

2003

# Larry K. Jenkins v. Kent Peterson, Timothy Vetere and John Does 1-5 : Reply Brief

Utah Court of Appeals

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## In the Utah Court of Appeals

LARRY K. JENKINS,

Plaintiff & Appellee,

v.

KENT PETERSON, an individual,  
TIMOTHY VETERE, an individual, and  
KENT PETERSON AND TIMOTHY  
VETERE, a general partnership, and JOHN  
DOES 1-5,

Defendants;

TIMOTHY VETERE, Appellant

### Appellant's Reply Brief

Docket No. 20030181-CA

Civil Case No. 0007-47

*Appeal from an order and judgment of foreclosure in favor of Plaintiff/Appellee, Larry K. Jenkins, entered by the Honorable Lyle R. Anderson of the Seventh District Court.*

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**FILED**  
Utah Court of Appeals

OCT 14 2003

Paulette Stagg  
Clerk of the Court

OCT 14 2003

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In the Utah Court of Appeals

LARRY K. JENKINS,

Plaintiff,

v.

KENT PETERSON, an individual,  
TIMOTHY VETERE, an individual, and  
KENT PETERSON AND TIMOTHY  
VETERE, a general partnership, and JOHN  
DOES 1-5,

Defendants.

**Errata Sheet**  
to Mr. Vetere's Opening Brief

Docket No. 20030181-CA

Civil Case No. 0007-47

Defendant/Appellant Timothy Vetere, by and through his undersigned counsel of record, hereby files this Errata Sheet in connection with his Opening Brief in the above-entitled appeal, filed on August 7, 2003.

**THE ERRATA**

In preparing his Reply Brief, Mr. Vetere discovered that, through an oversight, he had omitted from the Issues & Standards of Review section of his Opening Brief the citations indicating where in the record each of the issues on appeal were preserved for appeal. Mr. Vetere deeply regrets this omission, and offers the following restatement of his Issues statement in reparation:

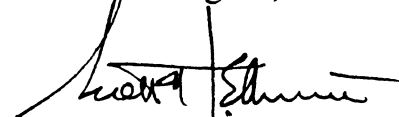
**Issue 1:** The central issue in this case is whether the trial court erred in denying Defendant/Appellant Timothy Vetere's ("Vetere") motion for summary judgment and granting summary judgment in favor of Plaintiff/Appellee Larry K. Jenkins ("Jenkins"), and against Vetere, ruling that Jenkins holds a security interest in the Subject Property, and ordering foreclosure of the land with all proceeds up to \$12,000 plus interest going to Jenkins. (*R. at 226–30, 331 pp. 19:11–21:6.*)

**Sub-Issue A:** Whether the Security Agreement ("Agreement") created a security interest in the property where the Agreement only provides an assignment of 25% of the proceeds from any sale to Jenkins when the land is sold, and where the Trustee, acting for Peterson, sold all of Peterson's interest in the Subject Property for \$8,000. (*R. at 226–27, 331 pp. 19:23–20:20.*)

**Sub-Issue B:** Whether the alleged security interest secured more than the interest in 25% of the selling price where the instrument of security did not mention any other obligation. (*R. at 227–28, 283–84, 331 p. 19:16–20:20.*)

**DATED** this 14<sup>th</sup> day of October, 2003,

Smith Hartvigsen, PLLC



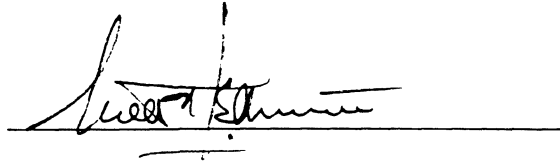
J. Craig Smith  
Scott M. Ellsworth

## Certificate of Service

On this 14<sup>th</sup> day of October, 2003, two true and correct copies of the foregoing *Errata Sheet to Mr. Vetere's Opening Brief* were mailed, United States mail, postage prepaid, to the following:

David Crabtree, Esq.  
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A handwritten signature in black ink, appearing to read "Kent Peterson", is written over a horizontal line.

## In the Utah Court of Appeals

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LARRY K. JENKINS,

Plaintiff & Appellee,

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KENT PETERSON, an individual,  
TIMOTHY VETERE, an individual, and  
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VETERE, a general partnership, and JOHN  
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TIMOTHY VETERE, Appellant

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### **Appellant's Reply Brief**

**Docket No. 20030181-CA**

**Civil Case No. 0007-47**

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*Appeal from an order and judgment of foreclosure in favor of Plaintiff/Appellee, Larry K. Jenkins, entered by the Honorable Lyle R. Anderson of the Seventh District Court.*

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# Argument

## I. INTRODUCTION

By focusing on Mr. Peterson's culpability rather than on the plain language and efficacy of the Security Agreement ("Agreement"), Mr. Jenkins' Brief misses the central issues of this appeal. At no time has Mr. Vetere disputed the fact that Mr. Peterson acted dishonestly. In fact, Peterson defrauded Mr. Vetere out of more than ten times the amount lost by Mr. Jenkins. Mr. Peterson's bad acts, however, have no relevance to this appeal. Instead, the dispositive issue is whether, and if so, to what extent Mr. Jenkins' damages are secured by an interest in the Subject Property through the Agreement.

