

2009

Marlene Stone v. Richard Flint, Judy Flint : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARLENE STONE,

Plaintiff/Appellee,

vs.

RICHARD FLINT and JUDY FLINT,

Defendants/Appellants.

BRIEF OF THE APPELLEE

Appellate Case No. 20090564-CA

Civil No. 080907234

BRIEF OF THE APPELLEE

Appeal from Order Dismissing Respondent's Counterclaim
Second Judicial District Court, Weber County, Ogden Department, State of Utah
Michael D. Lyon, District Court Judge

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IN THE UTAH COURT OF APPEALS

MARLENE STONE, Plaintiff/Appellee, vs. RICHARD FLINT and JUDY FLINT, Defendants/Appellants.	BRIEF OF THE APPELLEE Appellate Case No. 20090564-CA Civil No. 080907234
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Annotated § 78A-4-103(2)(j), cases transferred to the Court of Appeals from the Supreme Court.

DETERMINATIVE STATUTES AND RULES

1. Rule 401, Utah Rules of Evidence. Definition of “relevant evidence.”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

2. Rule 402, Utah Rules of Evidence. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

3. Rule 801, Utah Rules of Evidence. Definitions.

The following definitions apply under this article:

Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

Declarant. A “declarant” is a person who makes a statement.

Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Statements which are not hearsay. A statement is not hearsay if:

(d)(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. (Amended effective October 1, 1992)

4. Rule 802, Utah Rules of Evidence. Hearsay rule.

Hearsay is not admissible except as provided by law or by these rules.

5. Rule 803, Utah Rules of Evidence. Hearsay exception; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will. (Amended effective October 1, 1992; November 1, 2001; November 1,

2004.)

6. Rule 807, Utah Rules of Evidence. Other exceptions.

A statement not specifically covered by Rule 803 or Rule 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. (Added effective November 1, 2004.)

STATEMENT OF THE CASE

NATURE OF THE CASE:

On November 13, 2008 Plaintiff, Marlene Stone, filed a Complaint seeking the eviction of Defendants, Richard Flint and Judy Flint, from 15 acres she had leased to the Defendants on April 16, 2008. The lease was for a one (1) year period and expired on April 17, 2009.

Defendants, Richard Flint and Judy Flint, filed an Answer and Counterclaim on November 21, 2008. In their Counterclaim, Defendants, Flint, allege Plaintiff, Stone, sold three (3) loafing sheds on her property to the Flints and now refuses to give them the sheds. Flints allege Marlene Stone breached a Uniform Real Estate Contract and Bill of Sale and/or converted the loafing sheds to her

benefit. A loafing shed is a portable shed, typically made of metal, that provides shelter and feed to horses that are pastured and not typically left in a barn.

On February 3, 2009 the parties entered into a Confidential General Release and Settlement Agreement which was filed with the court on February 13, 2009. The parties stipulated in the Recital of the Confidential General Release and Settlement Agreement the only remaining issues for the court are whether three (3) loafing sheds and several non-fixed mobile panels on Marlene Stone's property are part of a Bill of Sale and Real Estate Purchase Contract, both dated April 16, 2008. The parties settled the eviction action and wrongful termination of the lease and Defendants, Flints' claim for trespass and breach of the Covenant for Quiet Enjoyment before the trial.

COURSE OF THE PROCEEDINGS:

Bench trial was held on April 15, 2009 and April 20, 2009. Pursuant to the Confidential General Release and Settlement Agreement, Plaintiff, Marlene Stone, dismissed her claim for eviction as the parties agreed the lease expired on January 2, 2009. Defendants, Richard Flint and Judy Flint, abandoned their claim of trespassing and breach of Quiet Enjoyment, reserving only whether three (3) sheds and several non-fixed mobile panels on Plaintiff, Marlene Stone's property, were part of the Bill of Sale and Real Estate Purchase Contract, both dated April 16, 2008. Paragraph 3 of the Agreement states the parties agree to stipulate that the legal ownership of the sheds and non-fixed panels are the sole and remaining issues which are scheduled for trial on April 15, 2009.

DISPOSITION BY THE TRIAL COURT:

Non-jury trial was held on April 15 and April 20, 2009. The trial court issued a Memorandum Decision on April 21, 2009. The trial court ruled the Real Estate Purchase Contract (REPC) suspended all prior negotiations, representations, and understandings of the parties, pursuant to

paragraph 14 of the REPC. The trial court concluded, as a matter of law, that the REPC and Bill of Sale are both unambiguous. Defendants, Flint, were awarded all structures that exist on their two (2) acres at the time of the contract and at the closing. Plaintiff, Marlene Stone, was awarded the three (3) loafing sheds and panels on her 15 acres.

Findings of Fact and Conclusions of Law were entered on June 1, 2009 and an Order was also entered that date, dismissing Defendants, Flint's Counterclaim for breach of contract/conversion and awarded Plaintiff, Marlene Stone, her attorney fees and court costs.

STATEMENT OF RELEVANT FACTS

Plaintiff, Marlene Stone, owned a home and 17 acres of land located in Hooper, Weber County, Utah and placed it for sale after her husband died (R at 165).

The land, the home, and all the farms appraised for about \$1,400,000. (R at 167)

Because the property was so expensive, Marlene Stone agreed to sell part of it so long as she could still have access to the remaining property. (R at 167)

The boundary lines to a 1-acre parcel or a 2-acre parcel had not been surveyed at the time Marlene Stone listed the property for sale as she did not want to incur the survey expense if someone purchased all 17 acres. (R at 167)

On February 1, 2008 Plaintiff, Marlene Stone, met Defendants, Richard Flint and Judy Flint, and their realtor, Joe Adair, at her home located at 6006 South 7100 West, Hooper, Utah. (R at 167-168)

On February 1, 2008 all the parties were in a bedroom of Marlene Stone's home overlooking her property and barns. Marlene Stone stated, if they wanted two (2) acres she would have to keep 60

something feet for a road to her remaining property, but the Flints would receive the house and both barns. Richard Flint asked Marlene Stone, “Is all this stuff going to stay?” (R at 168)

Marlene Stone replied, “Yes, it does.” (R at 168) “Yes. I’m not going to move anything. I’m going to leave everything right where it is.” (R at 170)

Joe Adair, Flints’ realtor, testified, we put in the REPC the two (2) acres would be surveyed and subject to the Flints’ approval. (R at 32) Addendum One (1) to the REPC provides seller to have property surveyed and four (4) corners staked to buyers’ approval. Survey to be completed by Greg Hansen, with Hansen Engineering.

Joe Adair testified Hooper City approved the boundary line changes after surveying the two (2) acres to be sold to the Flints. It was not approved by Hooper City until right before closing. (R at 33) The two acres surveyed provided for a 66-foot right-of-way to Marlene Stone on the north side of the Flints’ property. (R at 28, 171) Marlene Stone testified, she knew if she did not sell all the property (17 acres) she would have to survey the property to establish a right-of-way or road to her remaining 15 acres east of the Flints’ two (2) acres of property. (R at 172)

Marlene Stone testified she did not intend to sell the loafing sheds on her 15 acres to Richard Flint and Judy Flint at the time she signed the REPC. (R at 175)

Marlene Stone leased to the Flints her 15 acres for 10 months on the same day of the real estate closing. (R at 175)

Marlene Stone allowed the Flints to use the loafing sheds on her 15 acres for the 10 months the 15 acres were leased to them. (R at 174) Marlene Stone testified she did not want to move any loafing sheds off the property the Flints purchased or off the property she kept. (R at 174)

After the survey was made and the 2 acres sold to the Flints, Marlene Stone had three (3) loafing sheds on her property and the Flints had three (3) loafing sheds on their two (2) acres, together with the home and two (2) barns. (R at 175)

Richard Flint testified that Marlene Stone did not indicate to him he was entitled to any personal property on her 15 acres. (R at 118)

The panels, gates, and loafing sheds the Flints possessed were on their 2 acres and the panels, gates, and loafing sheds Marlene Stone possessed were all on her 15 acres. (R at 118-120)

Judy Flint testified on February 1, 2008 she had no idea what land actually made up the 2 acres. She and her husband wanted the 2 acres to include the house, horse barn, and hay barn and wrote up the REPC that way. (R at 154)

Judy Flint testified, once the 66-foot right-of-way was established and their 2 acres staked out by Hansen surveyors, she did not ever personally have a conversation with Marlene Stone about what personal property went with their land. (R at 155)

As to the horse walker, Judy Flint testified the main body of the horse walker was on Marlene Stone's property but the arms of it extended over onto the Flints' 2 acres so when the horses were being exercised, they would walk on the Stone property and the Flint property. Marlene Stone wanted the entire horse walker moved onto the Flints' property so that a fence could be erected between the properties. (R at 156)

Richard Flint testified, after February 1, 2008 he did not discuss with Marlene Stone about the loafing sheds and panels that would remain on her property. (R at 114) The subject was not discussed.

Richard Flint testified the loafing sheds and panels were not moved after the Flints purchased

their 2 acres in April, 2008. (R at 114) Everything remained exactly the same. (R at 114) Marlene Stone had three (3) loafing sheds on her property and the Flints had three (3) loafing sheds on their 2 acres. (R at 115-116)

Richard Flint testified, the panels and gates he possesses are all on his 2 acres and the panels and gates Marlene Stone possesses are all on her 15 acres. (R at 118-119) He does not claim she took his personal property and put them on her property. (R at 118-119)

As to the horse walker, Richard Flint testified the base, a large cement slab, was on Marlene Stone's property and the arms extended over onto the Flints' property so that horses being exercised would walk on both properties. (R at 125-131) In paragraph 9 of the Confidential General Release and Settlement Agreement, the parties stipulate, pursuant to the April 16, 2008 Real Estate Purchase Contract and accompanying Bill of Sale, the horse walker was to be the property of the Flints and would be moved onto their property by January 30, 2009 as set forth in paragraph 10.

Defendant, Richard Flint, specifically identified the location of all the loafing sheds, hay barn, and horse barn on Plaintiff's exhibit 1, a map of the Plaintiff's property and Defendants' two (2) acres. (R at 31-32, 58) Structure A, B, and E are loafing sheds on Marlene Stone's 66-foot right-of-way. (R at 58) Structure D is a loafing shed on the Flints' two (2) acres. (R at 31-32, 58) Structure E is a pigeon pen and loafing shed on Marlene Stone's property. (R at 58) Structure F is a loafing shed on the Flints' property. Structure G is a five-stall horse barn on the Flints' property. (R at 58) Structure H is a hay barn on the Flints' property. (R at 58) Structure I is a loafing shed on the Flints' property. (R at 58)

Structures A, B, and E are loafing sheds on Marlene Stone's 66-foot right-of-way and are the disputed three (3) loafing sheds in this lawsuit. (R at 67) Richard Flint testified, he thought the three

(3) loafing sheds; A, B, and E, located on Marlene Stone's property, belonged to him. (R at 74)

The Bill of Sale was prepared by the title company at the time of closing, on April 16, 2008, and was drafted consistent with the REPC and addendums thereto. (R at 32, 46) The Bill of Sale states, Marlene Stone sold the buyers, Richard Flint and Judy Flint, certain personal property now at 6006 South 7100 West, Hooper, Utah; particularly described as all lounging and loafing sheds, panels, gates, fences, waterers, and horse walker as presently exist.

Marlene Stone testified, she use to live at 6006 South 7100 West, Hooper, Utah before she sold that property to the Flints. (R at 165) The address given by Hooper City for her remaining 15 acres is 5990 South 7100 West, Hooper, Utah. (R at 165)

During the trial, Marlene Stone's attorney objected to the testimony of Jeffrey D. Harris concerning a conversation between Marlene Stone and Jeffrey Harris about what personal property was included in the two (2) acres Jeffrey Harris was once considering buying from Marlene Stone. (R at 133) Plaintiff's counsel objected on the grounds of hearsay (R at 133) and relevance. (R at 136) The trial court sustained the objection on the grounds of relevance. (R at 136)

SUMMARY OF ARGUMENT

A bench trial was held on Richard and Judy Flint's Counterclaim for breach of contract and conversion of personal property, to-wit: three (3) loafing sheds and some non-fixed mobile panels. Buyers, Richard and Judy Flint, and Seller, Marlene Stone, signed a Real Estate Purchase Contract (REPC) on February 1, 2008 wherein a home located at 6006 South 7100 West, Hooper, Weber County, Utah; together with two (2) acres of land with a horse barn and hay barn were sold to the Flints by Marlene Stone.

Clause 1.1 of the REPC included fixtures and personal property if presently owned and attached to the property. This clause also states the following items should also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: oven/range, refrigerator, window coverings as presently exist.

Later the same day, Addendum No. One to the REPC was also signed by the parties incorporating, as part of the REPC: Included items: "all lounging/loafing sheds, panels, gates, feeders/waterers and horse walker as presently exist. Seller to have property surveyed and four (4) corners staked to buyers' approval."

The home is described as being located at 6006 South 7100 West, Hooper, Weber County, Utah. The two (2) acres were to be surveyed and staked at a later time to be approved by the buyers with the provision the horse barn and hay barn were included. The personal property was to be described and conveyed under a separate Bill of Sale with warranties as to the title.

