

1991

Louis L. Timm, John Neiuwland, Floyd M. Childs,  
ABCO Insurance Agency, Inc., Joseph L. Henriod,  
Annette Jacob Trust v. T. Lamar Dewsnap, Aletha  
Dewsnap : Brief of Appellee

Utah Supreme Court

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BRIEF

*NOTE* 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; ABCO Insurance  
Agency, Inc., a Utah Corpo-  
ration; and, JOSEPH L. HENRIOD,  
Trustee for the ANNETTE JACOB  
TRUST,

Plaintiffs and  
Appellees,

vs.

T. LAMAR DEWSNUP and  
ALETHA DEWSNUP,

Defendants and  
Appellants.

DOCKET NO. 91-0157

Priority No. 16

BRIEF OF APPELLEES

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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**FILED**

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CLERK SUPREME COURT  
UTAH

LOUIS L. TIMM, JOHN NEIUWLAND, )  
and FLOYD M. CHILDS, Trustees )  
of United Precision Machine )  
and Engineering Company Profit )  
Sharing Trust; ABCO Insurance )  
Agency, Inc., a Utah Corpo- )  
ration; and, JOSEPH L. HENRIOD, )  
Trustee for the ANNETTE JACOB )  
TRUST, )

**VS.**

**Defendants and Appellants.**

Priority No. 16

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

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. HENRIOD, Trustee for the ANNETTE JACOBS  
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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### STATEMENT OF JURISDICTION AND PROCEEDINGS BELOW

The Supreme Court has jurisdiction over this appeal pursuant to 78-2-2(3)(j) Utah Code Annotated (Supp. 1988). This appeal is taken from a final order entered by the Fourth Judicial District Court of Millard County, Utah, the Honorable Ray M. Harding presiding, in which the Dewsnums' Motion to either Reconsider and Set Aside the Summary Judgment or to Certify the Summary Judgment as Final and the Dewsnums' Motion to Amend their Counterclaim was denied.

### ISSUES PRESENTED ON APPEAL

The issues on appeal are as stated by the Appellants.

### STANDARD OF APPELLATE REVIEW

Although in cases involving conclusions of law by a Trial Court the Appeals Court reviews the decision under a correction-of-error standard, the Appeals Court may affirm the Trial Court's decision on any proper ground(s), despite the Trial Court's assigning another reason for its ruling. Buehner Block Company v. UWC Associates, 752 P2d. 892, 895 (Utah 1988). See also Global Recreation v. Cedar Hills Development, 614 P2d. 155 (Utah 1980).

### STATEMENT OF THE CASE

The Dewsnums' Statement of the Case does not accurately reflect either the nature of this case or the



status of the proceedings in the lower court. This appeal does not as the Dewsnums urge, represent the only chance to tell the story of their ten-year long struggle. In fact, the Dewsnums have presented their story to two Utah District Court Judges, a United States Bankruptcy Judge, a Federal District Court Judge, the United States Tenth Circuit Court of Appeals and they are presently presenting their story to the United States Supreme Court. In reality, this case involves the attempt of Plaintiff's to collect on a valid Trust Deed Note secured by a Trust Deed executed by the Dewsnums more than 13 years ago, which the Dewsnums failed to pay.

In 1978, the Dewsnums executed a Trust Deed and a Trust Deed Note together with an Assignment of Contract in favor of Plaintiffs. The documents were executed in consideration of Plaintiffs loan to the Dewsnums of \$119,000.00. When the Dewsnums failed to make payments due on the Notes the Plaintiffs brought suit against the Dewsnums asking for a Money Judgment and Order foreclosing the collateral given to secure the Dewsnums payment of the debt. The Dewsnums, through counsel, filed an Answer and Counterclaim. In 1981, Plaintiffs filed their Motion for Summary Judgment. After notice and a Hearing before Judge Burns the Plaintiffs Motion was granted in its entirety and Summary Judgment was entered.

More than ten years later Aletha Dewsnap filed a Motion to Reconsider and Set Aside Summary Judgment or Certify the Summary Judgment as Final and a Motion to Amend the Dewsnums' Counterclaim. After reviewing the file in this case and the written arguments from both sides, Judge Harding denied the Dewsnap's Motions.

Plaintiffs strongly object to the Dewsnap's allegations and contentions in their statement of the case totally unsupported by the record of these proceedings. Said allegations are in fact unsupportable, because they are not true.

#### STATEMENT OF FACTS

The facts delineated in the Dewsnap's Brief are both misleading and in violation of the Courts rules relating to Statements of Fact. Many of Appellants Statement of Alleged Facts are unsupported by the record. Several of the Appellant's statements are particularly offensive in that in addition to being totally unsupported by factual averment in the record they by innuendo make false allegations concerning a member of the State Bar.

First, the Dewsnums' Statement of Fact number 2 states that Joseph Henriod was the Dewsnap's attorney when they approached him in 1978 about a loan. This is not true. The only pages of the record referred to by the Dewsnums to substantiate this fact are merely two pages of the Dewsnums'

Memorandum in Support of their Motion to Amend their Counterclaim. Second, the Dewsnums contend in Statement of Fact number 23 that Joseph Henriod told the Dewsnums in approximately September of 1980 that he could no longer be their lawyer and recommended a lawyer in Provo. Again this is not true and the only portion of the record referred to by the Dewsnums to support this claimed fact is the Memorandum filed by the Dewsnums' attorney in Support of their Motion to Amend their Counterclaim. Plaintiffs' believe that the above referenced Statements of Fact by the Dewsnums misrepresent the record and are a violation of Rule 24(k) of the Utah Rules of Appellate Procedure.

