

2009

Michael C. Posner v. Equity Title Insurance Agency,
Inc., a Utah corporation; NRT, Inc., a New Jersey
corporation dba Coldwell Banker Residential
Brokerage : Reply Brief of Appellant

Utah Court of Appeals

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Catherine James, David E. Ross; Attorneys for Plaintiff/Appellant.

David Bennion; Parsons Behle and Latimer; David W. Overholt; Robert A. Ponte; Richer and Overholt, P.C.; Attorneys for Defendants/Appellee.

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IN THE UTAH COURT OF APPEALS

<p>MICHAEL C. POSNER,</p> <p>Appellant,</p> <p>vs.</p> <p>EQUITY TITLE INSURANCE AGENCY, INC., a Utah Corporation NRT, INC., a New Jersey corporation dba COLDWELL BANKER RESIDENTIAL BROKERAGE, Appellees.</p>	<p>Appellate Case No. 20090058-CA</p> <p>District Court Case No. 040901853</p>
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REPLY BRIEF OF APPELLANT

Appeal from the Ruling of the Third Judicial District Court,
The Honorable Tyrone E. Medley,

David Bennion
PARSONS BEHLE & LATIMER
One Utah Center
201 S. Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84145

David W. Overholt
Robert A. Ponte
RICHER & OVERHOLT, P.C.
901 West Baxter Drive
South Jordan, UT 84095

Catherine James
6037 N. 6300 W.
Mountain Green, Utah 84050

David E. Ross II
1912 Sidewinder Drive, Suite
Park City, Utah 84060

Attorneys for Defendants/Appellee

Attorneys for Plaintiff/Appellant

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UTAH APPELLATE COURTS

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IN THE UTAH COURT OF APPEALS

MICHAEL C. POSNER,

Appellant,

vs.

EQUITY TITLE INSURANCE
AGENCY, INC., a Utah Corporation
NRT, INC., a New Jersey corporation
dba COLDWELL BANKER
RESIDENTIAL BROKERAGE,
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South Jordan, UT 84095

Catherine James
6037 N. 6300 W.
Mountain Green, Utah 84050

David E. Ross II
1912 Sidewinder Drive, Suite
Park City, Utah 84060

Attorneys for Defendants/Appellee

Attorneys for Plaintiff/Appellant

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SUMMARY OF POSNER’S REPLY TO EQUITY

In its Appellee Brief, Equity Title Insurance Agency, Inc. (“Equity”) argues that it ought to be dismissed because Posner admitted that his real estate agent instructed Equity to close, and Equity’s title agent merely followed the real estate agent’s authorized instructions. Equity also argues that its title agent Helen Smith breached no duties to Posner when she closed with the \$260,000 Financial Guaranty. None of these arguments provide this Court with a satisfactory legal basis for upholding the trial court’s dismissal on a motion for summary judgment.

With respect to Equity’s arguments on authority, Posner replies that none of Equity’s arguments provide a sufficient legal basis for finding a delegation of authority. For example, Posner’s admission that a conversation between his agents occurred is not an admission as to its truth. Posner has consistently maintained that he never told Christoffersen that he approved the Financial Guarantee, that he never instructed her to tell Helen Smith to close, and supplied evidence that casts doubt on whether either agent had a reasonable basis for believing Posner had seen and approved the Guarantee. Nor are Posner’s testimony or affidavits—in which he describes what he thought his real estate agent did at his closing, or describes his expectations

of his agents—sufficient proof of authorization, as evidence of authorization must show or at least suggest that Posner gave *written* approval for Christoffersen to act and speak on his behalf at closing.

With respect to Equity’s argument that its agent breached no duty when she closed with an unsecured \$260,000 Financial Guaranty rather than the secured \$263,900 Surety Bond required by Posner’s REPC, Posner answers that a precondition to his sale was that the buyer supply a secured \$263,900 Surety Bond. When Helen Smith closed with a document that did not specifically match those terms, without Posner’s express authorization, she directly breached the escrow instructions contained in Posner’s REPC and therefore breached her fiduciary duty to Posner.

ARGUMENTS

I. MR. POSNER’S RECITATION OF THE TESTIMONY OF OTHER PARTIES IS NOT AN ADMISSION AS TO THE TRUTH OF THE TESTIMONY

The fact that Posner recites in his pleading “Ms. Christoffersen informed Ms. Smith that Mr. Posner had approved the Financial Guarantee written for the amount of \$260,000 and stated that Equity could proceed with the closing” is not an admission as to the truth of the matter. Posner recites the above conversation based on the deposition testimonies of Christoffersen and Smith, who both testified the conversation occurred.