The two (2) acres were surveyed later and approved by the buyers prior to the closing on April 16, 2008. The home located at 6006 South 7100 West, Hooper, Utah and the two (2) acres, including the horse barn and hay barn, were conveyed to the buyers by means of a warranty deed. The personal property was described and conveyed to the buyer by a Bill of Sale with warranties also at closing on April 16, 2008.

The Bill of Sale, dated April 16, 2008, conveys to the buyers that certain personal property located now at 6006 South 7100 West, Hooper, Utah 84315 as follows: oven/range, refrigerator, window coverings, two (2) water irrigation sheds, all lounging and loafing sheds, panels, gates, feeders, waterers, and horse walker as presently exist.

Seller, Marlene Stone, was assigned by Hooper City the address of 5990 South 7100 West,

Hooper, Utah for her remaining 15 acres of property not sold to the Flints.

Prior to trial on April 15, and April 20, 2009, the parties signed a Confidential General Release and Settlement Agreement on February 2 and February 3, 2009 and filed it with the court. The parties stipulated the only remaining issues for the court are whether three (3) sheds and several non-fixed mobile panels on seller, Marlene Stone's property are part of a Bill of Sale and Real Estate Purchase Contract, both dated April 16, 2008.

Clause 9 of the Confidential General Release states, it is acknowledged by the parties there is a horse walker that is located on the Stone's real property, but which is the property of the Flints, pursuant to an April 16, 2008 Real Estate Purchase Contract and accompanying Bill of Sale, of the same date of this statement, and is in no way an admission conveying the rightful ownership of the loafing sheds or any remaining property on the Stone's land and which the Flints claim an interest in by virtue of said contracts.

Clause 10 states, the Flints agree to remove the horse walker by January 30, 2009 onto their two (2) acres.

The trial court correctly ruled that clause 1.1 of the REPC is not ambiguous and cannot be read to include any items of personal property not presently owned and attached to the property located at 6006 South 7100 West, Hooper, Utah. Accordingly, the three (3) loafing sheds and panels located on Marlene Stone's remaining 15 acres were not conveyed to the buyers, Richard and Judy Flint.

Moreover, the Bill of Sale, which in the final, integrated explanation of the parties' intent, transferred only that certain personal property now at 6006 South 7100 West, Hooper, Utah.

Consequently, the Flints are only entitled to receive three (3) loafing sheds and the panels on their two (2) acres located at 6006 South 7100 West, Hooper, Utah and not those located on Marlene Stone's remaining 15 acres. The Bill of Sale is not ambiguous and can only be interpreted to convey the personal property located on the Flints' two (2) acres at the time the Bill of Sale was signed on April 16, 2008.

The trial court correctly excluded the testimony of witness, Jeffrey Dean Harris, on grounds of relevancy. The proffered testimony of Jeffery Harris as to his conversation with seller, Marlene Stone, concerning his inquiry to purchase two acres and some personal property on a different day, time, and location was properly excluded based upon Marlene Stone's counsel's objection as to hearsay and relevancy.

The trial court did not err in excluding and misstating certain alleged salient facts from its Findings of Fact. Flints argue because seller, Marlene Stone, did not dispute the Flints' right to the horse walker, feeder, and waterers at trial; that their extrinsic facts are important for the Court to determine whether the REPC and Bill of Sale are ambiguous. The only trial issues were stipulated to be awarding of three (3) loafing sheds and various panels located on Marlene Stones' property. The ownership of the horse walker was stipulated to in the Confidential General Release and the issue of ownership of feeders and walkers was stipulated not to be a trial issue.

Seller, Marlene Stone, should be awarded her attorney fees on appeal based upon the REPC and terms of the Confidential General Release, considering she was awarded her costs and attorney fees at trial.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT NEITHER THE REAL ESTATE PURCHASE CONTRACT NOR THE BILL OF SALE ARE AMBIGUOUS.

The trial court correctly ruled neither the Real Estate Purchase Contract (REPC) nor the Bill of Sale, dated April 16, 2008, are ambiguous thereby permitting the trial court to interpret the contracts as a matter of law.

“The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract.” *WebBank v. American Gen. Annuity Svc. Corp.*, 2002 UT 88, ¶ 17, 54 P.3d 1139.

1139. When interpreting a contract, “we look to the writing itself to ascertain the parties’ intentions, and we consider each contract provision...in relation to all of the others, with a view toward giving effect to all and ignoring none.” “If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” *Green River Canal Co. v. Thayn* 2003 UT 42, 84 P. 3d 1134,1141 (Utah 2003).

[5] ¶ 25 A contractual term or provision is ambiguous “if it is capable of more than one reasonable interpretation because of ‘uncertain meanings of terms, missing terms, or other facial deficiencies.’ ” *Daines v. Vincent* 2008 UT 51, 190 P.3d 1269, 1275 (Utah 2008).

Contractual ambiguity can occur in two different contexts: (1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties. 907 p.2d at 268. The first context presents a question of law to be determined by the judge. *WebBank*, 2002 UT 88, ¶ 22, 54 P.3d 1139. The second context presents a question of fact where, if the judge determines that the contract is facially ambiguous, “parol evidence of the parties’ intentions should be admitted.” *Id.* at 1275-1276.

In Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 the Supreme Court of Utah set forth a two-part standard for determining facial ambiguity. First, we indicated that “[w]hen determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the ‘extrinsic evidence of the judge’s own linguistic education and experience.’ ” Second, after a judge considers relevant and credible evidence of contrary interpretations, the judge must ensure that “the interpretations contended for are reasonably supported by the language of the contract.”

In Daines v. Vincent, *id.* at 1276, the Supreme Court of Utah held: In articulating the *Ward* rule, we sought to establish a balanced, “better-reasoned” approach to an analysis of facial ambiguity that would allow judges to “consider the writing in the light of the surrounding circumstances.” *Id.* However, we did not intend that a judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit. In other words, our statement that “[r]ational interpretation requires at least a preliminary consideration of all credible evidence,” does not create a preference for that evidence over the language of the contract. Thus, under *Ward*, a finding of ambiguity after a review of relevant, extrinsic evidence is appropriate only when “reasonably supported by the language of the contract.” *Ward*, 907 P.2d at 268.

The principles of *Ward*, *id.*, were succinctly set forth in Café Rio, Inc. v. Larkin-Gifford-Overton, LLC, 629 Utah Adv. Rep. 21, 22-23 as follows: Under well-accepted rules of contract interpretation, we look to the language of the contract to determine its meaning and the intent of the contracting parties. We also “consider each contract provision...in relation to all of the others, with a view toward giving effect to all and ignoring none.” Where “the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the

plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” Only if the language of the contract is ambiguous will we consider extrinsic evidence of the parties’ intent. We have explained that “ambiguity exists in a contract term or provision if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.” Additionally, “[u]nder the well-established rule of construction *ejusdem generis*,” we determine the meaning of a general contractual term based on the specific enumerations that surround that term.

The trial court found the present case to be factually similar to *Flores v. Earnshaw*, 2009 UT 90, 627 Utah Adv. Rep 13. In *Flores*, the parties disagreed if personal property, as enumerated in Clause 1.1 of the REPC, was indicated in the sale. The Utah Court of Appeals held Clause 1.1 was not ambiguous as the personal property was included in the sale if presently owned and attached to the property. The Court of Appeals ruled the personal property was not included in the sale because the personal property was not “presently owned and attached to the property” because the condominium was yet to be built.

In the present case, the trial court ruled the three (3) loafing sheds and panels the Flints sought were not “presently owned and attached” to the two (2) acres the Flints purchased from Marlene Stone. It is undisputed, as demonstrated by Plaintiff’s exhibit 1, the loafing sheds labeled A, B, and E, nor the panels, are “presently owned and attached to the property” purchased by the Flints. The trial court further ruled, the Bill of Sale, which is the final, integrated expression of the parties’ intent, only transferred those items of personal property “now at 6006 South 7100 West, Hooper, Utah.” The trial court ruled the three (3) loafing sheds and panels located on the Flints’ two (2) acres, were awarded to them but the three (3) loafing sheds and

panels located on Marlene Stone's remaining 15 acres located at 5990 South 7100 West, Hooper, Utah, remained her property.

II. THE TRIAL COURT DID NOT ERR IN SUSTAINING PLAINTIFF'S OBJECTION TO DEFENDANT'S WITNESS'S TESTIMONY ON GROUNDS OF HEARSAY AND RELEVANCE.

Counsel for the Flints called Jeffrey Dean Harris as a witness to testify concerning a meeting he had with Marlene Stone to discuss possible purchase of two (2) acres and some personal property to be included in the sale. Counsel for Marlene Stone objected to the testimony of the witness when asked what did Marlene Stone state, "was the personal property that was included with that purchase." (R at 133)

The trial court ruled it was clearly hearsay (R at 135) and requested counsel for the Flints to point to an exception to the hearsay rule that would allow the testimony to come in. (R at 135) Counsel for the Flints cited Rule 803(3), Utah Rules of Evidence, the existing mental state of mind of the declarant, (Marlene Stone).

Counsel for Marlene Stone then objected on the grounds of relevance as the conversation with the witness, Jeffrey Harris, occurred on a different day, different time, and it is not material nor relevant to the Flints' case. The Court sustained that objection. (R at 136)

Testimony by the witness about what Marlene Stone may have said on a different occasion and date is clearly hearsay and not relevant to the case between the Flints and Marlene Stone. Evidence which is not relevant is not admissible, pursuant to Rule 402, Utah Rules of Evidence, and the testimony of the witness was clearly hearsay. Defendants, Flints' witness's testimony was correctly excluded by the trial court.

III. THE TRIAL COURT DID NOT ERR IN EXCLUDING AND ALLEGEDLY MISSTATING SALIENT FACTS FROM ITS FINDINGS OF FACT

Counsel for the Flints argues that paragraphs 12 and 13 of the Findings of Fact refer only to three (3) lounging/loading sheds, and some mobile gates and panels on Marlene Stone's property being in dispute in the suit. The only possible reference to structures in Findings of Fact 13 was the last sentence that the parties had no further discussion regarding the structures as they may lie inside and outside the two (2) acres.

The Flints argue it is important that they allegedly took possession of all the feeders, waterers, and horse walker located on Marlene Stone's property and the Court failed to include those facts in its Findings. However, the parties stipulated the only trial issues were ownership of the lounging/loafing sheds and the non-fixed mobile panels. The parties stipulated, in their Confidential General Release, those were the only two issues and that the horse walker was the property of the Flints and included in the Bill of Sale. The location and ownership of the feeders and waterers was irrelevant at the time of trial and was not contested by either party. The parties and the trial court are bound by the agreement of the parties as to what issues were contested and to be decided by the trial court.

CONCLUSION AND REQUEST FOR RELIEF


The trial court's determination that the Real Estate Purchase Contract and the Bill of Sale are not ambiguous should be affirmed. The trial court's interpretation that the loafing/lounging sheds and mobile panels were not "presently attached" to the property purchased by the Flints nor were these items of personal property, "now at 6006 South 7100 West, Hooper, Utah" at the time

the parties signed the REPC and Bill of Sale, should also be affirmed.

Plaintiff, Marlene Stone, should be awarded her attorney fees and costs on appeal, pursuant to Clause 17 of the REPC and also Clause 17 of the Confidential General Release and Settlement Agreement.

Respectfully submitted this 14th day of January, 2010.


NEELEY & NEELEY


ROBERT L. NEELEY
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

In accordance with Utah Rules of Appellate Procedure 26(b), I hereby certify that on the 14 day of January, 2010 two (2) true and correct copies of the foregoing Brief of the Appellee were served by U.S. mail, postage prepaid, to David B. Stevenson, attorney for Defendant/Appellant, at the following address:

David B. Stevenson
STEVENSON & SMITH, P.C.
3986 Washington Blvd.
Ogden, Utah 84403


SECRETARY

ADDENDUMS

- A. Real Estate Purchase Contract
- B. Bill of Sale
- C. Confidential General Release and Settlement Agreement
- D. Plaintiff's Exhibit P1, map of property
- E. Memorandum Decision
- F. Findings of Fact and Conclusions of Law
- G. Order Dismissing Respondent's Counterclaim
- H. Rule 401, Utah Rules of Evidence
- I. Rule 402, Utah Rules of Evidence
- J. Rule 801, Utah Rules of Evidence
- K. Rule 802, Utah Rules of Evidence
- L. Rule 803, Utah Rules of Evidence
- M. Rule 807, Utah Rules of Evidence

ADDENDUM

A



REAL ESTATE PURCHASE CONTRACT



This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer Richard + Judy Flint offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$ 1,000 in the form of Personal check #1677 which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by [Signature] on 1/19/08
(Signature of agent/broker acknowledges receipt of Earnest Money) (Date)

Brokerage: AAAR REALTORS INC. Phone Number 801-390-1188

OFFER TO PURCHASE

1. PROPERTY: 6006 South 7100 West
also described as: 2 Two Acres w/ Horse Barn + HAYRABIN
City of Hooper County of Weber State of Utah Zip 84315
(the "Property")

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment, ceiling fans; water heater, built-in appliances, light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna, satellite dishes and system, permanently affixed carpets; automatic garage door opener and accompanying transmitter(s), fencing, and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title oven/range
Refrigerator - window coverings as presently exist.