Plaintiffs submit that the following Statement of Facts represents the relevant facts that are established by the record in this case.

1. On June 1, 1978, the Dewsnums borrowed \$119,000 from the Plaintiffs, namely the Annette Jacob Trust, The United Precision Machine and Engineering Company Profit Sharing Trust and Abco Insurance Agency, Inc. (R. 8, 9, 10.).

2. The Dewsnums executed three Promissory Notes in favor of the Plaintiffs totalling \$119,000 (R. 8, 9, 10.).

3. At the same time the Dewsnums executed a Trust Deed and Amended Trust Deed (collectively the "Trust Deed") to secure the Promissory Notes (R. 133-143).

4. As additional security for the Promissory Notes, the Dewsnums executed an Assignment of Contract (the "Assignment of Contract") assigning to the Plaintiffs their interest as purchasers in a uniform real estate contract (the "Purchase Contract") (R. 11-13).

5. The Dewsnums failed to make the 1980 annual installment payment on the "Purchase Contract" and failed to pay the 1979 property taxes when due. On June 7, 1980, the Plaintiff's made the "Purchase Contract" payment and paid the taxes owing on the property (R. 2, 69, 70).

6. On June 1, 1980, the \$119,000 loan came due. The Dewsnums did not pay off the loan on June 1, 1980, and subsequently on September 16, 1980, the Plaintiffs filed their Complaint against the Dewsnums (R. 1-7).

7. The Dewsnums retained attorney, Robert Fillerup who filed an Answer and Counterclaim on November 21, 1980 (R. 59-63). The Answer and Counterclaim is attached as Exhibit "A" herein.

8. In December 1980, the Dewsnums paid some, but not all, of the amounts due Plaintiffs. Subsequently on March 3, 1981, Plaintiffs filed their Motion for Summary Judgment accompanied by the Affidavit of Louis Timm (R. 66-70).

9. The Motion for Summary Judgment was noticed for oral argument and Judgment was granted by Judge Burns on April 14, 1981 (R. 74).

10. A copy of the proposed Summary Judgment was mailed to Robert Fillerup, the Dewsnums' attorney on April 16, 1981 (R. 79).

11. Judge Burns signed the Summary Judgment and Decree of Foreclosure on April 22, 1981, and it was filed on April 24, 1981. (R. 75-79).

12. On April 23, 1981, the Dewsnums filed a Chapter 11 Bankruptcy No. 81-01367. Their Bankruptcy was dismissed on April 1, 1982. (R. 218).

13. On August 17, 1982, the Dewsnums filed a second Chapter 11 Bankruptcy No. 82C-02046. On February 13, 1984, this Bankruptcy was dismissed with prejudice by Judge Glen E. Clark. (R. 219).

14. On June 27, 1984, the Dewsnums filed a Chapter 7 Bankruptcy No. 84C-01746 which is still pending. (R. 84 219).

15. On March 3, 1987, seven years after Judge Burns' decision, the Dewsnums filed an Amended Complaint in Federal Bankruptcy Court, to determine the validity of Plaintiffs lien on the property that is the subject matter of this lawsuit. (R. 227-234). A copy of the Complaint is attached as Exhibit "B" herein.

16. The Dewsnums' First Cause of Action in their Bankruptcy Complaint alleges that the notes secured by the

Plaintiff's Trust Deed have been paid in full and that the Trust Deed should be ordered removed. (R. 228, 229).

17. On June 24, 1987, a trial was held on the Dewsnums' Complaint before Judge Glen E. Clark. (R. 219).

18. On June 15, 1988, Judge Clark issued a Memorandum Opinion dismissing the Dewsnums' Complaint. (R. 262-281).

19. On August 15, 1988, Judge Clark entered a Judgment dismissing with prejudice Plaintiffs' Complaint in its entirety. (R. 283-284). A copy of Judge Clarks' Order is attached as Exhibit "C" herein.

20. The Dewsnums appealed Judge Clark's decision to the Federal District Court and an Order was entered by Judge J. Thomas Green Jr. on March 15, 1989, affirming Judge Clark's dismissal of the Dewsnum's Complaint. (R. 220).

21. The Dewsnums then appealed Judge Green's decision to the Tenth Circuit Court of Appeals. On July 11, 1990, the Tenth Circuit Court of Appeals filed its decision affirming the dismissal of the Dewsnum's Complaint. (R. 220)

22. The Dewsnums requested that the United States Supreme Court grant a Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals. The Writ was subsequently granted. The case has been briefed by all parties and is now presently set for oral argument on October 15, 1991. (Note: At the time of Judge Harding's ruling

denying the Dewsnums Motions that are the subject of this appeal, the United States Supreme Court had not yet granted the Writ of Certiorari.)

23. Since the filing of the Complaint in this case the Dewsnums have been represented in either this case or their bankruptcy proceedings by at least six (6) different attorneys. (R. 59, 84, 86, 219, 220, 283.)

24. On January 6, 1991, based on a request for abandonment signed by the Dewsnums newest attorney the Bankruptcy Trustee abandoned the Dewsnums' Counterclaim. (R. 105.)

25. On January 28, 1991, the Dewsnums filed a Motion to Amend their Counterclaim. (R. 194-207.)

26. On January 25, 1991, the Dewsnums filed a Motion to Reconsider and Set Aside or to Certify as Final. (R. 107-109.)

27. On February 21, 1991, Judge Ray M. Harding issued a Memorandum Decision denying the Dewsnums' Motions. (R. 348-349.)

28. On March 11, 1991, Judge Ray M. Harding signed an Order Denying the Dewsnums' Motion to Amend Counterclaim, Reconsider or Certify as Final. (R. 350-351.)