Posner was not present when Christoffersen spoke with Smith—he was in Florida (R. 327), so his acknowledgement that a conversation occurred does not reflect personal knowledge. On the contrary, Posner expressly denies that he “had approved the Financial Guaranteeand stated that Equity could proceed with closing.” (Eq. App. Br. p. 5). Posner never saw the Financial Guarantee, never told Christoffersen that it was okay to close with the Financial Guaranty, and never instructed Christoffersen to tell Smith that he approved closing the sale with the Financial Guarantee. His Appellant Brief supplies circumstantial evidence that neither agent saw the Guarantee themselves, and thus knew that Posner had given informed approval (Affidavits of Posner R 481-486; Facts and Disputed Facts R. 460-465; Exhibits R 487-545). There is a dispute about what happened just prior to and at Posner’s closing which raises a genuine dispute of material fact that should have gone to the jury, and therefore Equity’s dismissal on its summary judgment motion is inappropriate.

II. POSNER’S TESTIMONY IS NOT SUFFICIENT EVIDENCE OF CHRISTOFFERSEN’S AUTHORITY

Equity cites the following quote, “admitted under oath,” as evidence that Posner gave Christoffersen authority to instruct Equity to close:

Q: Can you just elaborate on what your—what her [Ms. Christoffersen’s] role at closing was? Was there an agreement in place that she would be contacted?

A: The only reason Kandis was at the closing was to get her commission. And my contact with her as being I guess my agent was to make sure that it closed. And she was the one that was negotiating back and forth with the contract as far as making sure that we had a surety bond and how much it was and everything else.

Equity claims that Posner is bound by this position, having never modified it, but Posner actually did clarify what he meant:

Q: Michael, I want to clarify something. When you were speaking....[with Mr. Bennion]...you said you gave instructions to both Kandis Christoffersen and Helen Smith. I gather you said essentially the same thing to them, "Make sure a surety bond is in place." Is that correct?

A: Yes.

Q: But you said you did not expect Kandis Christoffersen to review the bond in any way:

A: Right.

Posner's first steps in initiating his lawsuit firmly support his denial that he had made any delegation to Christoffersen. Had Posner actually expected Christoffersen to accept the Surety Bond on his behalf, and to instruct Equity to close (Equity App. Br. p. 6), he could have named her in his original Complaint and alleged a breach of those duties. In fact, at the time he filed his initial Complaint, Posner was not aware that Christoffersen played *any* role at his closing. It was only after Posner received Equity's Answer, in which it stated that Christoffersen had instructed Smith to close, that Posner became aware of Christoffersen's actions and amended his complaint.

Posner contends that the instruction ‘make sure the transaction closes’ offered by Equity as proof of Christoffersen’s extended agency, is nothing more than a general exhortation and certainly a matter that Helen Smith as escrow and title agent was expected to do anyway. Since Posner gave the instruction ‘make sure the buyer supplies a surety bond’ to *both* agents, Helen Smith’s failure to make sure the buyer provided a surety bond is not excused by claiming that Kandis Christoffersen gave her instructions that were inconsistent with Posner’s instructions, as Smith had her own fiduciary duty to Posner.

As Equity states, the truth is not a nose of wax to be twisted and turned, but in this case, the truth lies in the documented evidence that was created just prior to and during the time of Posner’s closing, such as the listing agreement, the REPC, the amendments to the REPC, the fax and phone records of calls made between the parties, the closing documents, and the Financial Guarantee itself. This evidence shows that Christoffersen did play a role in Posner’s closing, but it was not one that he had delegated.

Under Utah law, a principal broker and licensees acting on his behalf who represent a seller must have a written agency agreement with the seller that defines the scope of the agency. Utah Admin. Code R162-6-1(6.1.11.1.) reads: “A principal broker and licensees acting on his behalf who represent

a seller shall have a written agency agreement with the seller defining the scope of the agency.” The written listing agreement [Posner App. Br. Addendum 3] between Posner and Coldwell defines the scope of Christoffersen’s agency, and it contains nothing about acting on Posner’s behalf at this closing.¹ Smith *herself* stated that she did not believe Christoffersen was acting on Posner’s behalf. (R. 469-471), therefore, neither the facts nor Posner’s testimony support Equity’s argument that Smith closed Posner’s sale in the belief that Christoffersen was acting within her authority as Posner’s agent.