1.2 Excluded Items. The following items are excluded from this sale.

1.3 Water Rights. The following water rights are included in this sale. Culinary Connections
Two (2) shares Hooper Irrigation All See's & transfer
Cost's to be Paid by seller

2. PURCHASE PRICE. The Purchase Price for the Property is \$ 410,000

2.1 Method of Payment. The Purchase Price will be paid as follows:

\$ 1,000 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$ At Req'd (b) New Loan. Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: ☒ CONVENTIONAL ☐ FHA ☐ VA ☐ OTHER (specify) _____

If an FHAVA loan applies, see attached FHAVA Loan Addendum.

If the loan is to include any particular terms, then check below and give details:

\$ 0 ☒ SPECIFIC LOAN TERMS: seller to pay 3% of sales price
towards buyers closing cost for buy down

\$ 0 (c) Loan Assumption Addendum (See attached Assumption Addendum if applicable)

\$ 0 (d) Seller Financing (see attached Seller Financing Addendum if applicable)

\$ 0 (e) Other (specify) 0

\$ 100,000 (f) Balance of Purchase Price in Cash at Settlement

\$ 410,000 PURCHASE PRICE. Total of lines (a) through (f)

2.2 Financing Condition. (check applicable box)

(a) ☒ Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."

(b) ☐ Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.



2.3 Application for Loan.

(a) **Buyer's duties.** No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure if Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal Condition. Buyer's obligation to purchase the Property ~~IS~~ ☒ **IS NOT** conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING.

Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (?) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: ☒ 1 hours ☐ days after Closing;

☐ Other (specify) 7 Seven days from Recording Seller to pay Buyers
Daily Rate of Interest until occupancy

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract:

☒ Seller's Initials MAH ☒ Buyer's Initials MAH

The Listing Agent, MAH PARKER, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Listing Broker, MAH PARKER, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Selling Agent, JOE ADAMS, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Selling Broker, ADAMS REALTY INC., represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller

as a Limited Agent

6. **TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(b), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":

- (a) a Seller property condition disclosure for the Property signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (e) Other (specify) _____

8. **BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS.** Buyer's obligation to purchase under this Contract (check applicable boxes)

- (a) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
- (d) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
- (e) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property (specify)

Any inspection of Buyer's choice at Buyer's Expense.

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 Evaluations & Inspections Deadline. No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. **ADDITIONAL TERMS.** There ☒ ARE ☐ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: 1) Addendum No. one

- ☒ Seller Financing Addendum ☒ FHA/VA Loan Addendum ☒ Assumption Addendum
- ☒ Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law)
- ☒ Lead-Based Paint Addendum (in some transactions this addendum is required by law)
- ☒ Other (specify) Contingency on sale of Buyer's Home

10. SELLER WARRANTIES & REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition **ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:**

- (a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;
- (b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;
- (c) the roof and foundation shall be free of leaks known to Seller;
- (d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and
- (e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes): A one-year Home Warranty Plan ☒ ~~WILL~~ ☐ ~~WILL NOT~~ be included in this transaction. If included, the Home Warranty Plan shall be ordered by ☒ Buyer ☐ Seller and shall be issued by a company selected by ☒ Buyer ☐ Seller. The cost of the Home Warranty Plan shall not exceed \$ 380 and shall be paid for at Settlement by ☐ Buyer ☒ Seller.

11. WALK-THROUGH INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

☐ SHALL

☒ MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation, if the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

17. ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. NOTICES. Except as provided in Section 23, all notices required under this Contract must be (a) in writing, (b) signed by the party giving notice, and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABROGATION. Except for the provisions of Sections 10.1, 10.2, 16 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date, and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, Notice of Loan Denial, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. ACCEPTANCE. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance, and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract.

- (a) Loan Application & Fee Deadline 2/10/08. (Date)
- (b) Seller Disclosure Deadline 2/10/08. (Date)
- (c) Evaluations & Inspections Deadline 2/28/08. (Date)
- (d) Loan Denial Deadline MARCH 1 2008 (Date)
- (e) Appraisal Deadline MARCH 1 2008 (Date)
- (f) Settlement Deadline on or before April 1 2008 (Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 9:00 [] AM [3] PM Mountain Time on 2/2/08 (Date), this offer shall lapse, and the Brokerage shall return the Earnest Money Deposit to Buyer.

Richard Hunt
(Buyer's Signature)

(Offer Date)

2/1/08

Judy Hunt
(Buyer's Signature)

(Offer Date)

2/1/08

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

Richard & Judy Hunt
(Buyers' Names) (PLEASE PRINT)

(Notice Address)

(Zip Code)

(Phone)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ ACCEPTANCE OF OFFER TO PURCHASE: Seller Accepts the foregoing offer on the terms and conditions specified above.

☐ COUNTEROFFER: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____.

Marlene Stone 02-01-08
(Seller's Signature) (Date) (Time)

(Seller's Signature)

(Date)

(Time)

(Seller's Names) (PLEASE PRINT)

(Notice Address)

(Zip Code)

(Phone)

☐ REJECTION: Seller Rejects the foregoing offer.

(Seller's Signature) (Date) (Time)

(Seller's Signature)

(Date)

(Time)

DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

Richard H Hunt 2/5/08
(Buyer's Signature) (Date)

Judy Hunt
(Buyer's Signature)

2/5/08
(Date)

(Seller's Signature) (Date)

(Seller's Signature)

(Date)

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be [] faxed [] mailed [] hand delivered on _____ (Date), postage prepaid, to the [] Seller [] Buyer.

Sent/Delivered by (specify) _____

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL EFFECTIVE AUGUST 6, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



ADDENDUM NO. one TO REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 2/1/08, including all prior addenda and counteroffers, between Richard + Emily Flint as Buyer, and Martene Stone as Seller, regarding the Property located at 6006 So. 7100 West Hooper. The following terms are hereby incorporated as part of the REPC:

- Included Items: all landscaping/feeding sheds - Panels, Gates, Feeders/Waterers + horse walker as presently exist
- Seller to have property surveyed + (4) four corners staked to buyers Approval - Survey completed by Greg Harrison w/ Harrison Engineering - If lot split required Approval thru Hooper City to be completed + paid by seller
- OFFER/CONTRACT SUBJECT TO SELLERS ACQUISITION OF A SUITABLE NEW RESIDENCE

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☐ Buyer shall have until _____ ☐ AM ☐ PM Mountain Time on _____ (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Richard Flint 2/1/08
Buyer () Seller Signature Date Time

Martene Stone 2/1/08
Buyer () Seller Signature Date Time

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____
Martene Stone 02-01-08
(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.





ADDENDUM NO. two
TO

Page 1 of 1



REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 2/1/08 including all prior addenda and counteroffers, between Richard & Judy Flint as Buyer, and Marlene Stone as Seller, regarding the Property located at 6006 So. 7100 W. Stanger. The following terms are hereby incorporated as part of the REPC

1. OPTION TO KEEP HOUSE ON MARKET ("TIME CLAUSE")

1.1 Right to Accept Other Offers. Buyer and Seller agree that Seller may continue to offer the Property for sale and to accept other offers subject to the rights of Buyer as provided below. If Seller accepts any such offers, Seller will notify Buyer in writing within one (1) calendar days after entering into such a contract.

1.2 Right to Remove Conditions. Buyer shall have 2 (2) hours after receipt of Seller's written notice in which to either: (a) agree in writing to remove from the REPC the following condition(s) (check applicable boxes): ☒ Financing Condition; ☐ Appraisal Condition; ☒ Evaluations & Inspections, ☒ Subject to the Sale of Buyer's Residence; ☐ Other (explain) _____

or (b) by failing to respond in writing to Seller's notice, allow the REPC to automatically become canceled, in which instance, the Earnest Money Deposit shall be released to Buyer.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 8 [] AM ☒ PM Mountain Time on 2/2/08 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Richard Flint 2/1/08 Judy Flint 2/1/08
[] Buyer [] Seller Signature (Date) (Time) [] Buyer [] Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____

Marlene Stone 02-01-08
(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



ADDENDUM NO. Three
TO
REAL ESTATE PURCHASE CONTRACT

Page 1 of 1



THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 2/1/08 including all prior addenda and counteroffers, between Richard & Sarah Flint as Buyer, and Mackenzie Stone as Seller, regarding the Property located at 6006 So. 7100 W. 1000 ft. The following terms are hereby incorporated as part of the REPC:

1. SUBJECT TO SALE OF BUYER'S RESIDENCE

1.1 **Subject to Sale of Buyer's Residence.** Buyer's obligation to purchase the Property is conditioned upon the closing of the sale of Buyer's residence located at: 3289 West 1500 North (the "Residence") by 5:00 P.M. (MST) on the 1st day of April 2008 (the "Residence Closing Deadline").

1.2 **Status.** Buyer ☐ **DOES** ☒ **DOES NOT** have a signed contract for the sale of the Residence. The Residence ☐ **IS** ☒ **IS NOT** presently listed for sale through (provide name/address/phone of real estate brokerage): Adair Realty P.O. Box 271 / 801-390-1188. If the Residence is not now listed, it will be so listed on or before the 8th day of February, 2008. Buyer will diligently pursue the closing of the sale of the Residence.

1.3 **Right to Cancel.** If the sale of the Residence is not closed by the Residence Closing Deadline, Buyer or Seller may, within three calendar days after the Residence Closing Deadline, cancel the REPC by providing written notice to the other party. In the event of such cancellation, the Earnest Money Deposit shall be released to Buyer. Buyer may however, remove this condition at any time prior to the Residence Closing Deadline by providing written notice to Seller.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ **REMAIN UNCHANGED** ☐ **ARE CHANGED AS FOLLOWS:** _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ **Seller** ☐ **Buyer** shall have until 8 ☐ **AM** ☒ **PM** Mountain Time on 2/2/08 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Richard Flint 2/1/08 Sarah Flint 2/1/08
☒ **Buyer** ☐ **Seller** Signature (Date) (Time) ☒ **Buyer** ☐ **Seller** Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ **ACCEPTANCE:** ☐ **Seller** ☐ **Buyer** hereby accepts the terms of this ADDENDUM.

☒ **COUNTEROFFER:** ☐ **Seller** ☐ **Buyer** presents as a counteroffer the terms of attached ADDENDUM NO. 4

Mackenzie Stone 02-01-08
 (Signature) (Date) (Time) (Signature) (Date) (Time)

☐ **REJECTION:** ☐ **Seller** ☐ **Buyer** rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



ADDENDUM NO. 4 TO REAL ESTATE PURCHASE CONTRACT



THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of February 1, 2008 including all prior addenda and counteroffers, between Elint as Buyer, and Stone as Seller, regarding the Property located at: 6006 S. 7100 W. Hooper, Utah 84315. The following terms are hereby incorporated as part of the REPC:

1) The confirmation of agency disclosure referenced in section 5 of the R.E.P.C. shall be changed as follows: The Listing agent shall be Mike Bowman and the listing broker shall be Realty Link, LLC who both represent the seller. The Selling agent and selling broker who represents the buyer shall remain the same.

All other terms to remain the same.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☒ **REMAIN UNCHANGED** ☐ **ARE CHANGED AS FOLLOWS:** _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☒ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on February 8, 2008 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Madeleine Stone
☐ Buyer ☒ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ **ACCEPTANCE:** ☐ Seller ☒ Buyer hereby accepts the terms of this ADDENDUM

☐ **COUNTEROFFER:** ☐ Seller ☒ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____

Richard H. Elint 2/5/08 Quincy R. Elint 2/5/08
 (Signature) (Date) (Time) (Signature) (Date) (Time)

☐ **REJECTION:** ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 1, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



ADDENDUM NO. Extension TO Addendum



REAL ESTATE PURCHASE CONTRACT

THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of _____, including all prior addenda and counteroffers, between Flint as Buyer, and STONE as Seller, regarding the Property located at _____. The following terms are hereby incorporated as part of the REPC:

Closing Extended to on or before April 15
2008 - All other terms remain the same.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☒ Buyer shall have until _____ ☐ AM ☒ PM Mountain Time on _____ (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 22 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Richard H. Flint 3/29/08 Gary K. Flint 3/29/08
☒ Buyer ☐ Seller Signature Date Time ☐ Buyer ☐ Seller Signature Date Time

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____.

Maureen Stone _____
(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



ADDENDUM

B

"THIS IS A LEGALLY BINDING CONTRACT IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE."

