the court, "[t]he motion shall be served at least 10 days before the time fixed for hearing." In this case, neither plaintiffs' motion for summary judgment nor plaintiffs' affidavit in support thereof either mention the counterclaim or mention any of the issues raised in the counterclaim.

Therefore, any disposition of the counterclaim would have been without notice to the Dewsnums.

As a general rule, a summary judgment entered without the notice required by Rule 56(c) is invalid:

Rule 56(c)...provides that a motion for summary judgment shall be served at least 10 days before the hearing date....Noncompliance with this time provision of the rule deprives the court of authority to grant summary judgment [Citation omitted].

Dolese v. United States, 541 F.2d 853, 854 (10th Cir. 1976).

See also, 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, Section 2719, at 6-8 (1983).

In considering the Rule 56(c) notice requirement, the Utah Supreme Court has held that "substantial compliance" is sufficient. Walker v. Rocky Mountain Recreation Co., 508 P.2d 538 (Utah 1973) (holding 9 days notice was in "substantial compliance" to Rule 56(c)). Furthermore, the Utah Supreme Court has held that the Rule 56(c) notice requirement can be waived where both parties are present. Walker States Thrift & Loan Co. v. Blomquist, 504 P.2d 1019 (Utah 1972); Security Title Co. v. Payless Builders Supply, 407 P.2d 141 (Utah 1965). Neither of those exceptions apply in this case since no notice was given at all and neither the Dewsnums nor their attorney attended the hearing.

When notice is given pursuant to the Rules of Civil Procedure, the adequacy of the content of the notice has been analyzed by the court under the due process analysis reviewed

above. See, e.g., Nelson v. Jacobsen 669 P.2d 1207 (Utah 1983). Consequently, a notice given pursuant to Rule 56(c) that is "ambiguous" or "inadequate to inform a party of the specific issues they must be prepared to meet" fails to satisfy Rule 56(c) as well as fails to satisfy due process. For the reasons discussed in the foregoing section, the plaintiffs did not give the Dewsnums the notice required by Rule 56(c) that their counterclaim was subject to adjudication.

Because notice was not given as required under Rule 56(c) of the Utah Rules of Civil Procedure, the Dewsnums' counterclaim could not have been disposed of by the summary judgment, even if the summary judgment had expressly disposed of the Dewsnums' counterclaim (which it did not). This case is similar to two cases from other jurisdiction in which the lower court had expressly disposed of a counterclaim, even though it was not mentioned in the motion for summary judgment. In both cases the appellate court reversed relying on the fact that the notice required by the applicable rule of civil procedure had not been given. In Faussner v. Waver, 432 So.2d 100 (Fla. Dist. Ct. 1983) the court reversed the summary judgment as to the counterclaim where the "summary judgment on the counterclaim was not addressed by any motion and [therefore] there was no notice to [the counterclaimant]". Id. at 102. Similarly, in Production Credit Association v. Davidson, 444 N.W.2d 339 (N.D. 1989) the court reversed

the summary judgment as to the counterclaim where "PCA did not make a motion to dismiss the counterclaim [and] PCA did not refer to the issues raised in the counterclaim in its motion for summary judgment, the brief and the affidavit." Id. at 346.

Because the plaintiffs did not give the Dewsnums notice that their counterclaim was to be before the court on summary judgment as required by Rule 56(c) of the Utah Rules of Civil Procedure, even if the summary judgment did dispose of the counterclaim, the adjudication of the Dewsnums' counterclaim must be reversed since it was done in violation of Rule 56(c).

## II

THE SUMMARY JUDGMENT SHOULD HAVE BEEN EITHER  
RECONSIDERED AND SET ASIDE OR CERTIFIED AS FINAL.

### A. THE SUMMARY JUDGMENT MAY BE RECONSIDERED UNDER RULE 54(b).

Because the summary judgment did not dispose of all the claims in this case and because the trial court did not certify that judgment as "final" pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, under Rule 54(b) of the Utah Rules of Civil Procedure that judgment is "subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties:"

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one

or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

When the Court entered the summary judgment, it only ruled on the plaintiffs' claim, and not on the Dewsnums' counterclaim. Furthermore, the court did not certify the summary judgment as a "final judgment" for purposes of Rule 54(b). Consequently, under Rule 54(b) the summary judgment is "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Because the summary judgment did not dispose of all the claims in this case and was not certified as "final", the Dewsnums did not have a right to appeal the summary judgment when it was entered. Rule 3 of the Utah Rules of Appellate Procedure only provides a right of appeal from "final judgments." (formerly Rule 72(a) of the Utah Rules of Civil Procedure).

The problem the Dewsnums faced when the summary judgment was entered was the same problem the appellants faced in

Kennedy v. New Era Industries, Inc., 600 P.2d 534 (Utah 1979). In Kennedy, the trial court granted summary judgment on several, but not all claims. When an appeal was taken on the summary judgment, the Utah Supreme Court refused to take jurisdiction since the summary judgment did not dispose of all the claims and since the summary judgment was "entered by the trial court without a Rule 54(b) [final judgment] determination," and therefore it was not a "final judgment." Id. at 536.

Therefore, when the Dewsnums filed their motion to either reconsider and set aside or to certify as final, what they were requesting was identical to the request made in Salt Lake City Corp. v. James Constructors, 761 P.2d 42 (Utah App. 1988). In that case, summary judgment was granted against the plaintiff on some but not all of its claims. Sixteen months later the plaintiff moved the court to either reconsider its earlier summary judgment as allowed under Rule 54(b), or to certify its earlier summary judgment as "final pursuant to Rule 54(b)" so that it could be appealed. Id. at 43-44. In that case, the court chose to certify its earlier summary judgment as final, and the plaintiff was able to appeal that summary judgment. In this case, having held that the summary judgment "implicitly" disposed of the counterclaim, and therefore was a final judgment at the time it was entered, the district court refused to either reconsider and set aside the summary judgment or to certify it

as final pursuant to Rule 54(b). Once this court has held that the Dewsnums' counterclaim was not "implicitly" disposed of, then under Rule 54(b) the summary judgment is "subject to revision" because it did not dispose of all the claims in this case and was not certified as final.

B. THE SUMMARY JUDGMENT SHOULD BE RECONSIDERED  
AND SET ASIDE.

In the spring of 1980, the Dewsnums were in the process of purchasing the Arrow Land under the Purchase Contract and had given the plaintiffs a security interest in the Purchase Contract under the Assignment of Contract. On June 2, 1980, the Dewsnums terminated the Purchase Contract by failing to make the January 2, 1980 payment by June 2, 1980. The Purchase Contract provided that if any annual January 2 payment was not made to the escrow agent by June 2 of that year, the Purchase Contract automatically terminated:

If Buyers default on the payment falling due on January 2, 1977, or any payment thereafter falling due, and if such sum or any part thereof remains in default for a period of five months, then Buyers shall forfeit any and all right, title and interest that they otherwise would have in and to the property covered by this agreement, title to which has not passed to Buyers at that time, and this agreement shall terminate.

(Purchase Contract, pp. 5-6).

The escrow instructions instructed the escrow agent to deliver title to the Arrow Land back to the seller if it had not received the annual January 2 payment by June 2 of any year:

Your instructions are to...release to the seller the warranty deed...if...the Buyers shall default in the payment of any sum falling due under the agreement and said sum or any part thereof remains in default for a period of five months.

(Escrow Instructions, Paragraph 4)

Thus, when the Dewsnums did not make the January 2, 1980 payment by June 2, 1980, the Purchase Contract automatically terminated, and title to the Arrow Land was automatically delivered back to the seller.

The Assignment of Contract only required the Dewsnums to reimburse plaintiffs for payments made by plaintiffs "under and pursuant to [the Purchase Contract]:"

[The Dewsnums] agree that in the event they are in default that [plaintiffs] may make the payments due under and pursuant to [the Purchase Contract] and will be reimbursed for the same by [the Dewsnums].

(Assignment of Contract, Paragraph 4).

The plaintiffs' payment of \$49,966.21 was made on June 7, 1980 and therefore could not have been made "under or pursuant to the Purchase Contract" since the Purchased Contract had terminated five days before that payment was made. Consequently, the Dewsnums had no contractual obligation under the Assignment of Contract to reimburse plaintiffs for that payment.

Even if the Dewsnums were required to reimburse the plaintiffs for that payment, that payment was not secured by the Trust Deed. The Trust Deed only secured the Promissory Notes and did not secure payments made under the Assignment of Contract:

[The] trustor conveys and warrants to trustee in trust with power of sale, the following described property...for the purpose of securing payment of the indebtedness evidence by a promissory note of even date herewith, in the principal sums of \$33,000; 56,000 and 30,000, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as thereon set forth, and any extensions and/or renewals or modifications thereof.

(Trust Deed, p. 1)

Under Utah law, a trust deed cannot be foreclosed for a debt that is not secured by the trust deed. In First Security Bank of Utah v. Shiew, 609 P.2d 952 (Utah 1980) the Utah Supreme Court stated:

[T]o attempt to foreclose, for example, on the mortgager's home for debts incurred in operating a business and which debts are not specifically covered by the mortgage would be unconscionable and contrary to public policy.