III. POSNER’S REPC WAS MATERIALLY CHANGED

Equity disputes Posner’s assertion that his REPC was materially breached when Smith closed with a \$260,000 Financial Guarantee rather than with the \$263,000 Surety Bond the REPC expressly required. (Equity App.. Br. p. 13-14). Equity suggests 1) that there was no meaningful difference between a document entitled ‘Financial Guarantee’ rather than ‘Surety Bond’, and 2) that the \$3,900 discrepancy between what was submitted and what the REPC required is immaterial because no payments

¹ See also U.C.A. §25-5-4(1)(e): The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement...every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation...

on the Guarantee were ever made and that failure to pay was not ‘caused’ by the \$3,900 discrepancy.

Equity argues that there is no real distinction between a financial guarantee and a surety bond. However, it is clear from the REPC Addendum 9 (Posner App. Br. Addendum 1), that Posner agreed to the Seller carry back for \$263,900 *secured in second position* and that a surety bond would be issued in the amount of the \$263,900. (Emphasis added) Posner made it clear that the surety bond was to be secured. The Financial Guarantee provided by American Natural Resources Corporation was on its face an unsecured instrument (Posner App. Br. Addendum 2).

The difference in price between the REPC and the Financial Guarantee should have put Equity on notice of a fundamental discrepancy between the two documents. By closing the transaction nevertheless, Equity effectively changed the terms of Posner’s seller financing. The \$3,900 change was material because it increased Posner’s seller financing to \$263,900; in the event of a buyer default, the Financial Guarantee (even *had* it been what Posner requested) would have paid back \$260,000, leaving Posner \$3,900 short. Posner agreed to sell based on his expectation that his seller financing terms guaranteed him receipt *in full* of the negotiated purchase price.

Acceptance of a document that neither matched the form or substance of the financial security requested, nor the seller financing amount specified in the REPC, constituted a material breach.² By closing in breach of the terms of Posner's REPC, Equity closed on a sale to an unqualified buyer. The sale to an unqualified buyer, absent the financial protection his REPC required, left Posner with no choice but to buy back his land when the buyer defaulted, and thereby directly caused Posner's losses.³

SUMMARY OF POSNER'S ANSWER TO COLDWELL

Posner will answer Coldwell's arguments that 1) his conduct met the requisite legal standards for striking testimony, 2) he failed to marshal the evidence in support of the trial court's ruling adequately, and 3) that he cannot prevail at trial without a real estate expert witness. Posner does not believe Coldwell presented any authority for awarding attorney fees in its defense of Posner's single claim for tort.

² A material breach occurs when the failure of performance "defeats the very object of the contract" or "[is] of such prime importance that the contract would not have been made if default in that particular had been contemplated" *Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 451 (Utah 1979). See also *Rogers v. Relyea*, 601 P. 2d 37, 41 (Mont. 1979): "A substantial or material breach is one which touches the fundamental purposes of the contract and defeats the object of the parties in making the contract."

³ Under the applicable standard of review, Posner's claim that a breach occurred must be taken as true for the purposes of this appeal. See *Kouris v. Utah Highway Patrol*, 70 P.3d 72, 75 (Utah 2003): in reviewing a grant of summary judgment, [the reviewing court must] view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.

Correct application of the ruling in Kilpatrick v. Bullough Abatement, Inc., 199 P.3d 957 (Utah 2008) demonstrates that Posner's late submission of his expert report was not a willful failure to obey the Amended Scheduling Order (hereinafter 'the Order'). Posner demonstrates that in all but one of the other examples of misconduct Coldwell attributes to him, it either misstates the record or incompletely summarizes in a way that distorts Posner's conduct. Posner also contests Coldwell's claim that he failed to marshal the case against him adequately. Posner is required to cite the factual findings that support the trial court's orders and conclusions of law under Rule of Appellate Procedure 24 (a)(9). However, findings of fact must be supported by sufficient evidence, 918 P.2d 469, 472 Askew v. Hardman (Utah 1996), and Posner was not obliged to summarize Coldwell's numerous other allegations of misconduct, as he believes they do not qualify as facts.⁴ Finally, Posner disputes Coldwell's characterization of his closing as so complicated that expert testimony is required as to the standard of care.