Bill of Sale

(WITH WARRANTIES)

Know all Men by These Presents:

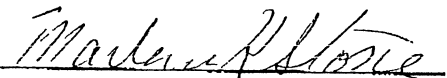
That **Craig D. Stone and Marlene K. Stone as Trustees of The Stone Family Revocable Trust U/A dated February 1, 2007** the **SELLER**, for and in consideration of the sum of: **Ten Dollars and Other Valuable Considerations to _me/us_ in hand paid by Richard Flint and Judy Flint, the BUYER, the receipt** whereof is hereby acknowledged, have/has bargained, sold, assigned and transferred, and by these presents do/does bargain, sell, assign and transfer unto said BUYER that certain personal property now at **6006 S. 7100 W., Hooper, UT. 84315 WEBER County, State of UT**, particularly described as follows: **Oven/Range, Refrigerator, Window Covering, 2 Water Irrigation Shares, All Lounging and Loafing Sheds, Panels, Gates Feeders, Waterers, and Horse Walker as presently exist**

And the Seller upon the consideration recited above warrants ownership of and good title to said property, the right to sell the same and that there are no liens, encumbrances or charges thereon or against the same and to defend the title and possession transferred to the BUYER against all lawful claims.

In Witness Whereof, I/We have hereunto set My/Our hand(s) this **16th day of April, 2008**

Witness: _____





Marlene K. Stone (Trustee)

ADDENDUM

C

Confidential General Release and Settlement Agreement**RECITALS**

This action was commenced in the Second Judicial District Court of Weber County, State of Utah, by Plaintiff, Marleen Stone, in which she sought eviction of Defendants and Counter Plaintiffs, Richard and Judy Flint, from leased property pursuant to claims of waste. The Defendants responded to this allegation and brought counter claims against the Plaintiff on three grounds:

1. Trespass
2. Breach of Contract and/or Conversion
3. Breach of the Covenant of Quiet Enjoyment (i.e., property warranty)

Pursuant to the following Settlement Agreement, **STONE** expressly agrees to drop her lawsuit against **FLINT** and **FLINT** agrees to drop the First Cause of Action, Trespass, from the suit. These items will be dismissed with prejudice within seven (7) days of signing this agreement. The parties herein stipulate that the only remaining issues for the court are whether three (3) sheds and several non-fixed mobile panels on **STONE'S** property are part of a Bill of Sale and Real Estate Purchase Contract, both dated 16 April 2008.

This Confidential General Release and Settlement Agreement shall hereinafter be referred to as the "Agreement."

1. **RICHARD AND JUDY FLINT (FLINT)**, their heirs, successors, administrators, agents and representatives, shall hereinafter be referred to, jointly and individually, separately and collectively, as **FLINT**.

2. **MARLENE STONE** her partners, parents, subsidiaries, divisions, branches, and affiliates (the foregoing shall be collectively referred to as **STONE**), and each of their incorporators, directors, officers, owners, shareholders, servants, agents, employees, former employees, attorneys and representatives, and the successors, heirs and assigns of each of the foregoing, and any person, partnership, corporation, association, organization or entity now or previously acting, directly, in the interest of or on behalf of **MARLENE STONE** shall hereinafter be referred to, jointly and individually, separately and collectively, as **STONE**.

AGREEMENT:

3. The parties hereby agree to stipulate that the legal ownership of the sheds and non-fixed mobile panels are the sole and remaining issues which are scheduled for a trial on 15 April 2009.

4. On 1 January 2009, the parties agree that **FLINT** removed all animals, belongings, materials, farm equipment, and any other personal property belonging to **FLINT** from off of the property of **STONE**, which is the subject of a lease dated 16 April 2008 (15 acres adjoining and on the North and East of the **FLINT** property).

5. It is expressly acknowledged that while the duration of said lease was from 17 April 2008 to 17 April 2009, the lease expired per agreement of the parties effective on 2 January 2009.

6. **STONE** herein agrees to pay **FLINT** the sum of \$559.00 for the prorated remainder of the lease ($\$569 = \$1,889.25/\text{yr} + 365 \text{ days/yr} \times 108 \text{ days remaining for lease period}$) within seven (7) days of the signing of this Agreement by the parties. This number will be further reduced by an amount of \$40 per month for each month that the horse walker remains on **STONE'S** property. The parties agree that \$80 of the above sum will be withheld from the \$559 payment listed above to ensure such \$40 per month payment for a period of two months.

7. The parties hereby agree not to disparage one another, specifically including statements about the other to neighbors, friends, or church members of the **FLINTS**; further, the parties mutually agree to keep the terms and conditions of this agreement confidential, subject to the exceptions in numbered paragraph 23 below.

8. **STONE** hereby acknowledges and agrees to the terms and conditions of the Joint Motion for Stipulated Temporary Injunction (i.e. three years, or until **STONE** sells her property, which ever is longer) and the proposed Order submitted to the court that is attached hereto.

9. It is hereby acknowledged that there is a horse walker that is located on the **STONE'S** real property but which is the property of **FLINT** pursuant to a 16 April 2008 Real Estate Purchase Contract and accompanying Bill of Sale of the same date. This statement is in no way an admission concerning the rightful ownership of the loafing sheds or any remaining property on the **STONE'S** land and which the **FLINTS** claim an interest in by virtue of said contracts.

10. **FLINT** agrees to remove said horse walker by 30 January 2009. **FLINTS** also agrees to cap the electrical line to the pasture electrical fence also by said date and **STONE** agrees to cap and/or sever any connections from her electric fence that go onto the **FLINTS'** property by said date.

11. It is expressly agreed that **STONE** shall have no right to any utilities presently existing on her property but that are attached and/or coming from the **FLINT** property. This includes, but is not limited to, any electrical, water or sewer. It is expressly agreed that the electrical lines for the horse walker will remain underground. As part of the deconstruction and/or movement of the horse walker, **FLINT** herein agrees to cap the exposed electrical lines and bury them underground where they

currently exist. Furthermore, **FLINT** agrees to disconnect the electrical line to the horse walker, at the point it comes above ground on **FLINT'S** property.

12. To the extent there are other issues to work out between the parties regarding the ownership or right to use utilities, including but not limited to gas, electrical, irrigation or potable water lines on either party's property, this Agreement does not address such issues which are not currently before the court.

13. The parties hereby expressly agree to comply with the requirements of the court with respect to contact with one other.

14. This Agreement constitutes a partial settlement of the claims between the parties.

15. The parties acknowledge that their properties adjoin each other and that for significant sections of the property line there is no fence, or there are fences or other structures traversing through the mutual property line. As a result, the parties recognize that there will be continued need in the future to resolve disputes either between these parties or their successors in interest.

16. This Agreement in no way affects the property rights of the parties with respect to either real property or personal property not at issue in this current lawsuit. This includes, but is not limited to, **FLINTS'** interest in two or more shares of irrigation of the Wilson Hooper Water line purchased by the **FLINTS** from **STONE**. However, it is the intent of the parties to work together through their respective counsel to resolve any future disputes concerning the common property lines and the structures that may be in common as well.

17. Each party will bear their own attorney's fees and costs for all matters settled herein. The parties expressly reserve the right to request the fees and costs for litigation for the remaining issue concerning the ownership interest of the loafing sheds.

18. This release is purposefully broad, and it is intended to capture any conceivable claim which the parties have against each other or their agents excluding those specifically preserved herein.

19. The parties warrant and represent that they have not sold, assigned, granted, or transferred to any other person, corporate or natural, any claims encompassed by this Agreement that he has, had, or may have at any time in the future, or claims to have or have had against the other party.

20. All negotiations relating to this Agreement are merged herein. There are no promises, agreements, conditions, undertakings, warranties, or representations, oral or written, express or implied, among **FLINT** and/or **STONE** as to such matters other than as set forth herein. No waiver, change, or modification of this Agreement shall be valid unless the same is in writing and is signed by the party to be bound thereby.

21. The singular number, when used herein, includes the plural, and vice-versa, as the context may require. The masculine, feminine, and neutral genders shall include such other genders as are appropriate.

22. If any term or other provision of this Agreement is invalid, illegal, or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Agreement nevertheless shall remain in full force and effect.

23. The confidentiality provisions of this Agreement shall not, however, apply to prevent **STONE** or **FLINT** from advising its attorneys, tax return preparers, financial advisors, and/or government tax agencies of the settlement of the claims and the consideration received therefore. To the extent that **FLINT** or **STONE** disclose such information to its attorneys, tax return preparers, financial advisors, and/or government tax agencies, they shall advise those persons of the confidentiality provisions of this Agreement. Nothing herein prevents the parties from disclosing this agreement, its terms and conditions, in litigation, in a court of law, or in an alternative dispute resolution proceeding.

24. The parties agree to maintain and/or not remove survey stakes or markers on their property. This is not a ratification of said survey, or a waiver of any claim or right, but merely a good faith agreement to maintain the alleged boundary for the benefit of both parties to this agreement. To the extent that such markers or stakes have been removed by **STONE'S** animals or otherwise, the parties agree to replace the same if the original location is known to them and it is located on their individual property. This does not give either party the right to trespass onto the other's property to move or replace a stake.

25. This Agreement shall in all respects be interpreted, enforced, and governed by and under the laws of the State of Utah. The parties agree to pay all reasonable attorney's fees incurred in enforcing this Agreement.

26. This Agreement contains the entire agreement, understanding and stipulation between the parties hereto. The terms of this Agreement are contractual, and not a mere recital, and may be enforced in court. Any waiver by **STONE** or **FLINT** of a breach or violation of any provision of this Agreement shall not be construed as a waiver of any other provision or of any subsequent breach or violation of the Agreement. This Agreement is deemed to have been drafted jointly by the parties. Any uncertainty or ambiguity shall not be construed for or against any party based on attribution of drafting to any party.

27. The parties are encouraged to consult with an attorney of their choice before signing this Agreement.

28. The parties agree that they are entering into the Agreement knowingly, willingly, and voluntarily, and that no promises, representations, or inducements not expressly set forth herein were made to them that caused them to sign the Agreement.

THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND FULLY
UNDERSTAND THE MEANING AND INTENT OF ALL OF THE PROVISIONS AND
TERMS OF THIS AGREEMENT, INCLUDING THE FINAL BINDING EFFECT.

WITNESS my signature on this 2nd day of FEB, 2009.

Richard Flint
Richard Flint

2/2/09
Date

Judy R. Flint
Judy Flint

02/02/09
Date

Marlene Stone
Marlene Stone

02/03/09
Date

Brad C. Smith, No. 6656
David B. Stevenson, No. 12244
STEVENSON & SMITH, P.C.
Attorneys for Defendants
3986 Washington Blvd.
Ogden, UT 84403
Tel.: (801) 394-4573

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

MARLENE STONE, Plaintiff, vs. RICHARD FLINT AND JUDY FLINT, Defendants.	JOINT MOTION FOR STIPULATED TEMPORARY INJUNCTION Civil No. 080907234 395 1171 Judge: Michael D. Lyon
RICHARD FLINT AND JUDY FLINT, Counterclaimants, vs. MARLENE STONE and Does 1-5, Counterdefendants.	

Come now Defendants/Counterclaimants (hereinafter "Defendants"), Richard Flint and Judy Flint, by and through counsel, David Stevenson, and Plaintiff/Counterdefendant (hereinafter "Plaintiff"), Marlene Stone, by and through counsel, Isaac Macfarlane, and moves the Court for a temporary injunction by stipulation of the parties and requests that an injunction issue enjoining Counterdefendant, Marlene Stone, and/or her agents from the following:


1. From trespassing on Defendants' property, located at 6006 S. 7100 West in Hooper, Utah, and having serial number Serial # 10-124-0001. Plaintiff is

enjoined from being on any part of Defendants' property, including, but not limited to, their driveway and unpaved surfaces, private sidewalk adjoining their porch, and/or their home.

2. Plaintiff is enjoined from contacting Defendants in any way, including, but not limited, direct in-person contact, over the telephone, through the internet, at their places of employment, or otherwise. This also includes any contact through an agent of the Plaintiff, except for Plaintiff's attorney, real estate agent, or police officer.
3. From parking or driving on Defendants' property.
4. From any stalking behavior, as defined in Utah Code Ann. § 77-3a-101 et seq.

By stipulation, the parties motion that the Court issue a temporary injunction through the attached order, and that said injunction exist for three years or until such time as Plaintiff sells her adjoining property lying immediately to the North and East of Defendants' property, whichever is longer, and with respect to each and every item listed above.

STEVENSON & SMITH, P.C.



Brad C. Smith

David B. Stevenson

Attorneys for Richard and Judy Flint

FROERER & ASSOCIATES, P.L.L.C.



Isaac C. Macfarlane

Attorney for Marlene Stone

Brad C. Smith, No. 6656
David B. Stevenson, No. 12244
STEVENSON & SMITH, P.C.
Attorneys for Defendants
3986 Washington Blvd.
Ogden, UT 84403
Tel.: (801) 394-4573

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

MARLENE STONE,

Plaintiff,

vs.

RICHARD FLINT AND JUDY FLINT,

Defendants.

**ORDER FOR TEMPORARY
INJUNCTION**

Civil No. 080907234

RICHARD FLINT AND JUDY FLINT,

Counterclaimant,

vs.

MARLENE STONE and Does 1-5,

Counterdefendants.