Id. at 955-56 (citation omitted).

Furthermore, in interpreting whether a trust deed secures a debt, the trust deed will be "construed most strictly against its framer." Bank of Ephraim v. Davis, 559 P.2d 538, 540 (Utah 1977). In Shiew, for example, the Utah Supreme Court held that even though a mortgage purported to secure all future advances, a future advance was not secured by the mortgage where the intention that the future advance be secured by the mortgage was not specifically referenced in the document under which the future advance was made. 609 P.2d at 957.

In this case, neither the Trust Deed nor the Assignment of Contract even mention that advances made under the Assignment of Contract are to be secured by the Trust Deed. Even if there were some mention made, it would be strictly construed against the plaintiffs, who drafted the loan documents. If the court in Shiew holds that a mortgage does not secure future advances that the mortgage purports to secure because there is not sufficient intent manifest in the other documents, clearly the Trust Deed in this case does not secure advances made under the Assignment of Contract where none of the documents manifest that intention. The summary judgment erroneously foreclosed on the Trust Deed for a debt that was not valid, and even if valid, was not secured by the Trust Deed. Therefore, the summary judgment should either be set aside or certified as final so that it can be appealed.

Everyone in this case knows that the summary judgment was wrongfully granted. In the proceedings below, the plaintiffs never even tried to justify the summary judgment, but only argued that procedurally the summary judgment should not be reconsidered. The Dewsnums have suffered for many years as a result of a summary judgment that was wrongfully granted. The time has come to set it aside. If it is not set aside, the summary judgment should be certified as final so that it can be appealed.

### III

THE DEWSNUPS' MOTION TO AMEND THEIR COUNTERCLAIM  
SHOULD HAVE BEEN GRANTED.

A. UNTIL JANUARY 6, 1991, THE DEWSNUPS' WERE BARRED FROM  
PROCEEDING ON THEIR COUNTERCLAIM.

At the time the Dewsnums filed bankruptcy, the Dewsnums' counterclaim became part of the "estate" created pursuant to Section 541(c) of the Bankruptcy Act (11 U.S.C.A. Section 101 et seq.). Section 541(a)(1) of the Bankruptcy Act provides that the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." Commentators have stated that "[i]t is...intended that all interests of the debtor in rights of action be included as property of the estate under Section 541(a)(1)." 4 L. King, Collier on Bankruptcy, Section 541.10[1] (15th Ed. 1991) (Emphasis in original).

Under Section 323(a) of the Bankruptcy Act, the bankruptcy trustee is the "representative of the estate," and is authorized to act on behalf of the bankruptcy estate. Bankruptcy Rule 6009 provides that "[w]ith or without court approval, the trustee...may prosecute...any pending action or proceeding by...the debtor." Under Section 554 of the Bankruptcy Act, the bankruptcy trustee is authorized to abandon property of the bankruptcy estate that is "burdensome to the estate or that is of inconsequential value and benefit to the estate." Upon abandonment, "the trustee is simply

divested of control of the property because it is no longer part of the estate." 4 L. King, Collier on Bankruptcy, Section 554.02[2] (15th Ed. 1991). Title to a right of action that has been abandoned "reverts to the debtor and he may then prosecute if he so desires." Id. Section 541.10[1].

Until the Dewsnums' counterclaim was abandoned by the trustee, the Dewsnums could not prosecute the counterclaim. Had they attempted to prosecute the counterclaim, they would have experienced the same result as in Benson v. Probst, 366 P.2d 700 (Utah 1961). In that case, a married couple that had filed bankruptcy attempted to prosecute a claim on their own behalf that had not been abandoned by the bankruptcy trustee. The Utah Supreme Court barred the couple from doing so, stating that the claim became "an asset in the hands of the trustee in bankruptcy" and the trustee had "plenary power to deal with it as an asset and as the trustee and the federal courts deem proper...." Id. at 700.

On January 6, 1991, the bankruptcy trustee abandoned the Dewsnums' counterclaim. Until then, the Dewsnums were unable to pursue their counterclaim. After the Dewsnums' counterclaim has been abandoned, the Dewsnums sought to amend and pursue their counterclaim. The court, however, denied their motion to amend, holding that the counterclaim had been "implicitly" disposed of by the summary judgment.

B. THE DEWSNUPS' MOTION TO AMEND THEIR COUNTERCLAIM  
SHOULD HAVE BEEN GRANTED.

Rule 15(a) of the Utah Rules of Civil Procedure provides that a counterclaim may be amended "by leave of the court" and that "leave shall be freely given when justice so requires":

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend if at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The Utah Supreme Court has stated that Rule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated:

[The Rules of Civil Procedure] must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.

Cheney v. Rucker, 381 P.2d 86, 91 (Utah 1963).

"[T]he policy of the law is toward liberality in the allowance of amendments and to regard them favorably in order that the real controversy between the parties may be presented, their rights determined, and the cause decided..." Johnson v. Brinkerhoff, 57 P.2d 1132, 1136 (Utah 1936) (Citation omitted). The "courts should be liberal in allowing

amendments to the end that cases may be fully and fairly presented on their merits." Hancock v. Luke, 148 P. 452, 457 (Utah 1915) (Citation omitted).

Accordingly, the Utah Supreme Court has long held that if the opposing party has an adequate opportunity to respond to the amended pleadings, the amendment should be allowed. In overruling the trial court's denial of a Rule 15 motion to amend in Lewis v. Moultrie, 627 P.2d 94 (Utah 1981), the Utah Supreme Court stated that leave to amend should have been granted since the opposing party had "fair opportunity" to respond to the amended pleading:

A prime consideration in determining whether an amendment should be permitted is the adequacy of an opportunity for the opposing party to meet the newly raised matter.... Some tempest has been raised about the court allowing the plaintiff to make tardy amendments to the pleadings.... The pleadings are never more important than the case that is before the court.... There can be no prejudice in this case because we'll give ample time for an answer.... This is in harmony with what we regard as the correct policy: of recognizing the desirability of the pleadings setting forth definitely frame issues, but also of permitting amendment where the interest of justice so requires, and the adverse party is given a fair opportunity to meet it.

Id. at 98 (Citations omitted).

Similarly, in upholding a trial court's granting of leave to amend in Cheney v. Rucker, 381 P.2d 86 (Utah 1963), the Utah Supreme Court held that "[w]hat [the opposing party is] entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is

required." Id. at 91.

The Utah Supreme Court has never upheld a trial court's refusal to grant leave to amend a pleading before a trial date has been set, since at that point in the litigation the opposing party will always have time to respond to the amended pleading. (See Gillman v. Hansen, 486 P.2d 1045 (Utah 1971) (where the case had not been set for trial, the trial court "abused its discretion" in refusing to permit defendant to amend its answer to add a counterclaim); Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co., 215 P. 995 (Utah 1923) (where the case had not been set for trial, it was "error" for the trial court to refuse to permit an amendment to the counterclaim); Hancock v. Luke, 148 P. 452 (Utah 1915) (where case had not been set for trial, it was "error" for the trial court to refuse to permit an amendment to the answer).

The Utah Supreme Court has stated that "the rule in this state has always been to allow amendments freely where justice requires, and especially is this true before trial." Gillman v. Hansen. 486 P.2d 1045, 1046 (Utah 1971). In Gillman, the court went on to state that one of the purposes of a pre-trial conference was to "enable the parties to make such amendments to the pleadings as may be required to present all issues at trial." Id. at 1047.

In this case, no trial date has been set and no pretrial conference has been held with respect to the counterclaim. The opposing party will have ample opportunity to respond to

the Dewsnums' Amended Counterclaim. Under these circumstances, the Utah Supreme Court has always held that leave to amend must be granted.

The only time the Utah Supreme Court has upheld a trial court's refusal to grant leave to amend is where the amendment was sought shortly before trial or at trial so that the opposing party did not have adequate time to respond. See Hein's Turkey Hatcheries, Inc. v. Nephi Processing Plant, Inc., 470 P.2d 257 (Utah 1970) (upholding trial court's denial of motion to amend answer at trial); Girard v. Appleby, 660 P.2d 245 (Utah 1983) (upholding trial court's denial of motion to amend complaint at trial because of the "disadvantage" defendants would face trial); Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188, 1190-91 (Utah 1983) (upholding trial courts denial of motion to amend answer at trial because amendment would make "the expense of discovery and preparing for trial" by opposing party "wasteful and pointless"; Westley v. Farmer's Insurance Exchange, 663 P.2d 93 (Utah 1983) (upholding trial court's denial of motion to amend complaint brought several weeks before trial which would have caused the trial to be postponed); Kelly v. Utah Power & Light, 746 P.2d 1189 (Utah App. 1987) (upholding trial courts denial of motion to amend shortly before trial because opposing party would have been prejudiced by having an issue adjudicated for which they did not have time to prepare). In this case, the plaintiffs will have ample time

to respond to the amended counterclaim. No trial date has been set. No pretrial conference has been held. The Dewsnums' Motion to Amend Counterclaim should have been granted.