The court below plainly erred in ordering foreclosure of the Subject Property to cover a damage award of \$12,000 to Mr. Jenkins. Mr. Jenkins makes four principal arguments for affirmance, none of which has any merit. First, Jenkins argues that the Bankruptcy Trustee's Quitclaim Deed was explicitly subject to all valid and existing liens.<sup>1</sup> While the bankruptcy court deferred the determination of the validity of the liens to the state court, this has no impact on the instant case where Jenkins holds no valid lien. Second, Jenkins argues that Mr. Vetere raised a new argument on this appeal. Mr. Vetere, however, did not raise any new arguments on this appeal. He argued in his memoranda and at the summary judgment hearing both that the Agreement was not effective in creating a security interest in the Subject Property, and that the amount secured by the Subject Property was unascertainable. Third, Jenkins' Brief claims that

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<sup>1</sup> More correctly stated, the validity of all liens, including the purported lien Mr. Jenkins allegedly obtained through the Agreement, was expressly deferred by the bankruptcy court to the state court to determine. *See* R. 182, 199.

Utah law allows an invalid mortgage—one without a sum certain—to somehow, following a breach, morph into a valid mortgage as soon as an amount of damages can be ascertained.<sup>2</sup> Finally, Jenkins’ claims rely heavily on the assumption that the Agreement is ambiguous. To the contrary, the Agreement is plain and unambiguous on its face. Thus, no evidence beyond the Agreement can have any impact on the determination of the intent of the parties. The Agreement did not convey any fee interest in the Subject Property. At a maximum, the plain meaning of the Agreement purports to secure 25% of the proceeds from any sale. The sale from the Bankruptcy Trustee for \$8,000 would qualify as a sale under the Agreement, and the interest of Mr. Jenkins would therefore be \$2,000. This is the maximum amount possibly secured by the alleged security interest.

**II. THE TRUSTEE’S DEED QUALIFIES AS A SALE UNDER THE AGREEMENT, AND THE FACT THAT THE SALE WAS SUBJECT TO A DETERMINATION OF LIENS BY THE STATE COURT HAS NO IMPACT ON THE OUTCOME OF THIS CASE.**

The Bankruptcy Estate’s sale of Peterson’s interest to Vetere qualifies as a sale under the Security Agreement because the quitclaim deed was subject only to existing liens and rights as determined by the state court. Jenkins essentially argues, and the court below apparently accepted, that the Bankruptcy Court imputed Jenkins’ rights against Peterson into rights in the Subject Property. There are two major errors with this conclusion: First, the Bankruptcy Court merely reserved for determination by this Court

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<sup>2</sup> While some other jurisdictions allow for uncertainty in the amount owing under a mortgage, to ensure an effective recording and notice system in real estate, Utah requires a sum certain.

Jenkins' existing rights to the land, if any, and did not grant him any new rights. Second, even if the quitclaim deed was subject to all liens, Jenkins' either never held a valid lien, or alternatively, his lien was limited to 25% of the proceeds from a sale.

Jenkins expends considerable effort to prove that the bankruptcy court intended to preserve Jenkins' rights to the land. Vetere does not dispute that the Trustee deeded Peterson's interest in the Subject Property to him "subject to all liens and interests" so that any liens or interests could be determined in state court. However, the phrase "subject to all liens and interests" has no effect unless there is a valid and existing lien or interest. Jenkins would have the court believe that the Bankruptcy Court converted Jenkins' rights against Peterson into rights in the property. This is an untenable position, however, as the bankruptcy court sought only to preserve Jenkins' existing rights to the land, not to give him any new rights to the land. Instead, the court and the parties merely agreed that Jenkins' rights to the property should not be determined in the bankruptcy court forum.<sup>3</sup> R. 179, 182, 184. Therefore, the court below erred by granting a new lien in the Subject Property.