ARGUMENTS

I. THE TRIAL COURT ABUSED ITS DISCRETION IN STRIKING THE EXPERT REPORT

⁴ See Campbell v. Campbell. 896 P.2d 635, 638 (Ut. Ct. App. 1995), citing *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App.1991): "...appellants need not engage in a futile marshalling exercise if they can demonstrate that findings...are legally insufficient."

Coldwell's motion (R. 1527-1529), memoranda (R.1530-1558; R. 1618-1624) and oral argument (Tr. May 12, 2008) were confined to the tardiness of Posner's designation of his expert witness Greg Froerer and their claim of prejudice. Posner's memorandum in opposition (R. 1610-1617) and oral argument (Tr. May 12, 2008) was also limited to the tardiness claim and prejudice claim. The trial court rendered its opinion as to the issues of tardiness and prejudice (Tr. May 13, 2008) and its findings incorporated Coldwell's Memoranda in the Order (R. 1695-1699).

In its Appellee Brief, however, Coldwell (App. Br. p 5-6) argues that "...more importantly, the trial struck Posner's expert witness report and testimony to sanction Posner's repeated and persistent dilatory conduct in this case." Coldwell continues by arguing that by allowing Posner's late designation would be to endorse and legitimize his "persistent refusal to comply with the Amended Scheduling Order."

There was absolutely no finding by the trial court of any "repeated and persistent dilatory conduct" and no finding that the reason the expert witness was excluded was because of such conduct. (R. 1695-1699; R. 1530-1561; R. 1618-1624). The trial court merely found that the designation of an expert witness was filed late and Coldwell would be prejudiced by allowing the expert report and testimony. The only order suggesting dilatory conduct

was the trial court's Notice of Order to Show Cause (R 1515), an order directed at both parties.

To avoid a reversal by this Court and to justify the harsh sanction of the trial court, Coldwell must demonstrate "willfulness, bad faith or fault." Kilpatrick v. Bullough Abatement, Inc., 199 P.3d 957, 967 (Utah 2008).⁵ As there was no such finding made by the trial court, Coldwell notes (App. Br. p. 15) that a lower court's failure "to make a specific finding of willfulness, bad faith or fault 'is not grounds for reversal *if* a full understanding of the issues on appeal can nevertheless be determined by the appellate court.'" (Emphasis added) In support of the argument, Coldwell cites Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 962 (Utah App. 1989) and Preston & Chambers, P.C. v. Koller, 943 P. 2d 260 (Utah App. 1997).

Amica and Preston provide us guidance as to the kind of conduct that merits harsh sanctions. In Amica, the sanctioned conduct included not responding to discovery requests for 8 months, and not responding to a Court ordered motion to compel. The Court, in reviewing the record, found support for a finding of willfulness, bad faith or fault as demonstrated by misrepresentation, bribery, intimidation of witnesses, brandishing a revolver,

⁵ See also Morton v. Continental Baking Co., 938 P.2d 271, 276 (Utah 1997) Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

etc. (Id.) Similarly, in Preston, the Court upheld sanctions after noting that the record established the following findings:

During thirty-four months, Preston had served Koller with two separate sets of interrogatories, sent an informal letter, and deposed Koller, in each instance requesting the disclosure of potential expert witnesses. Each request went unanswered. After nearly three years, the trial court ordered that an expert be retained, imposed a deadline, and expressly stated that the malpractice claims would be dismissed if Koller did not comply. (Preston, at 263).

Compared to the conduct in Amica or Preston, Posner's conduct of filing designation of expert witness Gage Froerer after the discovery deadline, does not reflect the egregious conduct, in the form of repeated failures to respond to discovery requests, motions, court orders, bad faith, and so forth, that Amica and Preston illustrate as being sufficient to demonstrate willfulness, bad faith or fault. As pointed out in Kilpatrick at 967, the Constitution limits the power of the courts to dismiss an action without affording a party an opportunity for a hearing on the merits of his cause (citing Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)). The Supreme Court has held that Rule 37⁶ of the Federal Rules of Civil Procedure "should not be construed to authorize dismissal . . . when it has been established that failure to comply has been due to inability,

⁶ Supreme Court referred to Rule 37 of the Federal Rules of Civil Procedure which are for the most part the same as Utah's Rule 37 *URCP*.

and not to willfulness, bad faith, or any fault of petitioner." Societe Internationale, (Id. at 212).⁷ The Tenth Circuit confirmed that the clients' knowledge was integral to imposing sanctions. M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 873 (10th Cir.1987). The sanction of dismissing Posner's Complaint is a sanction against him personally and he is entitled to due process under the United States Constitution. Aside from pointing out that the trial court did not address any willfulness, bad faith or fault, there is nothing in the Record that establishes Posner's willfulness, bad faith or fault in filing the expert designation late and Coldwell, in its marshalling of facts, does not present any such evidence.