#### CONCLUSION

In 1980, a meritless claim was brought against the Dewsnums by their own attorney. Although the claim was meritless, a court granted summary judgment on that claim when the attorney that their attorney had recommended represent them failed to make an appearance on the plaintiffs' motion for summary judgment (unbeknownst to the Dewsnums for many years).

The summary judgment having been granted, the Dewsnums have spent 10 years in bankruptcy court litigation trying to save the family farm. The Dewsnums perservered, knowing they were in the right and believing that someday, somehow, if they did not give up justice would prevail.


The summary judgment was wrongfully granted. Everyone in this case knows that. However, the Dewsnums' former attorney (and the other plaintiffs) have pursued the Dewsnums through 10 years of bankruptcy litigation trying to enforce it. The Dewsnums are entitled to justice just like any other citizen, and the Dewsnums are entitled to be released from the bondage of this injustice.

The Dewsnums' counterclaim has never been decided and has finally been released to them by the bankruptcy trustee. The

Dewsnups are entitled to finally have their day in court on their amended counterclaim, as well as to have the summary judgment finally set aside.

Based on the foregoing, this court should hold that the Dewsnups' counterclaim was not "implicitly" disposed of and should set aside the summary judgment and grant the Dewsnups leave to amend their counterclaim.

DATED this 8<sup>th</sup> day of July, 1991.

  
\_\_\_\_\_  
RUSSELL A. CLINE  
Attorney for T. LaMar  
and Aletha Dewsnup

MAILING CERTIFICATE

This is to certify that on this 8<sup>th</sup> day of July, 1991, four (4) true and correct copies of the foregoing Appellants Brief were hand delivered to:

Michael Z. Hayes  
Mazuran, Verhaaren & Hayes  
2180 South 1300 East, Suite 260  
Salt Lake City, Utah 84106

  
\_\_\_\_\_

INDEX TO EXHIBITS

- Exhibit A - Demand for Reimbursement
- Exhibit B - Complaint
- Exhibit C - Answer and Counterclaim
- Exhibit D - Motion for Summary Judgment
- Exhibit E - Affidavit of Louis L. Timm
- Exhibit F - Summary Judgment and Decree of Foreclosure
- Exhibit G - Memorandum Decision
- Exhibit H - Order Denying Defendant Dewsnups' Motion  
To Amend Counterclaim, Reconsider or  
Certify as Final

Exhibit A

DEMAND FOR REIMBURSEMENT (Assignment of Contract)

TO: T. LaMAR and ALETHA DEWSNUP,  
Deseret, Utah 84625

You have failed to make the annual payment due under the terms of the assigned Uniform Real Estate Contract. You have also failed to pay the 1979 Property Taxes when due. Therefore:

Assignees, under the terms of the Assignment of Contract dated June 1, 1978, by and between T. LaMar Dewsnap and Aletha Dewsnap, Assignors, and Trustees of United Precision Machine and Engineering Company Profit Sharing Plan, ABCO Insurance Agency, Inc. and Joseph L. Henriod, Trustee for the Annette Jacob Trust, Assignees, hereby demand that Assignors reimburse Assignees the amount of Forty-Nine Thousand Nine-Hundred Sixty-Six Dollars and twenty-one cents (\$49,966.21) which sum has been paid by Assignees as follows: \$47,880.50 paid on June 7, 1980, to Valley Bank at Delta, Utah as escrow agent under the terms of the above-described Contract, and \$2,085.71 paid on June 7, 1980, to the Millard County Treasurer for past due taxes.

Assignees demand that Assignors continue to perform all of the conditions and obligations requested under the terms of the Real Estate Contract.

If you fail to comply with this Demand within five (5) days, legal action will be filed against you for damages, interest and attorney's fees in accordance with the terms of said Assignment of Contract.

Govern yourself accordingly.

DATED this 14th day of June, 1980.

ASSIGNNESS:

Louis L. Timmer  
Trustee, United Precision Machine  
& Engineering Company Profit  
Sharing Trust

John J. Henrich  
Trustee, United Precision Machine  
& Engineering Company Profit  
Sharing Trust

Elroy M. Childs  
Trustee, United Precision Machine  
& Engineering Company Profit  
Sharing Trust

A. Krehl Smith  
A Krehl Smith, President  
ABCO Insurance Agency, Inc.

Joseph L. Henriod  
Joseph L. Henriod, Trustee for  
Annette Jacob Trust

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

On this 16<sup>th</sup> day of June, 1980, personally  
appeared before me Louis L. Timmer, who being  
by me duly sworn, says that he is the Trustee of United Precision  
Machine & Engineering Company Profit Sharing Trust, the Trust that  
executed the above and foregoing instrument and that said instrument  
was signed in behalf of said Trust by authority of its Trust  
Agreement and said Louis L. Timmer acknowledged  
to me that said Trust executed the same.

In witness whereof I have herewith set my hand and affixed  
my seal this 16th day of June, 1980.

Ken L. Brinkhoff  
Notary Public  
Residing at Salt Lake County

My Commission Expires:

June 24, 1981

STATE OF UTAH )  
ss.  
COUNTY OF SALT LAKE )

On this 16th day of June, 1980, personally  
appeared before me John Newland, who being  
by me duly sworn, says that he is the Trustee of United Precision  
Machine & Engineering Company Profit Sharing Trust, the Trust that  
executed the above and foregoing instrument and that said instrument  
was signed in behalf of said Trust by authority of its Trust  
Agreement and said John Newland acknowledged  
to me that said Trust executed the same.

In witness whereof I have herewith set my had and affixed  
my seal this 16th day of June, 1980.

Ken L. Brinkhoff  
Notary Public  
Residing at Salt Lake County

My Commission Expires:

June 24, 1981

STATE OF UTAH )  
ss.  
COUNTY OF SALT LAKE )

On this 16th day of June, 1980, personally  
appeared before me Floyd M. Chede, who being  
by me duly sworn, says that he is the Trustee of United Precision  
Machine & Engineering Company Profit Sharing Trust, the Trust that  
executed the above and foregoing instrument and that said instrument  
was signed in behalf of said Trust by authority of its Trust  
Agreement and said Floyd M. Chede acknowledged  
to me that said Trust executed the same.

In witness whereof I have herewith set my hand and affixed  
my seal this 16th day of June, 1980.

Kay L. Brinkhoff  
Notary Public  
Residing at Salt Lake County

My Commission Expires:

June 24, 1981  
STATE OF UTAH )  
ss.  
COUNTY OF SALT LAKE )

On this 16 day of June, 1980, personally  
appeared before me A. Krehl Smith, who being by me duly sworn,  
says that he is the President of ABCO Insurance Agency, Inc., the  
corporation that executed the above and foregoing instrument and  
that said instrument was signed in behalf of said corporation by  
authority of its by-laws and said A. Krehl Smith acknowledged to  
me that said corporation executed the same.

In witness whereof I have herewith set my hand and affixed  
my seal this 16 day of June, 1980.

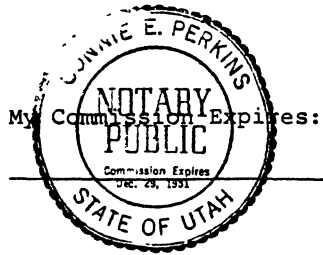
Michael K. Kropf  
Notary Public  
Residing at Salt Lake City

My Commission Expires:

14 April 1980  
STATE OF UTAH )  
ss.  
COUNTY OF SALT LAKE )

On this 16 day of June, 1980, personally  
appeared before me Joseph L. Henriod, who being by me duly sworn,  
says that he is the Trustee of Annette Jacob Trust, the Trust that  
executed the above and foregoing instrument and that said instrument  
was signed in behalf of said Trust by authority of its Trust  
Agreement and said Joseph L. Henriod acknowledged to me that said  
Trust executed the same.

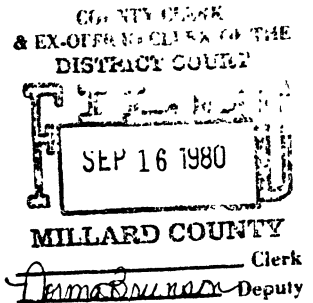
In witness whereof I have herewith set my hand and affixed  
my seal this 16 day of June, 1980.



