

1993

# Larry M. Chaffin and Greta M. Chaffin v. Mark R. Cromar and Geneve D. Cromar : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LARRY M. CHAFFIN and GRETA M. CHAFFIN, )

Plaintiffs, )

vs. )

No. 930539-CA

MARK R. CROMAR and GENEVE D. CROMAR, )

Defendants and  
Third-Party Plaintiffs,  
and Appellants )

vs. )

Priority No. 15

DONALD DWYER, )

Third-Party Defendant  
and Fourth-Party  
Plaintiff, and Appellee )

vs. )

GREG L. WINGET, et al., )

Fourth-Party Defendants. )

OF APPEALS  
F

930539

BRIEF OF APPELLANTS

Appeal from a Summary Judgment of  
the Third Judicial District Court of  
Salt Lake County, State of Utah.  
Honorable Kenneth Rigtrup, Judge.

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**FILED**

Utah Court of Appeals

OCT 06 1993

  
Mary T. Noonan

LARRY M. CHAFFIN and GRETA M. CHAFFIN,  
Plaintiffs,  
vs.  
MARK R. CROMAR and GENEVE D. CROMAR,  
Defendants and  
Third-Party Plaintiffs,  
and Appellants  
vs.  
DONALD DWYER,  
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**PARTIES TO THE PROCEEDINGS BELOW**

LARRY M. CHAFFIN and  
GRETA M. CHAFFIN

Plaintiffs

vs.

MARK R. CROMAR and  
GENEVE D. CROMAR

Defendants, Third-Party  
Plaintiffs, and Appellants

vs.

DONALD DWYER

Third-Party Defendant,  
Fourth-Party Plaintiff,  
and Appellee

vs.

GREG L. WINGET,  
BRENT E. WINGET,  
JEN S. WINGET,  
RIVERVIEW PLAZA ASSOCIATES, LTD.  
and MERRILL TITLE COMPANY

Fourth-Party Defendants

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LARRY M. CHAFFIN and GRETA M. CHAFFIN,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 930539-CA
	)	
MARK R. CROMAR and GENEVE D. CROMAR,	)	
	)	
Defendants and	)	Priority No. 15
Third-Party Plaintiffs,	)	
and Appellants	)	
vs.	)	
	)	
DONALD DWYER,	)	
	)	
Third-Party Defendant	)	
and Fourth-Party	)	
Plaintiff, and Appellee	)	
	)	
vs.	)	
	)	
GREG L. WINGET, et al.,	)	
	)	
Fourth-Party Defendants.	)	

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**BRIEF OF APPELLANTS**

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**JURISDICTION**

This appeal is from a summary judgment of the Third Judicial District Court of Salt Lake County insofar as it denies Appellants' right to recover reasonable attorney's fees in connection with an express contract of indemnification. The judgment was entered on November 20, 1992. It was certified as final on June 23, 1993. The notice of appeal was filed on June 30, 1993. The jurisdiction

of the Utah Court of Appeals rests upon Utah Code Ann. §78-2a-3(2)(k)(1992).

#### **ISSUES PRESENTED FOR REVIEW**

1. Did the trial court err in ruling that the phrase "including reasonable attorney's fees" contained in a hold harmless agreement did not apply to enforcement of the agreement itself?

2. Did the trial court err in denying an award of attorney's fees incurred in defending against the claims covered by the indemnification agreement between the parties?

These questions present matters of law for the court to be determined under a correctness standard. Gate City Fed. Sav. & Loan v. Dalton, 808 P.2d 1117 (Utah App. 1991).

#### **DETERMINATIVE PROVISIONS OF LAW**

This case raises a question of contractual rather than constitutional or statutory construction. The contract documents are located in the Addendum at tabs A, B, C and D respectively.

#### **STATEMENT OF THE CASE**

This is an action by Defendants, Third-party Plaintiffs, and Appellants, Mark and Geneve Cromar, against Third-party Defendant and Appellee, Donald Dwyer, to enforce the terms of a hold harmless agreement executed by Dwyer in connection with the purchase of real estate from the Cromars. The trial court entered summary judgment in favor of the Cromars on the agreement, but denied their request for reasonable attorney's fees. The Cromars appeal the adverse ruling on attorney's fees.

## STATEMENT OF FACTS

The following material facts are uncontroverted.

On or about November 6, 1979, the Cromars purchased certain real property located in Salt Lake County, Utah, from Larry M. Chaffin and Greta M. Chaffin (the "Chaffins"), the original plaintiffs in this case. (R. 172; 183). In connection with the purchase, the Cromars executed and delivered a promissory note secured by a second deed of trust to the Chaffins in the principal amount of \$74,000.00 (the "Note"). (R 172-73; 183-84; Add. A, B.)

On or about July 14, 1983, Donald Dwyer purchased the property from the Cromars who conveyed it to him by warranty deed. (R 173; 184; Add. C.) At the closing of this transaction, Dwyer executed an Agreement Surviving Real Estate Closing (the "Agreement") whereby he assumed the Note and agreed to hold the Cromars harmless, including reasonable attorney's fees, from any and all obligations contained in the Note and Second Trust Deed. (R. 173; 184.) The precise contractual language is as follows:

Buyer hereby holds Seller harmless, including reasonable attorney's fees, from any and all obligations contained in that certain first Trust Deed (including the "due-on-sale" clause, if any), and related Note dated September 29, 1974, in favor of UTAH MORTGAGE LOAN CORPORATION, in the original amount of \$475,000.00, copies of which are attached hereto and incorporated herein, and from any and all obligations in that certain Second Trust Deed (including the "due-on-sale" clause, if any) and related notes dated November 6, 1979, in favor of DON L. BUEHNER, UNIVEST CORPORATION, LARRY M. CHAFFIN and GRETA M. CHAFFIN, husband and wife in the original amount of \$185,000.00, copies of which are attached hereto and incorporated herein. (R. 180-81; Add. D.)

Dwyer owned the property for a time, made payments under the Note directly to Chaffins, and subsequently sold the property to a third party. (R. 173; 184.) The Cromars were neither released nor discharged by the Chaffins from their obligations under the Note; Dwyer was not released, substituted, nor discharged from his obligations under the Agreement. (R. 173; 184.)

On or about November 22, 1990, the Chaffins filed a complaint in this action against the Cromars asserting a right to recover full payment under the Note. (R. 174; 185). Shortly thereafter, the Cromars by letter addressed and delivered to Dwyer's attorney, J. Thomas Bowen, demanded payment to be made by Dwyer of all amounts due and owing under the Note and tendered the defense of the action. (R. 174; 185.) Dwyer refused and failed to pay any amounts due under the Note and refused and failed to accept the tender of the defense. (R. 174; 185.)

Upon learning of Dwyer's refusal to pay the amount due or to defend the action, the Cromars employed legal counsel to respond to the complaint which had been filed against them. (R. 174; 185.)

On or about December 13, 1991, summary judgment was entered in favor of the Chaffins and against the Cromars on the Note in the total amount of \$83,108.87. (R. 137-38.) The judgment included Chaffins' costs and attorney's fees in the amount of \$2,454.82. (R. 137-38.) This portion of the judgment has not been challenged.

On or about February 20, 1992, the Cromars again demanded that Dwyer honor the terms of the Agreement and hold them harmless by making payment of all amounts due under the summary judgment of the

court, together with the Cromars' costs and reasonable attorney's fees incurred in defending the action. (R. 175; 186.) Dwyer again refused and failed to pay any amounts due the Cromars under the terms of the Agreement. (R. 175; 186.)

On or about August 11, 1992, the trial court made a Minute Entry under Rule 4-501 granting the Cromar's Motion for Summary Judgment as prayed and awarding "such attorney's fees and costs against Dwyer as are supported by Affidavit and as are awarded by the Court." (R. 260-62; Add. E.)

Following submission of the Cromar's affidavit and proposed judgment, Dwyer filed a notice of objection to that portion of the proposed judgment which would have granted the Cromars' attorney's fees incurred in seeking enforcement of the Agreement against Dwyer. (R. 264.) On or about November 20, 1992, the trial court ruled in favor of the objection as a matter of law, modifying its minute entry of August 11, 1992 and striking the award of attorney's fees to the Cromars in its entirety. (R. 318-20; Add. H.) The summary judgment in favor of Cromars and against Dwyer was then signed and entered as modified by the order granting Dwyer's objection. (R. 315-17; Add. I.) The Cromars appeal from that portion of the judgment striking the award of attorney's fees.

## **SUMMARY OF THE ARGUMENT**

THE CROMARS ARE ENTITLED TO RECOVER ATTORNEY'S FEES REASONABLY AND NECESSARILY INCURRED IN CONNECTION WITH THE INDEMNIFICATION AGREEMENT.

