

1999

Justin F. Pavoni and Kimberly A. Pavoni v. C.
Michael Nielsen and Does 1 through 10, inclusive:
Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 990179-CA

IN THE UTAH COURT OF APPEALS

JUSTIN F. PAVONI and KIMBERLY A.
PAVONI, individuals,

Plaintiffs/Appellants,

v

C. MICHAEL NIELSEN, an individual and
DOES 1 through 10, inclusive,

Defendants/Appellees.

Appeal No. 990179-CA

Priority No. 15
Oral Argument Requested

REPLY BRIEF OF APPELLANTS

**ON APPEAL FROM THE
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IN AND FOR SUMMIT COUNTY, STATE OF UTAH
PAT B. BRIAN, DISTRICT JUDGE**

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SEP 10 1999

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I. INTRODUCTION

In accordance with Utah law governing challenges to directed verdicts, appellants ("the Pavonis") summarized in their opening brief the evidence at trial in the light most favorable to the Pavonis and demonstrated that the trial court's directed verdicts dismissing their claims under the Indemnification Agreement and the Earnest Money Sales Agreement were erroneous. Appellee Nielsen has now submitted a brief seeking to uphold the trial court's rulings, and the Pavonis submit this reply brief to show that each of Nielsen's arguments is meritless. The directed verdicts and the accompanying award of attorney's fees to Nielsen overlooked critical evidence in favor of the Pavonis, failed to follow Utah law and must be reversed.

The directed verdict on the Indemnification Agreement was premised on the erroneous finding that the Pavonis produced no evidence of unreimbursed losses and expenses covered by the Agreement. In fact, the trial court overlooked the fact that it had already admitted evidence of such losses for both attorney's fees (see, Exhibits 35A and 35B) and architectural fees, as well as additional evidence showing that the Pavonis' land was diminished in value by the imposition of the Call easement from which Nielsen had agreed to defend the Pavonis. This evidence--admitted and in the record --totally undermines the directed verdict.

Nielsen's response includes trying to re-raise objections to the admission of the evidence which objections were overruled below and as to which Nielsen has not filed a cross-appeal. Evidence admitted below that contradicts the directed verdict cannot be ignored here, particularly where no cross-appeal challenging the admission of the evidence has been filed. See Franklin v. Stephenson, 372 Utah Adv. Rep. 10 (Utah 1999) ("[a] judge cannot grant a directed verdict or judgment notwithstanding the verdict by ignoring evidence he has admitted on the ground that the admission was error.") (quoting 21 Wright & Graham, Federal Practice and Procedure: § 5041, at

229-30 (1977)). Beyond reiterating overruled and unappealed objections, Nielsen resorts to arguing inferences from the evidence that he claims supports his view that the Pavonis should not recover. However, Nielsen's inferences from hotly disputed facts cannot salvage an erroneous directed verdict. Indeed, it is because the facts are disputed that a directed verdict should not have been entered. Even without proof of damages, the Pavonis were entitled to nominal damages for Nielsen's breach of the Indemnification Agreement because Nielsen failed to defend the Pavonis and instead capitulated to the Call easement.

Nielsen's arguments with respect to the Earnest Money Sales Agreement are equally unavailing. Nielsen seeks to evade Utah's "collateral rights" exception to the merger doctrine which holds that promises to perform future activities after the closing, which are collateral to the contract of sale, are not extinguished by conveyance of the deed. The Pavonis demonstrated that Nielsen's promise to install gravel 120 days after the closing is just such a future promise that survived under the collateral rights exception. Nielsen argues that the Earnest Money Sales Agreement at issue here contains a unique abrogation clause that precludes the application of the collateral rights doctrine. Yet, Utah courts have recognized the "collateral rights" exception in cases involving the very same abrogation clause present in this case. See Maynard v. Wharton, 912 P.2d 446, 449 (Utah App. 1996); Compare Embassy Group, Inc. v. Hatch, 865 P.2d 1366, 1368 (Utah App. 1993). Moreover, the abrogation clause by its own terms does not apply to "warranties," and Nielsen's promise to install gravel was identified under the agreement as a warranty, and thus, survived for this reason as well. The Pavonis were thus free to enforce Nielsen's promise, and a directed verdict should not have been granted because evidence regarding whether Nielsen installed the gravel as promised was in dispute.