Judge: Michael D. Lyon

The parties, Defendants Richard Flint and Judy Flint and Plaintiff Marlene Stone, by and through their respective counsel, having moved the Court for a temporary injunction by stipulation, and having found good cause for issuing said temporary injunction, it is therefore ORDERED and DECREED that Plaintiff, Marlene Stone, and/or her agents are temporarily enjoined:

1. From trespassing on Defendants' property, located at 6006 S. 7100 West in Hooper, Utah, and having Serial # 10-124-0001. Plaintiff is enjoined from being on any part of Defendants' property, including, but not limited to, their driveway

and unpaved surfaces, private sidewalk adjoining their porch, and/or their home.

2. Plaintiff is enjoined from contacting Defendants in any way, including, but not limited, direct in-person contact, over the telephone, through the internet, at their places of employment, or otherwise. This also includes any contact through an agent of the Plaintiff, except for Plaintiff's attorney, real estate agent, or police officer.
3. From parking or driving on Defendants' property.
4. From any stalking behavior, as defined in Utah Code Ann. § 77-3a-101 et seq.

Said injunction shall exist for three years or until such time as Plaintiff sells her adjoining property lying immediately to the North and East of Defendants' property, whichever is longer, and with respect to each and every item listed above.

Judge Michael D. Lyon

ADDENDUM D

Plaintiff's Exhibit T1
Case No. 080907237
Date: 4/15/09
Clerk's Initials JB



135 ft

Image State of Utah

©2009 Tele Atlas

Google

2006

Eye alt 468 ft

ADDENDUM

E

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

MARLENE STONE, Plaintiff, vs. RICHARD FLINT and JUDY FLINT, Defendants.	MEMORANDUM DECISION Judge Michael D. Lyon Case No. 080907234
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In this case, Defendants seek a determination, under their counterclaim, that they purchased from Plaintiff certain personal property as part of a real estate purchase transaction. All claims under Plaintiff's complaint were resolved through mediation, leaving only Defendants' claim. The parties tried this case without a jury on April 15 and 20, 2009. Following closing arguments, the Court took the matter under advisement for a review of the trial evidence and supporting exhibits. Based on the evidence and controlling law, the Court grants judgment in favor of Plaintiff, no cause of action on Defendants' counterclaim. The Court also awards Plaintiff a reasonable attorney fee for her defense of Defendants' counterclaim.

BACKGROUND

Plaintiff Marlene Stone owned real property known as 6006 S. 7100 W. in Hooper, Utah, consisting of approximately 17 acres. She listed the property for sale on the multiple listing service, giving prospective buyers three options: 1) purchase all 17 acres, 2) purchase two acres, or 3) purchase one acre.

Defendants Richard Flint and Judy Flint became interested in the property. They and their realtor, Joe Adair, met with the Plaintiff on February 1, 2008. During this initial meeting, Plaintiff explained that her husband had recently passed away, that she wanted to be relieved of the burden of managing the property by herself, and that she was interested in selling, preferably, all of her 17 acres, including the structures on the property. Mr. Flint inquired, "Does all of this stuff stay with the property?" Plaintiff replied affirmatively. Both parties seem in agreement that when Defendant asked his question, he was looking out of Plaintiff's bedroom window, facing to the east of Plaintiff's property, overlooking the hay barn, horse barn, and various items of personal property. For ease of description in this decision, the Court will refer to this personal property collectively as *structures*. These structures included mobile fencing, called panels; mobile gates that interfaces with the panels; open sheds, called loafing sheds, for animals that can be moved; and a horse walker.

Defendants expressed interest to Plaintiff, however, in purchasing only two acres, encompassing the home and the two barns. Plaintiff explained that if the Defendants wanted only two acres, the two acres would not include a strip of her property of approximately 66 feet in width, lying on the northern part of her property and extending eastward, because she needed an access to the remaining 15 acres; otherwise, she would essentially be landlocked. Plaintiff further explained that in order to sell the two acres the Defendants were interested in, encompassing the home and two barns, she would need to obtain a survey to partition this amount of real estate from the aggregate 17 acres because, at that time, the exact boundaries of the proposed two acres were undetermined.

After the parties discussed Defendants' interest in only two acres, no further discussion occurred regarding the structures, except regarding the horse walker, as discussed below. In point, the parties never addressed the structures or where they might be situated after the survey and partition of two acres from the remaining 15 acres.

Based on the discussions that occurred in Plaintiff's bedroom, the Defendants assumed that all structures on the entire 17 acres went with the two acres they were would eventually purchase because Plaintiff did not want to manage the property any more. Plaintiff, on the other hand, assumed that since the Defendants wanted less than the 17 acres, only the structures existing on the two acres would pass in the conveyance to the Defendants; she would keep the structures situated on the remaining 15 acres.

Later that same day, February 1, 2008, Mr. Adair, Defendants' realtor, prepared and presented to Plaintiff a real estate purchase contract (hereafter "REPC"). The first addendum to the REPC provided that Plaintiff would have the property surveyed and the four corners staked to Defendants' satisfaction prior to closing of the sale. The first addendum also listed the structures included in the sale: "All lounging/loafing sheds, panels, gates, feeders/waterers and horse walker as presently exist."

When the Defendants presented the REPC through Mr. Adair, she told him that, if they wanted the horse walker, the Defendants would need to move it completely on to the two acres. As of February 1, 2008, the base of the horse walker was situated on the eventual ground that was part of the 66-foot-wide access reserved by Plaintiff, although the arm of the horse walker rotated partially into the two acres the Defendants would purchase. Further, the electric motor

operating the horse walker was wired to the barn, also within the two acres that the Defendants were receiving as part of the two acres. Otherwise, Plaintiff accepted the Defendants' offer.

As the parties agreed, Plaintiff had the property surveyed and the four corners of the property staked just prior to the closing on the property on April 16, 2008. Defendants physically inspected the staked property they were to purchase and were satisfied with the boundaries. Even at this juncture of the parties' dealings, no further discussions occurred regarding the structures, as they may lie inside and outside the two acres.

The boundaries of the two acres Defendants purchased are defined by the pencil line on exhibit P1. On exhibit P1, north is to the top of the exhibit and west is to the left of the exhibit. The northern boundary of the two acres abuts the 66-foot-wide strip Plaintiff retained ownership in for access to the remaining 15 acres of her property. Included in the boundaries of the two acres are the home in the lower left-hand corner of the exhibit, the two barns identified with the letters G and H, and the structures defined with the letters F, D, and I. Excluded from the boundaries of the two acres, and appearing in Plaintiff's access, are three loafing sheds defined with letters A, B, and C. Structure A abuts the property line between Plaintiff's property and a third party neighbor. Structure E also remains on Plaintiff's remaining property that extends to the east.

In purchasing the home and the two acres, Defendants assumed the original address of 6006 S. 7100 W. in Hooper, Utah. Hooper City gave Plaintiff a new address for her remaining 15 acres, known as 5990 S. 7100 W., Hooper, Utah.

Contemporaneous with the closing on the real property, the title company prepared a bill

of sale that Plaintiff signed and Defendants accepted in the closing. The bill of sale transferred title to “that certain personal real property *now* at 6006 S. 7100 W., Hooper, Utah” (emphasis added). The bill of sale then enumerated the personal property specified in the first addendum to the REPC “as presently exist.”

Also contemporaneous with the closing, Plaintiff leased to Defendants the remaining 15 acres of her property to Defendants for one year. That lease was later broken in 2008, and the parties resolved their rights and liabilities under that lease through mediation after Plaintiff filed suit. Thus, those matters are not before the Court. Nonetheless, it is relevant in this proceeding that, as a result of friction between the parties stemming from Defendants’ use of the remaining 15 acres under the lease agreement, the parties realized that each side had a different interpretation of the REPC and bill of sale regarding the meaning of “all” of the structures. Defendants believed they had purchased all of the structures existing on the 17 acres, whereas Plaintiff believed she had sold only all of the structures on the two acres that she had conveyed to the Defendants.

ISSUES PRESENTED

This dispute in the interpretation of the REPC and the bill of sale is the crux of the lawsuit between the parties. Defendants contend that the language of the REPC and bill of sale gave them “*all* lounging/loafing sheds, panels, gates, feeders/waterers and horse walker as presently exist,” both on the two acres they had purchased and on the 15 acres retained by the Plaintiff. On the other hand, Plaintiff argues that Defendants received only the structures on the property they purchased. At issue is whether the word *all*, as used in the REPC and bill of sale, is

ambiguous. The Court holds that it is not ambiguous.

ANALYSIS

Contractual ambiguity may occur in two contexts: “(1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties.” *Daines v. Vincent*, 2008 UT 51, ¶ 25, 190 P.3d 1269, 1276. The Utah Supreme Court went on to further clarify: “The first context presents a question of law to be determined by the judge. The second context presents a question of fact where, if the judge determines that the contract is facially ambiguous, parol evidence of the parties’ intentions should be admitted.” *Id.* However, “before permitting recourse to parol evidence, a court must make a determination of facial ambiguity.” *Id.* In other words, extrinsic evidence offered to show that an ambiguity exists does not “trump ‘the language of the contract.’” *Flores v. Earnshaw*, 2009 UT App 90, ¶ 10, quoting *Daines*, 2008 UT APP 51 at ¶27, 190 P.3d at 1276. In short, unless the Court finds that the language of the REPC is ambiguous, it may not consider parol evidence, or the discussions of what occurred upstairs in Plaintiff’s bedroom concerning what personal property goes with the real estate conveyance. The contract controls the rights of the parties.

Thus, the first responsibility of this Court is to determine whether a facial ambiguity exists. The Utah Supreme Court clarified the procedure for determining whether a contract is facially ambiguous also in *Daines*, where the Court set forth a two-step analysis. First,

“when determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the extrinsic evidence of the judge’s own linguistic education and experience.” Second, after a judge considers relevant and credible evidence of contrary interpretations, the judge must ensure that “the

interpretations contended for are reasonably supported by the language of the contract.”

Id. at ¶ 26, 190 P.3d at 1276, quoting *Ward v Intermountain Farmers Ass’n*, 907 P.2d 264, 268 (Utah 1995). The Court later clarified that “we [do] not intend that a judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit.” *Daines*, 2008 UT 51, at ¶ 27, 190 P.3d at 1276.

The Utah Court of Appeals applied these principles in *Flores*, 2009 UT App 90. In *Flores*, the parties entered into an agreement for the sale of a “yet-to-be-built condominium unit.” *Id.* at ¶ 1. Although the building itself did not yet exist, the parties used a standard real estate purchase contract (REPC) to accomplish the sale. Clause 1.1 of the REPC, entitled “Included Items” stated: “Unless excluded herein, this sale includes the following items *if presently owned and attached to the Property . . .*” *Id.* at ¶ 5 (emphasis added by *Flores* court). The trial court determined that the surrounding circumstances of the case, including the fact that the building had not yet been built, rendered clause 1.1 ambiguous. The court of appeals disagreed, holding that clause 1.1 was not facially ambiguous. *Id.* at ¶ 14. The court emphasized that “the enumerated items are included in the sale only if they were presently owned and attached to the Property.” *Id.* Since the building had not yet been constructed, “none of the items listed in clause 1.1 were owned and attached to the property at the time the REPC was executed[.]” *Id.* The court concluded that “based on the plain language of the REPC, the parties intended for the sale to convey only a ‘shell’ of [the unit].” *Id.*

The *Flores* case is factually similar to the present case. Plaintiff and Defendants have a

signed agreement identifying what is included in the sale. Clause 1.1 of their agreement is identical to clause 1.1 of the contract in *Flores*. It states that the listed items are included “if presently owned and attached to the Property.” The Court determines that, as in *Flores*, this provision is unambiguous and cannot be read to include any items that were not “presently owned and attached to the Property,” namely, the two acres Defendants purchased. The property included in the sale, identified as a pencil line on Plaintiff’s exhibit P1, includes the house, the two barns labeled G and H, and the structures labeled F, D, and I. It does not include the loafing sheds labeled A, B, and E, nor the panels or gates on most of the structure labeled C. Those structures are not “presently owned and attached to the Property” to be conveyed and, under the unambiguous terms of the contract, were not intended to be conveyed to Defendants.

Moreover, the bill of sale, which is the final, integrated expression of the parties’ intent concerning the transfer of personal property in this transaction, transferred only those items of personal property *presently* existing on the two acres conveyed or otherwise specifically identified, such as the horse walker. The bill of sale plainly states what Plaintiff sold to Defendants, namely, “that certain personal property *now* at 6006 S. 7100 W., Hooper, Utah, . . . , more particularly described as follows: oven/range, refrigerator, window coverings, 2 water irrigation shares, all lounging and loafing sheds, panels, gates, feeders, waterers, and horse walker as presently exist.” (Emphasis added.) Consequently, the Defendants received only three loafing sheds on their newly acquired real property, not the other three remaining on Plaintiff’s property. Likewise, they received the panels and gates on their property, as well as the waterers and feeders on their property. While the base of the horse walker was on Plaintiff’s property, and

thus may technically be on her property, because it also rotated partially on Defendants' property and because the apparatus was wired to the barn. Plaintiff chose to allow them to have it, provided they moved it completely on to their property.