### **A. Enforceable Contract.**

The Agreement Surviving Real Estate Closing ("Agreement") is a valid and binding contract of indemnification. Attorney's fees reasonably and necessarily incurred in enforcing such a contract are recoverable when the contract so provides.

### **B. Contract Documents.**

#### **1. Rules of Construction.**

In interpreting the terms of a contract, resort must be had to the Agreement as a whole, including the circumstances, nature, and purpose of the contract.

Where an express indemnity contract is involved, the extent of the duty to indemnify must be determined from the contract itself. Any doubt as to the meaning of an express indemnification provision should be resolved in favor of the indemnitee.

#### **2. Contractual Language.**

The contractual language involved is located in two separate documents: (1) The Agreement Surviving Real Estate Closing executed by Cromars and Dwyer; and (2) The Promissory Note executed by Chaffins and Cromars and incorporated by reference into the Agreement. The precise language is as follows:

Buyer hereby holds Seller harmless, including reasonable attorney's fees, from any and all obligations contained in that certain first Trust Deed (including the "due-on-sale" clause, if any), and related Note dated September 20, 1974, in favor of UTAH MORTGAGE LOAN CORPORATION, in the original amount of \$475,000.00, copies of which are attached hereto and incorporated herein, and from any and all obligations in that certain Second Trust Deed (including the "due-on-sale" clause, if any) and related Notes dated November 6, 1979, in favor of DON L. BUEHNER, UNIVEST CORPORATION, LARRY M. CHAFFIN, husband and wife in the original amount of \$185,000.00, copies of which are attached hereto and incorporated herein.

Agreement Surviving Real Estate Closing. (Add. D.) (Emphasis added.)

If this note is collected by an attorney after default in the payment of principal or interest, either with or without, suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

Promissory Note dated November 6, 1979. (Add. A.) (Emphasis added.)

3. Extent of Dwyer's Obligation.

a. The attorney's fee phrase contained in the Agreement applies to obligations contained in both First and Second Trust Deeds and related Notes because of its placement in the sentence before recitation of the principal obligations.

b. Dwyer's primary obligation to pay attorney's fees incurred by Chaffins in collecting the Note was created by the attorney's fee language in the Note itself which he assumed.

c. Dwyer's secondary obligation to pay attorney's fees incurred by Cromars in connection with the Note was created by

the separate and distinct insertion of attorney's fees language into the Agreement.

1) The attorney's fees provision was inserted before the description of the underlying obligations thereby implying a commitment in addition to those obligations.

2) The attorney's fees provision in the Agreement was unnecessary and redundant unless it referred to an additional obligation beyond payment of the Chaffins' fees, since those were already covered by express language in the Note which was incorporated by reference into the Agreement.

3) Courts in other jurisdictions have construed similarly broad language to permit recovery of attorney's fees both for defense of the principal claim indemnified against and for enforcement of the indemnity agreement itself.

4) Public policy favors making an indemnitee whole by allowing recovery of attorney's fees reasonably and necessarily incurred in defending against the principal claim covered by an indemnification agreement and in enforcing the agreement itself; especially where the indemnitor, as here, is given timely notice and tendered the defense of the action, but utterly fails and refuses to meet his contractual obligations.



## ARGUMENT

### INTRODUCTION

To indemnify is to save or hold harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss. Hasbrouck v. Carr, 145 P. 133, 136 (N.M. 1914); Black's Law Dictionary, (5th ed. 1979). It is an obligation resting on one party to make good a loss or damage incurred by another. Rossmoor Sanitation, Inc. v. Pylon, Inc., 532 P.2d 97, 100 (Cal. 1975). "The right exists when there is a legal obligation on the indemnitee to pay or a sum is paid by him for which the indemnitor should make reimbursement." INA Ins. Co. v. Valley Forge Ins. Co., 722 P.2d 975, 980 (Ariz. App. 1986).

This case involves the proper construction of an express contract of indemnity, i.e., the Agreement Surviving Real Estate Closing between the parties executed on July 14, 1983. (Add. D). The first issue is whether the contract provides for recovery of attorney's fees for enforcement of the Agreement itself, including collection of the judgment against Dwyer. The second issue is whether the Cromars are entitled to recover attorney's fees incurred in defense of the principal action filed by the Chaffins.

## I.

THE CROMARS ARE ENTITLED TO RECOVER ATTORNEY'S FEES REASONABLY AND NECESSARILY INCURRED IN ENFORCING THEIR RIGHT TO INDEMNITY PURSUANT TO THE EXPRESS CONTRACT BETWEEN THE PARTIES.

### A. Enforceable Contract.

It has long been established in Utah that an award of attorney's fees is proper only if supported by statute or contract. B & R Supply Co. v. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216 (1972). When expressly provided by contract, attorney's fees reasonably and necessarily incurred in enforcing the right to indemnity are recoverable. 42 C.J.S. Indemnity § (1991).

In this case, summary judgment based on the Agreement Surviving Real Estate Closing was entered in favor of the Cromars and against Dwyer on November 20, 1992. (Add. I). That judgment was not appealed by Dwyer and is now final. (Add. J, K.). Consequently, the valid and binding nature of the underlying indemnification Agreement has been established. The question is whether Dwyer's promise to hold the Cromars harmless includes the obligation to pay the attorney's fees incurred by the Cromars in enforcing the Agreement itself.

### B. Contract Documents.

#### 1. Rules of Construction.

"When a question arises regarding a written document, the first source of inquiry must be the document itself, considered in its entirety." Hal Taylor Assocs. v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982). In interpreting the terms of a contract, the

court must look to the Agreement as a whole including the circumstances, nature, and purpose of the contract. Utah State Medical Ass'n. v. Utah State Employees Credit Union, 655 P.2d 643, 646 (Utah 1982).

A contractual provision is not necessarily ambiguous just because one party gives that provision a different meaning than another, but rather to demonstrate ambiguity, contrary positions of the parties must each be tenable. Plateau Mining Co. v. Utah Div. of State Lands and Forestry, 802 P.2d 720, 725 (Utah 1990). A contractual provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies. Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1990). "In determining whether a provision in a contract is ambiguous, the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words used, and reference must be made to all of the Agreement's provisions." Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371, 374 (Colo. 1990). Whether ambiguity exists in a contract is a question of law for the court. Winegar, 813 P.2d at 108.

Where an express indemnity contract is involved, the extent of the duty to indemnify must be determined from the contract itself. INA Ins. Co. v. Valley Forge Ins. Co., 772 P.2d at 979. Any doubt as to the meaning of an express indemnification provision should be resolved in favor of the indemnitee. 772 P.2d at 979 n2.

## 2. Contractual Language.

In this case, Dwyer's promise to indemnify Cromars is found in the Agreement at paragraph d. The entire paragraph reads as follows:

Buyer hereby holds Seller harmless, including reasonable attorney's fees, from any and all obligations contained in that certain first Trust Deed (including the "due-on-sale" clause, if any), and related Note dated September 20, 1974, in favor of UTAH MORTGAGE LOAN CORPORATION, in the original amount of \$475,000.00, copies of which are attached hereto and incorporated herein, and from any and all obligations in that certain Second Trust Deed (including the "due-on-sale" clause, if any) and related Notes dated November 6, 1979, in favor of DON L. BUEHNER, UNIVEST CORPORATION, LARRY M. CHAFFIN, husband and wife in the original amount of \$185,000.00, copies of which are attached hereto and incorporated herein.

Agreement Surviving Real Estate Closing. (Add. D.) (Emphasis added.)

As it happened, Chaffins sued Cromars on the promissory note dated November 6, 1979, and obtained judgment for the entire unpaid balance including accrued interest, attorney's fees, and costs. (R. 137-38.) The relevant language of the Note which defined Cromars' obligation to Chaffins and therefore Dwyer's primary obligation to the Cromars reads as follows:

If this note is collected by an attorney after default in the payment of principal or interest, either with or without, suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

Promissory Note dated November 6, 1979. (Add. A.) (Emphasis added.)

### 3. Extent of Dwyer's Obligation.

Dwyer argued below that he was not obligated to pay any of Cromars' attorney's fees since the language in the Agreement "does not contain any reference to attorney's fees relating to the Second Trust Deed or the related notes." (R. 268.) This construction, however, is seriously flawed, since it distorts the plain meaning of the words and is unreasonable under the circumstances.

Dwyer's construction could find possible justification if the contractual language quoted above had been split into two separate sentences and if the attorney's fees phrase occurred only once with reference to the First Trust Deed. In the instant case, however, such ambiguous sentence structure was not used. Instead, the attorney's fees phrase occurred in a single, integrated, extended sentence. The placement of the phrase "including reasonable attorney's fees" at the beginning of this sentence and before the two parallel phrases "from any and all obligations" referring to the First and Second Trust Deeds and related Notes, clearly means that the attorney's fees phrase was intended to apply to both parallel phrases, not merely the first. To read the sentence as Dwyer would do, distorts its parallel structure.