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<sup>3</sup> In his Appellee's Brief, Jenkins uses the "subject to all liens and interests" language from the Trustee's Deed to support his argument that the sale could have no effect at all on Jenkins' rights. The bankruptcy court and the parties specifically noted that Jenkins' interest in the Subject Property must be determined by the state court. R. 182. Any lien or interest would necessarily have arisen from the Agreement. As the Agreement did not give Jenkins any valid interest in the property, the Trustee's Deed affected a complete conveyance of Peterson's interest to Vetere. In the alternative, if a lien did exist as a result of the Agreement, the terms of the lien would be limited to 25% of the sales price by that Agreement. Thus, it is the Agreement that affects Jenkins' rights, not the Trustee's Deed.

Instead of seeking to prove that a valid lien exists, Jenkins merely assumes that he holds a lien on the Subject Property. A party seeking to enforce a lien has the burden of proving the validity of the lien. *See 1<sup>st</sup> Choice Bank v. Fisher Mechanical Contractors, Inc.*, 15 P.3d 1100, 1104 (Colo. App. 2000).<sup>4</sup> By simply assuming the validity of the lien, Jenkins has failed to meet his burden of proof. Furthermore, Vetere has shown that the plain meaning of the Agreement created no valid lien on the Subject Property, or alternatively, even if a valid lien is assumed, the Agreement created no lien that secured any more than \$2,000. *See infra* part V; Appellant’s Opening Brief, parts II.A & III.A. Therefore, the court erred in ordering foreclosure of the Subject Property, or alternatively erred in its ordering foreclosure for more than \$2,000.

### **III. VETERE MAKES NO NEW ARGUMENTS ON THIS APPEAL.**

Vetere’s argument “that there existed no liquidated sum due or owing to Mr. Jenkins” was, contrary to Jenkins’ assertion, adequately raised below. Appellee’s Brief, 12. Of course, “defenses and claims not raised [below] . . . cannot be considered for the first time on appeal.” *Bangerter v. Poulton*, 663 P.2d 100, 102 (Utah 1983). *See also State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994); *State v. Irwin*, 924 P.2d 5, 7 (Utah App. 1996). However, in examining the record, the centrality of the “no sum certain” argument is readily apparent. First, the record is replete with arguments that the

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<sup>4</sup> It should be noted that the determination of whether a valid lien exists is purely an issue of law because it depends only on the interpretation of the plain meaning of the Agreement. *Wagner v. Clifton*, 2002 UT 109, ¶ 12, 62 P.3d 440 (quoting *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 19, 54 P.3d 1139).

Agreement did not create a security interest in the Subject Property, but instead merely affected an assignment of proceeds. Second, the dispute both on appeal and in the court below has essentially centered on what amount, if any, was secured by an interest in the Subject Property. These two observations, taken together, effectively dispel any notion that this is a new or in Jenkins words a “novel argument.” Finally, Vetere argued below that there was no “specific amount owing” because he argued that the Agreement did not create a valid loan. Loans, mortgages, and trust deeds can all be characterized as obligations requiring a “specific amount owing.” The entirety of subsection II.B of Vetere’s original memorandum was devoted to proving that the Agreement did not constitute a valid loan agreement, R.228–29, thereby preserving the sum certain issue for appeal.

Vetere argued both in his memoranda and at the summary judgment hearing that the Agreement did not create a security interest in the land. For example, in his first memorandum below, Vetere specifically distinguished instruments that are typically used to convey an interest in real property—warranty deeds, quitclaim deeds, trust deeds, and mortgages—from the instrument at issue. R.227. Also, in that same memorandum, Vetere stated that “[b]ecause the Security Agreement did not give Jenkins an interest in the land (but only in the profits) Jenkins cannot ask for . . . foreclosure on the Parcels.” R.230. Furthermore, at the summary judgment hearing, Vetere argued that Jenkins’ “only claim to the property that we’re fighting about here . . . is that when it’s sold they get some money out of it.” R.331, 29. Thus, it is clear from the record that Vetere argued in the proceedings below that the Agreement affected only an assignment of

proceeds,<sup>5</sup> and therefore did not create a security interest in the land. In other words, the Agreement was ineffective in securing the transaction with an interest in the land.

The lack of a sum certain was also discussed extensively in the proceedings below. In fact, almost the entire legal dispute between the parties has centered on determining, if possible, the specific amount owing. Numerous places in the record show a lack of certainty as to what amount is secured by an interest in the property. For example, in his initial memorandum in support of summary judgment, Jenkins argues that he “is entitled to priority repayment of his \$12,000.00 as restitution default damages under black letter contract law.” R.113. Although Jenkins’ does not present a single valid argument as to why \$12,000 should be secured in the land, this passage clearly shows his contention that the secured sum is \$12,000. In contrast, Vetere has consistently argued that no damages are secured, or alternatively that at most \$2,000 in damages were secured. *See, e.g.* R.283-84. Thus, many of the arguments made below were made based on the fact that there was no ascertainable specific amount owing.

