

1988

Michael J. Hoth, Jeffrey R. Hoth, dba Hoth
Brothers, a Utah partnership v. Karl R. White and
Amy H. White, husband and wife : Brief of
Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Kevin E. Kane; Daines & Kane; Attorney for Third-Party Respondents.

Dale G. Siler; Hillyard, Anderson & Olsen; Attorney for Third-Party Appellants.

Recommended Citation

Brief of Respondent, *Hoth v. White*, No. 880308 (Utah Court of Appeals, 1988).

https://digitalcommons.law.byu.edu/byu_ca1/1094

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

4
UMENT
!

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

KEY NO. ~~88-308-CA~~

MICHAEL J. HOTH, JEFFREY R. *
HOTH, dba HOTH BROTHERS, a *
Utah partnership, *
Plaintiffs, *

vs. *

KARL R. WHITE and AMY H. *
WHITE, husband and wife, *
Defendants. *

APPENDIX TO

BRIEF OF RESPONDENT/
CROSS-APPELLANT

KARL R. WHITE and AMY H. *
WHITE, husband and wife, *
Third Party Plaintiffs *
and Respondents, *

Case No. 880308-CA

vs. *

Priority No. 14(b)

DEAN R. MORGAN, CHARLES R. *
TEAMS, DEAN R. MORGAN dba *
POLAR BEAR HOMES, and CHARLES *
R. TEAM dba TEAM REALTY, *
Third Party Defendants *
and Appellants. *

APPENDIX TO
BRIEF OF RESPONDENT

APPEAL FROM A FINAL JUDGMENT BY THE HONORABLE TED S. PERRY,
FIRST CIRCUIT COURT OF THE STATE OF UTAH, LOGAN CITY DEPARTMENT
WHICH COURT WAS KNOWN AT THE TIME OF THE ENTRY SAID JUDGMENT AS
THE SECOND CIRCUIT COURT OF THE STATE OF UTAH IN AND FOR COUNTY
OF CACHE, LOGAN CITY DEPARTMENT

DALE G. SILER (USB #2956)
HILLYARD, ANDERSON & OLSEN
Attorney for Third Party
Defendant/Appellants
175 East First North
Logan, Utah 84321

KEVIN E. KANE (USB #3939)
DAINES & KANE
Attorney for Third Party
Plaintiffs/Respondants
108 North Main, Suite 200
Logan, Utah 84321

Tab A

APPENDIX "A"

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended, effective Jan. 1, 1987.)

APPENDIX "A"

(cont.)

48-1-13. Partner by estoppel. (1) When a person by words spoken or written or by conduct represents himself, or consents to another's representing him, to any one as a partner, in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made who has on the faith of such representation given credit to the actual or apparent partnership, and, if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by, or with the knowledge of, the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as if he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability; otherwise, separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of an existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

Tab B

FINDINGS OF FACT

1. The Court finds that the Plaintiffs are partners and that the Plaintiff Michael J. Hoth is a licensed contractor under the laws of the State of Utah. The defendants are owners of the property described in paragraph 2 of the Plaintiff's complaint and are husband and wife. The Third Party Defendants are individuals doing business under their trade names as set forth in the caption of these findings, but that for the purpose of the contract with the defendants, the said third party defendants had entered into a joint venture in which the profits would be shared and where each would be subject to any losses that may be incurred.

2. The Court finds that the cause of action arose in Cache County where the defendants reside and the amount claimed is less than \$10,000.

3. The Court finds the Defendants and Third Party Defendant, Dean Morgan, for and in behalf of both Third Party Defendants, entered into a written contract on or about August 26, 1986 (see defendants' exhibit #7 and #6 and plaintiffs' exhibits 1 through 8), for the construction of a house on defendants' property described in paragraph 2 of plaintiffs' complaint in accordance with the plans and specifications.

4. The Court finds that the Plaintiffs and Third Party Defendant Dean Morgan entered into a subcontract for the framing of said house and some other miscellaneous items in the amount of \$6000. That the sum of \$6000 was a reasonable price for said subcontract work under the original plans and specifications.

5. The Court finds that the Plaintiffs substantially completed the work required by their subcontract.

6. The Court finds that the Third Party Defendant paid the sum of \$3500 to the Plaintiffs and that the balance owing on the basic subcontract is \$2500.00.

7. The Court finds that the following additional work was ordered by the defendants as owners or by the third party defendants as contractors and the plaintiffs performed said work and are entitled to reasonable compensation for the same:

a. Changing basement stairs due to a design error in location of plumbers pipes a total of 10 hours of labor.

b. Remodel of master showerlid at the request of the owners total of 4 hours.

c. Moving the bearing wall in the kitchen and dining room request of the owners a total of two hours of labor.

d. Changing the two back doors to a different size at the request of the owners for a total of 4 hours.

e. Changing the reinforcing trusses which were originally built to the plans but which did not meet the building inspector's requirements for a total of 2 hours of labor.

f. Putting a doorway under the stairs not included on the plans at the request of the owner a total of 1 hour of labor.

g. Relocating the bedroom window in the northeast bedroom due to a defect in the plans at the request of the owner for a total of 1 hour.

h. Extra framing for the Octagon tower due to lack of detail in the plans at the request of the owner for a total of 6 hours.

i. Extra door in the tower approved by the owners and ordered by the third party defendant Dean Morgan for a total of 3 hours.

j. Remodeling the front porch as requested by the owners and changing the plans for a total of 8 hours of labor.

k. Cost of one case of nails used in installing the extras for a total of \$64.00.

l. Placing tar paper on the roof. Not required under original subcontract done at the request of the third party defendant Dean Morgan for the benefit of the owners for a total of 10 hours.

m. Additional work on the tower requested by the owner for a total of 2 hours of labor.

n. Remodel of dining room window to match the change in plans for the octagon tower at the request of the owners for a total of 3 hours of labor.

o. Additional work on the upstairs bathroom window in the Northeast for a total of 1 hour.

p. Caulking the second floor plywood which was an extra approved by the owners for a total labor of 2 hours.

q. Changing the upstairs bath room doors at the request of the owners for a total of 2 hours.

r. Installing a laundry room under the stairs not on original plans at the request of the owner for a total of 2 hours.

8. That a reasonable cost for the labor for the extras was \$15 per hour for a total of 63 hours or \$945 plus \$64 for the extra nails equals a total for the extras of \$1009 for which the plaintiffs are entitled to compensation.

9. That the plaintiffs failed to complete a portion of their subcontract and the owners were required to obtain the labor from other sources as follows:

a. For work done by Robert Smith and Pat Christensen: a total of 42½ hours of labor at an hourly rate of \$10.00 per hour for a total cost of work not performed by the plaintiff but which was performed by Robert Smith and Pat Christensen in the amount of \$425.00.

b. For work done by Robert Reiner having a reasonable value of \$91.

c. That other work which the owners contracted to be performed was not the responsibility of the plaintiffs and the owners are not entitled to a set off therefor.

10. That there is owing to the plaintiffs for work performed the sum of \$6000 plus \$1009 for extras less \$516 for work not performed, less \$3500 paid or the net sum of \$2993.00.

11. That the plaintiffs hired an attorney to represent them in filing a mechanics lien and in bringing this action to foreclose the lien. That a reasonable attorneys fee for the plaintiffs including costs of filing the mechanics lien is \$1000.