Dwyer's strained construction is also highly questionable under the circumstances. Why, for example, would the Cromars insist on being held harmless from the obligation to pay attorney's fees on the First Trust Deed on which they were not even parties, and then exclude the obligation on the Second Trust Deed and related Note to which they were? In short, the attorney's fee

phrase is not one of limitation, but of necessary inclusion in order to afford complete protection to the Cromars in the absence of any novation and release of the Cromars by the Chaffins.

There is, however, another aspect of the contractual language which is highly significant. The trial judge concluded that the extent of Dwyer's obligation to pay attorney's fees was limited to those incurred by Chaffins in collecting the Note. (R. 319; Add. H.) These fees were included in the damage award against the Cromars and duly paid. (R. 137-38). The judge erred, however, by failing to note that the obligation to pay the Chaffins' fees was expressly stated in the Note itself. (Add. A.) Thus, the attorney's fee language in respect to Chaffins did not need to reappear in the Agreement between Cromars and Dwyer in order to be binding on Dwyer. Instead, it was expressly incorporated by reference into the Agreement. (Add. D.)

If the obligation to pay Chaffins' attorney's fees was founded upon language in the Note itself, what purpose did the phrase "including reasonable attorney's fees" play in the subsequent Agreement with Dwyer? Here again, the placement of the phrase holds the clue to its meaning. The phrase is placed immediately after the promise to indemnify or hold harmless and before recitation of the obligations to be indemnified against. If it is not to be completely redundant, it must include an additional or secondary obligation to pay attorney's fees other than those of the Chaffins which were already covered by the language in the Note. Cromars respectfully submit that the plain meaning of the phrase in

the Agreement is to hold them harmless from the obligation to pay attorney's fees to their own counsel for any and all legal services rendered necessary by Dwyer's refusal to meet his own contractual obligations to the Cromars. This includes establishment of the right to indemnity and collection of the judgment.

#### 4. Supporting Authorities.

Two courts have recently allowed an award of attorney's fees in litigation to enforce indemnity rights. In Chetopa State Bancshares, Inc. v. Fox, 628 P.2d 249 (Kan. App. 1981), for example, the purchaser's assignee brought an action against certain sellers to enforce the assignee's claimed indemnification rights under a contract for sale of the bank's stock. The lower court granted judgment to reimburse the assignee for its attorney's fees in connection with two related lawsuits and a tax claim based on the bank's conduct, but denied recovery of fees incurred in the suit to enforce the assignee's indemnification rights. Id. The Kansas Court of Appeals held that a contractual provision which stated that sellers agreed to indemnify and hold purchaser harmless from any "expense (including reasonable attorney's fees) suffered or incurred by [purchaser] at any time after the date hereof, arising from, or as a result or in respect of, the breach of any warranty, representation or covenant made by Sellers or any of them in this Agreement," was a covenant that sellers would pay those expenses, and, thus, sellers were required to reimburse assignee for attorney's fees incurred in its suit to establish indemnity rights. Id. at 251.

In Wuertz v. Tobias, 512 So. 2d 1209 (La. App. 5th Cir. 1987) the lessor of a service station filed a third-party demand against the lessee and his liability insurer for indemnification of a judgment including attorney's fees incurred by the lessor in defense of the action as well as in establishing its right to indemnity. In that case, the lessee had agreed to:

indemnify and hold Lessor, its agents and employees, harmless from and against all claims, demands, liabilities, suits or actions (including all reasonable expenses and attorneys' fees incurred by or imposed on Lessor in connection therewith) for any such loss, damage, injury or other casualty. Lessor also agrees to pay all reasonable expenses and attorneys' fees incurred by Lessor in connection with the provisions of this paragraph.

Wuertz, 512 So. 2d at 1211.

On appeal, the Louisiana Court of Appeals held that:

Amoco is likewise entitled to recover all reasonable expenses and attorneys' fees incurred in establishing its right to indemnity. While it is the general rule of indemnity that an indemnitee may recover from its indemnitor only those costs and expenses incurred in defense of a claim against the principal demand, when specifically provided for by contract attorneys' fees incurred in *establishing* the right to indemnity may also be recovered.

Wuertz, 512 So. 2d at 1212.

Even though the contractual language involved in these two cases is not precisely the same, it is nevertheless noteworthy that both courts were willing to permit an award of attorney's fees for enforcing indemnity agreements when the language used appeared to contemplate recovery beyond the principal claim indemnified



against. Thus in Chetopa, for instance, the agreement was to indemnify the purchaser for attorney's fees incurred "at any time after the date hereof" because of a breach by the sellers. 628 P.2d at 251. And in Wuertz, recovery was allowed for attorney's fees incurred by the lessor "in connection with the provisions of this paragraph." 517 So.2d at 1211.

Similarly broad language appears in this case. By placing the attorney's fee phrase before the statement describing the principal claims to be indemnified against, i.e., "any and all obligations" contained in the two trust deeds and related notes, the parties contemplated a separate and distinct legal obligation. Furthermore, since the principal obligation indemnified against, namely the Chaffins' Note, already included an express commitment to pay the Chaffins' attorney's fees, there was no reason to repeat the same language in the Agreement itself unless it meant something in addition to what the Note already provided. In short, the attorney's fee phrase appears twice. The language in the Note refers to the Chaffins' legal fees. The additional language in the Agreement must then refer to the Cromars' legal fees. To restrict the meaning of the language in the Agreement to the Chaffins' legal fees, renders it wholly redundant and unnecessary, and defeats the intention of the parties as expressed in the contract documents taken as a whole.

### C. Public Policy

The same result has been reached on grounds of public policy. In Manson-Osberg Co. v. State, 552 P.2d 654 (Alaska 1976), for example, the court held as follows:

As to the matter of attorney's fees, we find that there was no error in an award of full attorney's fees in this matter. While Civil Rule 82 would normally only allow an award which would "partially compensate" the prevailing party, we hold that the "hold harmless" indemnity clause should include the cost of recovery on the clause itself, as a matter of policy. . . . The hold harmless clause required that the contractor shall save harmless the government from all suits, actions, or claims of any character brought on any account of injuries or damages sustained by any person. The government is not held harmless if it must incur costs and attorney's fees in bringing suit to recover on the indemnity clause.

552 P.2d at 660 (footnotes and citations omitted). See also Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059, 1067 (Alaska 1979); Duty Free Shoppers Group Ltd. v. State, 777 P.2d 649, 654 (Alaska 1989).

The policy considerations underlying the above line of cases apply to the Cromars' situation as well, since an indemnitee really is not "held harmless" in the sense of being made whole if required to bring suit to recover on the indemnity clause itself.

In this case, the Cromars gave notice of the pending litigation to Dwyer on two separate occasions; (1) shortly after suit was filed (R. 174-175), and (2) shortly after judgment was entered against them. (R. 185-186). In both cases, Dwyer refused and failed to pay any amounts due under the Note or the judgment.

The Cromars were thus left no choice but to employ counsel to defend the principal action and then proceed against Dwyer to recover under the indemnification provisions of the Agreement. In addition, Cromars have been compelled to resort to collection proceedings in Texas in order to recover on their judgment which was again contested by Dwyer. Thus, rather than being held harmless, Cromars have been compelled to incur substantial expense in the establishment of their rights and the collection of amounts lawfully due and owing in this case. In order to be made whole as contemplated by the indemnification Agreement, they are entitled to reimbursement for the attorney's fees necessarily expended to enforce the Agreement against Dwyer.

## II.

THE CROMARS ARE ENTITLED TO RECOVER ATTORNEY'S FEES REASONABLY AND NECESSARILY INCURRED IN DEFENDING AGAINST THE PRINCIPAL CLAIMS COVERED BY THE INDEMNIFICATION AGREEMENT.

As a general rule, an indemnitee is entitled to recover as part of the damages, reasonable and necessary attorney's fees incurred in defending the claim indemnified against. 42 C.J.S. Indemnity §20 (1991); 41 Am. Jur. 2d Indemnity §36 (1968). This rule is particularly applicable where, as here, the indemnitor was notified and given an opportunity to contest the claim but fails or refuses to do so. Id. "If the indemnitor fails to defend, then he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense." 42 C.J.S. Indemnity §20. The rule applies whether the defense is

successful or not and even though attorney's fees are not expressly mentioned. Id.

In this case, Cromars filed an Affidavit of Attorney's Fees and Costs clearly including services rendered in defense of the Chaffins' action on the Note as well as services rendered in prosecuting the third party complaint and motion for summary judgment against Dwyer. (R. 304-05; Add. F). Dwyer subsequently filed a Notice of Objection to Proposed Judgment and Memorandum in which he objected to an award of attorney's fees incurred by the Cromars in pursuing their claim against him. (R. 264-72). In responding to the objection, however, the trial judge struck out his previous award of attorney's fees to the Cromars in its entirety, including any award for services rendered in defense of the principal action. (R. 315-16; Add. I.) Under either express or implied contract principles, this action was prejudicial error and should be reversed.