Finally, Vetere argued below that the Agreement did not effect a *loan* secured by an interest in the Subject Property. Jenkins claims that Vetere makes a new argument on

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<sup>5</sup> In a particularly puzzling argument, Jenkins mistakenly states that Vetere argued in his Appellant’s Opening Brief that the Agreement affected a conveyance of Peterson’s interest. Appellee’s Brief, 4. Apparently, Jenkins construed the language “assignment of proceeds” to mean “conveyance of an undivided fee interest in the property.” *Id.* at n.3. The two phrases, of course, describe two very different transactions. An assignment of proceeds transaction requires that any money (proceeds) obtained from a sale be given (assigned) to the designated party. A conveyance of an undivided fee interest in a property, in contrast, gives the whole “bundle of sticks.” Thus, where Vetere argued that the Agreement affected an assignment of proceeds, he did not go against any argument that he made below.

appeal; however, the alleged new argument is that the Agreement did not effect *an obligation with a specific amount owing* secured by an interest in the Subject Property. *A loan and an obligation with a specific amount owing* are essentially the same thing, and consequently, the arguments are also the same. The following quotation from Vetere's initial memorandum below is especially illustrative: in discussing whether the \$12,000 was given as a loan, and therefore whether there was a debt owing, Vetere stated, "[t]he Security Agreement did not contain a time frame within which the money would have to be paid back, *amount to be paid*, amount of interest to accrue, or a plan for payments to be made to Jenkins." R.229 (emphasis added). Looking at the *no loan* argument below, and the *no sum certain* argument on appeal, it is readily apparent that they are the same argument. In a nutshell, the only way the district court could have logically concluded that a lien existed on the Subject Property for \$12,000, is to find that the Agreement affected a secured loan of \$12,000 from Jenkins to Peterson. Just as he did below, however, Vetere argues that there was no loan, or in other words, no specific amount owing, and thus, that there can be no lien on the Subject Property. Thus, because an entire subsection of Vetere's initial memorandum below was devoted to the loan argument, R.228-29, Vetere may certainly raise this argument again on appeal.

#### **IV. TO EFFECT A VALID MORTGAGE, THE SPECIFIC AMOUNT MUST BE ASCERTAINABLE UPON CREATION OF THE MORTGAGE.**

The Agreement did not create a valid mortgage under Utah law because either there was no specific amount owing when the mortgage was allegedly created, or



alternatively, any mortgage which might have been created was released upon sale of the subject property by the Bankruptcy Trustee. In *Bangerter v. Poulton*, the Utah Supreme Court held that “to establish a valid trust deed or mortgage, a legal debt or obligation with a specific amount owing must exist.” 663 P.2d at 101.<sup>6</sup> Jenkins cites a general rule from *American Jurisprudence* that is plainly in conflict with the rule espoused by the court in *Bangerter*.<sup>7</sup> Appellee’s Brief, 13. *American Jurisprudence*, of course, is not binding authority, and in this case, it is not even an accurate representation of Utah law. Perhaps some jurisdictions do not require a debt with specific amount owing to create a valid mortgage; however, in order to promote clarity in recording, many states, including Utah, have chosen to require such a sum certain. See, e.g. *Bangerter*, 663 P.2d at 101; *Smith v. Haertel*, 125 Colo. 348, 244 P.2d 377, 379 (1952); *E.E.E., Inc.*, 318 N.W.2d at 106. Essentially, a person who wants to purchase real estate should be able to look at the

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<sup>6</sup> Jenkins’ arguments against the *Bangerter* rule can only be characterized as weak. He says that “Mr. Vetere’s reliance upon the language . . . in *Bangerter* . . . is seriously flawed,” but fails to say in what way. He notes that “a cursory perusal of [*Bangerter*] will only bolster” his position, but does not cite a single instance where it does so. Finally, he attempts to cast aside a Utah Supreme Court decision and replace the decision with a supposedly “well accepted [sic] and uniformly applied legal principle” from Am. Jur.

<sup>7</sup> Jenkins also cites a North Dakota decision which, interestingly enough, directly contradicts his position. Appellee’s Brief, 13. The North Dakota Supreme Court held that “any obligation capable of being reduced to a money value may be secured by a mortgage.” *E.E.E., Inc. v. Hanson*, 318 N.W.2d 101, 106 (N.D. 1982). In the instant case, “25% of the selling price on any parcel(s) sold” could not be “reduced to a money value” until a sale had occurred. Thus, under either the Utah or North Dakota rule, the mortgage is invalid.

recorded documents to learn the exact amount and character of all encumbrances on the property. *Smith*, 244 P.2d at 379.