### SUMMARY OF THE ARGUMENT

As a general principle of law this Court has always held that a Judge's decision in allowing or denying Motions before him is a matter left up to his sound discretion. For this reason a Judge's decision to grant or deny motions of this type will only be overturned based upon a clear abuse of that discretion.

Judge Harding's Denial of the Dewsnap's Motions was within his discretion and is sustainable by this Court on several grounds.

First, the Dewsnap's Counterclaim could not be amended because it had been disposed of more than ten years prior to the filing of their Motion to Amend. Plaintiffs Motion for Summary Judgment alleged that there remained no disputed material facts in the case before the Court. The granting of Plaintiffs Summary Judgment by Judge Burns was in complete contradiction to the relief requested by the Dewsnap's. The Dewsnap's Counterclaim requested a reformation of the Trust Deed and the voiding by the Court of the Assignment of the Dewsnap's Purchase Contract. Judge Burns' granting of the Plaintiff's Motion for Summary Judgment acknowledged the validity of the Trust Deed and ordered the Dewsnap's interest in the Purchase Contract foreclosed. Judge Burns simply could not have entered the Summary Judgment foreclosing the Dewsnap's interest in the Purchase Contract if



a question of fact remained as to the validity of the assignment.

Second, had Judge Harding granted the Dewsnums' Motion to Amend their Counterclaim it would have resulted in prejudice to the Plaintiffs. If in fact the Dewsnums' Counterclaim remained viable after the Summary Judgment, the Dewsnums allowed it to be dormant for a period of almost eleven years. During this time the Judge signing the Summary Judgment retired and Lamar Dewsnum died. The Dewsnums' claims have become so stale that any requested reincarnation would be prejudicial to the Plaintiffs per se.

Third, the issues presented by the Dewsnums in their proposed Counterclaim were tried and dismissed with prejudice by Judge Glen E. Clark of the United States Bankruptcy Court for the District of Utah. The Dismissal by Judge Clark of the Dewsnum's claims is res judicata and bars the Dewsnums from now bringing the same claims in the Utah District Court as well as claims that should have been, but were not, brought before Judge Clark.

The Dewsnums' Motion to Reconsider and Set Aside or Certify as Final the Summary Judgment was properly denied by Judge Harding. Judge Harding correctly ruled that the Dewsnum's Motion to Reconsider and Set Aside or Certify as Final does not exist under the Utah Rules of Civil Procedure.

## ARGUMENT

### I.

THE DEWSNUPS' COUNTERCLAIM WAS ADJUDICATED WHEN JUDGE BURNS ENTERED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS

A. Rule 54(b) of the Utah Rules of Civil Procedure does not apply to the facts present in this case.

Plaintiff's Complaint requested a determination by the trial Court of amounts owed on the notes executed by the Dewsnums' and for an Order of the Court foreclosing Plaintiff's security interest pursuant to the assignment of the Purchase Contract.

The Dewsnums' Answer and Counterclaim alleged that the Assignment of the Purchase Contract was unknowingly and unwittingly signed by the Dewsnums and further, that part of the property covered by the Trust Deed was improperly included in the Trust Deed. As a result of the foregoing, the Dewsnums asked that the Assignment of the Purchase Contract be vacated and the Trust Deed reformed.

Judge Burns' Summary Judgment established the amount owed on the notes, and found that the Trust Deed and Assignment of the Purchase Contract secured the Notes and ordered the Dewsnums interest in the Purchase Contract foreclosed. The relief granted by Judge Burns was so completely incompatible with the relief requested by the Dewsnums in their Counterclaim as to render their claim that

the Counterclaim is still viable, meaningless. This is so because it would have been impossible for Judge Burns to order the foreclosure of the Dewsnums interest in the Purchase Contract and acknowledge the Trust Deed as additional security for the notes if there remained a question of fact concerning the validity of the same security interests that he was ordering foreclosed.

The Dewsnums reliance on Lamp v. Andrus, 657 F2d 1167 (10th Cir. 1981) is misplaced. The Lamp decision did not involve a Counterclaim where the relief sought was reformation of the instruments that the Plaintiffs were seeking to foreclose. The Lamp Counterclaim was truly a separate cause of action that required a ruling independent of the Plaintiff's Claims. The Dewsnum Counterclaim was comprised of several affirmative defenses to the Plaintiffs action that were characterized by the Dewsnums' attorney as a Counterclaim. A counterclaim must be a proper counterclaim and not merely a defense "mistakenly designated" as a counterclaim in order to fall under the provisions of Rule 54(b). 6 Moore Federal Practice 2d, Section 54.35.

A fact situation much closer to the present case is found in Joseph E. Bennett Co. v. Trio Industries, Inc. 306 F2d 546 (1962). After quoting Rule 54(b) of the Federal Rules of Civil Procedure in its entirety the Court concludes that Rule 54(b) is not applicable.

There has been no formal adjudication of the Defendant's Counterclaim and there has been no expressed determination and direction under the above rule. Therefore, strictly speaking, the Judgment entered for the Plaintiff in this case does not dispose of all claims for relief and so is not a "Final Decision" within the meaning of Title 28 U.S.C. Section 1291. But the Judgment for the Plaintiff rests upon the finding that it had not broken its Contract with the Defendant which is the issue tendered by the Defendant's Counterclaim. Thus all claims presented have actually been decided. All that is lacking is a formal "Final Decision", i.e. the entry of a ministerial act of a formal Judgment of Dismissing the Defendant's Counterclaim. Under these circumstances, following the reasoning of Judge Clark in General Time Corp v. Padua Alarm Systems, Inc., 199 F2d 351, 358 (C.A. 2 1952), Cert. Denied, 345 U.S. 1917, 73 S. Ct. 728, 97L.ed. 1351, (1953), we hold that the Judgment entered for the Plaintiff is a "Final Decision" appealable under Section 1291. Id. at Page 548.