12. That the plaintiffs timely filed a mechanics lien in the office of the Cache County Recorder. That there were no inaccuracies in the mechanics lien as understood at the time of filing by the plaintiffs.

13. That the owners paid the sum of \$3000 to Dean Morgan in January 1987 and the additional sum of \$2000 which Dean Morgan paid to third party defendant Charles Team. That had said sums been paid to the plaintiffs, no lien would have been filed and this action would have been unnecessary. That neither Dean Morgan and Charles Team were entitled to any money under the contract until they had first satisfied the costs of construction of the house. That the failure of Dean Morgan and Charles Team to pay the plaintiffs was a breach of the contract.

14. That the contract between the defendants and the third party defendants provided for the award of attorneys fees in the event of a breach. That a reasonable attorneys fee for bringing this action is \$1000.

From the foregoing findings of fact the court concludes:

CONCLUSIONS OF LAW.

1. Plaintiff is entitled to recover from the defendants the sum of \$2993.00, plus the sum of \$1000 attorneys fees plus plaintiffs' costs.


2. That in the event the defendants fail to pay said sum the plaintiffs may proceed and foreclose the mechanic's lien in a matter provided by law.

3. That the third party plaintiffs (the defendants) are

to recover from the third party defendants and each of them
the sum of \$3993 plus costs assessed in favor of the plaintiffs
plus attorneys fees in the amount of \$1000 plus the costs of
the third party ^{PLAINTIFFS} ~~defendants~~ in bringing this action.

Let judgment be entered accordingly.

Dated *March 29, 1911*



CIRCUIT JUDGE

Tab C

EARNEST MONEY RECEIPT

DATE August 26, 1986

The undersigned Buyer Karl & Amy White
deposits with Agent/Broker Company as EARNEST MONEY, the amount of One Hundred
Dollars (\$ 100.00),
in form of check
shall be deposited in accordance with applicable State Law.
Green Realty Received by: _____
Agent/Broker Company

AGREEMENT

IDENTIFICATION OF PARTIES. The Buyer who makes the aforesaid EARNEST MONEY Deposit is Karl & Amy White
whose present residence address is 651 East 2160 North Layton, Utah 84324
present telephone number is 501 753 1326. The contractor who will build the Residence and related improvements described herein
is Bar Bar Homes, whose office address is 7200 Pine Cone St SLC, Utah 84121
and telephone number is 242-6024 Contractor's License # 24792

DESCRIPTION OF THE PROPERTY. The EARNEST MONEY Deposit is given to secure and apply on the purchase price of a new
residence described hereafter to be constructed on a parcel of real property located at 670 East 300 North Hyde Park UT
city of Hyde Park county of Cache, State of Utah, which is more particularly described as
_____ of the _____ Subdivision, or alternatively,

purchase price ☐ includes, ☒ does not include, the parcel of real property described above. Contractor shall construct a new residence and
improvements in accordance with:
/VA Approved Plan No. _____

Plans and Declaration of Condominium (check one) ☐ as recorded, ☐ as proposed for Unit No. _____ of the
_____ Condominiums.
or (specify) Custom

CONNECTIONS, UTILITIES AND OTHER RIGHTS. Contractor represents that the property, upon completion of construction, will have
improvements which are included in the purchase price:

<input type="checkbox"/> sewer <input type="checkbox"/> connected	<input checked="" type="checkbox"/> natural gas <input checked="" type="checkbox"/> connected
<input type="checkbox"/> tank <input checked="" type="checkbox"/> connected	<input checked="" type="checkbox"/> electricity <input checked="" type="checkbox"/> connected
<input type="checkbox"/> sanitary system _____	<input type="checkbox"/> ingress & egress by private easement <input type="checkbox"/> paved
	<input type="checkbox"/> dedicated road <input type="checkbox"/> paved
<input type="checkbox"/> water <input checked="" type="checkbox"/> connected	<input type="checkbox"/> sidewalk
<input type="checkbox"/> water <input type="checkbox"/> connected	<input type="checkbox"/> curb and gutter
<input type="checkbox"/> connected <input type="checkbox"/> other _____	<input type="checkbox"/> other rights _____
<input type="checkbox"/> irrigation water/secondary system _____	
<input type="checkbox"/> phone <input type="checkbox"/> connected <input checked="" type="checkbox"/> prewired	
<input type="checkbox"/> antenna <input type="checkbox"/> master antenna <input checked="" type="checkbox"/> prewired	

or agrees to pay for building permit fees and all connection fees except the following: fees to get water, gas, &
sanitary to property

SURVEY. In the event the property corners are not marked by survey stakes, a survey ☒ will be made, ☐ will not be made, to mark the
corners at the expense of owner prior to commencement of
construction; and/or an ALTA title policy endorsement insuring Buyer against error in the legal description and placement of the residence on the
property, ☐ shall not be furnished, ☒ shall be furnished at the expense of owner at closing.

PURCHASE PRICE. The total purchase price for the property is One Hundred Forty Two Thousand Two Hundred and Fifty
(\$ 142,250.00) which shall be paid as follows:

100.00 which represents the aforesaid EARNEST MONEY DEPOSIT.
100.00 representing the additional CASH DOWN PAYMENT to be paid by Buyer on or before August 26, 1986.
WHICH AMOUNT SHALL BE NON-REFUNDABLE EXCEPT AS SPECIFIED BELOW AND SHALL BE USED IN CONSTRUCTION OF THE RESIDENCE.
150.00 representing the approximate balance, if any, to be paid in cash by Buyer at the final closing or from proceeds of
permanent financing as provided in Section 6 below.
250.00 TOTAL PURCHASE PRICE

Amount of the purchase price may be increased if additional costs are incurred for extras as described hereafter. Buyer agrees to pay for
all such extras as agreed to in a written change order as part of the purchase price of the property.

FINANCING. Financing for the property shall be provided as follows:

Construction financing (check one)
☐ Shall be provided by Contractor.
☒ Shall be provided by Buyer in the amount of \$ 40,000.00. Upon funding, progress payments shall be made
in accordance with the requirements of the construction lender.

(b) **Permanent financing.** If permanent financing is required, Buyer shall apply for funds for payment of the total purchase price less any down payment or advances. Said loan shall be (check one) ☐ FHA, ☐ VA, ☒ CONVENTIONAL, ☐ OTHER.

(c) When construction and/or permanent financing is required, Buyer agrees to use best efforts to obtain financing, and apply at his & the vendors choice within 15 days of the Effective Date of this Agreement, and to sign the necessary documentation. If Buyer does not qualify within 30 days of the original application(s), this Agreement shall be voidable at the option of Buyer or Seller upon written notice. If voided, all monies deposited herewith shall be returned to the Buyer.

(d) Once Buyer has been approved for permanent financing, Buyer shall be obligated to close the loan at the prevailing interest rate on the date of closing, provided the interest rate has not increased to the point where Buyer can no longer qualify. Contractor shall not be obligated to pay more than 2 discount points under the permanent financing without an increase in the purchase price equal to the increase in discount points. Closing shall be no earlier than October 15, 1986.