**A. Jenkins' Post-Breach Damage Claim Does Not Qualify As a Sum Certain Because a Sum Certain Must Be Ascertainable from the Recorded Document.**

Twelve thousand dollars cannot be the sum certain because, if it were, the recordation policy behind the sum certain rule would be frustrated, and an inequity would result. Jenkins adamantly claims that \$12,000 is the specific amount owing, but cites no authority to support this contention. Apparently, Jenkins believes that the law only requires *any* certain sum at *any* time. Thus, Jenkins argues that a mortgage, invalid for lack of a sum certain at its inception, somehow becomes valid when there is a breach allowing for an ascertainable amount of damages. This is simply not a plausible reading of the sum certain rule. The recordation policy behind the sum certain rule would be completely frustrated if a purchaser had no way of knowing the nature or extent of an encumbrance. Such an interpretation would also create an inequity in the present case as Mr. Vetere could not have known when he purchased the land from the Bankruptcy Trustee that it supposedly secured a \$12,000 damage claim. As discussed in his Opening Appellate Brief, Vetere purchased the land from the Bankruptcy estate for \$8,000 with notice only of a disputed encumbrance, or at most, an encumbrance of \$2,000 (25% of the sale price). *See* Appellant's Opening Brief, 16–17.

**B. The Rule of *Bill Nay & Sons Excavating v. Neeley Construction Company* Does Not Apply to the Instant Case Because the Facts Are Clearly Distinguishable.**

Jenkins relies on *Bill Nay & Sons Excavating v. Neeley Construction Company*, 677 P.2D 1120 (1984) (hereinafter “*Bill Nay*”), to support a number of his claims, but he misapplies language from the case,<sup>8</sup> and in any event, *Bill Nay* is clearly distinguishable from the instant case. The facts of *Bill Nay* are as follows: Neeley Construction purchased real estate from the Manti Improvement of Business Association. Plaintiff Bill Nay subsequently obtained a \$9,000 judgment against Neeley Construction. Neeley Construction was insolvent, and in order to prevent a lien on the property, they arranged to have the land transferred to a third party. Because Neeley Construction had supplied the entire consideration for the land, the court held that the third party merely held the land in constructive trust for Neeley Construction, and that the land could therefore be reached by Neeley Construction’s creditors, including Bill Nay.

The instant case is distinguished on a number of points. First, the central issue in *Bill Nay* was whether the fraudulent party had an interest in property such that the defrauded party could attach a lien to it, *Id.* at 1122, not whether there was a valid

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<sup>8</sup> On page 13 of his brief, Jenkins misuses *Bill Nay*. To support his contention that “Utah Courts have consistently recognized and enforced . . . secured interests in real property to secure performance of any number of obligations[,]” Jenkins quotes the following language from *Bill Nay*: “The interest of a purchaser under a real estate contract is an interest in real property that can be mortgaged.” 677 P.2d at 1121. However, the court in that case was merely stating that, where a purchaser has provided the consideration under a contract to purchase land, they have a foreclosable interest in real property. Thus, the case does not speak to what obligations may be secured by a mortgage, but speaks only to the determination of whether a party has a foreclosable interest. In this case, it is indisputable that neither Peterson nor his Bankruptcy Estate has any foreclosable interest in the Subject Property, having sold it to Vetere for \$8,000.

existing lien which is the issue in the instant case. Furthermore, the third party in *Bill Nay* had no valid interest in the property. Therefore, asserting a lien against the property presented no inequity as against the third party. Also, Neeley Construction was both the owner of the property, and the fraudulent party in the action. In contrast, asserting a lien against the Subject Property in the instant case would work a great inequity against Vetere. He does have a valid interest in what was formerly Peterson's interest, because he paid \$8,000 to buy it. Furthermore, Vetere was in no way involved with Peterson's fraudulent transactions. Thus, where it was just to impose a lien against Neeley Construction in *Bill Nay*, it would be patently unjust to impose a lien against Vetere's property.

**C. Jenkins Raises New Statutory Arguments on This Appeal, but Even If These Arguments Are Not Barred, They Are Unpersuasive.**

Jenkins also cites *Bill Nay* to support a new argument that Utah Code section 78-22-1, and the Utah Uniform Fraudulent Transfer Act apply to this case, but again fails to articulate a single argument as to how they apply. UTAH CODE ANN. § 78-22-1 (2000); *id.* §§ 25-6-1 to -13 (2000). These claims are inadmissible on this appeal because they were neither pled nor argued in the district court,<sup>9</sup> but even if the Court were to consider them, neither of these statutes applies to the instant case.