The Bennett Decision was followed in 1986 by the 6th Circuit Court of Appeals in the case of Ford Motor Co. v. Transport Indemnity Co. 795 F2d 538 (6th Cir. 1986). The Ford case, supra, involved a District Courts granting of a Summary Judgment where the Defendant's Counterclaim was not dismissed. In holding that the Summary Judgment was a final decision the 6th Circuit held as follows:

If the District Court's ruling on one claim necessarily precludes an alternative or mutually exclusive claim, a final order will arise despite the lack of an explicit declaration by the District Court. Joseph E. Bennett Co. v.

Trio Industries, Inc. 306 F2d. 546, 548 (1st Cir. 1962); General Time, 199 F2d. 358. Although the District Court never explicitly ruled on TICO's Counterclaims, we are persuaded that the District Court rulings rejected these Counterclaims. Id at 543.

The Sixth Circuit goes on to base its decision that the Counterclaims were rejected on two separate and distinct grounds. First, that Ford in its Motion for Summary Judgment argued that the Counterclaims were meritless both as a matter of fact and law and second, that the District Court's finding of liability upon an endorsement executed by TICO necessarily and implicitly rejected TICO's exoneration and rescission claims.

Judge Burns' granting of Plaintiff's Motion for Summary Judgment establishing the amount owed on the Notes and ordering the foreclosure of the security interest is mutually exclusive of the Dewsnuys' claims that the security should not be foreclosed because of a mistake by the Dewsnuys in executing the instruments creating the security.

As in the Bennett and Ford cases, supra, Judge Burns' Judgment constituted a final appealable order.

B. The Dewsnuys had notice of the disposition of their claims and were not denied due process.

Plaintiff's Motion for Summary Judgment requested a money Judgment against the Defendant's and that the security for the notes be foreclosed. In this regard, the Summary

Judgment Motion specifically states that there are not material issues of fact remaining in the case. The Dewsnums have never denied that they received a copy of the Motion for Summary Judgment, the Affidavit of Louis Timm, nor have they denied receiving notice of the hearing before Judge Burns. It was the Dewsnums and their attorney who chose to not respond to the Motion for Summary Judgment, to not file any opposing Affidavits and to not appear at the hearing on the Motion.

The notice requirements of Rule 56(c) of the Utah Rules of Civil Procedure were complied with by the Plaintiffs to the letter. Dewsnums knew well in advance of the hearing that the Plaintiffs were claiming there were no material facts at issue that would preclude a money Judgment being entered against the Dewsnums as well as a foreclosure of the security on the Notes. It was the Dewsnums and their attorney's decision to not appear at the hearing on Plaintiff's Motion for Summary Judgment and argue that their Counterclaims created issues of fact that would preclude the entry of Summary Judgment against them. The Dewsnums' claim that they did not receive Notice of the proceedings in this matter is simply not supported by the record. Their attorney did receive notice of the hearing. Whether his failure to appear at the hearing or otherwise respond to Plaintiffs Motion was by strategy, agreement with the Dewsnums or possible neglect is a matter between the Dewsnums and their attorney. The

Dewsnups cannot lay at Plaintiffs feet the Dewsnups failure to defend against Plaintiffs Summary Judgment Motion.

II.

JUDGE HARDING PROPERLY REFUSED TO ALLOW THE DEWSNUPS TO FILE AN AMENDED COUNTERCLAIM.

A. It was within Judge Harding's discretion to allow or not allow the Amended Counterclaim.

As previously discussed in this Brief Judge Harding correctly ruled that the Summary Judgment disposed of Defendant's Counterclaim. Assuming, however, arguendo that the Dewsnups' Counterclaim remained after the entry of the Summary Judgment, Judge Harding was still justified, eleven years later, in refusing to allow the Dewsnups to amend it.

In Utah the decision of a Trial Court to allow or not allow an amended pleading has always rested within the Judge's sound discretion. Absent a clear abuse of discretion the Appellate Court will not disturb a Trial Court's ruling on a Motion to Amend. Girard v. Appleby, 660 P2d. 245 (Utah 1983). See also Westley v. Farmers Insurance Exch., 663 P2d 93 (Utah 1983) and Kelly v. Babcock & Wilcox 746 P.2d 1189 (Utah Ct. App. 1987).

B. The Dewsnups proposed Amended Counterclaim is barred by the doctrine of res judicata.

Res Judicata reflects the refusal of the Courts to tolerate pointless litigation and is based on the premise that

the proper administration of justice is best served by limiting parties to one fair trial on an issue or cause 46 Am. Jur. 2d. Judgment, Section 395 (1969).

"Res Judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions encourage reliance on adjudication." Alan v. McCurry 449 U.S. 90, 94 (1980).