My Commission Expires:

Winnie E. Perkins  
Notary Public  
Residing at East Lake County

Exhibit B



WENDELL E. BENNETT  
AND ASSOCIATES  
Attorneys at Law  
Attornies for Plaintiffs  
370 East 500 South, Suite 100  
Salt Lake City, Utah 84111  
Telephone: 532-7846

IN THE DISTRICT COURT OF MILLARD COUNTY, STATE OF UTAH

---oooOooo---

LOUIS L. TIMM, JOHN NEIUWLAND, : C O M P L A I N T  
and FLOYD M. CHILDS, Trustees :  
of United Precision Machine :  
and Engineering Company Profit :  
Sharing Trust; ABCO Insurance :  
Agency, Inc., a Utah Corpora- :  
tion; and, JOSEPH L. HENROID, :  
Trustee for the ANNETTE JACOB :  
TRUST, :

Plaintiffs, :

vs. :

T. LAMAR DEWSNUP and ALETHA :  
DEWSNUP, ARROW INVESTMENT CO. :  
a Limited partnership, THE :  
FEDERAL LAND BANK OF BERKLEY, :  
IMPERIAL LAND TITLE INC., as :  
Trustee and EUGENE L. CARSON and :  
ELAINE CARSON as Beneficiaries, :  
STRINGHAM, MAZURAN, LARSEN & :  
SABIN, a Professional Corpora- :  
tion, MINERAL FERTILIZER CO., :  
INC, and HARRY V. KAPS. :

Defendants. :

---oooOooo---

COMES NOW the plaintiffs above named, and complains of  
the defendants, and for cause of action alleges:

1. That on June 1, 1978, the plaintiff United Precision  
Machine and Engineering Company Profit Sharing Trust lent to the  
defendants the sum of \$30,000.00; the plaintiff ABCO Insurance  
Agency, Inc. lent to the defendants the sum of \$56,000.00; and  
Joseph L. Henroid, Trustee of the Annette Jacob Trust lent to the  
defendants the sum of \$33,000.00, all amounts bearing interest  
from that date until paid at the rate of 18% per annum. Copies of  
said promissory notes are attached hereto, and by this reference  
made a part hereof.

000001

2. Under the terms of the promissory notes herein before referred to all accrued interest was to have been paid on June 1, 1979; and the entire balance of interest and principal was to have been paid on or before June 1, 1980.

3. The principal sum of \$119,000.00 has not been paid, and interest due on June 1, 1980 in the sum of \$21,420.00 has not been paid, and the entire amount thereof is now due and payable, plus daily interest on the principal amount at the rate of \$58.68 per day.

4. That in order for the plaintiffs to protect their security hereinafter referred to it was necessary for them to pay \$47,880.50 to Valley Bank in order to protect the security herein sued upon, and to also pay to the Millard County Treasurer the sum of \$1,042.85 in order to protect the security herein sued upon due to the defendants' failure and refusal to make those payments when due. The daily interest on the \$47,880.50 that the defendants owe to the plaintiffs is \$23.61 per day from the date the payment was made until the plaintiffs are reimbursed therefore, and the daily interest on the \$1,042.85 paid to the Millard County Treasurer is \$.51 per day from the date of payment until the plaintiffs are repaid by the defendants.

5. That the obligation herein sued upon was secured by a trust deed which is in default, and will be going to trust deed sale following the expiration of time required by statute under the trust deed default provisions, with the notice of sale to be set on or after September 26, 1980. The properties subject to trust deed sale are located in Millard County, State of Utah, are more particularly described as follows, to wit:

BEGINNING 980 Feet West of the Southeast Corner of the Southwest 1/4 of Section 4, Township 17 South, Range 4 West, Salt Lake Base & Meridian; thence North 1320 feet; thence West 1264 feet; thence South 625 feet; thence Southeasterly along the roadway 541 feet; thence South 470 feet; thence East 840 feet to beginning. More or less 35 Acres.

BEGINNING 980 feet West of the Northeast Corner of the Northwest 1/4 of Section 9, Township 17 South, Range 4 West, Salt Lake Base & Meridian; thence South 1320 feet; thence West 840 feet; thence North 1320 feet; thence East 840 feet to beginning. More or less 25 Acres.

The Southwest quarter of the Northeast quarter; of the Northwest quarter of the Southeast quarter; the Southeast quarter of the Northwest quarter; and the Northeast quarter of the Southwest quarter of Section 13, Township 18 South, Range 8 West, Salt Lake Base & Meridian.

EXCEPTING THEREFROM that portion which lies within the boundaries of the DELTA CANAL COMPANY, MELVILLE IRRIGATION COMPANY, ABRAHAM IRRIGATION COMPANY and the DESERET IRRIGATION COMPANY distribution systems.

EXCEPTING THEREFROM all rights of way, stock trails, ditches and canals, gravel pits and gravel beds.

Together with all water rights appurtenant to said property.

6. That in addition to the trust deed securing said loan, the defendants executed an assignment of contract wherein they assigned their contract of purchase dated November 1, 1976 with Arrow Investment, Ltd. to the plaintiffs, and also gave a security agreement to the plaintiffs dated June 1, 1978. The assignment of contract, marked Exhibit A is attached hereto, and by this reference is made a part hereof the same as if the entire assignment of contract and its attachments were set out verbatim at this point. The security agreement, marked Exhibit B is attached hereto, and by this reference made a part hereof as if the same had been set out verbatim at this point in the complaint.

7. The properties subject to the assignment of contract dated November 1, 1976 are located in Millard County, State of Utah, and are more particularly described as follows, to wit:

Parcel No. 1: That certain farm commonly known as the Curtis Farm, consisting of 177 acres, more or less, and described as the SW 1/4 of Section 8, T. 18 S., R. 7 W., SLB&M; and beg. at the NW corner of the SE 1/4 of said Section 8, thence S. 610 feet, then E. 1218 feet, thence N. 610 feet, and thence W. 1218 feet to the point of beginning.

Parcel No. 2: That certain farm commonly known as the Greenwood Farm, consisting of 89.93 acres, more or less, and described as beginning at the NW corner of Section 18, T. 18 S., R. 7 W., SLB&M, thence E. 2010.5 feet, thence S. 150.8 feet, thence S. 75° 51' W. 332 feet, thence S. 30° 59' W. 601 feet, thence southerly to a point N. 42° 28' E. 133.9 feet from the SE corner of the SW 1/4 of the NW 1/4, thence S. 42° 28' W. 133.9 feet, thence westerly to the W. 1/4 corner of said Section 18, thence northerly to the NW corner of said Section, the place of beginning.

Parcel No. 3: That certain farm commonly known as the John Baker Farm, consisting of 157.25 acres, more or less, and described as the E. 1/2 of the N.E. 1/4 and the E. 1/2 of the S.E. 1/4 of Section 13, T. 18 S., R. 8 W., SLB&M, less a strip 5 1/2 rods wide on the S. side of the SE 1/4 of the SE 1/4 of said Section 13.

Parcel No. 4: A part of that certain tract known as the Tamarack Forty, consisting of approximately 25 acres, more or less, and described as beginning at the SW corner of the SE 1/4 of the SE 1/4 of Section 12, T. 18 S., R. 8 W., SLB&M, thence East to the middle or thread of the Baker Ditch, thence northerly along the middle or thread of said ditch to the intersection of said ditch with the Conk Ditch, thence due North to the existing fence located between said Conk Ditch and the White Top Ditch, thence easterly along said fence to the Conk Ditch, thence northeasterly along the middle or thread of said Conk Ditch to the intersection with the North Boundary of said SE 1/4 of the SE 1/4 of said Section 12, thence due West to the West boundary of said SE 1/4 of the SE 1/4 of said Section 12, thence due South to the point of beginning. In general terms, this tract is the westerly 25 acres, more or less, of said SE 1/4 of the SE 1/4 of said section 12.

Parcel No. 5: A part of that certain tract known as the White Top Forty, consisting of approximately 30 acres, more or less, and described as beginning at the SW corner of the NE 1/4 of the SE 1/4 of Section 12, T. 18 S., R. 8 W., SLB&M, thence due East to the intersection with the Conk Ditch, thence northerly along the middle or thread of said ditch to the North boundary of said NE 1/4 of the SE 1/4 of said Section 12, thence due West to the West boundary of said NE 1/4 of the SE 1/4 of said Section 12, thence due South to the point of beginning. In general terms, this tract is the westerly 30 acres, more or less, of said NE 1/4 of the SE 1/4 of said Section 12.

Parcel No. 6: That certain farm commonly known as the Oley Black Farm, containing 78 acres, more or less, and described as the E. 1/2 of the N.W. 1/4 of Section 12, T. 18 S., R. 8 W., SLB&M, less a strip two rods in width on the E. side of said tract.

8. That the collateral subject to the security agreement referred to in the foregoing paragraphs consist of the following: A water right of 4 days use per month during the growing season of the Conk Ditch Irrigation Association consisting of 6.66 acre feet per hour between 5:00 a.m. of the 25th and 5:00 a.m. of the 29th of each month and all proceeds of sale for the disposition thereof.

9. That the defendant Arrow Investment Company, a limited partnership, claims a right, title, and interest in and to the property described in paragraph 7, as contract sellers under an agreement for the sale of real and personal property dated

November 1, 1976, which is the contract that the defendants Dewsnap assigned to the plaintiffs, and as the contract seller under said contract their right, title, and interest in and to the real property described in paragraph 7 will be effected, and their rights in this matter must, therefore, be adjudicated.