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<sup>9</sup> Jenkins did not raise either of these claims at the district court level. Although Jenkins asserts the court's authority to affirm on any grounds, there has recently been some scholarly commentary suggesting that allowing new arguments by Appellees, but not Appellants, may be a violation of basic due process rights. D. Scott Crook, *Affirming the Untested: Affirming a Trial Based on Issues Raised Sua Sponte*, UTAH B.J., Oct. 2001, at 10, 11. Indeed, this Court has squarely refused to rule on new grounds unless the new

First, section 78-22-1 outlines the procedures for and limitations on attaching a lien on property to satisfy a judgment. *Id.* § 78-22-1. Jenkins is not, however, seeking to attach a lien to satisfy a judgment; he claims an interest in the Subject Property through a lien that purportedly preexists this court action. The Order from the district court did not impose a judgment against Vetere, but merely recognized the supposed validity of an existing lien, and ordered foreclosure on that lien. R. 306-09. Furthermore, section 78-22-1 allows for attachment of a lien on any “real property of the judgment debtor,” UTAH CODE ANN. § 78-22-1 (emphasis added), and Vetere is certainly not a judgment debtor as summary judgment was granted dismissing all claims against Vetere personally and as a member of the alleged partnership.<sup>10</sup>

Second, the Utah Uniform Fraudulent Transfer Act does not apply because, among other reasons, the transfer from the Bankruptcy Estate to Vetere was a “good faith transfer” under section 25-6-9 of the code. The Uniform Fraudulent Transfer Act seeks to remedy situations similar to *Bill Nay* where a person transfers property in an effort to prevent a creditor from attaching a lien to the property. UTAH CODE ANN. § 25-6-1 to -

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grounds for affirmance are (1) apparent on the record, and (2) thoroughly briefed. *State v. Montoya*, 937 P.2d 145, 149–150 (Utah App. 1997). Jenkins’ claims fail on both of these elements, and are therefore inadmissible on this appeal.

<sup>10</sup> In Footnote 4 of Jenkins’ Appellee’s Brief, he misrepresents the circumstances surrounding the voluntary withdrawal of his claims against Mr. Vetere personally. The voluntary withdrawal was simply that, a voluntary withdrawal. It was not a conditional withdrawal as Jenkins now attempts to characterize it. See R. 331, 44-45. Furthermore, Jenkins’ threat to reopen the claims against Vetere is especially hollow where the final order from the District Court signed by Jenkins dismissed those claims with prejudice. R. 309.

13. As discussed in the previous paragraphs, the instant case is clearly distinguishable from this scenario. Under the act, a transfer is fraudulent

if the debtor made the transfer . . . (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor: (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

The inapplicability of this statute becomes clear when you consider the absurdity resulting from an attempt to apply the act to the facts of this case. Such an attempt would entail, *arguendo*, Peterson transferring an interest to Jenkins in order to prevent the creditor (Jenkins?) from getting to the interest in the property. Thus, the absurdity is that Jenkins would receive the interest in order to keep himself from attaching a lien to the interest.

Jenkins' only other possible application of the act would require him to characterize the transfer from the Bankruptcy Trustee to Vetere as fraudulent. Section 25-6-9 of the code, however, exempts good faith transfers from the remedial provisions of the act. As part of the good faith exclusion, that section specifically exempts any transfer "for a reasonably equivalent value," and precludes enforcement as "against any subsequent transferee . . . ." *Id.* Therefore, if Jenkins argues that the alleged transfer from Peterson to Jenkins was fraudulent, the act does not apply in this motion for summary judgment because Vetere is a "subsequent transferee." Alternatively, if Jenkins argues that the bankruptcy transfer was fraudulent, the act does not apply because the

bankruptcy court specifically noted that \$8,000 was a reasonable purchase price for the Subject Property. R. 192.

Thus, even if the court decides to consider Jenkins' new argument, it does not avail Jenkins as neither of the statutes applies to the instant facts.

**V. THE AGREEMENT DOES NOT EFFECTIVELY CONVEY ANY INTEREST IN THE SUBJECT PROPERTY, BUT IF IT DOES, IT CONVEYS, AT MOST, A SECURITY INTEREST SECURING ONLY 25% OF THE PROCEEDS FROM ANY SALE.**

Ultimately, the district court erred principally by not giving effect to the plain meaning of the Agreement. "If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *Wagner*, 2002 UT 109, ¶ 12 (quoting *WebBank*, 2002 UT 88, ¶ 19).<sup>11</sup> The language of the Agreement is plain and unambiguous on its face, and thus, the intent of the parties must be derived from that plain meaning. Therefore, any evidence that Jenkins belatedly offers beyond the Agreement itself is barred from consideration.