Under express contract principles, the same analysis set forth in Point I applies. Specific use of the attorney's fees language in the Agreement in addition to the Note established a secondary obligation on the part of Dwyer to pay the Cromars' legal fees. That obligation would clearly apply to fees incurred in defending against "any and all obligations" contained in the Second Trust Deed and related Note which constituted the principal claim indemnified against. In the absence of any contractual language limiting or barring such recovery, the Cromars are entitled to an award of those fees.

The same result follows from implied indemnity principles. Even in the absence of express contractual language, a party who establishes a right to indemnification based upon his/her relationship to another is entitled to attorney's fees reasonably and necessarily incurred in defense of the claim indemnified against. Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d at 446 ("an indemnitee is not held harmless pursuant to an implied indemnity agreement if it must incur expenses to vindicate its rights"); Piedmont Equip. Co., Inc. v. Eberhard Mfg. Co., 665 P.2d 256, 259 (Nev. 1983).

It would be incongruous indeed if the Cromars were entitled to recover their defense fees in the absence of any contractual language at all, but be denied them in the presence of such language in an express contract. Since such language was specifically inserted into the Agreement, this court should reverse the lower court and direct that it be given full force and effect.

#### **CONCLUSION**

Mark and Geneve Cromar are entitled to an award of all attorney's fees reasonably and necessarily incurred in defending against the principal demand of the Chaffins pursuant to the express contract of indemnity with Dwyer. They are also entitled to an award of attorney's fees reasonably and necessarily incurred in enforcing their right to indemnity under the terms of the Agreement itself. The summary judgment of the lower court should be reversed insofar as it denies the Cromars' attorney's fees and

the case remanded for a determination and award of such fees as are just.

DATED this 6<sup>TH</sup> day of October, 1993.

Respectfully submitted,

DURHAM, EVANS & JONES

By

G. Richard Hill

Paul M. Durham, Esq.

G. Richard Hill, Esq.

50 South Main Street, Suite 850

Salt Lake City, Utah 84144

Attorneys for Appellants

Mark and Geneve Cromar

**CERTIFICATE OF MAILING**

I certify that I caused two true and correct copies of the foregoing BRIEF OF APPELLANTS to be mailed, first-class postage prepaid, to the following this 6<sup>TH</sup> day of October, 1993:

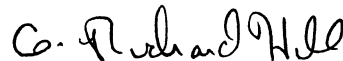
J. Thomas Bowen, Esq.  
Attorney at Law  
800 McIntyre Building  
68 South Main Street  
Salt Lake City, Utah 84101  
Attorney for Appellee

with courtesy copies to:

Daniel W. Anderson  
Laura L. Moser  
FABIAN & CLENDENIN  
Twelfth Floor  
215 South State Street  
P.O. Box 510210  
Salt Lake City, Utah 84151

Stephen W. Brinton  
REEVE BRINTON & PATTERSON  
Suite 320, Washington Mansion  
151 East 5600 South  
Murray, Utah 84111

Bruce J. Nelson  
ALLEN, HARDY & RASMUSSEN  
215 South State, Suite 900  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

## **ADDENDUM A**



# NOTE SECURED BY DEED OF TRUST

(INSTALLMENT — INTEREST INCLUDED)

\$ 74,000.00

Salt Lake City, Utah,

November 6, 19 79

FOR VALUE RECEIVED, the undersigned jointly and severally, promise to pay to the order of LARRY M. CHAFFIN and GRETA M. CHAFFIN, his wife, at its office in Salt Lake City, Utah,

SEVENTY FOUR THOUSAND and NO/100 \*\*\*\*\* DOLLARS (\$ 74,000.00 ),

together with interest from date at the rate of nine and 3/4 per cent (9-3/4%) per annum on the unpaid principal, said principal and interest payable as follows: \_\_\_\_\_

SIX HUNDRED THIRTY FIVE and 77/100 \*\*\*\*\* DOLLARS (\$ 635.77 ) on the 1st day of December, 19 79, and the same amount on the same day of

each succeeding month until December 1, 19 89, when the entire unpaid principal with accrued interest shall become due and payable. Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any such installment not paid when due shall bear interest thereafter at the rate of Ten per cent (10%) per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

\* or within 15 days of the due date thereof,

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Deed of Trust to Security Title Company, a Utah Corporation, as Trustee.

Mark R. Cromar  
MARK R. CROMAR

Genevieve D. Cromar  
GENEVE D. CROMAR

THIS FORM FURNISHED BY SECURITY TITLE COMPANY

DO NOT DESTROY THIS NOTE

EXHIBIT "A"

000009

## **ADDENDUM B**

WHEN RECORDED MAIL TO

Name  
Street  
Address  
City &  
State

3361275

SPACE ABOVE THIS LINE FOR RECORDER'S USE

SECOND DEED OF TRUST  
WITH ASSIGNMENT OF RENTS

This Deed of Trust, made this 6th day of November, 19 79, between  
MARK R. CROMAR and GENEVE D. CROMAR, his wife, as TRUSTOR,  
whose address is 1306 Village Hill Road Salt Lake City Utah 84121  
(Street and number) (City) (State)  
SECURITY TITLE COMPANY, a Utah corporation, as TRUSTEE, and DON L. RUEHNER, UNIVEST CORPORATION,  
LARRY M. CHAFFIN and GRETA M. CHAFFIN, his wife, as BENEFICIARY.

Witnesses: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described property, situated in Salt Lake County, State of Utah:

Lots 11 to 21, both inclusive, ~~subdivided into 18 lots~~ Block 2,  
SOUTH BOULEVARD ADDITION, according to the official plat thereof.

EXCEPTING THEREFROM, the following described portion conveyed to the State  
Road Commission of Utah for Highway known as Project No. U-218:

BEGINNING at the Northwest corner of Lot 17, Block 2, SOUTH BOULEVARD  
ADDITION, and running thence East 129 feet; thence South 6 feet, more or less,  
to a point 35 feet South of the City Monument line on 21st South Street;  
thence North 89° 58' 11" West 129 feet; thence North 6 feet, more or less,  
to the point of BEGINNING.

SECURITY TITLE CO.  
REF. No. 1954

20.50  
Nov 6 2 46 PM '79  
KATIE L. JON  
RECORDS  
SALT LAKE CO.  
SECURITY TITLE CO.  
REF. No. 1954  
Kathy Thompson  
 Evelyn Thompson

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereto belonging, now or hereafter used or enjoyed with said property, or any part thereof. HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits.

## For the Purpose of Securing:

(1) payment of the indebtedness evidenced by a promissory note of even date herof in the principal sum of \$ 185,000.00  
made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or re-  
newals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or ad-

REC-4980-1-796

vanes as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

**To Protect The Security of This Deed of Trust, Trustor Agrees:**

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to do all other acts which in the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property Trustor further agrees:

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction.

Trustor, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In the event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary. Instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In the event that the Trustor shall fail to provide satisfactory hazard insurance, the Beneficiary may procure, on the Trustor's behalf, insurance in favor of the Beneficiary alone. If insurance cannot be secured by the Trustor to provide the required coverage, this will constitute an act of default under the terms of this Deed of Trust.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may, Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may, Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

8. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

9. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may, Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

10. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

11. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Deed of Trust and the note for endorsement (in case of full reconveyance, for cancellation and retention) without affecting the liability of any person for the payment of the indebtedness secured hereby, and without releasing the interest of any party joining in this Deed of Trust, Trustor may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Deed of Trust or the lien or charge thereof; (d) grant any extension or modification of the terms of this loan; (e) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Trustor agrees to pay reasonable trustee's fees for any of the services mentioned in this paragraph.

12. As additional security, Trustor hereby assigns to Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Deed of Trust and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Deed of Trust to any such tenancy, lease or option.

13. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

14. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

15. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

16. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Deed of Trust and the note for endorsement (in case of full reconveyance, for cancellation and retention) without affecting the liability of any person for the payment of the indebtedness secured hereby, and without releasing the interest of any party joining in this Deed of Trust, Trustor may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Deed of Trust or the lien or charge thereof; (d) grant any extension or modification of the terms of this loan; (e) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Trustor agrees to pay reasonable trustee's fees for any of the services mentioned in this paragraph.

17. As additional security, Trustor hereby assigns to Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Deed of Trust and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Deed of Trust to any such tenancy, lease or option.

18. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

19. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

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15. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

16. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

17. After the lapse of such time as may then be required by law following the recordation of said notice of default, and notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every such case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant of warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deeds; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

18. Trustor agrees to surrender possession of the hereinabove described Trust property to the Purchaser at the aforesaid sale, immediately after such sale, in the event such possession has not previously been surrendered by Trustor.

19. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Deed of Trust in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceedings all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

20. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

21. This Deed of Trust shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

22. Trustee accepts this Trust: when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

23. This Deed of Trust shall be construed according to the laws of the State of Utah.

24. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

25. All rights of Beneficiary hereunder are subject to the rights of the holder of the first mortgage on the property.

*Mark R. Cromar*  
Signature of Trustor  
MARK R. CROMAR  
*Geneve D. Cromar*  
GENEVE D. CROMAR

STATE OF UTAH  
County of Salt Lake }

On the 6th day of November, A.D. 19 79 personally appeared before me

MARK R. CROMAR and GENEVE D. CROMAR, his wife

the signer(s) of the within instrument, who duly acknowledged to me that they executed the same.

My Commission expires: 10-12-82

STATE OF UTAH  
County of \_\_\_\_\_



*Douglas R. Umbreit*  
Notary Public, Residing at  
Salt Lake City, Utah

On the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_\_ personally appeared before me

and \_\_\_\_\_, who being by me duly sworn did say, each for himself, that he, she, said \_\_\_\_\_ is the \_\_\_\_\_ Secretary of \_\_\_\_\_ and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and said \_\_\_\_\_ and \_\_\_\_\_ each duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

My Commission expires: \_\_\_\_\_

Notary Public, Residing at \_\_\_\_\_

000113

0004980-INT-758

## **ADDENDUM C**

Recorded at Request of Grantee,  
at \_\_\_\_\_ M. Fee Paid \$ \_\_\_\_\_  
by \_\_\_\_\_ Dep. Book \_\_\_\_\_ Page \_\_\_\_\_ Ref. \_\_\_\_\_  
Mail tax notice to \_\_\_\_\_ Address \_\_\_\_\_

## WARRANTY DEED

MARK R. CROMAR and GENEVE D. CROMAR, husband and wife  
of Salt Lake City, County of Salt Lake, State of Utah, hereby  
CONVEY and WARRANT to  
DONALD DWYER

of \_\_\_\_\_ grantee  
for the sum of  
-----TEN AND NO/100ths----- DOLLARS

and other good and valuable considerations  
the following described tract of land in Salt Lake County  
State of Utah:

Lots 11 to 21, both inclusive, Block 2, SOUTH BOULEVARD ADDITION, according to the  
official plat thereof, recorded in the office of the Salt Lake County Recorder

EXCEPTING THEREFROM, the following described portion conveyed to the State Road  
Commission of Utah for Highway known as Project No. U-218:

BEGINNING at the Northwest corner of Lot 17, Block 2, SOUTH BOULEVARD ADDITION  
and running thence East 129 feet; thence South 6 feet; more or less, to a point  
35 feet South of the City Monument line on 21st South Street; thence North 89°  
58'51" West 129 feet; thence North 6 feet, more or less, to the point of BEGINNING

Subject to easements, restrictions, reservations and rights of way of record

Subject to annual general property taxes for 1983 and subsequent years thereafter

Subject to a Trust Deed dated September 20, 1974 in favor of UTAH MORTGAGE LOAN  
CORPORATION, with an unpaid balance of \$441,587.68 as of June 1, 1983, recorded  
November 11, 1974, as Entry No. 2664056, in Book 3719 at page 366, Salt Lake County  
Recorder. (Affects this and other property).

Subject to a Trust Deed dated November 6, 1979, executed in favor of DON L. BUEHLER,  
UNIVEST CORP., LARRY M. CHAFFIN and GRETA M. CHAFFIN, husband and wife, with an  
unpaid balance of \$180,579.27 as of June 1, 1983, recorded November 6, 1979, as  
WITNESS, the hand of said grantor, this day of  
, A. D. 19

\*\*as Entry No. 3361275, in Book 4980 at page 796, Salt Lake County Recorder.

Signed in the Presence of

Subject to matters of record, or enforceable in law or equity.

MARK R. CROMAR

GENEVE D. CROMAR

STATE OF UTAH,

County of SALT LAKE

On the 14th day of July, 1983, A. D. 19 83  
personally appeared before me MARK R. CROMAR and GENEVE D. CROMAR

the signers of the within instrument, who duly acknowledged to me that they executed the  
same.

Margaret E. Eger  
Notary Public

My commission expires 4-12-87 Residing in Salt Lake City, Utah

BLANK #101-WARRANTY DEED-© GEM PRINTING CO - SALT LAKE

EXHIBIT B



000168  
PARAMOUNT TITLE CORPORATION / (801) 461-0000

## **ADDENDUM D**



AGREEMENT SURVIVING REAL ESTATE CLOSING

WHEREAS:

1. DONALD DWYER, (hereinafter referred to as "Buyer"), is about to purchase from MARK R. CROMAR and GENEVE D. CROMAR, (hereinafter collectively referred to as "Seller"), the real property known as 2119 South Regent Street, 28 East 2100 South Street, Salt Lake City, County of Salt Lake, State of Utah;

2. Buyer and Seller desire that certain promises survive the closing of said real property and the delivery of the final deed of reconveyance.

NOW THEREFORE, in consideration of Buyer paying the purchase price of said real property and in consideration of Seller conveying said real property to Buyer, Buyer and Seller hereby agree to the following:

- a. Buyer and Seller understand that PARAMOUNT TITLE CORPORATION cannot guarantee or verify the figures pertaining to the first Trust Deed and Note in favor of UTAH MORTGAGE LOAN CORPORATION and the Second Trust Deed and Notes in favor of DON L. BUEHNER, UNIVEST CORPORATION, LARRY M. CHAFFIN and GRETA M. CHAFFIN, his wife. If the figures used in the related settlement statements are inaccurate, Buyer and Seller mutually agree to make appropriate adjustments.
- b. Seller guarantees that the note secured by said first Trust Deed is current to and including the monthly payment due May 1, 1983.
- c. Seller guarantees that the notes secured by said second Trust Deed are current to and including the monthly payments due June 1, 1983.
- d. Buyer hereby holds Seller harmless, including reasonable attorney's fees, from any and all obligations contained in that certain first Trust Deed (including the "due-on-sale" clause, if any), and related Note dated September 20, 1974, in favor of UTAH MORTGAGE LOAN CORPORATION, in the original amount of \$475,000.00, copies of which are attached hereto and incorporated herein, and from any and all obligations in that certain Second Trust Deed (including the "due-on-sale" clause, if any) and related Notes dated November 6, 1979, in favor of DON L. BUEHNER, UNIVEST CORPORATION, LARRY M. CHAFFIN and GRETA M. CHAFFIN, husband and wife in the original amount of

(continued..)

\$185,000.00, copies of which are attached hereto  
and incorporated herein.

- e. The matters set forth herein shall survive the closing of the  
transaction, ~~and the reconveyance of the purchase~~

DATED this \_\_\_\_\_ day of June, 1983.

Sellers:

Mark R. Cromar July 14, 1983  
MARK R. CROMAR

Geneve D. Cromar SC  
GENEVE D. CROMAR

Buyer:

Donald Dwyer by [Signature]  
DONALD DWYER Theresa Bowen, atty. Donald Dwyer

~~\*\*trust in favor of Seller executed at closing.~~

000170

AGREEMENT SURVIVING REAL ESTATE CLOSING

WHEREAS:

1. DONALD DWYER, (hereinafter referred to as "Buyer"), is about to purchase from MARK R. CROMAR and GENEVE D. CROMAR, (hereinafter collectively referred to as "Seller"), the real property known as 2119 South Regent Street, 28 East 2100 South Salt Lake City, County of Salt Lake, State of Utah;

2. Buyer and Seller desire that certain promises survive the closing of said real property and the delivery of the final deed of reconveyance;

NOW THEREFORE, in consideration of Buyer paying the purchase price of said real property and in consideration of Seller conveying said real property to Buyer, Buyer and Seller hereby agree to the following:

- a. Buyer and Seller understand that PARAMOUNT TITLE CORPORATION cannot guarantee or verify the figures pertaining to the first Trust Deed and Note in favor of UTAH MORTGAGE LOAN CORPORATION and the Second Trust Deed and Notes in favor of DON L. BUEHNER, UNIVEST CORPORATION, LARRY M. CHAFFIN and GRETA M. CHAFFIN, his wife. If the figures used in the related settlement statements are inaccurate, Buyer and Seller mutually agree to make appropriate adjustments.
- b. Seller guarantees that the note secured by said first Trust Deed is current to and including the monthly payment due May 1, 1983.
- c. Seller guarantees that the notes secured by said second Trust Deed are current to and including the monthly payments due June 1, 1983.
- d. Buyer hereby holds Seller harmless, including reasonable attorney's fees, from any and all obligations contained in that certain first Trust Deed (including the "due-on-sale" clause, if any), and related Note dated September 20, 1974, in favor of UTAH MORTGAGE LOAN CORPORATION, in the original amount of \$475,000.00, copies of which are attached hereto and incorporated herein, and from any and all obligations in that certain Second Trust Deed (including the "due-on-sale" clause, if any) and related Notes dated November 6, 1979, in favor of DON L. BUEHNER, UNIVEST CORPORATION, LARRY M. CHAFFIN and GRETA M. CHAFFIN, husband and wife in the original amount of

(continued..)