The Utah Court of Appeals in the case of Copper State Thrift and Loan v. Bruno 735 P2d. 387, 389 (Utah Ct. App. 1987) discusses the Doctrine of res judicata and its related branch of collateral estoppel. Copper State Supra. The Court of Appeals refers to this Court's decision in Penrod v. Nu Creation Creme, Inc., 669 P2d. 873, 874-75 (Utah 1983) at page 1189:

The Doctrine of res judicata has two related, but distinct branches. Both branches, however, have the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation...One branch, claim preclusion, bars the re-litigation of a claim that previously has been fully litigated between the same parties. To invoke this branch of res judicata, both suits must involve the same parties or their privies and the same claim or cause of action. Furthermore, the first claim must have been litigated on the merits and must have resulted in a final judgement. Penrod 669 P2d. at 875. In such a case, claim preclusion prevents



re-litigation not only of claims actually litigated in the first proceeding, but also claims which could and should have been litigated in the prior action, but were not raised. Id.

On March 3, 1987, the Dewsnums filed an Adversary Proceeding in the Bankruptcy Court, a copy of which Complaint is attached as Exhibit "B" to this Brief. The Dewsnums' First Cause of Action alleges that the Notes secured by the Plaintiff's Trust Deed had been paid in full and that the Trust Deed should therefore be removed from the record on the property of the Plaintiffs. After a two-day trial Judge Glen E. Clark dismissed the Dewsnums' claims with the exception of an issue concerning the ability of the Dewsnums to pay the fair market value of the secured property to the Plaintiffs and thereby redeem the property. Judge Clark later issued a Memorandum Decision holding that the Dewsnums could not redeem the property and a Judgment of Dismissal as to all of the Dewsnums' claims was signed by Judge Clark on August 15, 1988. The Dewsnums later appealed Judge Clark's ruling but only the part of the decision disallowing their claimed right to redeem the property by paying the fair market value to the Plaintiffs. Judge Clark's ruling has been upheld by both the District Court and the Tenth Circuit Court of Appeals and the matter has now been briefed and is set to be heard on oral argument before the United States Supreme Court on October 15 of this year.

Claim two of the Dewsnums proposed Amended Counterclaim is virtually identical to claim one of their Adversary Proceeding in the Bankruptcy Court. Based upon the foregoing the Dewsnums proposed Amended Counterclaim falls squarely within the Doctrine of res judicata or claims preclusion. The parties in the Dewsnums bankruptcy proceeding and the proposed Amended Counterclaim are identical. The Dewsnums Bankruptcy Court action was fully litigated and resulted in a Final Judgment of Dismissal. The Dewsnums did not appeal the Dismissal of their First Cause of Action in the Bankruptcy proceeding and the time for appeal has long since run. The other claims presented in the Dewsnums proposed Amended Counterclaim could and should have been litigated in the Bankruptcy Court action but were not raised by the Dewsnums. It is difficult to conceive of a fact situation falling more squarely within the claims preclusion branch of res judicata than the one presently before this Court.

C. The filing of the Amended Counterclaim would have been prejudicial to Plaintiffs.

If the filing of an amended pleading would result in prejudice to the adverse party it is within the discretion of the Trial Court to refuse to allow the amendment. The facts in this case make it clear that the filing by the Dewsnums of an Amended Counterclaim would be prejudicial to the Plaintiffs. The Plaintiffs Judgment was entered in 1980, some

eleven (11) years prior to the Dewsnums' Motion to Amend their Counterclaim. If the Dewsnums' Counterclaim still exists, they have allowed it to sit for such an extended period of time that, not only has the Trial Judge who originally heard the case retired, one of the Counterclaimants, namely Lamar Dewsnum, is deceased. The Dewsnums eleven (11) year delay in bringing their Motion to Amend has virtually made it impossible for the Plaintiffs to now conduct discovery into the allegations made in their proposed Amended Counterclaim.

D. The Dewsnum's Bankruptcies did not preclude them from a timely Motion to amend their Counterclaim.

In their Brief the Dewsnums state that the filing of their bankruptcies precluded them from a Motion to Amend their Counterclaim. This claim is simply not accurate. The Dewsnums correctly state that Section 323(a) of the Bankruptcy Act names the Bankruptcy Trustee as the "representative of the estate" and authorizes the Trustee to act on behalf of the bankruptcy estate. Further, the Dewsnums point out that Bankruptcy Rule 6009 provides that "(W)ith or without Court approval the Trustee...may prosecute...any pending action or proceeding by...the Debtor." What the Dewsnums fail to point out is that the Bankruptcy filed by the Dewsnums on April 23, 1981, the day after Judge Burns signed the Summary Judgment and Decree of Foreclosure, was a Chapter 11 Bankruptcy. The significance of this omitted fact is that under a Chapter 11

Bankruptcy the Dewsnums were acting as Trustees of the Estate and were empowered with the right to prosecute any pending actions on behalf of themselves. The truth is that from April 23, 1981, until June 27, 1984, the date the Dewsnums filed their Chapter 7 Bankruptcy, the Dewsnums had the right to prosecute their Counterclaim if they believed that one still existed.

In addition, the Dewsnums later filed an adversary proceeding in the Bankruptcy Court setting out several of the claims outlined in their proposed Amended Counterclaim. (The Bankruptcy Adversary proceeding is discussed at subpoint D of this argument.)

Finally, while it is technically true that the Dewsnums were precluded after the date of filing their Chapter 7 Bankruptcy from bringing their Motion in the District Court until the Trustee abandoned the claim, they fail to give the reasons why the claim was not abandoned until 1991. First, it is doubtful that the Trustee even knew about the claim since it was not listed by the Dewsnums in their bankruptcy schedules as an asset of the estate. Second, the Dewsnums were treating Judge Burns' Judgment as being final and were involved in an adversary proceeding to void the same Judgment that they now claim is not final. It was not until the

Dewsnups lost their bankruptcy case, that they decided to pursue the argument that the Judgment was not a final order.