Plaintiff is entitled to a reasonable attorney fee for the successful defense of Defendants' counterclaim, as provided in paragraph 17 of the REPC. Accordingly, she may present her counsel's affidavit to the Court, sending also a copy to Defendants' counsel to give him an opportunity to object to the reasonableness of the fees. As counsel prepares the affidavit, the Court reminds the parties that reasonable attorney fees are not merely measured by what an attorney actually bills and the number of hours spent on the case. Rather, in determining fees, the Court should consider those factors addressed in case law, namely, what work was actually performed, the work reasonably necessary to adequately defend the matter, the attorney's billing rate and whether it is consistent with customary rates in the locality, and any other circumstances listed in the Code of Professional Responsibility. See *Dixie State Bank v. Bracken*, 764 P.2d 985, 990 (Utah 1988).

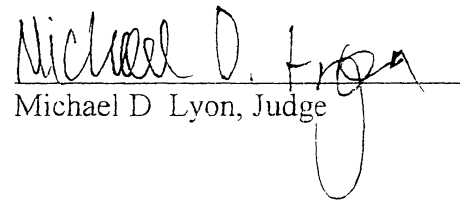
CONCLUSION

Notwithstanding the respective expectations or understandings of the parties arising from their discussions upon their initial meeting on February 1, 2008, the real estate purchase contract superceded all prior negotiations, representations, and understandings of the parties, as the clear language of paragraph 14 of the REPC provides. Moreover, the Court concludes, as a matter of law, that the REPC and the bill of sale governing the transfer of the personal property and structures are both unambiguous. Defendants are entitled to all structures that exist on the two

Memorandum Decision
Case No. 080907234
Page 10

acres at the time of the contract and at closing, unless otherwise expressly provided in the contract or bill of sale.

Dated this 21 day of April, 2009.

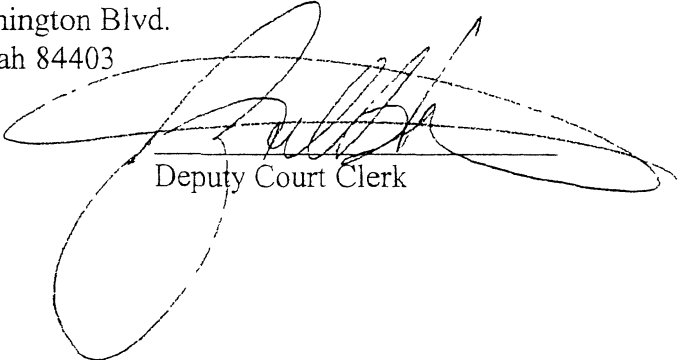

Michael D Lyon, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of April, 2009, I sent a true and correct copy of the foregoing ruling to counsel, as follows:

Robert L. Neeley
Attorney for Plaintiff
2485 Grant Avenue, Suite 200
Ogden, Utah 84401

David B. Stevenson
Attorney for Defendants
3986 Washington Blvd.
Ogden, Utah 84403



Deputy Court Clerk

RECEIVED
7/16/09

Brad C. Smith, No. 6656
David B. Stevenson, No. 12244
STEVENSON & SMITH, P.C.
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IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

MARLENE STONE,

Plaintiff and Appellee

vs.

RICHARD FLINT and JUDY FLINT,

Defendants/Counterclaimants
and Appellants.

NOTICE OF APPEAL

Trial Court No. 080907234

Notice is hereby given that defendants/counterclaimants and appellants, Richard Flint and Judy Flint, by and through counsel, appeal to the Utah Supreme Court the final judgment of the Honorable Michael D. Lyon entered in this matter on June 1, 2009. The appeal is taken from the entire judgment.

DATED this 24 day of June, 2009.



David B. Stevenson, Attorney for
Defendants/Counterclaimants/Appellees

ATTORNEYS AT LAW

3986 WASHINGTON BLVD

OGDEN UTAH 84403

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IN THE SECOND JUDICIAL DISTRICT COURT
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Plaintiff and Appellee

vs.

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and Appellants.

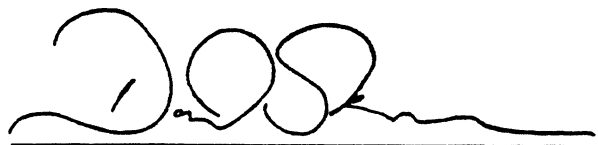
**CERTIFICATE OF SERVICE OF
NOTICE OF APPEAL**

Trial Court No. 080907234

I HEREBY CERTIFY that on this day I mailed, postage prepaid, a true and correct copy of Defendants/Counterclaimants and Appellants' Notice of Appeal to the following individual(s):

Robert Neeley
Neeley & Neeley
2485 Grant Ave., #200
Ogden, UT 84401

DATED this 24 day of June, 2009.



ADDENDUM

F

NEELEY & NEELEY
 ROBERT L. NEELEY [2373]
 Attorney for Plaintiff
 2485 Grant Ave, Suite 200
 Ogden, Utah 84401
 Telephone: (801) 621-3646
 Fax No.: (801) 621-3652
 bobneeley@yahoo.com

JUN 01 2009



IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

MARLENE STONE,

Plaintiff,

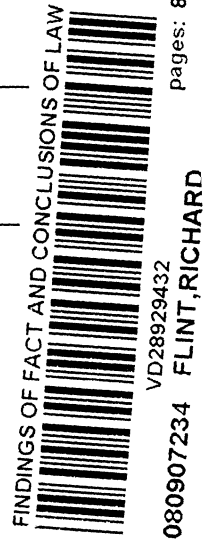
vs.

RICHARD FLINT and JUDY FLINT,

Defendants.

**FINDINGS OF FACT AND
 CONCLUSIONS OF LAW**

Civil No. 080907234 EV
 Judge: Michael D. Lyon



Non-jury trial in the above-entitled matter come on regularly for hearing before the above-entitled Court on April 15 and April 20, 2009. Plaintiff, Marlene Stone, was personally present and represented by her attorney, Robert L. Neeley, and Defendants, Richard Flint and Judy Flint, were personally present and represented by their attorney, David B. Stevenson. Plaintiff and Defendants were sworn and testified, together with witness Joe Adair and the court having received exhibits from Plaintiff and Defendants and having taken the matter under advisement and having issued its Memorandum Decision, therefore makes the following:

FINDINGS OF FACT

1. Plaintiff, Marlene Stone, owned real property known as 6006 S. 7100 W. in Hooper, Utah, consisting of approximately 17 acres.
2. Plaintiff listed the property for sale on the multiple listing service, giving prospective

buyers three options: 1) purchase all 17 acres, 2) purchase two acres, or 3) purchase one acre.

3. Defendants, Richard Flint and Judy Flint, became interested in the property. They and their realtor, Joe Adair, met with the Plaintiff on February, 1, 2008.

4. During this initial meeting, Plaintiff explained that her husband had recently passed away, that she wanted to be relieved of the burden of managing the property by herself, and that she was interested in selling, preferably, all of her 17 acres, including the structures on the property. Mr. Flint inquired, "Does all of this stuff stay with the property?" Plaintiff replied affirmatively. Both parties seem in agreement that when Defendant asked his question, he was looking out of Plaintiff's bedroom window, facing to the east of Plaintiff's property, overlooking the hay barn, horse barn, and various items of personal property. These structures included mobile fencing, called panels; mobile gates that interface with the panels; open sheds, called loafing sheds, for animals that can be moved; and a horse walker.

5. Defendants expressed interest to Plaintiff, however, in purchasing only two acres, encompassing the home and the two barns.

6. Plaintiff explained that if the Defendants wanted only two acres, the two acres would not include a strip of her property approximately 66 feet in width, lying on the northern part of her property and extending eastward, because she needed access to the remaining 15 acres; otherwise, she would essentially be landlocked.

7. Plaintiff further explained that in order to sell the two acres the Defendants were interested in, encompassing the home and barns, she would need to obtain a survey to partition this amount of real estate from the aggregate 17 acres because, at that time, the exact boundaries of the proposed

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stone v Flint

Page 3

two acres were undetermined.

8. After the parties discussed Defendants' interest in only two acres, no further discussion occurred regarding the structures, except regarding the horse walker, as discussed below. In point, the parties never addressed the structures or where they might be situated after the survey and partition of two acres from the remaining 15 acres.

9. Based on the discussions that occurred in Plaintiff's bedroom, the Defendants assumed that all structures on the entire 17 acres went with the two acres they would eventually purchase because Plaintiff did not want to manage the property anymore.

10. Plaintiff, on the other hand, assumed that since Defendants wanted less than the 17 acres, only the structures existing on the two acres would pass in the conveyance to the Defendants; she would keep the structures situated on the remaining 15 acres.

11. Later that same day, February 1, 2008, Mr. Adair, Defendants' realtor, prepared and presented to Plaintiff a real estate purchase contract (hereafter "REPC"). The first addendum to the REPC provided that Plaintiff would have the property surveyed and the four corners staked to Defendants' satisfaction prior to closing of the sale. The first addendum also listed the structures included in the sale: "all lounging/loafing sheds, panels, gates, feeders/waterers and horse walker as presently exist."

12. When the Defendants presented the REPC through Mr. Adair, she told him that, if they wanted the horse walker, the Defendants would need to move it completely on to the two acres. As of February 1, 2008, the base of the horse walker was situated on the eventual ground that was part of the 66-foot-wide access reserved by Plaintiff, although the arm of the horse walker rotated

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stone v. Flint

Page 4

partially into the two acres the Defendants would purchase. Further, the electric motor operating the horse walker was wired to the barn, also within the two acres that the Defendants were receiving as part of the two acres. Otherwise, Plaintiff accepted the Defendants' offer.

13. As the parties agreed, Plaintiff had the property surveyed and the four corners of the property staked just prior to the closing on the property on April 16, 2008. Defendants physically inspected the staked property they were to purchase and were satisfied with the boundaries. Even at this juncture of the parties' dealings, no further discussions occurred regarding the structures, as they may lie inside and outside the two acres.

14. The boundaries of the two acres Defendants purchased are defined by the pencil line on exhibit P1. On exhibit P1, north is the top of the exhibit and west is to the left of the exhibit. The northern boundary of the two acres abuts the 66-foot-wide strip Plaintiff retained ownership in for access to the remaining 15 acres of her property. Included in the boundaries of the two acres are the home in the lower left-hand corner of the exhibit, the two barns identified with the letters G and H, and the structures defined with the letters F, D, and I. Excluded from the boundaries of the two acres, and appearing in Plaintiff's access, are the three loafing sheds defined with the letters A, B, and C. Structure A abuts the property line between Plaintiff's property and a third party neighbor. Structure E also remains on Plaintiff's remaining property that extends to the east.

15. In purchasing the home and the two acres, Defendants assumed the original address of 6006 S. 7100 W. in Hooper, Utah. Hooper City gave Plaintiff a new address for her remaining 15 acres, known as 5990 S. 7100 W., Hooper, Utah.

16. Contemporaneous with the closing on the real property, the title company prepared a bill

of sale that Plaintiff signed and Defendants accepted in the closing. The bill of sale transferred title to “that certain personal real property *now* at 6006 S. 7100 W., Hooper, Utah.” The bill of sale then enumerated the personal property specified in the first addendum to the REPC “as presently exist.”

17. Also contemporaneous with the closing, Plaintiff leased to Defendants the remaining 15 acres of her property to Defendants for one year. That lease was later broken in 2008, and the parties resolved their rights and liabilities under that lease through mediation after Plaintiff filed suit. Thus, those matters are not before the Court. Nonetheless, it is relevant in this proceeding that, as a result of friction between the parties stemming from Defendants’ use of the remaining 15 acres under the lease agreement, the parties realized that each side had a different interpretation of the REPC and bill of sale regarding the meaning of “all” of the structures. Defendants believed they had purchased all of the structures existing on the 17 acres, whereas Plaintiff believed she had sold only all of the structures on the two acres that she had conveyed to the Defendants.

THE COURT having entered its Findings of Fact makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. At issue is whether the word *all*, as used in the REPC and bill of sale, is ambiguous. The Court holds that it is not ambiguous.

2. Contractual ambiguity may occur in two contexts: “(1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties.” *Daines v. Vincent*, 2008 UT 51 ¶ 25, 190 P.3d 1269, 1276. The Utah Supreme Court went on to further clarify: “The first context presents a question of law to be determined by the judge. The second context presents a question of fact where, if the judge determines that the contract is facially

ambiguous, parol evidence of the parties' intentions should be admitted." *Id.* However, "before permitting recourse to parol evidence, a court must make a determination of facial ambiguity." *Id.* In other words, extrinsic evidence offered to show that an ambiguity exists does not "trump 'the language of the contract.'" *Flores v. Earnshaw*, 2009 UT App 90 ¶ 10, quoting *Daines*, 2008 UT APP 51 at ¶ 27, 190 P.3d at 1276. In short, unless the Court finds that the language of the REPC is ambiguous, it may not consider parol evidence, or the discussions of what occurred upstairs in Plaintiff's bedroom concerning what personal property goes with the real estate conveyance. The contract controls the rights of the parties.