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<sup>11</sup> Jenkins implies that there is ambiguity in the Agreement, and notes that any ambiguity needs to be construed against the drafter. Appellee's Brief, 19 (*citing Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1372 (Utah 1996)). While this is the law, it has no relevance in this case where there is no ambiguity. If there had been any ambiguity, summary judgment could not have been granted, and a trial would be necessary to hear testimony as to the parties' intent. However, even if there were ambiguity, Jenkins cannot draw any connection between Peterson, who drafted the document, and Vetere. Thus, there is no reason to construe the alleged ambiguities against Vetere, because he is certainly not the drafter. In fact, he did not even know that the Agreement existed until more than six months after it was signed by Jenkins and Peterson. See Appellant's Opening Brief, 3–4.

As the plain meaning of the Agreement is central to this appeal, a thorough exposition of that plain meaning is in order. A copy of the Agreement is attached as Addendum Two of Appellant's Opening Brief, but for the convenience of the Court, the relevant language from the Agreement is quoted below.

**SECURITY AGREEMENT**

FOR THE SUM OF TWELVE THOUSAND DOLLARS (\$12,000), **KENT PETERSON** hereby grants to **LARRY K. JENKINS** an undivided interest in approximately 30 acres of vacant land located in Grand County, Utah. Parcel #1 consists of 25 acres +/- and Parcel #2 has 5 acres +/-; and, they are described below:

[the Agreement here gives the property descriptions of Parcels #'s 1 and 2]

**KENT PETERSON AND LARRY K. JENKINS HEREBY AGREE** that for the above-mentioned consideration and the undivided security interest in the property granted, Mr. Jenkins shall receive 25.0% of the selling price on any parcel(s) sold from the parcels listed above. This percentage due Mr. Jenkins shall be made part of the seller's closing instructions to the title company; and, upon successful closing on all or part of the subject properties, Mr. Jenkins shall receive the amount due him within three business days from Settlement Date.

[the Agreement was signed by Kent Peterson, Larry K. Jenkins, and Rennie L. Acerson, Notary Public]

**A. If The Agreement Effectively Conveyed Any Interest at All, It Conveyed Only a Security Interest in the Subject Property.**

The Agreement could not and did not effectively convey any interest in the Subject Property because it fails to specify a specific amount owing, but if, *arguendo*, it did convey an interest, the plain language of the document limits the conveyed interest to a security interest. The Agreement plainly did not convey a fee interest for two reasons: (1) the title of the document is inconsistent with a conveyance of property; and (2), the



second clause of the Agreement must be given effect as limiting any grant in the first clause.

First, the title of the document is evidence that the parties did not intend for the instrument to convey an interest in property. An interest in property is generally conveyed through warranty deeds, quitclaim deeds, trust deeds, and mortgages. *See* UTAH CODE ANN. § 57-1-1 et. seq. (2000). Noticeably absent from this list is “Security Agreements.” As such, a person reading the title of the document could not reasonably believe that it was intended to convey an interest in real property.

Second, even if the document is read as a deed, the plain language of the Agreement cannot be read as a conveyance in fee of Peterson’s former interest in the property. In Utah, “the whole deed and every part thereof is to be taken into consideration in determining the intent of the grantor, and clauses in the deed subsequent to the granting clause are given effect so as to curtail, limit, or qualify the estate conveyed in the granting clause.” *Haynes v. Hunt*, 85 P.2d 861, 863 (Utah 1939). Admittedly, if one reads only the first clause of the Agreement, he or she might think that Peterson had conveyed some unspecified interest in the land.<sup>12</sup> However, the second clause can only be read to limit any such grant. Where the second clause refers to “the undivided **security** interest in the property **granted**,” (emphasis added), it is impossible to read the

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<sup>12</sup> Jenkins argues, as he did below, that a conveyance of any unspecified interest is effective in conveying all of that interest. He says that this rule is “well recognized under Utah law, as it was under common law,” but again fails to cite a single source substantiating this claim. Appellee’s Brief, 16. Where a party makes an argument, but fails to cite any sources to support it, the court need not even address the argument. *See* UTAH R. APP. P. 24(a)(9); *Walker v. U.S. General, Inc.*, 916 P.2d 903, 908 (Utah 1996).

Agreement as conveying an interest in fee because the second clause must be “given effect so as to . . . limit . . . the granting clause.” *Haynes*, 85 P.2d at 863.

In short, notwithstanding the omission of the word “security” in the initial clause, the interest granted in the first clause can only be a security interest. Furthermore, such a security interest would be ineffective because there must be a “specific amount owing” to effect a valid mortgage or trust deed.<sup>13</sup> The plain meaning of the Agreement manifests the parties’ intent to convey only a security interest to Jenkins. A security interest is therefore the maximum interest possibly granted. Of course, if a security interest, or mortgage, was granted, it would be ineffective for lack of a sum certain. Therefore, Jenkins has no valid claim to the Subject Property.