III.

JUDGE HARDING WAS CORRECT IN REFUSING TO RECONSIDER AND SET ASIDE OR CERTIFY AS FINAL THE SUMMARY Judgment.

The Summary Judgment was not properly before the Court for reconsideration. Utah Courts have never recognized a Motion to Reconsider and Set Aside a Summary Judgment unless said Motion is brought pursuant to Rule 60 of the Utah Rules of Civil Procedure. In the case of Peay v. Peay, 607 P2d 841 (Utah 1980), the Utah Supreme Court in rejecting a Motion for Reconsideration of a Court Order and Motion for Relief from Final Judgment quoted with approval the decision of the Supreme Court in Utah State Employees Credit Union v. Riding 24 Utah 2d 211, 469 P2d 1 (Utah 1970):

Under the record here, we are unaware of any such Motion under our rules...

We think the Motion To Reconsider the Motion to Vacate the Judgment is abortive under the Rules...We conclude that the Judgment of Foreclosure, unappealed from, must stand absent any timely appeal. At P 843.

The Court goes on to quote with favor its ruling in Drury v. Lunceford 415 P2d, 662 (Utah 1966) where the Court ruled as follows:

When (a Motion has been made) and the Court has ruled upon the Motion, if the party ruled against were permitted to go

beyond the Rules, make a Motion for Reconsideration, and persuade the Judge to reverse himself, the question arises, why should not the other party who is now ruled against be permitted to make a Motion for re-reconsideration, asking the Court to again reverse himself?

...(T)he new Rules of Procedure...were designated to provide a pattern of regularity of procedure which the parties and the Courts could follow and rely upon...in order to avoid such a state of indecision for both the Judge and the parties, practical expediency demands that there be some finality to the actions of the Court; and he should not be in the position of having the further duty of acting as a Court of review upon his own ruling. (Citation omitted.) Id. at page 843.

The Dewsnums received Notice of the Plaintiffs Motion for Summary Judgment as well as notice of the hearing date on said Motion. After reviewing the Court files including the Motion and Affidavit of Louis Timm, Judge Burns executed an Order granting Plaintiffs Summary Judgment and ordering the property securing the Dewsnums notes to be foreclosed. All parties involved, including the Dewsnums recognized the Summary Judgment as being a final Order. Some eleven years later for a different District Court Judge to reconsider and set aside the Order would result in the frustrating results condemned by the Utah Supreme Court in the case of Haner v. Haner 373 P2d. 577 (Utah 1962).

...(T)o reopen a case just because a party persists in asserting and attempting to prove that his version of

the dispute was the truth and that of the opponents was false would open the door to a repetition of that procedure, whoever won the next time; and thus keeping the dispute going ad infinitum with no way of determining when the merry-go-round of the lawsuit would end. This would involve not only a waste of time, energy and expense but also would result in such uncertainty as to peoples rights that the very purpose of a lawsuit, the settling of disputes and putting them at rest, would be defeated. Resort to the Courts would be frustrating and impractical unless there were some point at which decisions became final so that the parties could place reliance thereon, leave their troubles behind and proceed to the future... Id at Page 579.

Judge Harding was clearly justified in refusing to grant a Motion that was so clearly outside the Utah Rules of Civil Procedure.

#### CONCLUSION


For more than eleven years the Plaintiffs have attempted to collect amounts owed to them by the Dewsnums. During this time the Dewsnums have been represented by at least six different attorneys. The Dewsnums' claims have been presented to Trial Judges in State Court and Federal Bankruptcy Court. Judge Burns granted Judgment in favor of Plaintiffs and against the Dewsnums in 1981. From 1981 until the Dewsnums filed the Motions which are the subject of this appeal all parties, including the Dewsnums, as well as the Dewsnums' attorneys, have treated Judge Burns' ruling as a

Final Judgment. If Judge Burns' ruling was not final, literally hundreds of hours and tens of thousands of dollars have been wasted by the parties in the Dewsnums' Bankruptcy proceedings as well as the recent proceedings in this case.

The Dewsnums have both used and abused the state and federal judicial systems for more than a decade. Justice requires that this matter mercifully come to an end. Judge Harding's ruling on the Dewsnums' Motions was correct and accordingly Plaintiffs respectfully submit that the Dewsnums' Appeal should be dismissed in its entirety by this honorable Court.

DATED this 6<sup>th</sup> day of September, 1991.

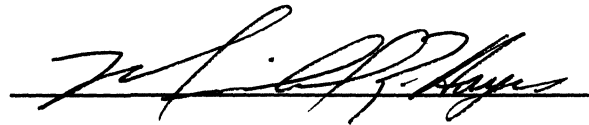
MAZURAN, VERHAAREN & HAYES, P.C.

  
\_\_\_\_\_  
Michael Z. Hayes  
Attorneys for Plaintiffs\Appellees



CERTIFICATE OF SERVICE

This is to certify that on this 6th day of September, 1991, four (4) true and correct copies of the foregoing APPELLEE'S BRIEF were hand delivered to Russell A. Cline, 123 Second Ave. T-2, Salt Lake City, Utah 84103.

A handwritten signature in cursive script, appearing to read "J. L. R. Hayes", is written over a horizontal line.

INDEX TO EXHIBITS

Exhibit A - Motion for Summary Judgment

Exhibit B - Amended Complaint to Determine Validity of Lien

Exhibit C - Judgment of Dismissal

"EXHIBIT A"

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

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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.