(e) Subject to the exceptions in Section C of the General Provisions, substantial completion shall be no later than December 10. For delays in substantial completion not excepted under section C of the General Provisions, Contractor agrees to pay and Buyer agrees to accept as liquidated damages the amount of \$ 50.00 per day for every day of delay beyond the agreed date of completion for a period not to exceed 30 days. After that period, Buyer may, at Buyer's option, elect to accept further delays and accrual of liquidated damages, or other remedies available at law.

PLANS AND SPECIFICATIONS. No changes shall be made to the Plans and Specifications or the purchase price except as agreed to in a change order signed by Buyer and Contractor which sets forth the change to be made and the amount of adjustment in the purchase price to be made by said change. Plans and Specifications shall be provided to the Buyer as follows: (Check One)

☐ The Buyer is purchasing the residence based on inspection of a model home of an FHA/VA Registered Plan or other Plan referred to in Section 2 above, and the Contractor shall provide an addendum attached hereto which specifies the finish material and structural options which are included in the total purchase price of the residence. Any deviations from the addendum referenced in this Section shall be agreed to in writing setting forth the nature and cost of the changes.

☒ The Buyer is purchasing a custom-built residence not based on a model, and detailed Plans and Specifications for the residence have been viewed and approved by the Buyer and are attached hereto and incorporated herein by reference.

SELECTION OF COLORS AND FINISH MATERIALS. The Plans and Specifications contain descriptions of the grade and type of materials to be used in finishing the residence or a dollar allowance for such items. The cost of said materials is included in the purchase price. To the extent that a choice of color or type of material is required, Buyer shall notify Contractor in writing of such selections no later than 15, 1986. If Buyer has not notified Contractor in writing of such selections as set forth above, Contractor shall have the right to make said selections at Contractor's sole discretion, reasonably exercised, to avoid delay in completion of construction. If selection of color, grade, or type of finishing materials pursuant to this Section are for materials more or less expensive than those specified or allowed for in the Plans and Specifications, or the attached addendum referred to in Section 7 above, any expense adjustments shall be made for or credited as agreed to by Buyer and Contractor in writing.

INSURANCE. During the period of construction and until closing, Contractor shall maintain in full force and effect, at Contractor's expense, an all-risk insurance policy for the full replacement value of all completed portions of improvements included in the residence; and all construction materials located on-site; complete coverage workmen's compensation insurance to insure against all claims of persons employed to construct the residence; and public liability insurance in the amount of \$100,000 or \$ 150,000, whichever is greater.

CONDITION AND CONVEYANCE OF TITLE. There ☐ are, ☒ are not, deed, protective, or restrictive covenants affecting the property. Buyer ☐ has, ☒ has not, reviewed those covenants prior to signing this Agreement. Where Buyer does not have title to the lot on which the residence is to be constructed, Contractor agrees to furnish good and marketable title to the property by Warranty Deed at closing. The form of title shall be in the form of a standard coverage ALTA owner's policy. Exceptions to the above including taxes, municipal assessments, easements and rights of way are as follows:

VESTING OF TITLE. Title shall be vested in Buyer as follows: Karl & Amy White

CONTRACTOR WARRANTIES. Contractor warrants that: (a) Contractor has received no claim or notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (b) all obligations against the property including taxes, liens, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, electrical systems (including all gas and electric appliances), and structural elements of the residence are warranted for a period of one (1) year from the date of closing.

CLOSING PROCEDURES. The Contractor shall provide the Buyer written notice of substantial completion of the residence. Buyer and Contractor agree to close within 5 days of Buyer's receipt of notice of substantial completion. If after receipt of such notice minor items of corrective or repair work remain, then Buyer, pending completion of such work, may withhold in escrow at closing a sum of money in an amount agreed to by Contractor and Buyer sufficient to pay for completion of such work. If such work is not completed within thirty (30) days after closing, the amount so escrowed may, at Buyer's option, be released to Buyer as liquidated and agreed damages for failure to complete. The items, including the items listed in Section 12(b) above, shall be based on ☐ date of possession ☒ date of closing ☐ Other. Other prorations shall include the following: nothing

There shall be no deviation from the closing schedule set forth herein except upon the written agreement of Buyer and Contractor.

GENERAL PROVISIONS. Unless otherwise indicated herein, the General Provisions on the reverse side hereof are incorporated into this Agreement by reference.

SPECIAL CONSIDERATIONS AND CONTINGENCIES. This Agreement is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing:

PERFORMANCE BOND. Contractor ☐ shall, ☒ shall not, be required to furnish a performance bond in the amount of the purchase price (including the lot) or \$ _____, whichever is greater prior to the commencement of work hereunder, and to deliver the bond to Buyer.

17. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Contractor shall have until 5:00 (AM/PM) August 27, 1986, 19____, to accept this offer. Unless so accepted, this offer shall lapse and the EARNEST MONEY shall be returned to Buyer.

E: August 26, 1986

SIGNATURE OF BUYER

Karl R. White
Amey White

OK ONE

ACCEPTANCE OF OFFER TO PURCHASE

Contractor hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

COUNTER OFFER

Contractor hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications as specified in the attached Addendum and presents said COUNTER OFFER for Buyer's acceptance.

8-27-86

8:30 (AM/PM)

SIGNATURE OF CONTRACTOR:

Dean R. Morgan

REJECTION

Contractor hereby REJECTS the foregoing offer. _____ (Contractor's initials)

AGREEMENT TO PAY REAL ESTATE COMMISSION

OK ONE:

The property is listed by _____, the Listing Agent/Broker Company, and a real estate commission of _____ shall be paid in accordance with the Sales Agency Agreement. The Listing Agent/Broker Company is: _____

The Listing Agent/Broker Company is _____ and has been authorized to offer this property for sale and Contractor agrees to pay a real estate commission of _____% of the total purchase price (including extras) as consideration for its efforts in procuring Buyer. Said commission shall be payable at closing or in Contractor's default on this Agreement, whichever occurs first. The amount or due date thereof cannot be changed without the prior consent of Listing Agent/Broker Company.

SIGNATURE OF Contractor:

DOCUMENT RECEIPT

The Law requires Broker to furnish Buyer and Contractor with copies of this Agreement bearing all signatures. (One of the following three must therefore be completed).

☒ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:

SIGNATURE OF CONTRACTOR

Dean R. Morgan 8/27/86
Date

SIGNATURE OF BUYER

Karl R. White 8/26/86
Date

Amey White 8/26/86
Date

☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____ 19____, by _____ Mail and return receipt attached hereto to the ☐ Contractor ☐ Buyer. Sent by _____

This is a legally binding contract. Read both front and back carefully before signing.

GENERAL PROVISIONS

A. DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by Buyer, Contractor may elect to either retain the monies deposited pursuant to this Agreement as liquidated damages or to institute suit to enforce any rights of Contractor. Both parties agree that, should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder by applicable law, whether such remedy is pursued by filing suit or otherwise. In the event the Agent/Broker company holding the EARNEST MONEY DEPOSIT is required to file an interpleader action in court to resolve a dispute over the EARNEST MONEY DEPOSIT referred to herein, the Buyer and Contractor agree that the defaulting party shall pay the court costs and attorney's fees incurred by the Agent/Broker Company in bringing such action.