In sum, the trial court's directed verdicts against the Pavonis' claims under the Indemnification Agreement and the Earnest Money Sales Agreement were erroneous. The trial court made an award of attorney's fees to Nielsen based upon its erroneous directed verdict rulings and that award of attorney's fees likewise must be set aside. This case must be remanded to the trial court for a new trial.

II. ARGUMENT

A. THE DIRECTED VERDICTS WERE IMPROPER BECAUSE THE PAVONIS SUBMITTED EVIDENCE CREATING QUESTIONS OF MATERIAL FACT ON THEIR CLAIMS FOR RELIEF.

Nielsen's brief is replete with spurious accusations that the Pavonis have attempted to *improperly influence this Court by reciting facts in support of their position that were contested by Nielsen at trial.* (Def's Brief at n. 1, 2, 3, 4, 5, 8, 9, 11, 12). It is clear, however, that Nielsen's counsel has failed to understand the standard of review that this Court applies to the grant of a directed verdict. Notwithstanding the ad hominem attacks on the Pavonis and their counsel, "[u]nder Utah law, a party who moves for a directed verdict has the very difficult burden of showing no evidence exists that raises a question of material fact." Alta Health Strategies, Inc. v. CCI Mech. Serv., 930 P.2d 280, 284 (Utah App. 1996), cert. denied, 936 P.2d 407 (Utah 1997) (emphasis added). In addressing a motion for directed verdict, "'where there is any evidence that raises a question of material fact, no matter how improbable the evidence may appear, judgment as a matter of law is improper.'" Id. (quoting Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah App. 1995), cert. denied, 913 P.2d 749 (Utah 1996)).

"Therefore, 'in directing a verdict, the [trial] court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts, but instead must simply examine whether evidence raising questions of material fact has been presented.'" Alta Health

Strategies, Inc., 930 P.2d at 284 (quoting Management Comm. of Graystone Pines Homeowners Assoc. v. Graystone Pines, Inc., 652 P.2d 896, 897 (Utah 1982)).

Nielsen argues that the trial court could not ignore the “mountain of evidence” presented at trial that may have supported a judgment in Nielsen’s favor. (Def’s brief at 23.) Nielsen’s argument, however, conflicts with the standard of review applied when a trial court directs a verdict. The trial court erred because it was not free to weigh the quantity or evaluate the quality of the evidence presented. Weighing and evaluating the evidence is a role expressly reserved for the jury. See Alta Health Strategies, Inc., 930 P.2d at 284; Management Comm. of Graystone Pines Homeowners Assoc. v. Graystone Pines, Inc., 652 P.2d 896, 897 (Utah 1982); Grossen v. Afton, 369 Utah Adv. Rep. 29, 32 (Utah App. 1999); Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah App. 1995).

In the instant case, the trial court either ignored the proper standard of review in granting Nielsen’s motion for directed verdict, or the trial court completely disregarded the evidence that was admitted at trial which presented issues of material fact that required determination by the jury. Therefore, this Court should reverse the trial court’s judgment, vacate its award of attorney’s fees to Nielsen and remand this matter to the trial court for further proceedings.

B. THE PAVONIS SUBMITTED EVIDENCE CREATING ISSUES OF MATERIAL FACT ON THEIR RIGHT TO RECOVER UNDER THE INDEMNIFICATION AGREEMENT.