As there are no facts to find willfulness, bad faith, fault or even persistent dilatory conduct, the exclusion of Gage Froerer must be reversed.

II. THE TRIAL COURT'S SANCTION WAS UNJUST

Coldwell argues (App. Br. p. 16-18) that the sanction was just. The trial court's power to sanction emanates from the Utah Rules of Civil Procedure, namely Rules 16 and 37:

Rule 16(d) states:

"Sanctions. If a party or a party's attorney fails to obey a scheduling order....., the court, upon motion, *may make such orders with regard*

⁷ Supreme Court referred to Rule 37 of the Federal Rules of Civil Procedure which are for the most part the same as Utah's Rule 37 *URCP*.

thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B),(C),(D).” (Emphasis added)

Rule 37(b)(2) states:

“Sanctions If a party fails to obey an order entered under Rule 16(b)...., unless the court finds that the failure was substantially justified, the court in which the action is pending *may take such action in regard to the failure as are just*, including the following: (b)(2)(C) strike pleadings or parts thereof,dismiss the action.....” (Emphasis added).

Coldwell itself admits that the 12 day tardiness was not enough justification to sanction Posner. During the hearing on its motion to exclude Gage Froerer’s report, and when addressing the trial court’s inquiry, Coldwell stated, “Again, the reason that this is a material issue is not so much [the] 12 days. We don’t hang people out to dry for 12 days.” (Tr. 05/12/ 08: pg 37, lines 21-23) “... it’s not a technicality we’re seeking to enforce with this 12-day lapse. It’s the fact that all of discovery went by without mentioning anything” (Tr. 05/12/ 08: pg 40 line 25 & pg 41 lines 1-3). The thrust of Coldwell’s motion, memorandum in support and oral argument was that Posner should have designated his expert witness well *before* the deadline, not that he was 12 days late. Coldwell itself deemed that the Order to Mediate (R. 875-879) had amended the Amended Scheduling Order⁸, and not only filed its dispositive motion for summary

⁸ “At the conclusion of fact discovery, and because the scheduling order had been *informally amended by the Court’s order to attend mediation*, Coldwell Banker filed a dispositive motion .. it’s motion for summary judgment immediately following the mediation .. the unsuccessful

judgment [R. 883-1042] 28 days after the Amended Scheduling Order deadline date of November 13, 2006 [R. 872-874], but noticed Posner for his deposition after the October 13, 2006 discovery deadline and deposed him on 11/20/06 [R. 880-882; 1290]. Coldwell also failed to observe the deadline for objecting to designated experts: that deadline fell 30 days after Posner's designation deadline [R. 872-874]. It is unjust to allow Coldwell to rely on an informal amending of the Amended Scheduling Order in making a filing and taking a deposition after the deadlines imposed in the Amended Scheduling Order and at the same time where Posner relied on the mediation order to delay designating his expert witness, to deny him the very same leeway. Not affording Posner the same consideration raises serious due process concerns, particularly in light of the severe sanction of dismissing Posner's Complaint and denying him the opportunity to have his claims decided upon the merits.

III. THE RECORD DOES NOT CONTAIN EVIDENCE OF MISCONDUCT TO JUSTIFY THE TRIAL COURT'S SANCTION

In this case, the record does not bear out Coldwell's numerous assertions that Posner showed a persistent refusal to comply with the Amended Scheduling Order, or that he was repeatedly and persistently

mediation.” [05/12/08: Tr. p. 4, lines 3-7] (Emphasis added). Coldwell noted that because of the mediation “we sat on the summary judgment motion” as its explanation for not filing by the November 13 '06 deadline. [05/12/08: Tr. p.38, lines 16-22] [R.1620]

dilatory. On the contrary, in multiple instances throughout its brief, Coldwell misstates or incompletely recites the record, as follows:

1. **Coldwell claims that “Posner made no mention of any experts in his responses to Coldwell’s interrogatories” and “never supplemented those responses.” (Coldwell App. Br. p. 5, 8, 12, 16), but Posner specifically stated in his interrogatory response that “no final determination regarding...witnesses” had been made.** Posner gave this reply in his interrogatories, (R.728), and noted it at oral argument (Tr. 5/12/2008: p. 25-26). There is a categorical difference between stating “there are no experts in this case” and stating “No final determinations regarding witnesses have been made.” The latter response was intended to indicate that Posner *had not yet made a final determination on potential witnesses, experts included*. It was not intended to mislead Coldwell. Indeed, the record shows that Posner did not even *retain* Gage Froerer until early November, 2006 (R. 1685), yet Coldwell cites Posner’s failure to mention of Mr. Froerer in his September interrogatory reply as an example of misconduct. (Cold. App. Br. p. 5, 15).

2. **The formal discovery period for the parties was 6 months, not the “two years of formal discovery” that Coldwell claims.** (Cold. App. Br. p. 5, 8, 15). Posner motioned to amend his complaint to include

Coldwell as a third defendant in December 2004 (R. 119-120), and Coldwell filed its answer in May of 2005 (R. 608-617). Posner and Coldwell stipulated to **suspend all proceedings** between the two parties in June, 2005 (R. 635-637), pending the outcome of Posner's appeal against Equity Title and Independence Title. The record establishes that formal proceedings did not resume between Posner and Coldwell until May of 2006, when a discovery schedule was entered into the record May 2, 2006 (R. 648-652). Coldwell implies that Posner dallied for two years before designating an expert, but the record clearly shows that the length of formal discovery between the parties was approximately 6 months—May-October of 2006.

3. **The Amended Scheduling Order did not require Posner to designate an expert prior to the end of discovery.** Coldwell states: "it was not until *after* the expiration of...fact...discovery... and *after* Coldwell Banker had filed a cumulative motion for summary judgment that Posner *finally, and belatedly*, designated [his expert] (emphasis added). (Cold. App. Br. P. 5). Coldwell never acknowledges that the Amended Scheduling Order deadline for designating an expert fell two months *after* the end of discovery (R. 723-726). It was reasonable for Posner to observe the Order's separate date for designating experts, and understand it as valid deadline for supplementing his discovery response.

4. **The record contains no evidence that Posner’s “omission and concealment of [an] expert witness prejudiced Coldwell and frustrated the effective management and litigation of the case...” (Cold. App. Br. p. 16), or that the preparation and costs of Coldwell’s first summary judgment motion were compromised.** Coldwell’s first summary judgment motion rests upon the arguments that Equity closed Posner’s sale according to his instructions, that the requirement of a surety bond was satisfied and the contention that Posner had, in any case, suffered no damages since, as a result of the sales, as he would reap “enormous profits”(R. 889).⁹ Neither of Coldwell’s original summary judgment memoranda reference expert witness issues as Coldwell’s defense focused upon the theory that Posner had suffered no damages [883-885 & 1264-1278].

5. **The record does not show misconduct that followed a repeating pattern.** Coldwell alleges that “the trial [court] struck Posner’s expert report and testimony to sanction Posner’s *repeated and persistent dilatory* conduct in this case....allowing Posner’s late designation would have endorsed and legitimized Posner’s *persistent refusal to comply* with the Amended Scheduling Order and other basic tenets of formal discovery, which Posner *so often ignored...*” and so on. (Emphasis added) (Cold. App.

⁹ Posner has consistently denied that he made a windfall profit, and argues that in any case, this is not the correct calculation for damages.

Br. p. 5-6). In addition to characterizing Posner as a deliberate rule-breaker, Coldwell alleges sabotage, ambush, deliberate omission and concealment, and suggested deliberate written and oral misrepresentations.¹⁰ (R.1621). Yet the only factual finding the trial court made was that Posner's expert designation occurred two weeks late.

Aside from the late expert designation, the record reveals one other delay: Posner acknowledges that he did not file a certificate of readiness for trial immediately after Coldwell's first summary judgment motion was denied in April 2007 [1486]. This is because he was not ready to take the case to trial financially and there was uncertainty about whether his senior lawyer, Michael Goldsmith, could continue as counsel. Mr. Goldsmith was originally retained as an experienced litigator,¹¹ but ultimately withdrew for health reasons¹² and David Ross was hired to replace him in October, 2007 whereby he required time to review the case files. The record shows Mr. Ross' substitution of counsel notice (R. 1520-1521).