B. CONTRACTOR COMPLIANCE. Contractor agrees to construct the residence in accordance with the standards and requirements of all applicable Federal, State, and Local governmental laws, ordinances and regulations. If the permanent financing to be obtained by the Buyer is based on an FHA or VA loan, Contractor agrees to meet all FHA or VA requirements relating to construction of the residence and closing of the permanent financing.

C. UNAVOIDABLE DELAY. In the event the residence may not be substantially complete by the date provided in Section 6(e) herein due to interruption of transport, availability of materials, strikes, fire, flood, extreme weather, acts of God or similar occurrences beyond the control of Contractor, Contractor shall immediately provide Buyer written notice of the nature and projected time of the delay. If any of the above actually cause a delay in substantial completion and Contractor has provided written notice of the delay to the Buyer, the completion date shall be extended a reasonable period based on the nature of the delay, but in no event shall the extension be more than forty-five (45) days beyond the completion date set in Section 6(e) herein. After that date, Buyer may, at Buyer's option, elect to accept further delays in exchange for liquidated damages as provided in Section 6(e) herein, or pursue other remedies available at law.

D. CLOSING. Contractor and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless the sale is FHA, VA or conventionally financed, in which case fees shall be paid according to FHA, VA or conventional lending regulations. Costs of providing title insurance shall be paid by Contractor. Unless otherwise agreed to in writing, taxes and assessments for the current year, and insurance, shall be prorated as set forth in Section 13. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

E. AUTHORITY OF SIGNATORS. If Buyer or Contractor is a corporation, partnership, trust, estate or other entity, the person executing this instrument on its behalf warrants his or her authority to do so and to bind Buyer and Contractor.

F. AGENT'S REPRESENTATIONS. Contractor and Buyer acknowledge that neither the Selling or Listing Agent/Broker Company has made representations or warranties concerning the condition of the property, boundary lines or size, Buyer's financing ability, or any other matter affecting the property or the parties, unless otherwise noted herein.

G. AGENCY DISCLOSURE. Selling Agent/Broker Company may have entered into an agreement to represent the Contractor.

H. TIME IS OF ESSENCE. Time is of the essence in this Agreement.

I. COMPLETE AGREEMENT — NO VERBAL AGREEMENTS. This instrument constitutes the entire Agreement between the parties and cedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no verbal agreements which modify or affect this Agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

J. SUBSTANTIAL COMPLETION. The residence shall be substantially complete when occupancy of the residence is allowable under the ordinances, and laws of the appropriate civil jurisdiction in which the property is located. In the absence of such governmental regulations, substantial completion shall be when the residence is ready for occupancy and only minor work remains which is corrective or repair in nature.

K. MECHANIC'S LIENS — NOTICE. Under Utah Law, any contractor, subcontractor, laborer, supplier or other person who performs labor or provides material to improve the property but is not paid for his work or supplies, has a right to enforce a claim against the property. This means that after a court hearing, the property could be sold by a court officer and proceeds of the sale used to satisfy the indebtedness. This can happen even if the contractor has been paid in full, if the labor or material suppliers remain unpaid.

L. CASH ADVANCES. All cash payments and advances provided directly by Buyer under this Agreement (other than EARNEST MONEY deposited with a real estate brokerage) shall be deposited, together with escrow instructions, with an escrow agent selected by Contractor. The use of an escrow agent shall be limited to Agent/Broker Company or any entity authorized to act as a trustee under Utah law. The use of such funds shall be limited to construction of the residence described in this Agreement.

Buyer or a full part form Buyer's Initials () () Date / /

Contractor's Initials Date 8/27/84

Tab D

NOVEMBER 27, 1986

Dean Morgan
Polar Bear Construction
7207 Fine Cone Street
Salt Lake City, Utah
84121

Dear Dean:

This letter is to confirm the information discussed in our conversations last week. Because the building of this home is a business transaction, we think it is very important to make sure there are no misunderstandings about expectations or intentions. In our experience, written communications are the best way to make sure that misunderstandings do not occur. If you have any questions about any of what follows, please let me know as soon as possible.

1. You agreed to send us receipts and cancelled checks on all of the expenditures as soon as possible. Also you agreed to obtain lien waivers for any subcontract work over \$500.00 and send the waivers to us by December 10, 1986.

2. As per our previous requests, you agreed to provide us with a written price for each of the following additions and/or changes by December 3, 1986:

- a. Changing the kitchen/dining room doors from 2'6" to 2'6"
- b. Making the dining room cantilever 3' instead of 2'
- c. Adding the screen porch off of the dining room
- d. Adding 3' to the height of the tower
- e. Changing the front porch roof as per the latest plan
- f. Adding whatever reinforcing is necessary to the attic so that there will be a vaulted ceiling.

We would appreciate it if you could provide prices for materials and labor separately.

3. As you know, our contract calls for a \$50.00 per day penalty for each day that the house is not completed beyond December 10, 1986. Because there was a delay in obtaining the building permit, we will not begin assessing the penalty until December 16, 1986. However, given the fact that we have had near perfect weather all fall, the penalty will be assessed as of that date as per the conditions of the contract. penalty

4. You have agreed to provide us with a revised written schedule for completion so that we can make arrangements for moving from our present home. This schedule should provide estimated weekly milestones so that we can determine whether we are falling behind.

5. You will provide us with at least one week of notice on any decisions we need to make about colors, materials, or placement.

All such decisions will be communicated to you and you will be responsible for communicating with the subcontractors. We will continue to monitor that the construction is proceeding according to the plan and will report any deviations to you. You have agreed to be responsible to see that necessary corrections are made.

6. If you or the subcontractors identify specific inadequacies in the plans, those need to be brought to our attention immediately and they will be corrected within 72 hours or less.

In addition to the above items that we discussed on the phone, there are several other concerns about schedule that we need to communicate. First, decisions about the outside trim cannot be made until you decide who will be installing the siding. As soon as you make a decision about that, please let us know. Secondly, the cabinet maker is ready to begin working as soon as the inside walls are up so that he can make the final measurements. He was planning on the job occurring much earlier since that's what we had communicated to him based on your original timeline. We do not expect that the change in timeline will cause delays, but that is a possibility.

We are looking forward to having the house completed and are optimistic that we will be able to work together productively in accomplishing that goal. If you disagree with or need to discuss the contents of this letter further, please let us know.

Sincerely,

Karl R. White

Tab E

APPENDIX "E"

April 2, 1987

Dean R. Morgan
7209 Pine Cone Street
Salt Lake City, Utah 84121

Mr. Morgan,

It has been almost two months since I have seen you. However, as a result of the contract you signed with my wife and I on August 27, 1986, you are still legally responsible as the general contractor on our home being built in Hyde Park, Utah. I have called you at least one or two times each week since the last time I saw you on February 11, 1987 and each time you have informed me that you would come to Logan within the next 3-4 days to work on the house and that you would let me know exactly when you would be here so we could get together and talk. Sadly, that has never happened.

I have taken extensive steps to avoid filing a legal action which would force you to comply with the conditions and specifications of the contract. The purpose of this letter is to make one more effort to avoid having this matter litigated. If you can meet with me by Wednesday April 8, 1987 at 11:00 AM, I will attempt to negotiate a settlement with you. Otherwise I will proceed to file a suit against you as soon after that date as possible. My proposal is outlined below. I am willing to listen to any concrete written counter proposal that you have ready by April 8th.