3. Thus, the first responsibility of this Court is to determine whether a facial ambiguity exists. The Utah Supreme Court clarified the procedure for determining whether a contract is facially ambiguous also in *Daines*, where the Court set forth a two-step analysis. First,

"When determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the extrinsic evidence of the judge's own linguistic education and experience." Second, after a judge considers relevant and credible evidence of contrary interpretations, the judge must ensure that "the interpretations contended for are reasonably supported by the language of the contract."

Id. at ¶ 26, 190 P.3d at 1276, quoting *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995). The Court later clarified that "we [do] not intend that a judge allow surrounding circumstances to create ambiguity where the language of the contract would not otherwise permit." *Daines*, 2008 UT 51, at ¶ 27, 190 P.3d at 1276.

4. The *Flores* case is factually similar to the present case. Plaintiff and Defendants have a signed agreement identifying what is included in the sale. Clause 1.1 of their agreement is identical to clause 1.1 of the contract in *Flores*. It states that the listed items are included "if presently owned

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stone v. Flint

Page 7

and attached to the Property.” The Court determines that, as in *Flores*, this provision is unambiguous and cannot be read to include any items that were not “presently owned and attached to the Property,” namely, the two acres Defendants purchased. The property included in the sale, identified as a pencil line on Plaintiff’s exhibit P1, includes the house, the two barns labeled G and H, and the structures labeled F, D, and I. It does not include the loafing sheds labeled A, B, and E, nor the panels or gates on most of the structure labeled C. Those structures are not “presently owned and attached to the Property” to be conveyed and, under the unambiguous terms of the contract, were not intended to be conveyed to Defendants.

5. Moreover, the bill of sale, which is the final, integrated expression of the parties’ intent concerning the transfer of personal property in this transaction, transferred only those items of personal property *presently* existing on the two acres conveyed or otherwise specifically identified, such as the horse walker. The bill of sale plainly states what Plaintiff sold to Defendants, namely, “that certain personal property *now* at 6006 S. 7100 W., Hooper, Utah,..., more particularly described as follows: oven/range, refrigerator, window coverings, 2 water irrigation shares, all lounging and loafing sheds, panels, gates, feeders, waterers, and horse walker as presently exist.” Consequently, the Defendants received only three loafing sheds on their newly acquired real property, not the other three remaining on Plaintiff’s property. Likewise, they received the panels and gates on their property, as well as the waterers and feeders on their property. While the base of the horse walker was on Plaintiff’s property, and thus may technically be on her property, because it also rotated partially on Defendants’ property and because the apparatus was wired to the barn, Plaintiff chose to allow them to have it, provided they moved it completely on to their property.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stone v. Flint

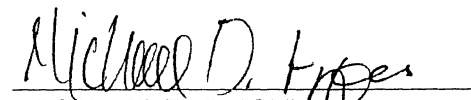
Page 8

6. Plaintiff is entitled to a reasonable attorney fee for the successful defense of Defendants' counterclaim, as provided in paragraph 17 of the REPC.

7. Notwithstanding the respective expectations or understandings of the parties arising from their discussion upon their initial meeting on February 1, 2008, the real estate purchase contract superceded all prior negotiations, representations, and understandings of the parties, as the clear language of paragraph 14 of the REPC provides. Moreover, the Court concludes, as a matter of law, that the REPC and the bill of sale governing the transfer of the personal property and structures are both unambiguous. Defendants are entitled to all structures that exist on the two acres at the time of the contract and at closing, unless otherwise expressly provided in the contract or bill of sale.

DATED this 1 day of ^{June} May 2009.

APPROVED AND ORDERED BY:


MICHAEL D. LYON
District Court Judge

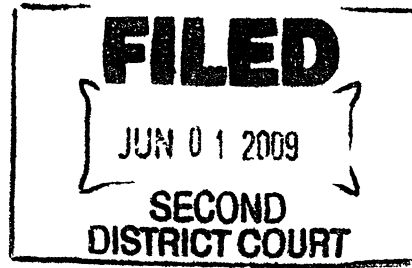
FILED
JUN 1 2009
DISTRICT COURT
JUDGE

ADDENDUM

G

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JUN 01 2009



IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

MARLENE STONE, Plaintiff, vs. RICHARD FLINT and JUDY FLINT, Defendants.	ORDER DISMISSING RESPONDENT'S COUNTERCLAIM Civil No. 080907234 Judge: Michael D. Lyon
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Non-jury trial in the above-entitled matter come on regularly for hearing before the above-entitled Court on April 15 and April 20, 2009. Plaintiff, Marlene Stone, was personally present and represented by her attorney, Robert L. Neeley, and Defendants, Richard Flint and Judy Flint, were personally present and represented by their attorney, David B. Stevenson. Plaintiff and Defendants were sworn and testified, together with witness Joe Adair and the court having entered its Findings of Fact and Conclusions of Law, now

HEREBY ORDERS, ADJUDGES, AND DECREES as follows, to-wit:

1. Defendants', Richard Flint and Judy Flint, counterclaim against Plaintiff, Marlene Stone, be and is hereby dismissed for no cause of action.

2. Plaintiff, Marlene Stone, is awarded \$ 2400 as and for attorney fees and \$ 101 as and for costs of court against Defendants, Richard Flint and Judy Flint.

Order Dismissing Respondent's Counterclaim



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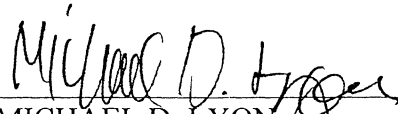
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ORDER DISMISSING RESPONDENT'S COUNTERCLAIM
Stone v Flint
Page 2

DATED this 1 day of ^{June} May 2009.

APPROVED AND ORDERED BY:



MICHAEL D LYON
District Court Judge

FILED
2009 JUN 15 PM 4:44

ADDENDUM

H

Boyden, 2006 UT 14, 133 P.3d 370.

Presumption upheld.

Where mother executed will and trust instrument, and it was later found that the will had

been executed as a result of undue influence, there was a prima facie presumption of continued undue influence with respect to an alleged subsequent ratification of the trust. *Robertson v. Campbell*, 674 P.2d 1226 (Utah 1983).

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983, 1985 Utah L. Rev. 63, 75.

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence §§ 159 to 165, 167.

C.J.S. — 31A C.J.S. Evidence § 130 et seq.

A.L.R. — Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 A.L.R.3d 19.

Refusal of defendant in “public figure” libel case to identify claimed sources as raising presumption against existence of source, 19 A.L.R.4th 919.

Presumptions and evidence respecting identification of land on which property taxes were paid to establish adverse possession, 36 A.L.R.4th 843.

Applicability of *res ipsa loquitur* in case of multiple, nonmedical defendants — modern status, 59 A.L.R.4th 201.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 A.L.R.4th 906.

Rule 302. Applicability of federal law in civil actions and proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

Advisory Committee Note. — The text of this rule is taken from Rule 302, Uniform Rules of Evidence (1974). Presumptions in criminal

cases are not treated in this rule. See Utah Code Annotated, Section 76-1-503 (1953) or any subsequent revision of that section.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of “relevant evidence.”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is comparable in substance to Rule 1(2), Utah Rules of Evidence (1971), but the former rule defined relevant evidence as that having a tendency to prove or

disprove the existence of any “material fact.” Avoiding the use of the term “material fact” accords with the application given to former Rule 1(2) by the Utah Supreme Court. *State v. Peterson*, 560 P.2d 1387 (Utah 1977).

NOTES TO DECISIONS

Burden of proof.

Demonstrative evidence.

— Photographs.

Discovery.

Effect of remoteness.

Relationship to crime charged.

Relevance.

Victim’s testimony on defense theory.

Cited.

Burden of proof.

The defendant failed to meet his burden to lay the necessary two-part foundation of relevance to admit evidence of the witness’s health history, offered for the purpose of attacking the

witness’s credibility, because he did not show that the witness’s mental health disorder impaired the witness’s ability to accurately perceive, recall, and relate events, nor did defendant offer evidence that the disability was contemporaneous with the witness’s observations or testimony. *State v. Stewart*, 925 P.2d 598 (Utah Ct. App. 1996).

In a prosecution for rape, it was not error to exclude testimony of defendant’s expert on Japanese cultural values since its only relevance was to the credibility of the victim, not any elements of the crime, and defendant did not lay a proper foundation for its admission. *State v. Finlayson*, 956 P.2d 283 (Utah Ct. App. 1998).

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Cited in *State v. Gray*, 717 P.2d 1313 (Utah 1986); *State v. Nickles*, 728 P.2d 123 (Utah 1986); *Meyers v. Salt Lake City Corp.*, 747 P.2d 1058 (Utah Ct. App. 1988); *Fisher ex rel. Fisher v. Trapp*, 748 P.2d 204 (Utah Ct. App. 1988); *Belden v. Dalbo, Inc.*, 752 P.2d 1317 (Utah Ct. App. 1988); *State v. Worthen*, 765 P.2d 839 (Utah 1988); *State v. Maurer*, 770 P.2d 981 (Utah 1989); *State, In re R.D.S.*, 777 P.2d 532

(Utah Ct. App. 1989) *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920 (Utah 1990); *State v. Pascual*, 804 P.2d 553 (Utah Ct. App. 1991); *State v. Larsen*, 828 P.2d 487 (Utah Ct. App. 1992); *State v. 633 E. 640 N.*, 942 P.2d 925 (Utah 1997); *State v. Nelson-Waggoner*, 2000 UT 59, 6 P.3d 1120; *State v. Balfour*, 2008 UT App 410, 198 P.3d 471.

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983, 1985 Utah L. Rev. 63, 78

United States v. Downing: Novel Scientific Evidence and the Rejection of *Frye*, 1986 Utah L. Rev. 839.

A.L.R. — Admissibility of evidence of absence of other accidents or injuries at place

where injury or damage occurred, 10 A.L.R.5th 371.

Admissibility of evidence in homicide case that victim was threatened by one other than defendant, 11 A.L.R.5th 831.

Admissibility and use of evidence of nonuse of bicycle helmets, 2 A.L.R.6th 429.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Advisory Committee Note. — The text of this rule is Rule 402, Uniform Rules of Evidence (1974) except that prior to the word “statute” the words “Constitution of the United States” have been added.

Compiler’s Notes. — The Utah rule also adds the words “or the Constitution of the state of Utah” to Rule 402, Uniform Rules of Evidence (1974).

NOTES TO DECISIONS

Discretion of court.
Effect of remoteness.
Harmless error.
Irrelevant evidence.
Other crimes.
Probability evidence.
Relevance.
Scientific evidence.
Standard of review.
Cited.

Discretion of court.

The trial court is given considerable discretion in deciding whether or not evidence submitted is relevant. *Bambrough v. Bethers*, 552 P.2d 1286 (Utah 1976).

While relevant evidence is generally admissible, a trial court has broad discretion to determine whether proffered evidence is relevant, and the appellate court will find error in a relevancy ruling only if the trial court has abused its discretion. *State v. Harrison*, 805 P.2d 769 (Utah Ct. App.), cert. denied, 817 P.2d 327 (Utah 1991).

In a personal injury action, the trial court did not abuse its discretion in admitting evidence of plaintiff’s prior injuries because they were relevant to the issues of causation and damages. *Ortiz v. Geneva Rock Prods., Inc.*, 939 P.2d 1213 (Utah Ct. App. 1997).

Effect of remoteness.

Remoteness usually goes to the weight of the

evidence and not its admissibility. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979), overruled on other grounds, *McFarland v. Skaggs Cos., Inc.*, 678 P.2d 298 (Utah 1984).

Harmless error.

Even if the admission of testimony regarding the ammunition and firing status of firearms used in the commission of a crime was erroneous, that error was harmless where the defendant objected only to the first attempt to admit the evidence and failed to raise an objection to the admission of the testimony from later witnesses, since the evidence would have been before the jury and the reviewing court could not say there was a reasonable likelihood of a more favorable result. *State v. Kohl*, 2000 UT 35, 999 P.2d 7.

Irrelevant evidence.

Testimony as to impulsiveness of another participant in the crime had no bearing on defendant’s guilt or innocence and was properly excluded as not relevant to defendant’s participation in the crime. *State v. Stephens*, 667 P.2d 586 (Utah 1983).

Trial judge did not err in refusing to admit evidence related to the claim of right defense, as the claim of right defense was not an available defense to the crime of robbery; thus, any evidence relating to the defense was irrelevant.

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prosecution to ex parte in camera hearing on request for state-funded expert witness, 83 A.L.R.5th 541.

ARTICLE VIII. HEARSAY

Rule 801. Definitions.

The following definitions apply under this article:

(a) *Statement*. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. A “declarant” is a person who makes a statement.

(c) *Hearsay*. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay*. A statement is not hearsay if:

(d)(1) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant’s testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(d)(2) *Admission by party-opponent*. The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(Amended effective October 1, 1992.)

Advisory Committee Note. — Subsection (a) is in accord with Rule 62(1), Utah Rules of Evidence (1971).

Subsection (b) is in accord with Rule 62(2), Utah Rules of Evidence (1971). The hearsay rule is not applicable in declarations of devices and machines, e.g., radar. The definition of “hearsay” in subdivision (c) is substantially the same as Rule 63, Utah Rules of Evidence (1971).