10. That the defendants Imperial Land Title, Inc., as trustee, in favor of Eugene L. Carson and Elaine Carson as beneficiaries, and Eugene L. Carson and Elaine Carson individually as beneficiaries under a trust deed recorded June 12, 1979, as entry number 28429 in book 134 at page 330-332 of the official records of the Millard County Recorder's Office are necessary parties to this action in that they claim a right, title, and interest to the real property described in paragraph 7, and the court will need to adjudicate their right, title, and interest in and to the real property described in paragraph 7 of this complaint, which interest is inferior and subordinate to the interest of the plaintiffs, and which should, therefore, be extinguished.

11. That the defendants Stringham, Mazuran, Larsen, and Sabin, a professional corporation has filed a notice of lien for attorney's fees and legal services against the property described in paragraph 7, recorded February 25, 1980 as entry number 31183 in book 139 at page 638 of the official records of the Millard County Recorder's Office, which lien must be adjudicated and ruled inferior and subordinate to the interest of the plaintiff in this action.

12. That the defendant Mineral Fertilizer Company, Inc., a corporation has filed a judgment obtained in the District Court of the Third Judicial District in and for the county of Salt Lake against LaMar Dewsnap in the sum of \$8,667.22, plus attorney's fees, interests and costs, which was filed on August 15, 1978 in the County Clerk's Office of Millard County, case number 6917, which judgment lien is inferior and subordinate to the interests of the plaintiff, and which should be adjudicated as being inferior and subordinate to the plaintiff's interests herein.

13. That the defendant Harry V. Kaps, claims a lien against the property described in paragraph 7 by reason of a judgment obtained against LaMar Dewsnup in the District Court of the Sixth Judicial District in and for the County of Garfield, for the sum of \$12,795.55, plus attorney's fees, interests and costs that was filed on May 16, 1980 in the County Clerk's Office of Millard County, case number 7141, which interest of said defendant Kaps is subordinate and inferior to the interest of the plaintiffs herein, which interest needs to be adjudicated in this proceeding.

14. That the defendant, the Federal Land Bank of Berkley is a necessary party to this action in fact it claims a right, title, and interest to the real property described in paragraph 7 by virtue of a mortgage dated December 4, 1974, executed by Richard L. Dewsnup and Barbara W. Dewsnup, his wife, to secure payment of a note bearing even date thereof in the sum of \$85,000.00 with interest thereon, payable as therein provided, which was recorded December 19, 1974 as entry number 12241 in book 108 at page 36 of the official records of the Millard County Recorder's Office, which interest needs to be adjudicated by the court.

15. That it will be necessary for the court to adjudicate the respective rights of the plaintiffs and the defendants to the property claimed by the plaintiffs and the defendants by reason of contracts, assignments of contracts, trust deeds, judgment liens, and the like, to order said property sold by sheriff sale pursuant to Utah law, and to then distribute the proceeds obtained on the sale to the parties both plaintiff and defendant claiming any right, title, or interest in and to the real property described in paragraph 7, and to determine the respective priorities claimed by all parties to the proceeds, and determine their standing following the sale of the property covered under that assigned contract by and between Arrow Investment Company, a limited partnership as seller and Thomas LaMar Dewsnup and Alice Aletha J. Dewsnup as buyers, which contract was

dated November 1, 1976, and also to that property described in the security agreement by and between the Dewsnums and the plaintiffs herein which is dated the 1st day of June, 1978.

That following the sale of the property covered under the assignment of contract and the security agreement herein before referred to the amount due and owing the plaintiffs by the defendants Dewsnum must be determined, and a judgment against them entered for any unpaid amounts owing to the plaintiffs from the defendants Dewsnum following the sale of the security herein referred to, and also the trust deed sale referred to in paragraph 5 of the complaint.

WHEREFORE, plaintiff prays judgment against all defendants determining the respective priority to the property in question that was given by the defendants Dewsnum to the plaintiffs as security for the loan of \$119,000.00 principal, plus interest, ordering said property sold, and the proceeds distributed in accordance with the priorities of the respected parties, determining any deficiency then remaining after both the sheriff's sale and the trust deed sale, fixing and awarding to the plaintiffs herein all of their costs of court, legal expenses and attorney's fees actually incurred, and the entry of a deficiency judgment against the defendants Dewsnum for any monies left unpaid on their obligation to the plaintiffs following the disposition of the security in question in this litigation, and the trust deed sale referred to in paragraph 5 of this complaint, with interest on all amounts, and for such other and further relief in accordance with the agreements and the contracts by and between the parties as would be just and equitable in the premises, and for all other relief provided for by law.

DATED this 15<sup>th</sup> day of September, 1980.

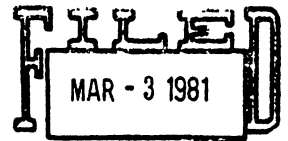
WENDELL E. BENNETT & ASSOCIATES

Plaintiff's Address:  
Salt Lake City, Utah

BY Wendell E. Bennett  
ATTORNEYS FOR PLAINTIFFS  
370 East 500 South, Suite 100  
Salt Lake City, Utah 84111

EXHIBIT C

COUNTY CLERK  
& EX-OFFICIO CLERK OF THE  
DISTRICT COURT



MILLARD COUNTY

*Thomas Brunson* Clerk  
Deputy

WENDELL E. BENNETT  
AND ASSOCIATES  
Attorneys at Law  
Attorneys for Plaintiffs  
370 East 500 South, Suite 100  
Salt Lake City, Utah 84111  
Telephone: 532-7846

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IN THE DISTRICT COURT FOR MILLARD COUNTY

STATE OF UTAH

---oooOooo---

LOUIS L. TIMM, et al.	:	MOTION FOR SUMMARY JUDGMENT
Plaintiffs	:	
vs.	:	
T. LAMAR DEWSNUP, et al.	:	
Defendants.	:	Civil No. 7191

---oooOooo---

COMES NOW the plaintiffs above named, and moves the court, pursuant to Rule 56, Utah Rules of Civil Procedure, for a summary judgment against the defendants Dewsnap for the principal sum of \$49,966.21, with interest thereon at either the rate of 10% or 18%, as the court may determine is due as a matter of law from June 2, 1980 until paid, and for attorney's fees in an amount in excess of \$5,000.00, which will be testified to by legal counsel for the plaintiffs at the time of the hearing on the motion for summary judgment, and for the plaintiffs' costs of court herein incurred.

This motion is made on the grounds and for the reason that there are not material issues of fact remaining in this case, and as a matter of law the defendants Dewsnap are indebted to the plaintiffs in the sum of \$49,966.21 in principal, plus interest, attorney's fees, and court costs, as a result of their breach of contract on promissory notes, secured by real property and water rights. Since the commencement of this action, the defendants Dewsnap have paid \$147,652.36 in what was believed to be the first part of a two part settlement, however, they have not paid the

remaining \$49,966.21 principal, or the interest and attorney's fees. The files and records of the court will indicate that the defendants are in default, and that the amount set out in the affidavit of Louis L. Timm, attached hereto, and by this reference made a part hereof, reflect that the defendants have a remaining balance due and owing the plaintiffs as above set out, and there are no material issues of fact that dispute that, and the plaintiffs are, therefore, entitled to summary judgment against the defendants, and each of them in the principal sum of \$49,966.21, plus interest thereon from June 2, 1980 until paid, attorney's fees incurred, court costs incurred, and for such other and further relief as the court finds due and owing.

DATED this 2nd day of March, 1981.

WENDELL E. BENNETT & ASSOCIATES

BY Wendell E. Bennett  
WENDELL E. BENNETT  
Attorney for Plaintiffs

MAILING CERTIFICATE

I do hereby certify that I mailed a copy of the foregoing on the 2nd day of March, 1981 to Robert C. Fillerup, 1325 South 800 East, Suite 305, Orem, Utah 84057.

Mary C. Kille

WENDELL E. BENNETT  
AND ASSOCIATES  
Attorneys at Law  
Attorneys for Plaintiffs  
370 East 500 South, Suite 100  
Salt Lake City, Utah 84111  
Telephone: 532-7846

---

IN THE DISTRICT COURT FOR MILLARD COUNTY

STATE OF UTAH

---oooOooo---

LOUIS L. TIMM, et al. : AFFIDAVIT OF LOUIS L. TIMM  
Plaintiffs :  
vs. :  
T. LAMAR DEWSNUP, et al. :  
Defendants. : Civil No. 7191

---oooOooo---

STATE OF UTAH )  
 )ss  
COUNTY OF SALT LAKE )

LOUIS L. TIMM, being first duly sworn deposes and  
states:

1. That he is one of the plaintiffs in the above entitled matter, and has personal knowledge as to all of the matters relative to the pending action, and matters stated in this affidavit.