BACKGROUND

On August 27, 1986 a contract was signed between Karl and Amy White and Polar Bear Homes (Dean Morgan and Charlie Teames). Nothing has happened since that time which would release either party from the conditions of that contract. The total price of building the home according to the contract and accompanying specifications was \$142,250. The home was to be completed by December 16, 1986 and the contract called for a \$50.00 per day penalty payment by the contractor to the Whites for any delay beyond that time. The Whites agreed to pay a fair price for any extras added by them that were not contained in the original specifications.

Construction is already more than 3 months behind schedule and it is estimated that it will be close to six months behind schedule by the time the home is completed. The total price of completing the home (after subtracting for any "extras") will be substantially more than \$142,250 (our best estimate at the present time is \$146,000--but this may change as we learn of new bills that were incurred without our knowledge or as we learn of work that has to be done to complete the house according to the contracted specifications).

CONSEQUENCES OF A SUCCESSFUL SUIT BY THE WHITES

If Whites file a successful suit to obtain what was promised in

the contract, at least the following will occur.

Polar Bear Homes will be responsible for finishing the home according to specifications for a price of \$142,250. Thus, the contractor will owe Whites at least \$3,750 for finishing the house.

The contractor will owe Whites a late fee of approximately \$9000 if the house is completed by June 15th.

The contractor will have to reimburse Whites for the time they have spent doing work that he was hired to do (e.g. obtaining bids, negotiating with and supervising subcontractors, doing miscellaneous framing, cleanup, electrical work, and various odd jobs so as to not hold up the subcontractors. At \$10 per hour for Amy and \$35.00 per hour for Karl, this will amount to approximately \$3500.00

Whites will present the court with evidence that the partners of Polar Bear Homes behaved in a way which was negligent, irresponsible, dishonest, slanderous and fraudulent. Based on this evidence they will ask the court to revoke contractor's and realtor's licenses for both of the partners. Whites will also file complaints against Polar Bear Homes and the partners with the Better Business Bureau, the Utah Home Builders Association, the Utah Department of Business Regulation, and the Utah Realtors Association. These complaints will contain all of the accumulated evidence presented in the suit (daily logs, testimony from subcontractors, evidence of negligence and fraud, etc.)

As per the contract, the partners of Polar Bear Homes will be responsible to pay for all of the Whites' legal costs as well as their own legal costs. This could easily amount to \$6000.00

Whites will include in the suit a claim for punitive damages because of the emotional duress and disruption which has resulted from the contractor not fulfilling the terms of the contract.

CONDITIONS OF SETTLEMENT

1. By April 15, 1987, the contractor agrees to make arrangements to finish all of the items on the attached list to Whites satisfaction, or pay a reasonable cost to have Whites make arrangements to finish all of the items.
2. Within 30 days of closing, the contractor agrees to obtain lien waivers and to pay or make satisfactory arrangements to pay any bills that are in excess of the agreed-upon-contract price of \$142,250.
3. Contractor agrees to sign a legally binding note to pay Whites \$6000.00 in late fees plus a reasonable rate of interest over the next 12 months.
4. Within 30 days of closing, the contractor agrees to pay Amy a rate of \$10.00 per hour for the work she has done since November 1, 1986 which was really the responsibility of the general contractor.

5. Within 30 days of closing, the contractor agrees to pay the attorney's fees that the Whites have already incurred (approximately \$650.00)

6. Contractor agrees that the price of the Heatmaker is included in the orinally-agreed-upon price of the house.

7. Within 30 days of closing, the contractor agrees to pay Whites half of the difference between what it will cost to paint the house according to the original specifications and the amount indicated in the allowances.

8. Contractor agrees to be responsible for paying for all costs necessary to finish the house according to the original specifications that are in excess of \$142,250

BENEFITS TO CONTRACTOR OF SETTLING

By settling now, the partners in Polar Bear Homes will obtain the following benefits:

1. Accrual of late fees will stop as of April 15, 1987

2. Substantial attorneys' fees (estimated to be another \$2500 for the White's attorney, in addition to their own), for which they would eventually be liable, will not be incurred.

3. Whites agree not to file suit for punitive damages or to seek the revoking of contractor and/or realtor licenses from the partners of Polar Bear Homes.

4. Whites will not charge for the time Karl has spent doing work for which the general contractor was responsible.

It is still my hope that this matter can be resolved quickly and agreeably. I am willing to consider any legitimate written counter proposal. I look forward to hearing from you in the near future.

Sincerely,



Karl R. White

cc Charlie Teames
Gordon Low
Kevin Kane

I. CONDITIONS THAT MUST BE MET

(see letter of April 2, 1987)

II. WORK WHITES DID THAT SAVED MORGAN TIME AND/OR MONEY

1. Completed framing for sheetrockers (e.g., tower bedroom, kitchen window, storage room, fireplaces, cold air return, pocket doors, etc.)
2. Trimmed foam caulking off all of the windows and finished taping the vapor barrier.
3. Supervised the installation of the waterline, gasline, telephone, and electrical line.
4. Purchased the building permit.
5. Ordered windows and doors.
6. Arranged and supervised movement of Heatmaker so that Mountain Fuel would not disconnect the gas. *and there would not be a code violation*
7. Arranged for and supervised building of redwood deck so that siding could proceed.
8. Finished caulking the windows so that sheetrock could proceed.
9. Anchored plumbing pipes and had 1 and 1/2" pipe changed to 2".
10. Strung electrical in the food storage room.
11. Arranged for the inspectors to come.
12. Finished fastening the heating ducts (plastic to metal) so the inspector would approve for sheetrocking.
13. Removed window so that sheetrock could be loaded into the attic.
14. Met the Delabro man so he would know which windows to repair.
15. Obtained track for dining room pocket door.
16. Footings would have been poured even more incorrectly if we hadn't been there to point it out
17. Installed insulation and sealed plastic so sheetrocking could proceed.
18. Moved a support wall in basement so exhaust vent could be moved
19. Sealed vapor barrier around chimney so attic could be sheetrocked
20. *No shower in 2nd floor tub by our volunteer decision*

III. WORK DONE PERSONALLY BY WHITES FOR WHICH THEY NEED TO BE PAID

1. Supervised construction of window wells
2. Cleaned up yard for rough grading
3. Cleaned up and hauled away trash in February and March
4. Chipped out cement to correct rough plumbing in the basement
5. Arranged for and supervised repair of leaking roof
6. Obtained bids and supervised work for finish carpentry, tile, painting, carpet/linoleum laying, siding
7. All items in # II above

IV. EXAMPLES OF RECKLESS AND IRRESPONSIBLE SUPERVISION BY MORGAN

1. Shingles and flashing on roof were done incorrectly. House leaked profusely and many of the shingles will have to be

redone.