\$185,000.00, copies of which are attached hereto  
and incorporated herein.

- e. The matters set forth herein shall survive the closing of the  
transaction, ~~and the reconveyance of the purchase money deed of\*\*~~

DATED this \_\_\_\_\_ day of June, 1983.

Sellers:

Mark R. Cromar July 14, 1983  
MARK R. CROMAR

Geneve D. Cromar SC July 14, 1983  
GENEVE D. CROMAR

Buyer:

Donald Dwyer by J. Thomas Bowen, atty.  
DONALD DWYER Donald Dwyer

~~\*\*trust in favor of Seller executed at closing.~~

## **ADDENDUM E**

AUG 11 1992

By                       
Clerk, Court

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

LARRY M. CHAFFIN and	:	MINUTE ENTRY - RULE 4-501
GRETA M. CHAFFIN,	:	RULING
	:	
Plaintiffs,	:	
	:	
vs.	:	CIVIL NO. 900906903
	:	
MARK R. CROMAR and GENEVE D.	:	
CROMAR,	:	
	:	
Defendants and Third	:	
Party Plaintiffs,	:	
	:	
vs.	:	
	:	
DONALD DWYER,	:	
	:	
Third Party Defendant and	:	
Fourth Party Plaintiff,	:	
	:	
vs.	:	
	:	
GREG L. WINGET, BRENT E.	:	
WINGET, JEN S. WINGET,	:	
RIVERVIEW PLAZA ASSOCIATES,	:	
LTD., and MERRILL TITLE	:	
COMPANY,	:	
	:	
Fourth Party Defendants.	:	

-----

The Court has reviewed third party plaintiffs' Motion for Summary Judgment, the Memorandum in Support of Third Party Plaintiffs' Motion for Summary Judgment, the Affidavit of Mark

000260

R. Cromar, the Affidavit of Geneve D. Cromar, the Memorandum in Opposition to Defendants' Motion for Summary Judgment, the Affidavit of Donald Dwyer, the Reply Memorandum in Support of Third Party Plaintiffs' Motion for Summary Judgment, the Complaint, the Third Party Complaint, the Answer of third party defendant Donald Dwyer and the documentation pertaining to the entry of summary judgment against defendants Mark R. and Geneve D. Cromar.

Based upon said review, the Court grants third party plaintiffs' Motion for Summary Judgment. The legal liability of Cromars to Chaffins has been determined. Dwyer agreed to hold Cromars harmless "from any and all obligations. . . in favor of. . . Larry M. Chaffin and Greta M. Chaffin. . . ." The Second Defense in Dwyer's Answer admitted this. No specific facts have been set forth in the Affidavit of Donald Dwyer as to how the schedule of payments on the subject property was inaccurate or creating any legally sufficient defenses against the Cromars.

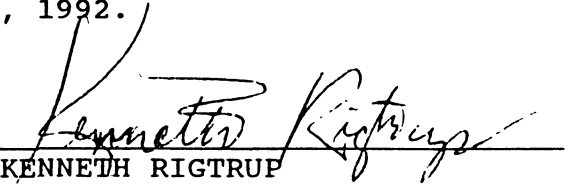
Accordingly, third party plaintiffs Mark R. and Geneve D. Cromar may have summary judgment against third party defendant Donald Dwyer for \$83,108.87, plus 12% per annum interest from and after December 13, 1991, until paid. Cromars shall be

000261

awarded such attorney's fees and costs against Dwyer as are supported by Affidavit and as are awarded by the Court.

Counsel for third party plaintiffs shall submit an appropriate Summary Judgment.

Dated this 11<sup>th</sup> day of August, 1992.

  
KENNETH RIGTRUP  
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry - Rule 4-501 Ruling, to the following, this 14th day of August, 1992:

Daniel W. Anderson  
Laura L. Moser  
Attorneys for Plaintiffs  
215 S. State, 12th Floor  
P.O. Box 510210  
Salt Lake City, Utah 84151

Paul M. Durham  
G. Richard Hill  
Attorneys for Defendants and  
Third Party Plaintiffs  
36 S. State, Suite 1200  
Salt Lake City, Utah 84111

J. Thomas Bowen  
Attorney for Third Party Defendant  
and Fourth Party Plaintiff  
1020 Beneficial Life Tower  
Salt Lake City, Utah 84111

Stephen W. Brinton  
Attorney for Fourth Party Defendants  
151 East 5600 South, Suite 320  
Murray, Utah 84107

Constance George

## **ADDENDUM F**

FILED  
DISTRICT COURT

SEP 24 9 11 AM '92

THIS CASE  
BY *CB* DISTRICT  
COUNTY  
CLERK

Paul M. Durham (0939)  
DURHAM & EVANS  
Attorneys for Defendants  
and Third-Party Plaintiffs  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 538-2424

---

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

---

LARRY M. CHAFFIN and GRETA M. )  
CHAFFIN, )

Plaintiffs, )

vs. )

MARK R. CROMAR and GENEVE D. )  
CROMAR, )

Defendants and )  
Third-Party Plaintiffs, )

vs. )

DONALD DWYER, )

Third-Party Defendant )  
and Fourth-Party )  
Plaintiff, )

vs. )

GREG L. WINGET, BRENT E. )  
WINGET, JEN S. WINGET, )  
RIVERVIEW PLAZA ASSOCIATES, )  
LTD., and MERRILL TITLE )  
COMPANY, )

Fourth-Party Defendants. )

AFFIDAVIT OF ATTORNEYS'  
FEES AND COSTS

Civil No. 900906903CN

Judge Kenneth Rigtrup

---

000303

STATE OF UTAH                    )  
                                  :SS  
COUNTY OF SALT LAKE    )

PAUL M. DURHAM, being first duly sworn, deposes and says:

1. I am a member of the Utah State Bar in good standing.

2. I am a shareholder and director of the law firm of DURHAM & EVANS.

3. I have personal knowledge of the facts set forth in this affidavit and, if called to testify with respect to the matters set forth herein, I would be competent to do so.

4. The law firm of DURHAM & EVANS has been retained to represent defendants and third-party plaintiffs, Mark R. Cromar and Geneve D. Cromar (the "Cromars"), in the above entitled action due to the default of third party defendant for which summary judgment has been awarded in favor of the Cromars.

5. The following is a correct accounting of defendants and third-party plaintiffs' costs and attorneys' fees incurred in this case as of the date hereof:

(a) Costs:

Filing fee for Complaint	\$	50.00
Fee for Texas service of process		<u>45.00</u>
TOTAL COSTS:	\$	95.00

(b) Attorneys' fees:

(Factual investigation; preparation of documents, affidavits, pleadings, research and corres-

pondence with respect to the defense of the action for summary judgment by Chaffins and the prosecution of the motion for summary judgment against Dwyer, including preparation of judgment and conferences with client and opposing counsel regarding the same).

73.5 Total Hours

TOTAL ATTORNEYS' FEES: \$7,259.75

Subsequent to the mailing of the Affidavit of Attorneys' Fees and Costs and proposed form of Judgment to opposing counsel, opposing counsel objected to the grounds stated for Third-Party Plaintiffs' award of attorneys' fees. Counsel spent an additional 11.0 hours totalling an additional \$1,185.00 in researching and responding to opposing counsel's objection. This additional amount is included in the above total attorney's fees figure.

3. Based on my knowledge of costs of comparable legal services, I affirm that the foregoing costs and fees are reasonable and were necessarily incurred in this action. Further costs and attorneys' fees will likely necessarily be incurred to execute on the judgment.

4. The legal bases for this award of attorney's fees are the provisions in the Note and Agreement Surviving Real Estate Closing for reasonable attorneys' fees incurred in collection, see Exhibits "A" and "C" to the Affidavit of Mark R. Cromar on file with the Court, and on the basis of the Court's award of attorney's

fees in granting summary judgment in the Minute Entry, dated August 11, 1992.

5. This Affidavit is true and correct to the best of my knowledge, information and belief.

DATED this 22nd day of September, 1992.

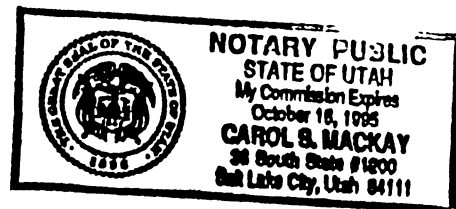
Paul M. Durham  
Paul M. Durham

SUBSCRIBED AND SWORN to before me this 22nd day of September, 1992.