**B. If the Agreement Effectively Granted a Security Interest, the Plain Language of the Agreement Limits the Security to “25.0% of the selling price on any parcel(s) sold.”**

Even assuming that the Agreement was effective in granting a valid security interest, the district court erred in ordering foreclosure on the property in the amount of \$12,000 because the plain meaning of the instrument limits the secured amount to 25% of the proceeds from any sale. The second clause of the Agreement clearly defines the benefit that Jenkins sought from this bargain. It says that “Mr. Jenkins shall receive 25.0% of the selling price on any parcel(s) sold from the parcels above.” Thus, Jenkins and Peterson entered into an investment contract. Jenkins invested \$12,000, and in return, he was promised 25% of the proceeds from any sale. Therefore, if anything was

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<sup>13</sup> See discussion *supra* part IV.

secured with a security interest in the Subject Property, it was Peterson's obligation to pay 25% of the proceeds from a sale.<sup>14</sup> As Peterson's interest was sold to Vetere for \$8,000, Jenkins is, at most, entitled to 25% of the sale price, or \$2,000. Thus, the district court erred because the plain language of the instrument cannot be stretched to allow for a \$12,000 award secured in the Subject Property.

### **Conclusion**

In reversing the decision below, this Court will not damage Jenkins in any way. He will retain all claims against the party responsible for his losses, Peterson. The bankruptcy court has already removed the temporary stay, and claims of fraud are not dischargeable in bankruptcy in any case. Regardless of this Court's decision on this appeal, Jenkins retains all rights to continue to pursue his claims against Peterson.

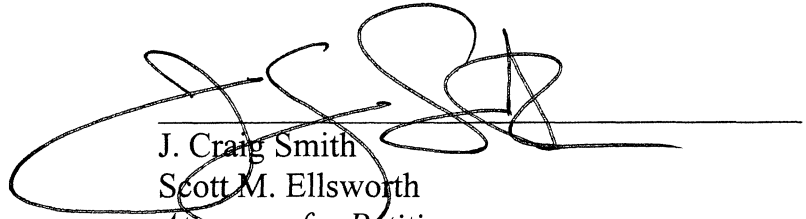
The Court should therefore reverse the judgment below and grant judgment for Vetere dismissing Jenkins' remaining claims to the Subject Property. The Court should further award Vetere costs and attorney fees because Vetere has been forced to expend considerable resources to defend himself against Jenkins' baseless claims.

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<sup>14</sup> As pointed out in Appellant's Opening Brief, this presents a paradox where the owner of the property is not the person who owes money to the claimant. A substantially similar situation was faced by the Florida Court of Appeals in *Secretary of Veterans Affairs v. Roma Food Enterprises of Florida, Inc.*, 840 S.2d 1066 (Fla. App. 2003). The Florida court held that, because of this incongruity, the agreement in that case merely created an assignment of proceeds, and the claimant had no right in the property. *Id.* at 1066-67. Interestingly, even though Mr. Vetere cited and argued the applicability of this case in his Opening Appellate Brief, Jenkins fails to address this case in his response.

Dated this 14<sup>th</sup> day of October, 2003.

**Smith Hartvigsen, PLLC**



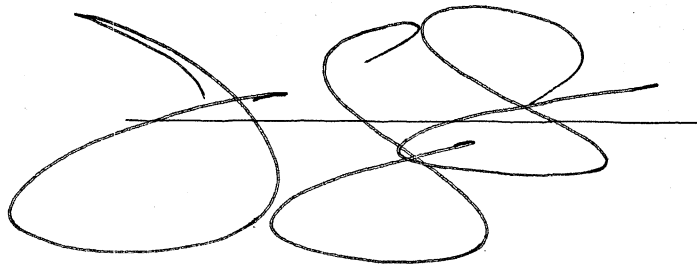
J. Craig Smith  
Scott M. Ellsworth  
*Attorneys for Petitioner,  
Timothy Vetere*

### Certificate of Service

On this 14<sup>th</sup> day of October, 2003, two true and correct copies of the foregoing *Petitioner's Opening Brief* were mailed, United States mail, postage prepaid, to the following:

David Crabtree, Esq.  
10714 South Jordan Gateway, Suite 300  
South Jordan, Utah 84095

Kent Peterson  
9519 South 4030 West #2  
South Jordan, Utah 84095

A handwritten signature in black ink, consisting of several loops and a horizontal line, positioned below the address for Kent Peterson.