2. That on June 1, 1978, the plaintiff United Precision Machine & Engineering Company Profit Sharing Trust lent to the defendants T. LaMar Dewsnap and Aletha Dewsnap, the sum of \$30,000.00; the plaintiff ABCO Insurance Agency, Inc. lent to the defendants T. LaMar Dewsnap and Aletha Dewsnap the sum of \$56,000.00; and the Annette Jacob Trust lent to the defendants T. LaMar Dewsnap and Aletha Dewsnap the sum of \$33,000.00, all amounts bearing interest from that date until paid at the rate of 18% per annum. Copies of said promissory notes were attached to the plaintiffs' complaint and are on file with the court.

3. Under the terms of the promissory notes herein referred to, all accrued interest was to have been paid on June 1, 1979; and the entire balance of interest and principal was to have been paid on or before June 1, 1980.

4. Up to the time of the filing of the complaint in this action, the principal sum of \$119,000.00 had not been paid, and interest due on June 1, 1980 had not been paid, and the action was commenced to collect on said obligation owed by the defendants Dewsnap.

5. That in order for the plaintiffs to protect their security interest located in Millard County, State of Utah, which are described in paragraph 7 of the plaintiffs' complaint, it was necessary for them to pay \$47,880.50 to Valley Bank in order to protect the security that is the subject matter of this litigation, and to also pay to the Millard County Treasurer the sum of \$2,085.71 (the sum of \$1,042.85 set out in the complaint was an error, and only constituted approximately 1/2 of the payment made) in order to protect the security that is the subject matter of this litigation inasmuch as the defendants Dewsnap had failed and refused to make payments under the contract that had been assigned as security in this matter when they were due. Had that payment not been made and those taxes paid, the security would have been totally lost or substantially impaired inasmuch as the contract seller, a relative of the defendants Dewsnap, could have taken action to either substantially impair or destroy the security interest of the plaintiffs herein, by reclaiming the property from the defendants Dewsnap. The daily interest on the \$47,880.50 that the defendants owe to the plaintiffs is \$23.61 per day from the date the payment was made until the plaintiffs are reimbursed therefore, and the daily interest on the \$2,085.71 paid to the Millard County Treasurer is <sup>\$1.62</sup> ~~\$1.62~~ per day from the date of payment until the plaintiffs are repaid by the defendants.

6. That since the commencement of the action, which was filed simultaneously with a trust deed default procedure, the defendants Dewsnap have paid, for the purpose of delaying a trust deed sale on the real property set out in paragraph 5 of the plaintiffs' complaint, the sum of \$147,652.36. The defendants Dewsnap have, however, failed and refused to pay the remainder owing to the plaintiffs, namely, the principal sums of \$47,880.50 that was paid to Valley Bank in Delta, Utah on the assignment of contract for the Richard Dewsnap/Arrow Investment Property, which sum was paid on June 2, 1980, and the \$2,085.71 for back taxes paid to the Millard County Treasurer on June 7, 1980. The total principal sum of \$49,966.21 is, therefore, due and payable to the plaintiffs by the defendants Dewsnap, plus interest.

7. The court's determination will have to be made as to whether or not the principal sum of \$49,966.21 should draw interest at the rate of 18% provided in the note, or 10%, which the note provides after default, there having been a typographical error made in the instruments that reduced the note interest from 18% to 10% after default.

8. Due to the defendant Dewsnap's default in this matter, it has been necessary for the plaintiffs to retain legal counsel for the purpose of having the matter pursued on a legal basis, and legal expenses have already exceeded the sum of \$5,000.00, and are still accruing, and can be testified to by our attorneys, Wendell E. Bennett & Associates at the time of the hearing on the motion for summary judgment for which this affidavit is given in support of.

FURTHER AFFIANT SAITH NOT.

DATED this 5<sup>th</sup> day of February, 1981.

LOUIS L. TIMM

SUBSCRIBED AND SWORN to before me this 27 day of February 1981.

My Commission Expires

9-21-83

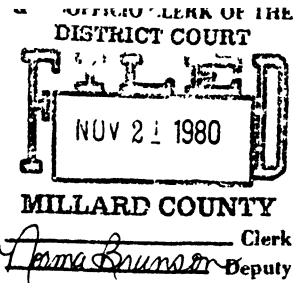
Kelly Richards  
NOTARY PUBLIC Residing At  
Salt Lake City, Utah

MAILING CERTIFICATE

I do hereby certify that I mailed a copy of the foregoing on the 2nd day of March, 1981 to Robert C. Fillerup, 1325 South 800 East, Suite 305, Orem, Utah 84057.

Kelly Richards

Exhibit E



ROBERT C. FILLERUP  
Attorney for Defendants  
Dewsnups  
1325 South 800 East, Suite 305  
Orem, UT 84057  
226-0992

IN THE DISTRICT COURT  
FOR MILLARD COUNTY, STATE OF UTAH

--ooo0ooo--

LOUIS L. TIMM, et al. :  
Plaintiffs, : ANSWER AND COUNTERCLAIM  
-vs- :  
T. LAMAR DEWSNUP, et al. : Civil No.  
Defendants. :

--ooo0ooo--

The defendants T. LAMAR DEWSNUP and ALETHA DEWSNUP  
answer the complaint of the plaintiff as follows:

FIRST DEFENSE

1. Plaintiffs' complaint fails to state a claim  
upon which relief can be granted.

SECOND DEFENSE

2. Defendants admit paragraphs 1 and 2 of plaintiffs'  
complaint.

3. In answering paragraph 3 of plaintiffs' complaint,  
defendants admit that the sum of One Hundred Nineteen Thousand  
Dollars (\$119,000) has not been paid, and admit that interest  
to June 1, 1980, has not been paid, but allege that defendants  
tendered the amount of Twenty-One Thousand Four Hundred  
Twenty Dollars (\$31,420) to plaintiffs on June 1, 1980, which  
plaintiffs refused to accept. Further, defendants deny that  
interest accrues on the principal amount at the  
rate of Fifty-Eight Dollars and Sixty-Eight Cents (\$58.68)  
per day and affirmatively allege that interest accrues only at  
the rate of Thirty-Two Dollars Sixty Cents (\$32.60) per day.

4. Defendants deny paragraph 4 of plaintiffs' complaint.

5. In answering paragraph 5 of plaintiffs' complaint, defendants admit that the promissory notes sued upon were secured by a trust deed, but affirmatively allege that said trust deed includes properties and property descriptions which were never intended to be included by the defendants. This defense is more fully set forth in an affirmative defense hereafter.

6. In answering paragraph 6 of plaintiffs' complaint, defendants admit that an assignment of contract marked "Exhibit A" was attached to the complaint, and that a security agreement marked "Exhibit B" was attached to the complaint. Defendants affirmatively allege that they were induced and coerced into signing the assignment of contract by Joseph Henroid, and Earl J. Peck, agents for the plaintiffs, and that they unknowingly and unwittingly signed said assignment, and consequently, said assignment of contract is void and of no effect.

7. In answering paragraph 7 of plaintiffs' complaint, defendnats deny that the assignment of contract is valid and therefore, deny that the properties listed are subject to the assignment of contract.

8. Defendants admit paragraphs 8, 9, 10, 11, 12, 13, and 14 of plaintiffs' complaint.

9. In answering paragraph 15 of plaintiffs' complaint, defendants allege that plaintiffs are not entitled to foreclose on any property other than the One Hundred Sixty (160) acres and the Conk Ditch water right, and that no other property should be ordered sold or foreclosed by the Court.

### THIRD DEFENSE

10. By way of affirmative defense, defendants allege that Joseph L. Henroid, and Earl J. Peck, acting as agents for both the plaintiffs and the defendants, and while both were serving as attorneys for the defendants, breached their fiduciary duties and duties of disclosure to defendants, and as a result, plaintiffs are estopped from foreclosing on the trust deed, assignment of contract, and security agreement as presently written.

### FOURTH DEFENSE

11. As a further affirmative defense, defendants allege that plaintiffs are estopped from proceeding in this action by reason of their election of remedies in foreclosing upon the trust deed, and this action must be stayed until such time as the foreclosure of said trust deed is terminated.

WHEREFORE, defendants pray that plaintiffs' complaint be dismissed and defendants be awarded thier costs for defending this action.

### COUNTERCLAIM

For cause of action against the plaintiffs, the defendants allege as follows:

1. At all times herein mentioned, Joseph L. Henroid was an agent of both the plaintiffs and the defendants, and, as a result, plaintiffs are bound by his conduct.

2. At all times herein mentioned, Earl J. Peck was an agent of both the plaintiffs and the defendants, and as a result, plaintiffs are bound by his conduct.

3. At the time of the signing of the trust deed, assignment of contract, and security agreement by defendants T. LAMAR and ALETHA DEWSNUP, defendants had retained Earl J. Peck and Joseph Henroid as their attorneys.

4. Henroid and Peck failed to fully advise the defendants of the nature of the transaction involved, failed to advise defendants that the trust deed included properties in addition to the One Hundred Sixty (160) acres, failed to advise defendants that they were assigning the contract of purchase referred to in plaintiffs' complaint, failed to advise defendants that they were signing a security agreement, and finally breached their fiduciary duty to the defendants in failing to fully disclose the nature of the transaction involved.