Carol S. Mackay  
NOTARY PUBLIC  
Residing in: Salt Lake City, UT

My Commission Expires:

10-16-95



CERTIFICATE OF MAILING

I certify that I caused a true and correct copy of the foregoing Affidavit of Attorneys' Fees and Costs to be hand-delivered this 22<sup>nd</sup> day of September, 1992, to the following:

Daniel W. Anderson  
Laura L. Moser  
FABIAN & CLENDENIN  
Attorneys for Plaintiffs  
Twelfth Floor  
215 South State Street  
P.O. Box 510210  
Salt Lake City, Utah 84151

J. Thomas Bowen  
Attorney for Third-Party Defendant  
and Fourth-Party Plaintiff  
1020 Beneficial Life Tower  
Salt Lake City, Utah 84111

Stephen W. Brinton  
REEVE, BRINTON & PATTERSON  
Attorneys for Fourth-Party Defendants  
Suite 320, Washington Mansion  
151 East 5600 South  
Murray, Utah 84107

  
\_\_\_\_\_

jmg\cromarat.aff

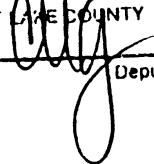
## **ADDENDUM G**



Paul M. Dursam (0939)  
DURHAM & EVANS  
Attorneys for Defendants  
and Third-Party Plaintiffs  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 538-2424

FILED DISTRICT COURT  
Third Judicial District

NOV 20 1992

SALT LAKE COUNTY  
By  Deputy Clerk

---

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

---

LARRY M. CHAFFIN and GRETA M. )  
CHAFFIN, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
MARK R. CROMAR and GENEVE D. )  
CROMAR, )  
 )  
Defendants and )  
Third-Party Plaintiffs, )  
 )  
vs. )  
 )  
DONALD DWYER, )  
 )  
Third-Party Defendant )  
and Fourth-Party )  
Plaintiff, )  
 )  
vs. )  
 )  
GREG L. WINGET, BRENT E. )  
WINGET, JEN S. WINGET, )  
RIVERVIEW PLAZA ASSOCIATES, )  
LTD., and MERRILL TITLE )  
COMPANY, )  
 )  
Fourth-Party Defendants. )

ORDER

Civil No. 900906903CN

Judge Kenneth Rigtrup

000327

Having considered memoranda of both counsel regarding the objection of third party defendant Donald Dwyer to an award of attorneys' fees to third party plaintiffs Mark R. Cromar and Geneve D. Cromar,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that third party defendant Donald Dwyer's objection is ~~DENIED~~ *Granted 100.*

DATED this 20<sup>th</sup> day of ~~September~~ *November*, 1992.

BY THE COURT:

*Kenneth Rigtrup*  
\_\_\_\_\_  
Judge Kenneth Rigtrup  
District Judge

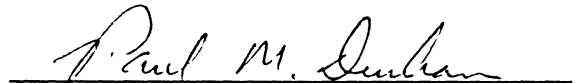
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Order to be hand-delivered this 22<sup>nd</sup> day of September, 1992, to the following:

Daniel W. Anderson  
Laura L. Moser  
FABIAN & CLENDENIN  
Attorneys for Plaintiffs  
215 South State #1200  
Salt Lake City, UT 84111

J. Thomas Bowen  
Attorney for Third-Party Defendant  
and Fourth-Party Plaintiff  
36 South State #1020  
Salt Lake City, UT 84111

Stephen W. Brinton  
REEVE, BRINTON & PATTERSON  
Attorneys for Fourth-Party Defendants  
151 East 5600 South #320  
Murray, UT 84107

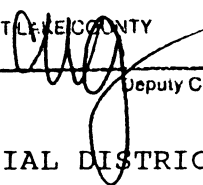


jmg\cromar.ord

## **ADDENDUM H**

NOV 20 1992

SALT LAKE COUNTY

By  Deputy Clerk

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

-----

LARRY M. CHAFFIN and GRETA M. CHAFFIN,	:	MINUTE ENTRY - RULE 4-501
	:	RULING
Plaintiffs,	:	
	:	CIVIL NO. 900906903
vs.	:	
MARK R. CROMAR and GENEVE D. CROMAR,	:	
	:	
Defendants and Third Party Plaintiffs,	:	
	:	
vs.	:	
DONALD DWYER,	:	
	:	
Third Party Defendant and Fourth Party Plaintiff,	:	
	:	
vs.	:	
GREG L. WINGET, et al.,	:	
	:	
Fourth Party Defendants.	:	

-----

The Court has reviewed third party plaintiff's Memorandum in Support of Attorney's Fees in Proposed Judgment, the third party defendants' Reply to Third Party Party Plaintiff's Memorandum in Support of Award of Attorney's Fees and third party defendant Donald Dwyer's Notice of Objection to Proposed Judgment.

000313


A careful reading of the Agreement Surviving Real Estate Closing entered between the Cromars and Donald Dwyer on or about July 14, 1983 discloses that Buyer Dwyer:

hereby holds Seller (Cromars) harmless, including reasonable attorney's fees, from any and all obligations contained in that certain first Trust Deed. . . and related Note. . . and from any and all obligations in that certain Second Trust Deed. . . and related Notes. . . . (Emphasis added.)

It is clear that Donald Dwyer only agreed to hold harmless the Cromars for all obligations contained in the two trust deeds and notes, "including reasonable attorney's fees." Nothing is contained in the Agreement Surviving Real Estate Closing about the payment of attorney's fees for enforcing said agreement. The Court concludes that third party defendant Donald Dwyer's Notice of Objection to Proposed Judgment is well taken.

The Court's Minute Entry of August 11, 1992 is corrected to strike the award of attorney's fees. The submitted Order and Judgment have been modified by interlineation to reflect the rulings herein contained. Said Order and Judgment have been signed and entered, as modified, this 20th day of November, 1992. Copies of said Order and Judgment are returned herewith.

Dated this 20<sup>th</sup> day of November, 1992.

  
KENNETH RIGTRUP  
DISTRICT COURT JUDGE

000310

MAILING CERTIFICATE

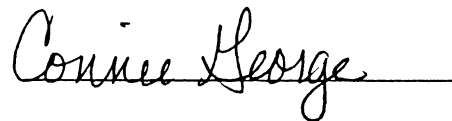
I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry - Rule 4-501 Ruling, to the following, this 24 day of November, 1992:

Daniel W. Anderson  
Laura L. Moser  
Attorneys for Plaintiffs  
215 S. State, 12th Floor  
P.O. Box 510210  
Salt Lake City, Utah 84151

Paul M. Durham  
G. Richard Hill  
Attorneys for Defendants  
36 S. State, Suite 1200  
Salt Lake City, Utah 84111

J. Thomas Bowen  
Attorney for Third Party Defendant and  
Fourth Party Plaintiff  
1020 Beneficial Life Tower  
Salt Lake City, Utah 84111

Stephen W. Brinton  
Attorney for Fourth Party Defendants  
151 East 5600 South, Suite 320  
Murray, Utah 84107

A handwritten signature in cursive script, reading "Connie George", followed by a horizontal line.

000320

## **ADDENDUM I**



FILED DISTRICT COURT  
Third Judicial District

NOV 20 1992

SALT LAKE COUNTY

By WJ Deputy Clerk

Paul M. Durham (0939)  
DURHAM & EVANS  
Attorneys for Defendants  
and Third-Party Plaintiffs  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 538-2424

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

2180194

1-14-93-300 pm

LARRY M. CHAFFIN and GRETA M. )  
CHAFFIN, )  
 )  
Plaintiffs, )

vs. )

JUDGMENT

MARK R. CROMAR and GENEVE D. )  
CROMAR, )  
 )  
Defendants and )  
Third-Party Plaintiffs, )

Civil No. 900906903CN

vs. )

DONALD DWYER, )  
 )  
Third-Party Defendant )  
and Fourth-Party )  
Plaintiff, )

Judge Kenneth Rigtrup

vs. )

GREG L. WINGET, BRENT E. )  
WINGET, JEN S. WINGET, )  
RIVERVIEW PLAZA ASSOCIATES, )  
LTD., and MERRILL TITLE )  
COMPANY, )  
 )  
Fourth-Party Defendants. )

000315

The Court having granted the motion for summary judgment of third party plaintiffs Mark R. Cromar and Geneve D. Cromar against third party defendant Donald Dwyer,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that third party plaintiffs Mark R. Cromar and Geneve D. Cromar ("the Cromars") be awarded judgment against third party defendant Donald Dwyer as follows:

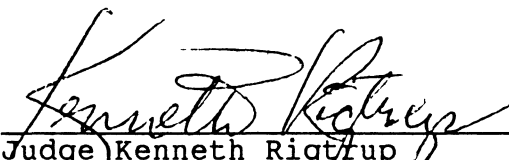
1. For damages in the sum of \$83,108.87 plus 12% per annum interest from and after December 13, 1991, until paid;

2. For ~~attorneys' fees in the amount of \$7,259.75 and for~~<sup>KR.</sup>  
~~costs of \$95.00. Furthermore, the Court finds that it is~~<sup>KR.</sup>  
~~reasonably anticipated there may be considerable work to collect~~  
~~the judgment to be awarded in this action, including possible costs~~  
~~and legal fees.~~ This judgment shall also cover such additional  
~~costs and legal fees~~<sup>KR.</sup> incurred in pursuit of the collection of this  
judgment. The Cromars are entitled to supplement the foregoing  
~~sums by affidavit filed with the Court for additional attorneys'~~<sup>KR. for</sup>  
~~fees and costs which may arise in the future.~~

3. Plaintiff is also entitled to interest on the judgment at the legal rate for judgments until this judgment has been satisfied.