2. Grading by border was done incorrectly
3. Footings were poured incorrectly
4. waterline installed incorrectly and at triple the going rate
5. Sheathing on roof and attic not nailed down correctly
6. Drip edge installed sloppy
7. Gaps left in the insulation
8. Some windows installed backwards and upside down and caulking done sloppy
9. Basement plumbing done incorrect and slab poured over it
10. Several walls on 1st floor measured incorrectly.
11. Some roof joists cracked and pipes too short

V. DELAYS CAUSED BY MORGAN

1. Framers started to build back deck out of fir instead of redwood so that it needed to be redone
2. Framers built stairs incorrectly (1st to 2nd floor)
3. Framed 1st floor doors in at the wrong height
4. House was ready to be sided one month before he arranged for a sider to come and then he had given the sider an incorrect estimate of size of house so the sider refused to do it
5. Several headers and support walls framed incorrectly
6. Admitted to us that he allowed framers to run over two months behind schedule because he was busy with a commercial job in Layton and he "couldn't" crack down on his relatives
7. His plumber was 2 weeks late getting to the job
8. Didn't arrange for roofer in time so that it started snowing before shingling was done which caused numerous leaks which had to be repaired causing further delays

VI. CONCESSIONS BY WHITES

1. Foundation being poured incorrectly altered the room sizes
2. Bedroom double wall put on the outside instead of the inside as it was supposed to be. This reduced the effectiveness of insulation and reduced size of garage by one foot
3. Rearranged 2nd floor so you wouldn't have to change it all around after the walls and stairs were put in wrong.
4. Accepted a molding instead of a smooth finish at the peak of the attic ceiling
5. Agreed to pay extra for a larger water heater when you decided that the one you had did not have enough capacity for the house *were now reconsidering that*
6. Because the house was behind schedule borrowed additional money over what had been agreed to in the contract so that some additional suppliers and subs could be paid off

VII. EXAMPLES OF FRAUD BY MORGAN

1. Told us on 10/18 he needed \$15,000 more to pay Parsons, Trusses, Hansen & Delabro. On 1/11/87 3 of the 4 were still unpaid and the money had been spent elsewhere *one has now filed*
2. Paid \$2000 to his partner and took \$3000 himself prior to the completion of the house *Also paid his nephews & brother in law instead of the suppliers & subcontractors* *been against us*

3. Charged tools and equipment against our account at Cantwells
4. Assured us that \$3000 would be plenty to do the painting as per the specifications, but our low bid out of 3 is \$6000.
5. Tried to take advantage of our lack of knowledge about building to make things more convenient for him. For example, he said it was impossible to move the Heatmaker, said the support wall in the basement couldn't be moved, and said he had to put an additional beam in the basement. In each instance further checking with the county building inspector or other contractor proved that he had misinformed us

Tab F

Professional Builder

MID-MARCH 1986



New House Plans
Choose Working Blueprints
From Over 250 Designs

POLAR BEAR
HEAT TIGHT HOMES
7848 WILLOWCREST CIR SALT LAKE CITY, UT 84121

CHARLIE TEAMES (801) 943-1120

PRICE: \$25

Tab G

RELEASE OF SUBCONTRACTOR

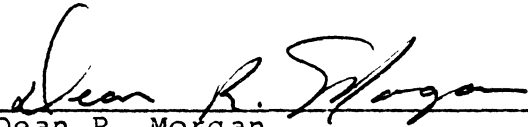
Release executed on this 11 day of May, 1987, by Dean R. Morgan, general contractor, of 7209 Pine Cone Street, City of Salt Lake, County of Salt Lake, State of Utah, herein referred to as "Releasor" to Mike and Jeff Hoth, Subcontractors, of 301 West 1100 North, City of Logan, County of Cache, State of Utah, herein referred to as "Releasees".

In consideration of services rendered to wit: framing of the home of Karl White according to an oral agreement, in that, the Releasees agreed to frame said home for a contract price of SIX THOUSAND DOLLARS (\$6,000.00). Said contract being fully performed. The workmanship is commendable and the results satisfactory regardless of the inadequate plans. I release and discharge Releasees and his heirs, legal representative and assigns from any further work on said home, claims, present and future, known and unknown, and in any manner arising out of said subcontract job.

It is acknowledged that THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500.00) has been paid and that TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) is owing, not inclusive of any extras or changes at the direction of Karl or Amy White, which have not been paid on this date.

I have read this Release and understand all of its terms. I execute it voluntarily and with full knowledge of its significance.

IN WITNESS WHEREOF, I have executed this Release at
SALT Lake City, on this 11 day of May,
1987.



Dean R. Morgan
General Contractor

HOTH.REL
D. 31 MF

Tab H

Kevin E. Kane - 3939
DAINES & KANE
Attorney for Defendants
108 North Main, Suite 200
Logan, UT 84321
Telephone: (801) 753-4403

IN THE SECOND CIRCUIT COURT, STATE OF UTAH
COUNTY OF CACHE, LOGAN CITY DEPARTMENT

MICHAEL J. HOTH, JEFFREY R.
d/b/a HOTH BROTHERS,

Plaintiff,

vs.

KARL R. WHITE and AMY H.
WHITE,

Defendant.

AFFIDAVIT FOR ATTORNEY'S
FEES OF DEFENDANTS

Civil No. 873000618

KARL R. WHITE and AMY H.
WHITE, Husband and wife,

Third-Party Plaintiffs,

vs.

DEAN R. MORGAN, CHARLES R.
TEAM, DEAN R. MORGAN, d/b/a
POLAR BEAR HOMES, and CHARLES
R. TEAM, d/b/a TEAM REALTY,

Third-Party Defendants.

STATE OF UTAH)
 (ss:
County of Cache)

KEVIN E. KANE of Daines & Kane, being first duly sworn upon
oath, deposes and states as follows:

1. That I am an attorney licensed to practice in the State
of Utah and have been retained by the above-named Defendants to
represent them in this matter.


2. That during the course of my representation of the Defendants in this action, the undersigned has rendered services as set forth in Exhibit "A" attached hereto and by this reference made a part hereof, for and on behalf of said Defendants.

3. That the usual and customary rate of legal services of the type rendered herein is \$75.00 per hour which brings the total for legal services rendered, based upon the outlined hours in Exhibit "A", to date of \$1,501.80.

4. That in connection with this matter, the firm of DAINES & KANE has incurred expenses as set forth in Exhibit "A" in the amount of \$199.50.

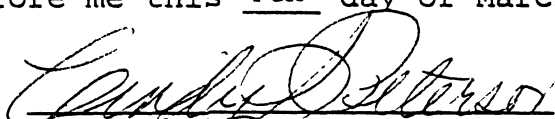
DATED this 4th day of March, 1988.

DAINES & KANE


Kevin E. Kane
Attorney at Law

SUBSCRIBED AND SWORN before me this 4th day of March, 1988.