Robert C. Fillerup

"EXHIBIT B"

William Thomas Thurman  
Scott C. Pierce  
McKAY, BURTON & THURMAN  
Suite 1200, Kennecott Building  
Salt Lake City, Utah 84133  
Telephone: (801) 521-4135

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

---

In re:	:	Bankruptcy No. 84C-01746
LAMAR DEWSNUP and	:	
ALETHA DEWSNUP,	:	
Debtors.	:	
-----	:	
LAMAR DEWSNUP and	:	Adversary Proceeding No.
ALETHA DEWSNUP,	:	87PC-0116
Plaintiffs,	:	
-vs-	:	
LOUIS L. TIMM, JOHN NEIUWLAND	:	
and FLOYD M. CHILDS, Trustees	:	
of the	:	A M E N D E D
UNITED PRECISION MACHINE AND	:	COMPLAINT TO DETERMINE
ENGINEERING COMPANY, PROFIT-	:	VALIDITY OF LIEN
SHARING TRUST, ABCO INSURANCE	:	
AGENCY, INC., JOSEPH L.	:	
HENROID, as Trustee for the	:	
Annette Jacob Trust,	:	
Defendants.	:	

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PARTIES AND JURISDICTION

Plaintiffs complain of Defendants as follows:

1. The Plaintiffs are residents of the State of Utah.

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2. Upon information and belief, Plaintiffs allege that Defendants, Louis L. Timm, John Neiuwland and Floyd M. Childs, Trustees of the United Precision Machine and Engineering Company Profit-Sharing Trust are residents of the State of Utah.

3. Upon information and belief Plaintiffs allege that Defendant, ABCO Insurance Agency, Inc., is incorporated under the laws of the State of Utah and has its principal place of business in the State of Utah.

4. Upon information and belief, Plaintiff alleges that Defendant, Joseph L. Henroid, as Trustee for the Annette Jacob Trust, is a resident of the State of Utah.

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(b).

6. This is a core proceeding under the meaning of 28 U.S.C. §157(b)(2)(K).

7. Venue is proper in this district under 28 U.S.C. §§1408 and 1409.

#### FIRST CAUSE OF ACTION

8. On or about June 1, 1978, Plaintiffs executed a Trust Deed with Defendants as beneficiary and Plaintiffs as Trustor in the amount of \$119,000.00.

9. On or about December 3, 1980, Plaintiffs paid in full, the underlying note which is secured by the Trust Deed alleged in paragraph 8 of this Complaint.

10. The debt owed by the Plaintiffs to the Defendants arising from the note secured by the June 1, 1978 Trust Deed has been satisfied in full. The Trust Deed should have been released and is no longer valid.

11. The Trust Deed dated June 1, 1978 with Plaintiffs as Trustor and Defendants as beneficiaries, should be removed from the record on the property of the Plaintiffs.

SECOND CAUSE OF ACTION

12. This Second Cause of Action is alleged alternatively and/or in supplement to the First Cause of Action in this Complaint. Therefore, the allegations contained in paragraphs 1 through 11 of this Complaint are realleged and made part of this Second Cause of Action.

13. In addition to the Trust Deed mentioned in Plaintiffs' First Cause of Action, Defendants claim to have a judgment lien on Defendants' property in the amount of \$49,966.21, plus interest from April, 1981, costs and attorney's fees.

14. Defendants claim that the \$49,966.21 judgment is also secured by the Trust Deed mentioned in the First Cause of Action of this Complaint.

15. Defendants claim that their Trust Deed and judgment lien attach to Plaintiffs' property located near Deseret, Utah, specifically described in Exhibit "A" attached hereto, and

Plaintiffs' property located near Oak City, Utah, specifically described in Exhibit "B" attached hereto.

16. The value of the 160 acres of Plaintiffs' property located near Deseret, Utah, as of the time of the filing of this action, was \$24,000.00.

17. The value of Defendants' property located near Oak City of the 56 acres of Plaintiffs' property located near Oak City, Utah, as of the time of the filing of this action was \$8,500.00.

18. Pursuant to 11 U.S.C. §506(d), the security interests of Defendants, including the Trust Deed and judgment lien, are invalid to the extent that they exceed the value of the debtors' property upon which they attach. The security interests of the Defendants are invalid to the extent they are unsecured.

19. The security interests of the Defendants can be satisfied in full by Plaintiffs remitting to the Defendants the fair market value of the property upon which the security interest attaches. The remainder of Defendants' claims against Plaintiffs are unsecured.

#### THIRD CAUSE OF ACTION

20. This cause of action is alleged as an alternative and/or supplement to the first two causes of action alleged in this Complaint. Therefore, Plaintiffs reallege the allegations



made in paragraphs 1 through 19 and incorporate them as part of this cause of action.

21. Defendants obtained a judgment against Plaintiffs on April 24, 1981.

22. Plaintiffs filed a Chapter 11 bankruptcy case in the United States Bankruptcy Court for the District of Utah on April 22, 1981.

23. The judgment and judgment lien obtained by Defendants in April of 1981 are void under 11 U.S.C. §362 as they were entered after Plaintiffs filed their Petition in bankruptcy.

WHEREFORE, debtors pray that:

1. The Court enter an order removing the June 1, 1978 Trust Deed, with Defendants as beneficiary, from the property of the debtors because the underlying note has been satisfied and the Trust Deed is invalid.

2. The Court enter an order avoiding Defendants' security interest on the real property of the Plaintiffs to the extent that the security interest exceeds the value of the real property under 11 U.S.C. §506(d).