DATED this 20<sup>th</sup> day of November, 1992.

BY THE COURT:

  
Judge Kenneth Rupp  
District Judge

000316

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Judgment to be hand-delivered this 22nd day of September, 1992, to the following:

Daniel W. Anderson  
Laura L. Moser  
FABIAN & CLENDENIN  
Attorneys for Plaintiffs  
215 South State #1200  
Salt Lake City, UT 84111

J. Thomas Bowen  
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## **ADDENDUM J**

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THIRD JUDICIAL DISTRICT COURT  
Third Judicial District

JUN 23 1993

By

*Lucy Venz*  
SALT LAKE COUNTY  
Deputy Clerk

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

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LARRY M. CHAFFIN and GRETA M. )  
CHAFFIN, )

Plaintiffs, )

vs. )

MARK R. CROMAR and GENEVE D. )  
CROMAR, )

Defendants and )  
Third-Party Plaintiffs, )  
and Appellants )

vs. )

DONALD DWYER, )

Third-Party Defendant )  
and Fourth-Party )  
Plaintiff, and Appellee )

vs. )

GREG L. WINGET, BRENT E. )  
WINGET, JEN S. WINGET, )  
RIVERVIEW PLAZA ASSOCIATES )  
LTD., and MERRILL TITLE )  
COMPANY, )

Fourth-Party Defendants. )

**FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW**

No. 900906903 CV

Judge Kenneth Rigtrup

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Third-party plaintiffs' motion for certification of final judgment under Rule 54(b) of the Utah Rules of Civil Procedure has been submitted for decision. The court has reviewed and considered

the summary judgment entered against Donald Dwyer on November 20, 1992, together with the summary judgments entered against the other defendants in this case. The court has also reviewed and considered the pleadings as well as the remaining claims against the fourth-party defendants. Based upon this review, the court finds that good cause exists to enter the following findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

1. This action was commenced following a foreclosure and sale of certain real property which had been purchased by the defendants Mark and Geneve Cromar in 1979; sold to the third-party defendant Donald Dwyer in 1983; and subsequently sold to the fourth-party defendant Riverview Plaza Associates, Ltd., in 1988. It involves three individual complaints to enforce the legal obligations arising from three separate transactions.

2. In the principal complaint, the plaintiffs Larry and Greta Chaffin sued the Cromars to recover the balance due under a promissory note given in exchange for the property on November 6, 1979. Summary judgment was entered against the Cromars on the note on December <sup>13 K.P.</sup>~~18~~, 1991. The judgment was paid and a satisfaction of judgment filed on January 7, 1993.

3. Cromars filed a third-party complaint against Donald Dwyer to enforce the terms of a hold harmless provision contained in an Agreement Surviving Real Estate Closing executed on July 14, 1983. On November 20, 1992, summary judgment was entered in favor of the Cromars and against Dwyer determining his liability under

the terms of the hold harmless provision, but refusing to award the Cromars' attorney's fees incurred in enforcing it. The Cromars seek to appeal the attorney's fee portion of this judgment.

4. Over five months have passed since entry of the judgment against Dwyer, and no motions for new trial, to alter or amend the judgment, or to stay execution thereof have been filed.

5. Dwyer filed a fourth-party complaint against his immediate buyer, Riverview Plaza Associates, Ltd., several general partners thereof, and Merrill Title Company which handled the closing. On October 13, 1992, the court entered partial summary judgment against Riverview and its general partners based on contractual obligations assumed by these fourth-party defendants in 1988. On March 10, 1993, the court incorporated this partial summary judgment on Dwyer's first claim for relief with a summary judgment against Riverview and its general partners on Dwyer's second claim for relief.

6. Fourth-party defendant Merrill Title Company answered Dwyer's fourth-party complaint on February 26, 1991. No further action has been taken against Merrill Title since that time.

7. A close examination of the record indicates that at the present time, the court has entered summary judgments against all of the defendants with the exception of Merrill Title Co. All of the claims have been resolved with the exception of Dwyer's third and fourth claims for relief.

8. Dwyer's third claim for relief against all of the fourth-party defendants except Merrill Title demands the return of

\$4,866.29 in excess escrow payments allegedly retained by them at the closing of their purchase of the property from Dwyer in 1988.

9. Dwyer's fourth claim for relief demands judgment against Merrill Title only for alleged negligence, misrepresentation, and malpractice relating to the closing of Dwyer's sale in 1988.

10. The only factual overlap between the remaining claims and the Cromars' judgment is that the same property was involved in each of the sales transactions. Otherwise, there is no factual or legal relationship between the Cromars' judgment which is sought to be certified herein and Dwyer's remaining fourth-party claims, since the parties, the transactions, the underlying legal obligations, and the factual and legal issues are all different.

11. Since the judgment sought to be certified for purposes of appeal is based upon a transaction which is wholly separate and unrelated to the transaction on which Dwyer's remaining claims are based, there is no just reason why certification of the Cromar's judgment should be delayed.

#### **CONCLUSIONS OF LAW**

1. This action involves three separate complaints alleging multiple claims of multiple parties.

2. The summary judgment entered November 20, 1992, on the Cromar's third-party complaint against Donald Dwyer wholly disposed of the claims of these parties.

3. There is no material degree of factual overlap between the issues presented in the judgment sought to be certified herein



and Dwyer's remaining two claims against the fourth-party defendants.

4. There is no just reason for delay in the certification of the summary judgment entered November 20, 1992.

5. The summary judgment in favor of the Cromars and against Donald Dwyer entered November 20, 1992, is final and appropriate for certification under Rule 54(b) of the Utah Rules of Civil Procedure.

DATED this 23<sup>rd</sup> day of June, 1993.

BY THE COURT:

Kenneth B. Ritz  
District Judge

CERTIFICATE OF MAILING

I certify that I caused a true and correct copy of the foregoing proposed Findings of Fact and Conclusions of Law to be mailed, first-class postage prepaid, to the following this 7<sup>th</sup> day of June, 1993:

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## **ADDENDUM K**

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JUN 23 1993  
 By Emily Venz  
 SALT LAKE COUNTY  
 Deputy Clerk

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

---

LARRY M. CHAFFIN and GRETA M. CHAFFIN,	)	
	)	
Plaintiffs,	)	
	)	<b>ORDER CERTIFYING</b>
vs.	)	<b>FINAL JUDGMENT</b>
	)	
MARK R. CROMAR and GENEVE D. CROMAR,	)	
	)	
Defendants and	)	
Third-Party Plaintiffs,	)	
and Appellants	)	
vs.	)	
	)	
DONALD DWYER,	)	No. 900906903 CV
	)	
Third-Party Defendant	)	
and Fourth-Party	)	
Plaintiff, and Appellee	)	Judge Kenneth Rigtrup
	)	
vs.	)	
	)	
GREG L. WINGET, BRENT E. WINGET, JEN S. WINGET,	)	
RIVERVIEW PLAZA ASSOCIATES	)	
LTD., and MERRILL TITLE	)	
COMPANY,	)	
	)	
Fourth-Party Defendants.	)	

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Based upon the motion of third-party plaintiffs for the certification of final judgment together with findings of fact and

conclusions of law heretofore entered by the court in support of the motion,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the summary judgment in favor of Mark and Geneve Cromar and against Donald Dwyer entered on November 20, 1992, be entered as a final judgment of this court for all purposes, and it is hereby certified as such pursuant to Rule 54(b) of the Utah Rules of Civil Procedure on the grounds that it wholly disposes of the claims of the parties and that there is no just reason for delay.

DATED this 23<sup>rd</sup> day of June, 1993.

BY THE COURT:

  
District Judge

CERTIFICATE OF MAILING

I certify that I caused a true and correct copy of the foregoing proposed Order Certifying Final Judgment to be mailed, first-class postage prepaid, to the following this 7<sup>th</sup> day of June, 1993:

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