Commission expires: 5/14/91
Residing in: *PO Logan, Utah*


Notary Public

KEVIN E. KANE
Daines & Kane
108 North Main, Suite 200
Logan, Utah 84321

EXHIBIT A

Re: Karl and Amy White
651 East 2160 North
No. Logan, UT 84321

01/30/87	Conference:	1.50	\$112.50
02/04/87	Teleconference and Review: With Amy regarding home.	.40	30.00
02/06/87	Conference: With Karl and Amy	.20	15.00
02/11/87	Conference:	1.60	120.00
02/17/87	Teleconference and Review: With Amy regarding home.	1.00	75.00
03/10/87	Payment from Whites	\$240.00	
03/11/87	Conference: With Gordon Low	.70	52.50
03/11/87	Review File/Documents: Logs and demand list	.20	15.00
03/13/87	Teleconference and Review: With Gordon Low	.20	15.00
03/13/87	Teleconference and Review: With Karl	.30	22.50
03/20/87	Teleconference and Review: Regarding Morgan	.10	7.50
03/20/87	Teleconference and Review: With Gordon Low	.20	15.00
03/20/87	Teleconference and Review: With Karl	.10	7.50
03/27/87	Teleconference and Review: Regarding settlement attempts	.10	7.50
03/30/87	Conference: With Gordon Low	.30	22.50
03/31/87	Teleconference and Review: With Karl	.10	7.50
04/01/87	Conference: With Gordon Low	1.10	82.50
04/01/87	Review File/Documents: March 10 List delivered	.20	15.00
04/02/87	Teleconference and Review: With Karl re: Hoth & Morgan	.20	15.00
04/03/87	Conference: With Gordon on Mtg. and Hoths	.20	15.00
04/03/87	Draft Documents: Hoth's Complaint	1.00	75.00
04/07/87	Conference: With Low, Morgan and Karl	2.60	195.00
04/07/87	Filing fees: District Court		75.00
04/08/87	Teleconference and Review: With Gordon Low	.20	15.00
04/09/87	Teleconference and Review: With Low re: settlement	.20	15.00
04/10/87	Review file/Documents: Low letter of 4/10/87.	.20	15.00
04/13/87	Conference: With Gordon Low		

	re: settlement	.20	15.00
04/13/87	Letter: rejection to Gordon	.20	15.00
04/13/87	Teleconference and Review:		
	With Karl re: rejection	.10	7.50
	SUBTOTAL:	13.40	\$1,005.00
	Disbursements:		75.00
			\$1,080.00
	Payments:		- 240.00
			<u>\$840.00</u>

05/11/87	Payment from Whites		\$760.00
07/10/87	Review Documents:		
	Plat dedication	.10	6.50
08/19/87	Conference: With Karl re: Hoths		
	and Morgan	.30	22.50
08/26/87	Conference: With Karl	.50	37.50
08/28/87	Teleconference: With Jeff Burbank	.20	13.00
08/28/87	Draft Documents: Reply	.40	30.00
09/01/87	Teleconference: Re: Burbank	.10	75.00
09/22/87	Conference: Re: Counterclaim	.90	67.50
09/23/87	Payment from Whites		\$97.50
09/24/87	Draft Documents: Answer Counter-		
	Claim, 3rd Party C.C.	2.40	180.00
09/25/87	Filing Fees: Circuit Court		25.00
10/01/87	Review Documents: Answer to C.C.	.20	15.00
10/01/87	Service Fees: Salt Lake Sheriff		15.00
10/05/87	Service Fees: Salt Lake Sheriff		15.00
10/07/87	Filing Fees: Circuit Court		5.00
10/29/87	Reimbursement from Salt Lake Sheriff		\$22.50
11/09/87	Payment from Whites		\$246.00
12/14/87	Review Documents: Notice of		
	of setting.	.13	9.75
01/29/88	Payment from Karl.		\$33.95
02/22/88	Court Preparation: With Karl	2.20	165.00
03/01/88	Court Preparation: With Karl	1.60	120.00
03/02/88	Court Preparation: With Karl	3.50	262.50
03/03/88	Court Preparation: With Karl	2.00	150.00
03/03/88	Court Time	7.50	562.50
03/03/88	Court Review: With Karl	.60	45.00
	SUBTOTAL:	22.63	\$1,697.25
	Disbursements:		124.50
			\$1,821.75
	Payments:		- 1,159.95
			<u>\$661.80</u>

TOTAL HOURS AT \$75.00 PER HOUR: 36.03

GRAND TOTAL NOW OWING:	\$1,501.80
TOTAL PAYMENTS MADE:	1,377.45
TOTAL BILLED:	<u>\$2,879.25</u>

Tab I

David Allen BENNION, Donald Dean
Bennion, and Dennis Layne
Bennion, Plaintiffs and Appellants,

v.

Lloyd HANSEN and John J. Van Leeu-
wen, as Trustees of the Grover A. Han-
sen Trust, Defendants and Respon-
dents.

No. 18925.

Supreme Court of Utah.

April 5, 1985.

Grandchildren sued trustees seeking to enforce terms of declaration of trust executed by their grandfather. The Third District Court, Salt Lake County, Scott Daniels, J., entered judgment in favor of trustees, and grandchildren appealed. The Supreme Court, Zimmerman, J., held that: (1) trial court did not abuse its discretion by denying trial to grandchildren whose only excuse for failure to file jury demand on time was that deadline for filing notice fell on Sunday, and where notice was filed on following Tuesday, four days late, and (2) trial court's findings had adequate evidentiary support.

Affirmed.

1. Jury ⚡25(6)

To avail oneself of right to jury trial, one's demand must be timely and in accordance with applicable rule or statute. Const. Art. 1, § 10.

2. Jury ⚡25(6)

Trial court did not abuse its discretion by denying jury trial to plaintiffs whose only excuse for failure to file jury demand on time was that deadline for filing notice fell on Sunday, and where notice was filed on following Tuesday, four days late. Const. Art. 1, § 10.

3. Appeal and Error ⚡1010.1(6)

On appeal, findings of trial court will not be disturbed unless there is no substantial record evidence to support them.

4. Appeal and Error ⚡931(1)

In reviewing evidence, Supreme Court views it in light most favorable to trial court.

5. Trusts ⚡37½

Creation of a trust requires delivery of property into the trust.

6. Deeds ⚡56(2, 3)

Delivery of deed requires that grantor either relinquish physical control of deed or have present intent to permanently divest himself of title to the property.

7. Trusts ⚡372(1)

Party challenging validity of delivery bears burden of proof; where grantor retains possession of or the right to recall deed, burden shifts to party claiming under deed.

8. Trusts ⚡372(3)

Ample evidence supported trial court's finding that grandchildren who sued trustee seeking to enforce terms of declaration of trust as executed by their grandfather did not meet their burden of proving that their grandfather placed the deed and trust declaration in a safety deposit box in 1972 with intention of relinquishing control over both documents, and thus that there had been no delivery as required for creation of trust, prior to amendment.

9. Trial ⚡403

Until a court files its findings of fact, no decision has been rendered or final ruling made.

10. Judges ⚡24

Any judge is free to change his or her mind on the outcome of a case until a decision is formally rendered.

James A. McIntosh, Salt Lake City, for plaintiffs and appellants.

Craig G. Adamson, Salt Lake City, for defendants and respondents.

ZIMMERMAN, Justice:

This is an appeal from a judgment affirming the disposition of an estate in accordance with an amended trust instrument. The appellants seek reversal on grounds that the trust instrument, which by its terms was irrevocable and unamendable, took effect before it was amended and, therefore, the amendment should have been ignored. We affirm the trial court.

Plaintiffs Layne, David, and Donald Bennion ("the Bennion brothers") sued Lloyd Hansen and John Van Leeuwen in their capacities as trustees of the Grover A. Hansen Trust, seeking to enforce the terms of a 1972 declaration of trust executed by their grandfather, Grover A. Hansen. Under the terms of the 1972 declaration, plaintiffs were to receive approximately one-third of Mr. Hansen's estate on the death of their mother, Mr. Hansen's daughter. The estate consisted almost entirely of a condominium and its furnishings. Rather than following the 1972 instrument's provisions, upon the death of the Bennion brothers' mother, the trustees distributed the estate in accordance with the terms of a 1974 amendment to the 1972 declaration of trust. This amendment reduced the brothers' share of the estate to the lump sum of \$4,500 to be shared equally among them.