¹⁰ Coldwell's brief suggests that Posner's contention that counsel mailed the expert designation on December 14 was "dubious", "suspect" and "mysterious." (Coldwell App. Br. p. 11)

¹¹ This was the first case that the other counsel, Ms. James, had ever taken, and it was agreed that Posner needed a litigator with some experience.

¹² Mr. Goldsmith was diagnosed with a slowly progressing form of Lou Gherig's disease (ALS) in fall of 2006. Initially uncertain that this was a correct diagnosis, Goldsmith did not wish to make his illness known; subsequently Goldsmith went public with his diagnosis as part of an effort to raise research funding, see: www.nytimes.com/2009/07/05/sports/baseball/05vecsey.html

While Posner acknowledges he did not contact Coldwell during this time, neither did Coldwell contact him; Posner took Coldwell's silence as an assent to the pace at which the case was proceeding.

7. The record contains no evidence of Posner's statements in mediation. Coldwell states "At no time...during the mediation did Posner reference, allege or represent that he had retained an expert in support of his claims..." (Cold. App., Br. p. 8); (Tr. 5/12/2008: p. 43-44). As the record does not contain any information about the mediation, which was confidential, these allegations are impossible to verify.¹³

9. Coldwell alleges that Posner was dilatory and delinquent in producing discovery documents, but the record does not support this conclusion. Coldwell's original summary judgment motion made no complaints about Posner's production of discovery documents and Coldwell presented evidence in support of its claim that Posner had reaped a windfall profit. It was only in March of 2008 that Coldwell filed a Motion to Exclude Documents and Testimony produced after the Expiration of Fact Discovery. In that memorandum, although Coldwell alleged that Posner failed to produce documents requested by Coldwell at his deposition on November

¹³ Circumstantial evidence in the record shows that Posner's expert was retained in early November and supplied an opinion prior to the mediation (R. 1685). Posner supplied the mediator with a copy of the expert report, and during mediation, Posner's counsel allowed the mediator to mention the expert report to Coldwell (Tr 5/12/2008: p. 27).

20, 2006, it never identified what he failed to produce. Similarly, Coldwell complained that “even now, Plaintiff produces documents that should have been produced years ago...” (R. 1567). In fact, the documents to which Coldwell was referring were created in April through December of 2007 (R. 1606-1607), *after* the end of discovery. Coldwell alleged that Posner “consistently and pervasively withheld documents and evidence that mitigates his purported damages”, yet only in a couple of its interrogatories (Nos. 11-12) or requests for production does Coldwell arguably request that Posner supply evidence of “mitigation of damages” and Posner responded to each such interrogatory and request for production of documents, including indicating that Coldwell could review the legal files of a lawsuit against Strachan at Posner’s attorney’s office (R. 727-743).¹⁴ Given the fact that construction on Posner’s condominiums continued beyond the end of discovery, with attendant delays, unanticipated costs and conflicts, Coldwell might have expected an on-going stream of new information after the formal end of fact discovery, especially in view of the fact Coldwell Interrogatory #13 specifically requests an itemization of “costs incurred for any improvements made to the property” (R. 736).

¹⁴ Confounding this issue is the fact that Posner has a different theory of damages than Coldwell, and Coldwell only requested Posner to supply evidence to support *his* damages claim. (R. 1085-1087).

In conclusion, for the reasons set forth above, the record simply does not bear out Coldwell's multiple allegations of misconduct and therefore, the record supports Posner's position that the sanction imposed was unjust.

IV. POSNER ADEQUATELY MARSHALLED THE EVIDENCE

As the Advisory Committee Order on Rule 24 notes: "...the challenger must present in comprehensive and fastidious order, every scrap of *competent* evidence introduced at trial which supports the very findings the appellant resists." (emphasis added), (citing Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc., 872 P. 2d 1051, 1052-1053 (Utah App. 1994). The appellant is not obliged, however, to marshal evidence that is not competent, and therefore Posner cited the only factual findings the trial court made in striking the expert report (5/13/2008: Tr. p.4-5)—the expert designation was two weeks late, and the trial had already been scheduled. Posner did not cite the numerous other allegations Coldwell makes because these allegations have such a tenuous basis in the record that they cannot properly be construed as facts. *See* Campbell v. Campbell, 896 P.2d 635, 638 (Ut. Ct. App. 1995), citing Woodward v. Fazzio, 823 P.2d 474, 477 (Utah App.1991): "...appellants need not engage in a futile marshalling exercise if they can demonstrate that findings...are legally insufficient."