5. As a result of such failures and breaches of fiduciary duty, defendants did not learn until June 1980, that additional property had been included on the trust deed, and that they had assigned their interest in the contract of purchase of ARROW INVESTMENT COMPANY, and that they had signed the security agreement.

6. By reason of such breaches of fiduciary duty and failure to disclose by their agents, plaintiffs are estopped from proceeding with any foreclosure action.

7. Defendants are entitled to a judgment against plaintiffs reforming the trust deed to include only the One Hundred Sixty (160) acres and the Conk Ditch Irrigation Association water right, and defendants are entitled to a judgment vacating the assignment of contract and deleting all other properties from the trust deed. In addition, defendants are entitled to a judgment barring plaintiffs from proceeding on, or otherwise foreclosing on, any other properties other than the One Hundred Sixty (160) acres and the Conk Ditch Irrigation Association water right.

8. By reason of the failure of disclosure and breach of fiduciary duty of the agents of the plaintiffs,

defendants are entitled to a reasonable attorney's fee and costs of this action.

WHEREFORE, defendants pray for judgment against the plaintiffs as follows:

1. For a decree reforming the trust deed to include only the One Hundred Sixty (160) acres and the Conk Ditch Irrigation Association water right.

2. For a decree vacating the assignment of contract of the ARROW INVESTMENT contract.

3. For a reasonable attorney's fee and costs of this action.

DATED this 19<sup>th</sup> day of November, 1980.

  
ROBERT C. FILLERUP

MAILING CERTIFICATE

MAILED a true and correct cpy of the foregoing ANSWER and COUNTERCLAIM to Wendell E. Bennett, Attorney for Plaintiffs, 370 East 500 South, Suite 100, Salt Lake City, UT 84111, postage prepaid on this 19<sup>th</sup> day of November, 1980.

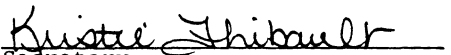
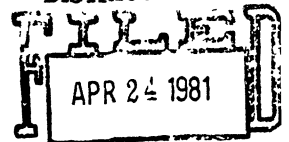
  
Secretary

Exhibit 1

EX-OFFICIO CLERK OF THE  
DISTRICT COURT



MILLARD COUNTY

*Arma Spunator* Clerk  
Deputy

WENDELL E. BENNETT  
AND ASSOCIATES  
Attorneys at Law  
Attorneys for Plaintiffs  
370 East 500 South, Suite 100  
Salt Lake City, Utah 84111  
Telephone: 532-7846

IN THE DISTRICT COURT FOR MILLARD COUNTY

STATE OF UTAH

---oooOooo---

LOUIS L. TIMM, et al.	:	SUMMARY JUDGMENT AND DECREE
	:	OF FORECLOSURE
Plaintiffs,	:	
vs.	:	
T. LAMAR DEWSNUP, et al.	:	Civil No. 7191
Defendants.	:	

---oooOooo---

The plaintiffs' motion for summary judgment against the defendants T. LaMar Dewsnap and Aletha Dewsnap having initially been set for hearing on Tuesday, March 17, 1981, and having been continued until Tuesday, April 14, 1981, at which time it was heard by the Honorable J. Harlan Burns, and having been supported by the unrebutted affidavit of Louis L. Timm, and the court being fully advised in the premises, and the court having examined the pleadings on file, now makes its

DECREE OF FORECLOSURE AND ORDER OF SALE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That there is now due and owing to the plaintiffs from the defendants T. LaMar Dewsnap and Aletha Dewsnap, the principal sum of \$47,880.50, which is accruing interest at the rate of \$23.61 per day from and after June 2, 1980, and the principal sum of \$2,085.71, which is accruing interest at the rate of \$1.02 per day from and after June 7, 1980, which accrual of interest shall continue until paid, together with \$53.50 for court

costs, and \$6,985.00 for the costs of collection, including attorney's fees, and plaintiffs are granted judgment against the defendants Dewsnap in said amount.

2. That said sums are secured by the mortgage and security agreement described in paragraphs 7 and 8 in the plaintiffs' complaint, as well as the trust deed property described in paragraph 5 of the plaintiffs' complaint, and constitutes a lien on the secured premises, and water rights, more particularly described as:

"All of the right, title, and interest of T. LaMar Dewsnap and Aletha Dewsnap, owned by them, or to which they have a right, under that certain agreement for the sale of real and personal property, by and between the Arrow Investment Company a limited partnership, as seller, and Thomas LaMar Dewsnap and Alice Aletha J. Dewsnap, as buyers, dated November 1, 1976, consisting of 6 parcels of land, more particularly described as follows:

Parcel 1: That certain farm commonly known as the Curtis Farm, consisting of 177 acres, more or less, and described as the SW 1/4 of Section 8, T. 18 S., R. 7 W., SLB&M; and beq. at the NW corner of the SE 1/4 of said Section 8, thence S. 610 feet, thence E. 1218 feet, thence N. 610 feet, and thence W. 1218 feet to the point of beginning.

Parcel 2: That certain farm commonly known as the Greenwood Farm, consisting of 89.93 acres, more or less, and described as beginning at the NW corner of Section 18, T. 18 S., R. 7 W. SLB&M, thence E. 2010.5 feet, thence S. 150.8 feet, thence S. 75° 51' W. 332 feet, thence S. 30° 59' W. 601 feet, thence southerly to a point N. 42° 28' E. 133.9 feet from the SE corner of the SW 1/4 of the NW 1/4, thence S. 42° 28' W. 133.9 feet, thence westerly to the W. 1/4 corner of said Section 18, thence northerly to the NW corner of said Section, the place of beginning.

Parcel 3: That certain farm commonly known as the John Baker Farm, consisting of 157.25 acres, more or less, and described as the E. 1/2 of the N.E. 1/4 and the E. 1/2 of the S.E. 1/4 of section 13, T. 18 S., R. 8 W., SLB&M, less a strip 5 and 1/2 rods wide on the S. side of the SE 1/4 of the SE 1/4 of said section 13.

Parcel 4: A part of that certain tract known as the Tamarack Forty, consisting of approximately 25 acres, more or less, and described as beginning at the SW corner of the SE 1/4 of the SE 1/4 of section 12, T. 18 S. R. 8 W., SLB&M, thence east to the middle or thread of the Baker Ditch, thence northerly along the middle or thread of said ditch to the intersection of said ditch with the Conk Ditch, thence due north to the existing fence located between said Conk Ditch and the White Top Ditch, thence easterly along said fence to the Conk Ditch, thence northeasterly along the middle or thread

of said Conk Ditch to the intersection with the north boundary of said SE 1/4 of the SE 1/4 of said section 12, thence due west to the west boundary of said SE 1/4 of the SE 1/4 of said section 12, thence due south to the point of beginning. In general terms, this tract is the westerly 25 acres, more or less, of said SE 1/4 of the SE 1/4 of said section 12.

Parcel 5: A part of that certain tract known as the White Top Forty, consisting of approximately 30 acres more or less, and described as beginning at the SW corner of the NE 1/4 of the SE 1/4 of section 12, T. 18 S., R. 8 W., SLB&M, thence due east to the intersection with Conk Ditch, thence northerly along the middle or thread of said ditch to the north boundary of said NE 1/4 of the SE 1/4 of section 12, thence due west to the west boundary of said NE 1/4 of the SE 1/4 of said section 12, thence due south to the point of beginning. In general terms, this tract is the westerly 30 acres, more or less, of said NE 1/4 of the SE 1/4 of said section 12.

Parcel 6: That certain farm commonly known as the Oley Black Farm, containing 78 acres, more or less, and described as the E. 1/2 of the N.W. 1/4 of section 12, T. 18 S., R. 8 W., SLB&M, less a stripe two rods in width on the E. side of said tract.

and water rights as follows:

570 shares of the capital stock of the Deseret Irrigation Company, a mutual water company, and;

8 and 1/2 days of Conk Ditch secondary water right, beginning at 5:00 a.m. on the 23rd day of each month during the irrigation season and continuing until 5:00 a.m. on the first day of the following month. This right is described as 8 and 1/2 days because that is the average monthly use, although the right consists of 8 days during months with 30 days and 9 days during months with 31 days. This secondary right is satisfied after the primary right is satisfied and derives from the water right allotted and decreed to Joseph B. Dewsnap, George W. Baker and Noah Rogers as described in the general adjudication decree of the water rights of the Sevier River System in that certain case known and identified as Richlands Irrigation Company v. West View Irrigation Company, civil number 843, in the District Court in and for the Fifth Judicial District of the State of Utah in and for the County of Millard.