After the brothers' request for a jury was denied for untimeliness, the trial court heard testimony and held that the 1974 amendment was effective. It found as a matter of fact that Grover Hansen had no present intent to create a trust in 1972 and had not delivered any property into the trust prior to executing the 1974 amendment. It therefore concluded that the irrevocable trust was not actually created until 1974 and that its terms were those set forth in the declaration signed in 1972, as

modified by the 1974 amendment. The court granted judgment for the defendants.

In this Court, the Bennion brothers seek reversal, claiming that the trial court erred in denying their request for a jury, that the 1974 amendment was ineffective because in 1972 there was valid delivery of both the declaration of irrevocable trust and a deed conveying the condominium into the trust, and that the trial court erred when it entered findings and conclusions inconsistent with its own earlier oral statements.

[1] The facts with respect to the brothers' first claim are simple. They filed a request for a jury eight days before the trial date. Rule 4.2 of the Rules of Practice in the district courts of this state requires that such a request be made ten days before trial. The trustees objected to the notice, and the law and motion judge sustained the objection. The brothers argue that this ruling denied them their constitutional right to a jury trial. Their argument is without merit. The Utah Constitution, article I, section 10, provides that in civil cases the right to a jury trial is "waived unless demanded." To avail oneself of this right, one's demand must be timely and in accordance with applicable rule or statute. *Board of Education v. West*, 55 Utah 357, 362-63, 186 P. 114, 116 (1919). Nothing more was required by the court below.

[2] The brothers further contend that, under *Board of Education*, the trial court had the discretion to relieve them of their default upon a showing of good cause and that the court abused its discretion by not permitting them a jury. However, there is absolutely no factual basis for finding that the lower court abused its discretion. The only excuse offered for the failure to file the demand on time is that the deadline for filing the notice fell on a Sunday. The notice, however, was filed on the following Tuesday, four days late.¹ It is hard to

1. Rule 4.2, Utah R. Practice, states that a written demand for a jury trial "must be filed at least ten (10) days prior to trial or at such other time as the trial judge may order." (Emphasis added.) Rule 6, Utah R.Civ.P., in delineating how time limits shall be computed, states that the

day of the event from which the designated time period runs, here the trial date, is not included in the computation. The last day of the period is included unless it is a Saturday, a Sunday, or a legal holiday. In that case, the time period runs "until the end of the next day which is not

understand how this fact alone would warrant our finding that the trial court abused its discretion in denying the brothers' request for a jury.

With respect to the second point, the brothers contend that in 1972 the trust declaration and the deed conveying the condominium to the trust were properly delivered and, therefore, that this property was beyond the reach of the 1974 amendment. This argument runs directly contrary to the trial court's explicit finding of fact that although the grantor executed these instruments in 1972, he did not deliver either instrument and had no intention of making such delivery. The court found that these instruments were not delivered and did not become effective until 1974 when the grantor executed the amendment and then had all three instruments simultaneously recorded.

[3, 4] On appeal, the findings of the trial court will not be disturbed unless there is no substantial record evidence to support them. *See, e.g., Litho Sales, Inc. v. Cutrubus*, Utah, 636 P.2d 487, 488 (1981). In reviewing the evidence, we view it in the light most favorable to the trial court. *See, e.g., Hardy v. Hendrickson*, 27 Utah 2d 251, 254, 495 P.2d 28, 29 (1972). The brothers' counsel has not approached this appeal with these standards in mind. His brief ignores the trial court's findings and invites this Court to reweigh all the evidence on the issue and independently find the facts. That is not this Court's role, and we firmly decline the brothers' invitation. Considering the evidence under the appropriate standards, we conclude that the trial court's findings have adequate evidentiary support and should not be disturbed.

[5-7] Creation of a trust requires delivery of property into the trust. Delivery of a deed requires that the grantor either

relinquish physical control of the deed or have a present intent to permanently divest himself of title to the property. *See Wiggill v. Cheney*, Utah, 597 P.2d 1351, 1352 (1979); *Hanns v. Hanns*, 246 Or. 282, 423 P.2d 499, 507 (1967). The general rule is that the party challenging the validity of delivery bears the burden of proof. *Controlled Receivables, Inc. v. Harman*, 17 Utah 2d 420, 423, 413 P.2d 807, 809 (1966). However, where the grantor retains possession of or the right to recall the deed, the burden shifts to the party claiming under the deed. *Hanns v. Hanns*, 423 P.2d at 508.

[8] In the present case, both parties conceded that actual physical delivery of the deed to the condominium did not occur. The brothers' claim rests on the contention that Grover Hansen placed the deed and the trust declaration in a safety deposit box in 1972 with the intention of relinquishing control over both documents. For this proposition, the brothers rely on the fact that one of the trustees had a key to the box. *See Agrelius v. Mohesky*, 208 Kan. 790, 494 P.2d 1095 (1972). However, there was ample evidence to support the trial court's finding that the brothers had not carried their burden of proof on this point.

First, there was conflicting testimony as to whether Grover Hansen had put the deed in the safety deposit box. Second, even if he did put the deed in the box, there was evidence that he did not do so with an intention to relinquish control over it and to effect delivery into the trust. The evidence was undisputed that Grover maintained control over the deed from 1972 until 1974. No one saw either the trust declaration or the deed from 1972 until Grover produced the documents in 1974 when the amendment was executed and all documents were recorded.

a Saturday, a Sunday or a legal holiday." (Emphasis added.) Reading these two rules together, the minimum ten-day period is counted back from the day before the trial is scheduled. Should the tenth day fall on a Sunday, as here, the time period must be counted back to the next day that is not a Saturday, a Sunday, or a

legal holiday. Thus, the jury demand would be due on the prior Friday. A Friday filing would comply with the demands of both Rule 4.2 and Rule 6, while to allow a Monday filing would directly contravene the ten-day minimum required by Rule 4.2.

[9, 10] The final argument of the brothers is also without merit. At the close of trial, after telling the parties he would take the matter under advisement and would further consider their trial briefs, the judge commented on his understanding of the evidence and gave some indication of his leanings. The brothers complain that the findings of fact finally signed by the judge do not agree with his post-trial comments. Until a court files its findings of fact, no decision has been rendered or final ruling made. Any judge is free to change his or her mind on the outcome of a case until a decision is formally rendered. *McCollum v. Clothier*, 121 Utah 311, 320, 241 P.2d 468, 472 (1952); *Chapman v. Jesco, Inc.*, 98 N.M. 707, 709, 652 P.2d 257, 259 (1982); *Johnson v. Whitman*, 1 Wash.App. 540, 541, 463 P.2d 207, 209 (1969). The rule suggested by the brothers would mean that a judge would have to refrain from expressing any views he or she might have on a matter for fear that those comments might be found to control the later disposition of the case. It would be most unwise to adopt any rule that might discourage judges from frankly discussing the merits of cases before them with attorneys for both sides; such discussion is often valuable to the court and counsel, both in focusing on the pivotal issues and in clarifying points that the court might otherwise have misunderstood.

The decision below is affirmed. Costs to respondents.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