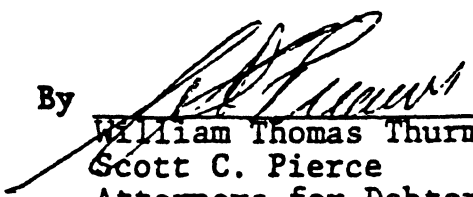
3. The Court enter an order voiding the April 24, 1981 judgment in favor of Defendants under 11 U.S.C. §362.

4. For such other relief as the Court deems appropriate under the circumstances.

DATED this 3<sup>rd</sup> day of March, 1987.

McKAY, BURTON & THURMAN

By

  
William Thomas Thurman  
Scott C. Pierce  
Attorneys for Debtors

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 4<sup>th</sup> day of March, 1987, to the following:

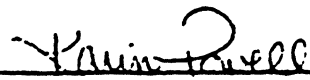
Louis L. Timm, Trustee  
United Precision Machine & Engineering Co.  
Profit-Sharing Trust  
4365 Mark Road  
West Valley City, Utah 84120

Joseph L. Henroid, Trustee  
Annette Jacob Trust  
1900 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

ABCO Insurance Agency  
c/o Krehl Smith, President  
2160 Scenic Drive  
Salt Lake City, Utah 84109

Wendell E. Bennett  
Attorney at Law  
448 East 400 South, Suite 304  
Salt Lake City, Utah 84111

SCP11

  
Kevin Russell

000332

+ Parcel 3:

The Southwest quarter of the Northeast quarter; 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 and Meridian.

EXCEPTING THEREFROM that portion lying within the boundaries of the County Road right-of-way.

EXCEPTING THEREFROM (Parcel 3) all rights of way, stock trails, ditches and canals, gravel pits and gravel beds.

\*\*\*\*\*

15/81  
The land referred to in this report is situated in the  
County of Millard, State of Utah, and is described as follows:

Parcel 1:

Beginning 980 feet West of the Southeast corner of the Southwest quarter of Section 4, Township 17 South, Range 4 West, Salt Lake Base and Meridian, thence North 1320 feet; thence West 1264 feet; thence South 625 feet, more or less, to the North boundary of Road right-of-way; thence Southeasterly along the Road right-of-way 541 feet; thence South 470 feet; thence East 840 feet to the point of beginning.

Parcel 2:

Beginning 980 feet West of the Northeast corner of the Northwest quarter of Section 9, Township 17 South, Range 4 West, Salt Lake Base and Meridian; thence South 1320 feet; thence West 840 feet; thence North 1320 feet; thence East 840 feet to the point of beginning.

EXCEPTING THEREFROM that portion lying within the boundaries of the County Road right-of-way.

EXHIBIT "B"

00023

"EXHIBIT C"

MICHAEL Z. HAYES - 1432  
MAZURAN, VERHAAREN & HAYES, P.C.  
Parkview Plaza, Suite 260  
2180 South 1300 East  
Salt Lake City, Utah 84106  
Telephone: (801) 359-4100

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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

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In re:	:	
LAMAR DEWSNUP and	:	
ALETHA DEWSNUP,	:	
	:	JUDGMENT OF DISMISSAL
Debtors.	:	
	:	
LAMAR DEWSNUP and	:	
ALETHA DEWSNUP,	:	Bankruptcy Case 84C-01746
	:	
Plaintiffs,	:	
	:	
vs.	:	Civil Proceeding No. 87PC-0116
	:	
LOUIS L. TIMM, et al.,	:	
	:	
Defendant.	:	

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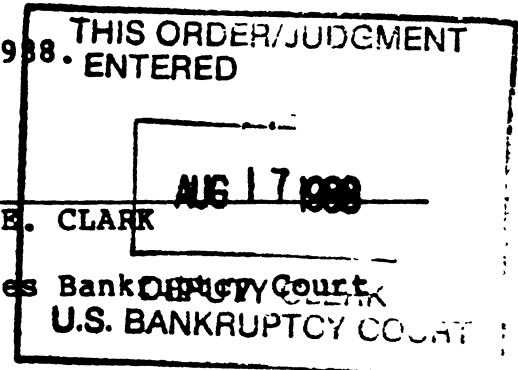
Plaintiffs' Adversary Proceeding came on for hearing before the Honorable Glen E. Clark on Thursday, June 25, 1987, at 9:00 o'clock a.m. Plaintiffs were represented by William Thomas Thurman and Scott C. Pierce of McKay, Burton & Thurman, Salt Lake City, Utah. Defendants were represented by Michael Z. Hayes of Mazuran, Verhaaren & Hayes, Salt Lake City, Utah. The Court, after having reviewed the file and having heard testimony from the parties and after having taken the matter under advisement

and subsequently filing its published Memorandum Opinion, which is incorporated into this Order by reference, hereby Orders, Adjudges and Decrees as follows:

1. Plaintiffs' Adversary Proceeding is dismissed in its entirety with prejudice;
2. All parties are to bear their own costs.

DATED this 15th day of August, 1988.

151  
JUDGE GLEN E. CLARK  
Chief Judge  
United States Bankruptcy Court



MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Judgment of Dismissal to the following this 17 day of August, 1988.

William Thomas Thurman, Esq.  
Scott C. Pierce, Esq.  
McKAY, BURTON & THURMAN  
Suite 1200 Kennecott Building  
Salt Lake City, Utah 84133

Michael Z. Hayes  
MAZURAN, VERHAAREN & HAYES  
Parkview Plaza, Suite 260  
2180 South 1300 East  
Salt Lake City, Utah 84106

MAILED ON AUG 17 1988

\_\_\_\_\_  
Secretary to Judge Clark