V. EXPERT TESTIMONY IS NOT REQUIRED

The fiduciary obligations that a real estate agent owes to her principal include the duties of disclosure, reasonable care and diligence.¹⁵ Disclosure is not complicated, as it can be easily distinguished from *failure* to disclose: did Christoffersen tell Posner the buyer supplied a Financial Guarantee or not? The obligation for written approval of contractual changes is also easily understood and proven: either there is a signature, or there isn't.

Posner submits that in this case, Christoffersen *herself* set a standard that she then failed to follow: she obtained Posner's signature approving the change in seller financing amount, \$3,900, but, having obtained Posner's permission to increase his seller financing, she then did *not* obtain any written approval of the \$260,000 Financial Guarantee, a document that fell \$3,900 of the very seller financing amount Posner had just approved.

Christoffersen's breach of fiduciary duty in this case had to do with simple omissions: she failed to disclose that the buyer had supplied a document entitled Financial Guaranty rather than Surety Bond, she failed to obtain a signature approving that document, even though it departed from the REPC

¹⁵U.A.C.A. R162-6-2. **Standards of Practice.** 6.2.15.1. Duties of a seller's or lessor's agent. A principal broker and licensees acting on his behalf who act solely on behalf of the seller or the lessor owe the seller or the lessor the following fiduciary duties:(a)-(b) omitted:...(c) **Full disclosure**, which obligates the agent to tell the seller or lessor all material information which the agent learns about the buyer or lessee or about the transaction;...and (e) **Reasonable care** and diligence.

terms in both title and amount, without obtaining Posner's written permission, she told Equity to close. In Wycalis v. Guardian Title, 780 P.2d 821, 826 n. 8 (Utah. App.1989), the Court suggested that expert testimony is necessary when the background field of knowledge involves sophisticated, specialized knowledge: Expert testimony is required "[w]here the average person has little understanding of the duties owed by particular trades or professions," as in cases involving medical doctors, architects, and engineers." (Id.) Posner submits that the subject matter of real estate is not inherently complex, dependent on sophisticated mathematical or scientific concepts, or beyond the ordinary experience of laypeople in the same sense that engineering or architecture is. Many jury members, for example, have undoubtedly bought or sold houses, and this familiarity with the basic concepts of real estate surely qualifies a reasonable juror to comprehend Christoffersen's conduct, and assess whether her omissions violated her basic fiduciary obligations as Posner's real estate agent.

CONCLUSION

As set forth in the preceding arguments, neither Equity nor Coldwell Banker has provided this Court with a sufficient legal and/or evidentiary basis for upholding the trial Court's respective summary judgment dismissals of each party. Therefore, Posner respectfully requests that this

Court reverse the trial court's dismissal of Equity because existing factual disputes should have precluded the grant of summary judgment, reverse the trial court's findings that Posner's real estate agent acted within her authority and that Equity breached no duty to Posner, and remand this case for trial.

Posner also requests that for the reasons set forth, this Court find that the trial court abused its discretion in sanctioning Posner by striking his expert report, which led to the dismissal of his case, and reverse the trial court's ruling that expert testimony on the standard of care was necessary, remanding this case for trial. For the reasons stated in his original Brief, Posner also requests that this Court reverse the trial court's award of attorney fees under the Listing Agreement.

Dated this 29th day of July, 2009.

Catherine James
David E. Ross II
Attorneys for Plaintiff/Appellant
Michael C. Posner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the following by U.S. Mail, first class, postage prepaid, this 29th day of July 2009:

David W. Overholt, Esq.
Robert A. Ponte, Esq.
RICHER & OVERHOLT, P.C.
901 West Baxter Drive
South Jordan, UT 84095-8687

David Bennion, Esq.
Parsons Behle & Latimer
One Utah Center
201 S. Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, UT 84145

Catherine James
David E. Ross II
Attorneys for Plaintiff/Appellant
Michael C. Posner