Subdivision (d)(1) is similar to Rule 63(1), Utah Rules of Evidence (1971). It deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten, and does not require the prior statement to have been given under oath or subject to perjury. The former Utah rules admitted such statements as an exception to the hearsay rule. See *California v. Green*, 399 U.S. 149 (1970), with respect to confrontation problems under the Sixth Amendment to the United States Constitution. Subdivision (d)(1) is as originally promulgated by the United States Supreme Court with the addition of the language “or the witness denies having made the statement or has forgotten” and is in keeping with the prior Utah rule and the actual effect on most juries.

Subdivision (d)(1)(B) is in substance the same as Rule 63(1), Utah Rules of Evidence

(1971). The Utah court has been liberal in its interpretation of the applicable rule in this general area. *State v. Sibert*, 6 Utah 2d 198, 310 P.2d 388 (1957).

Subdivision (d)(1)(C) comports with prior Utah case law. *State v. Owens*, 15 Utah 2d 123, 388 P.2d 797 (1964); *State v. Vasquez*, 22 Utah 2d 277, 451 P.2d 786 (1969).

The substance of subdivision (d)(2)(A) was contained in Rules 63(6) and (7), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Similar provisions to subdivisions (d)(2)(B) and (C) were contained in Rule 63(8), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Rule 63(9), Utah Rules of Evidence (1971), was of similar substance and scope to subdivision (d)(2)(D), except that Rule 63(9) required that the declarant be unavailable before such admissions are received. Adoptive and vicarious admissions have been recognized as admissible in criminal as well as civil cases. *State v. Kerekes*, 622 P.2d 1161 (Utah 1980).

Statements by a coconspirator of a party made during the course and in furtherance of the conspiracy, admissible as non-hearsay under subdivision (d)(2)(E), have traditionally been admitted as exceptions to the hearsay rule. *State v. Erwin*, 101 Utah 365, 120 P.2d 285

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128 P.3d 1151; *Taylor v. State*, 2007 UT 12, 570 Utah Adv. Rep. 25, 156 P.3d 739.

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983 — Part III, 1995 Utah L. Rev. 683.

Brigham Young Law Review. — The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal, 1987 B.Y.U. L. Rev. 231.

Journal of Contemporary Law. — Comment, Victims of Child Sexual Abuse in the Courtroom: New Utah Rules and Their Constitutional Implications, 15 J. Contemp. L. 81 (1989).

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence § 493 et seq.

C.J.S. — 31A C.J.S. Evidence § 259 et seq.

A.L.R. — Admissibility of impeached wit-

ness' prior consistent statement — modern state criminal cases, 58 A.L.R.4th 1014

Admissibility of tape recording or transcript of "911" emergency telephone call, 3 A.L.R.5th 784.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 A.L.R.5th 672.

Admissibility as "not hearsay" of statement by party's attorney under Federal Rules of Evidence 801(d)(2)(C) or 801(d)(2)(D), 117 A.L.R. Fed. 599.

Interpreter or translator as party's agent for purposes of "admission by party-opponent" exception to hearsay rule (Federal Rules of Evidence, Rule 801 (d)(2)(D)), 121 A.L.R. Fed. 611.

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by law or by these rules.

Advisory Committee Note. — This rule is Rule 802 of the Uniform Rules of Evidence (1974), and is the same as the first paragraph of Rule 63, Utah Rules of Evidence (1971).

Cross-References. — Affidavits, taking and certification of, § 78B-5-701 et seq.

Contemporaneous entries and writings of de-

cedent as prima facie evidence, § 78B-5-607.

Marriage certificate, issuance and filing, §§ 30-1-6, 30-1-12.

Official records as evidence, § 78B-5-602; U.R.C.P. 44.

Recording conveyances, § 57-3-101 et seq.

NOTES TO DECISIONS

In general.
Chemical breath analysis.
Nonhearsay.
Purpose.
Cited.

In general.

Hearsay is generally not admissible on the ground that it lacks trustworthiness for two basic reasons: (1) the person who purports to know the facts is not stating them under oath; (2) that person is not present for cross-examination. *State v. Sibert*, 6 Utah 2d 198, 310 P.2d 388 (1957).

In a husband's and wife's breach of contract suit against lawyers for the opposing parties in an earlier lawsuit, following a mediation agreement from the underlying misappropriation action against the husband, denial of the lawyers' motion for partial summary judgment was improper as the mediation confidentiality agreement unambiguously prohibited disclosure of any mediation contents, which included the wife's hearsay testimony regarding the purported acceptance of her settlement offer to the extent that such testimony was used to support the breach of contract claim. Because the mediator's statement regarding the lawyers' purported acceptance of the wife's settlement was

inadmissible, the husband and wife failed to set forth admissible evidence to demonstrate a genuine issue for trial on their breach of contract claim. *Moss v. Parr Waddoups Brown Gee & Loveless*, 2008 UT App 405, 197 P.3d 659.

Chemical breath analysis.

Section 41-6-44.3, governing the admission of chemical breath analysis, is a valid statutory exception to the hearsay rule. *Layton City v. Bennett*, 741 P.2d 965 (Utah Ct. App. 1987), cert. denied, 765 P.2d 1277 (Utah 1988).

Nonhearsay.

Police officer's recounting of victim's report of the crime was not hearsay because it was not presented for the truth of the matter, but to explain why the officer took the investigative steps that he did. *State v. Bryant*, 965 P.2d 539 (Utah Ct. App. 1998).

Purpose.

The hearsay rule has as its declared purpose the exclusion of evidence not subject to cross-examination concerning the truthfulness of the matters asserted. *State v. Long*, 721 P.2d 483 (Utah 1986).

Cited in *Johnson v. Hermes Assocs.*, 2005 UT 82, 128 P.3d 1151.

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COLLATERAL REFERENCES

Utah Law Review. — The Unconstitutionality of Statutes of Limitation on Habeas Corpus Relief and the Need for Reliability Findings for Child Victims' Out-of Court Statements, 1998 Utah L. Rev. 619

Journal of Contemporary Law. — Com-

ment, Victims of Child Sexual Abuse in the Courtroom New Utah Rules and Their Constitutional Implications, 15 J. Contemp. L. 81 (1989)

A.L.R. — Validity, construction, and application of child hearsay statutes, 71 A.L.R. 5th 637

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rules 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, including

of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of vital statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of religious organization.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents.* Statements in a document in existence twenty years or more the authenticity of which is established.

(17) *Market reports, commercial publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation concerning personal or family history.* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption,

marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) *Reputation concerning boundaries or general history.* Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) *Reputation as to character.* Reputation of a person's character among associates or in the community.

(22) *Judgment of previous conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to personal, family or general history, or boundaries.* Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(Amended effective October 1, 1992; November 1, 2001; November 1, 2004.)

Advisory Committee Note. — This rule is the federal rule verbatim. The 2001 amendment adopts changes made to Federal Rule of Evidence 803(6) effective December 1, 2000.

Cross-References. — Affidavits admissible in hearing on motion, Rule 43(b), U.R.C.P.

Affidavits, taking and certification of, § 78B-5-701 et seq.

Contemporaneous entries and writings of decedent as prima facie evidence, § 78B-5-607.

Historical works, books of science and art,

and published maps and charts as evidence, § 78B-5-605.

Judgment, entry of, Rule 58A, U.R.C.P.

Judgment roll in criminal case, contents and filing, U.R.Crim.P. 22.

Marriage certificate, issuance and filing, §§ 30-1-6, 30-1-12.

Official records as evidence, § 78B-5-602; Rule 44, U.R.C.P.

Recording conveyances, § 57-3-101 et seq.

NOTES TO DECISIONS

Business records.

Commercial publications.

Excited utterances.

Harmless error.

Learned treatises.

Medical diagnosis or treatment.

Nonhearsay.

Present sense impression.

Public records and reports.

Records of regularly conducted activities.

Then existing mental, emotional, or physical condition.

Cited.

Business records.

Computer printouts made by driver's license division can be admitted to show a driver's accumulated point totals as part of the business records exception to the hearsay rule. *Barney v. Cox*, 588 P.2d 696 (Utah 1978).

Summary based on books and records kept in the normal course of the business, but which itself was not made in the regular course of the business, did not qualify as a business records exception to the hearsay rule. *Shurtleff v. Jay Tuft & Co.*, 622 P.2d 1168 (Utah 1980).

For evidence to be admissible as a business record, a proper foundation must be laid to establish the necessary indicia of reliability, which foundation should generally include the

following: the record must be made in the regular course of the business or entity which keeps the record; the record must have been made at the time of, or in close proximity to, the occurrence of the act, condition or event recorded; the evidence must support a conclusion that after recordation the document was kept under circumstances that would preserve its integrity, and the sources of the information from which the entry was made and the circumstances of the preparation of the document were such as to indicate its trustworthiness. *State v. Bertul*, 664 P.2d 1181 (Utah 1983).

An arresting officer's sworn driving under the influence report form was not admissible under the business records exception of Subdivision (6), where it lacked proper foundation because neither the arresting officer nor the custodian of police records testified that the report was prepared in the regular course of business, contemporaneously with the arrest. *Kehl v. Schwendiman*, 735 P.2d 413 (Utah 1987).

Section 41-6-44.3 governs the admissibility of chemical breath tests as business records. Inasmuch as § 41-6-44.3 allows affidavits to establish the necessary foundation for breathalyzer evidence, it is less restrictive than the business records exception.

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Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Advisory Committee Note. — This rule is the federal rule, verbatim. A similar provision was contained in Rule 66, Utah Rules of Evidence (1971).

NOTES TO DECISIONS

Public record or report containing hearsay.

In a dispositional hearing, a predisposition report prepared by a Division of Child and Family Services caseworker was admissible as a public record or report, but, because it was

based on double hearsay information, the court could not base its disposition solely on the report. *J S v State*, 939 P2d 196 (Utah Ct App 1997), cert denied, 953 P2d 449 (Utah 1997).

COLLATERAL REFERENCES

Am. Jur. 2d. — 29 Am Jur 2d Evidence § 496

C.J.S. — 31A C J S Evidence § 280

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Amended effective October 1, 1992.)

Advisory Committee Note. — This rule is the federal rule, verbatim. Rule 65, Utah Rules of Evidence (1971), contained a comparable provision.

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983 — Part III, 1995 Utah L. Rev. 683

C.J.S. — 31A C J S Evidence § 337 et seq

Am. Jur. 2d. — 29 Am Jur 2d Evidence §§ 254, 267 et seq

Rule 807. Other exceptions.

A statement not specifically covered by Rule 803 or Rule 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the

statement and the particulars of it, including the name and address of the declarant.

(Added effective November 1, 2004.)

Advisory Committee Note. — This rule transfers identical provisions Rule 803(24) and Rule 804(b)(5) to a new Rule 807 to reflect the

organization found in the Federal Rules of Evidence. No substantive change is intended. This rule is the federal rule, verbatim.

NOTES TO DECISIONS

Under former Rule 803(24).

Subdivision (24), unlike the other enumerated hearsay exceptions, did not apply to a particular class or type of statement, but was intended for use in those rare cases in which, although the out-of-court statement does not fit into a recognized exception, its admission is justified by the inherent reliability of the statement and the need for its admission. *State v. Nelson*, 777 P.2d 479 (Utah 1989).

In determining whether a statement is sufficiently reliable for purposes of former Subdivision (24), a court should examine, among other factors: (1) the probable motivation of the declarant in making the statement; (2) the circumstances under which the statement was made; and (3) the knowledge and qualifications of the declarant. Additional factors that may be considered include (1) the character of the declarant for truthfulness and honesty and the availability of evidence on the issue; (2) whether the statement was given voluntarily, under oath, subject to cross examination and a penalty for perjury; (3) the extent to which the declarant's statement reflects his personal knowledge; (4) whether the declarant ever re-

canted his statement, and (5) whether the declarant's statement was insufficiently corroborated. *State v. Webster*, 2001 UT App 238, 32 P.3d 976.

Because an admissibility decision under Subdivision (24) required the application of facts to the legal requirements of the rule, the trial court had some discretion in making that determination. *N.D. v. A.B.*, 2003 UT App 215, 476 Utah Adv. Rep. 14, 73 P.3d 971.

A child's out-of-court videotaped statements about her stepfather's actions were material under Subdivision (24)(A) because the actions were the basis for the father's petition for a protective order against the stepfather. However, because there was no evidence in the parties' briefs, the trial record, or the findings about why the child was not called to testify, the record was inadequate to show either that the out-of-court statements were more probative than the in-court testimony of the child would have been or that the general purpose of the Rules of Evidence and the interests of justice were served by admitting the statements into evidence, as required by Subdivisions (24)(B) and (C). *N.D. v. A.B.*, 2003 UT App 215, 476 Utah Adv. Rep. 14, 73 P.3d 971.

COLLATERAL REFERENCES

A.L.R. — Uniform Evidence Rule 803(24): the residual hearsay exception, 51 A.L.R.4th 999.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5), 75 A.L.R.4th 199.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification.

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(b)(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(b)(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(b)(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.