In addition to the real property and water right above described, the following machinery and equipment is also a part of the security interest being foreclosed upon which was shown as Exhibit A to the contract, and is more particularly described as follows:

A John Deere Combine; a Forage Harvester; a John Deere Tractor; a Case Tractor; a Minneapolis Moline Tractor (large); a Front End Loader (attached to Case Tractor); a Calf Table and Two Metal Gates; an International Harvester Combine; a Case Plow; a John Deere Baler; Two Hydraulic Chaff Wagons; Two Overhead Tanks (fuel and water, at Tamarack and Curtis); a Case Swather; a Handcock

Scraper; a Land Plane; a Self-Propelled Bale Wagon; Rough Lumber Stored in Steel Buildings; a Ford Cattle Truck; a Chevrolet Dump Flat Bed Truck; a leaf Cutter Bees and Field Stands.

In addition to the foregoing real property, water rights, and personal property, there is also an additional water right which is subject to the security agreement, which is also being foreclosed in addition to the aforementioned real property, water rights, and personal property, more particularly described as follows:

A water right of 4 days use per month during the growing season of the Conk Ditch Irrigation Association consisting of 6.66 acre feet per hour between 5:00 a.m. of the 25th and 5:00 a.m. of the 29th day of each month and all proceeds of sale for the disposition thereof.

3. That said mortgage and collateral subject to the security agreement set out in the preceding paragraph is hereby foreclosed and it is ordered that the secured premises, water rights, and personal property be sold at public auction in the manner prescribed by statute by the sheriff of Millard County, subject to the interest of the Federal Land Bank of Berkley, Imperial Land Title Inc., as trustee and Eugene L. Carson and Elaine Carson as beneficiaries, Stringham, Mazuran, Larson and Sabin, a professional corporation, Mineral Fertilizer Company, Inc., and Harry V. Capps, no determination as to the relative priorities of any of said persons being established by the court at this time, and no rights of those persons or associations being determined by the court at this time, with the buyer of said property taking it subject to the respective rights of the persons herein named.

4. That said sheriff, after the time allowed by law for redemption has expired, shall execute a deed to the purchaser or purchasers at the sale, and if any of the parties to this action who may be in the possession of the premises, or a part thereof, or any person who since the commencement of this action shall refuse to deliver possession of the premises to such purchaser or purchasers on production of the deed for the premises, water rights, and personal property, or any part thereof, a writ of restitution may issue, without further notice, to compel such delivery to the purchaser or purchasers of the respective real property, waters rights, and personal property.

5. That the proceeds of the sale shall be applied as follows, in the following order: First, to the payment of the sheriff's fees, disbursements and costs of said sale; secondly, to the payment to the plaintiff of the principal sum of \$47,880.50, with interest thereon at the rate of \$23.61 per day from and after June 2, 1980, until paid, and the further principal sum of \$2,085.71, with interest thereon at the rate of \$1.02 per day from and after June 7, 1980, until paid; thirdly, to the payment to the plaintiffs of the costs of suit consisting of \$53.50, and for \$6,985.00 in collection costs including attorney's fees.

6. In the event a deficiency shall become due to plaintiff after the application of the proceeds aforesaid, the court retains jurisdiction of this matter for the purpose of determining the amount of deficiency judgment to be awarded to plaintiff.

7. That the defendants T. LaMar Dewsnap and Aletha Dewsnap and all persons claiming under them, or any of them, after the filing of the notice of pendency of this action, be and they are hereby forever barred and foreclose of all right, title, interest and equity of redemption in and to the secured premises, water rights, and personal property, and every part thereof, from and after the date of the delivery of the deed by the sheriff of Millard County.

DATED this 22 day of April, 1981.

BY THE COURT:

  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I do hereby certify that I mailed a copy of the foregoing on the 16<sup>th</sup> day of April, 1981 to Robert C. Fillerup, 1325 South 800 East, #305, Orem, Utah 84057.

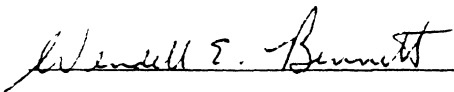
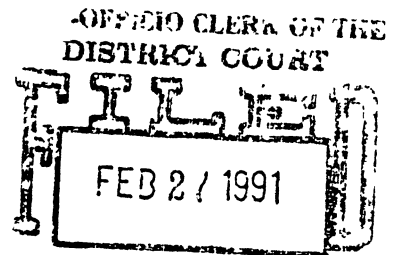
  
Wendell E. Bennett

Exhibit G



IN THE FOURTH JUDICIAL DISTRICT COURT  
OF THE STATE OF UTAH, IN AND FOR MILLARD COUNTY

\_\_\_\_\_  
Clerk  
\_\_\_\_\_  
Deputy

\*\*\*\*\*

LOUIS L. TIMM, JOHN NEIUWLAND,  
and FLOYD M. CHILDS, Trustees  
of United Precision Machine and  
Engineering Co. Profit Sharing Trust;  
et al.,

Plaintiffs,

Case Number 7191

-vs-

RAY M. HARDING, JUDGE

T. LAMAR DEWSNUP and ALETHA  
DEWSNUP, ARROW INVESTMENT CO.  
a limited partnership, et al,  
Defendants.

MEMORANDUM DECISION

\*\*\*\*\*

The Court having considered defendants' motions to amend counterclaim and reconsider or certify as final hereby denies such motions.

The Court finds that defendants' claims and their proposed amended counterclaim were denied in Judge Burn's judgment. Judge Burns' judgment foreclosed the mortgage, acknowledged the existence of the trust deed and ordered the property sold to satisfy the amount due plaintiffs. It is implicit in Judge Burn's decision that he denied defendants' counterclaims because the counterclaims asserted that some of the property was not to be included in the amended trust deed; however, Judge Burns rejected that argument, granted judgment for the entire amount due plaintiffs and ordered the property to be sold. Because of this the Court finds that the judgment of Judge Burns was not interlocutory.

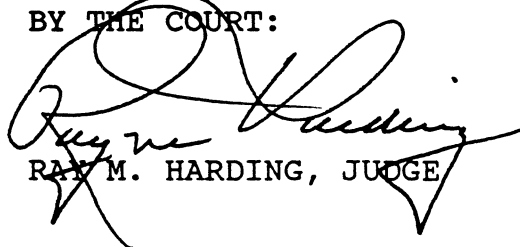
This Court can not certify the above matter as final for appeal at this time when the matter was final over ten years ago.

In regards to the defendants' motion to reconsider, the Court notes that no such motion exists under the Utah Rules of Civil Procedure. See, McKee v. Williams, 741 P.2d 978 (1981), Peay v. Peay, 607 P.2d 841 (1980).

Counsel for plaintiffs to prepare an order consistent with the terms of this decision and submit it to opposing counsel for approval as to form prior to submission to the court for signature.

Dated this 21st day of February, 1991.

BY THE COURT:



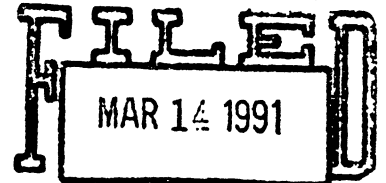
RAY M. HARDING, JUDGE

cc: Michael Z. Hayes, Esq.  
Russel A. Cline, Esq.

Exhibit H

MICHAEL Z. HAYES (1432)  
MAZURAN, VERHAAREN & HAYES P.C.  
2180 South 1300 East, #260  
Salt Lake City, Utah 84106  
Telephone: (801) 484-6161

& EX-OFFICIO CLERK OF THE  
DISTRICT COURT



MILLARD COUNTY

\_\_\_\_\_  
Clerk  
\_\_\_\_\_  
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF MILLARD COUNTY  
STATE OF UTAH

LOUIS L. TIMM, JOHN	)	
NEIUWLAND and FLOYD M.	)	
CHILDS, Trustees of United	)	ORDER DENYING DEFENDANT
Precision Machine and	)	DEWSNUPS MOTIONS TO AMEND
Engineering Co. Profit	)	COUNTERCLAIM, RECONSIDER OR
Sharing Trust, et al.,	)	CERTIFY AS FINAL
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
T. LAMAR DEWSNUP and	)	
ALETHA DEWSNUP, ARROW	)	Case No. 7191
INVESTMENT CO., a limited	)	
partnership, et al.,	)	
	)	Ray M. Harding, Judge
Defendants.	)	

The Court having considered Defendants' Motions to Amend Counterclaim and Reconsider or Certify as Final and having reviewed the file and the Memoranda in support of and opposing said motions and having entered its Memorandum Decision now makes the following findings and conclusions:

1. It is implicit in Judge Burn's Judgment foreclosing the trust deed that Judge Burns denied defendants' counterclaims.

2. Judge Burn's Judgment was a final judgment on the merits of the case which ordered the trust deed on the

property foreclosed, acknowledge the existence of the trust deed and ordered the property sold to satisfy the amount due plaintiffs.

3. The Court finds that Judge Burn's Judgment was not interlocutory in nature and was a final appealable judgment some ten years ago.

4. In regards to Defendants Motion to Reconsider the Court finds that no such Motion exists under the Utah Rules of Civil Procedure.

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that Defendants Motions to Amend Counterclaim and Reconsider or Certify as Final are denied with prejudice.

DATED this 11 day of March, 1991.

BY THE COURT

  
RAY M. HARDING  
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

  
RUSSELL A. CLINE