Turning first to the Indemnification Agreement, the trial court's directed verdict cannot be sustained. The background for the Agreement is set out in detail in the Pavonis’ opening brief, and is summarized briefly here for context. The Pavoni Indemnification Agreement was provided by Nielsen to the Pavonis to induce them to go forward with their purchase of a lot from Nielsen. Nielsen had advised the Pavonis shortly before closing that neighboring landowners (the Calls) had

filed litigation against him claiming an easement over the property. (R. at 920; Trial Tr., pp. 93-94.) Nielsen assured Mr. Pavoni that the Calls' claim "was nothing that [he] needed to worry about" (R. at 920; Trial Tr., p. 94), and Nielsen gave the Pavonis the Indemnification Agreement, obligating Nielsen to defend them against the Calls' claim and to indemnify them against losses "arising directly or indirectly" from the Call litigation. (See Plaintiffs' Addendum at Tab 19; Pl.'s Trial Ex. 4) ("Seller [Nielsen] does hereby agree to indemnify, defend, save and hold harmless, Buyer from and against any and all claims, demands, damages, losses, liens, liabilities, penalties, fines, costs, and expenses (including attorney's fees), if any, arising directly or indirectly from or out of, the lawsuit Civil No. 11110 [the Call litigation] following the Buyer's purchase of the subject property.")

The Pavonis went forward with the purchase, and eventually paid an architect \$5,500 to prepare house plans for a prime location on the property that had been agreed to with Nielsen as part of the sale. The Pavonis were never able to use those plans, however. Instead of defending the Pavonis against the Call litigation and ensuring that no easement was placed over their property, Nielsen decided to settle the Call litigation by recognizing an easement in favor of the Calls over the Pavonis' property -- and indeed, right through their planned homesite. When the Pavonis were alerted to this potential outcome, they consulted with attorneys about the effect of the Call litigation and what might be done. (R. at 925; Trial Tr., pp. 113-15.) After Nielsen settled the Call litigation and recognized an easement through the Pavonis' planned homesite, the Pavonis sold their property at a profit over their initial purchase price. The Pavonis then brought this suit against Nielsen seeking various relief, including recovery of the architectural fees that they had expended that were rendered useless by the Call litigation and recovery of the attorney's fees that they had incurred because of the Call litigation and the resulting easement.

At trial, the Pavonis introduced evidence of the attorney's fees that they incurred and the architectural fees that they lost as a result of the Call litigation and for which Nielsen had not reimbursed them in violation of his obligations under the Indemnification Agreement. As set forth in detail in the next section of this brief, the trial court specifically admitted into evidence -- over Nielsen's objection -- testimony and documents (Exhibits 35A and 35B) showing that the Pavonis incurred more than \$2,900 in unreimbursed attorney's fees arising directly or indirectly from the Call lawsuit. Nevertheless and without any explanation, the trial court found that the Pavonis had not introduced any evidence of damages, and granted a directed verdict. (R. at 735; Plaintiffs' Addendum at Tab 9, paragraph 4.) The trial court obviously overlooked the evidence of such unreimbursed losses, which it had already admitted (e.g., the testimony and documents concerning Exhibits 35A and 35B) and which was already in the record. This evidence by itself totally undercuts the directed verdict on the indemnification claim.

Nielsen's response to this evidence is to attempt to persuade this Court to ignore it. There are two problems with Nielsen's arguments. First, as a matter of law, a court cannot ignore evidence which has been admitted in determining the propriety of a directed verdict. All admitted evidence must be considered. If the admitted evidence contradicts the directed verdict, the directed verdict cannot be sustained, even if the evidence was admitted in error. See Franklin v. Stephenson, 372 Utah. Adv. Rep. 10 (Utah 1999) ("[a] judge cannot grant a directed verdict or judgment notwithstanding the verdict by ignoring evidence he has admitted on the ground that the admission was error.") (quoting 21 Wright & Graham, Federal Practice and Procedure: § 5041, at 229-30 (1977)). Second, even if admitted evidence could be excluded (which it cannot be under Franklin), Nielsen cannot challenge the evidence here because the evidence was admitted over his objection, and Nielsen has not filed any cross-appeal to challenge the admission of the evidence on appeal.

Nielsen objected to the Pavonis' attorney's fee evidence below on the theory that it should not be admitted because it was not sufficient foundational proof of expenses incurred directly or indirectly in connection with the Call lawsuit, as opposed to fees incurred in connection with the pursuit of this lawsuit. Nielsen argued below, as he does here, that attorney's fees must be supported by a billing statement or testimony from the billing attorneys. (R. at 940; Trial Tr., p. 172.) The trial court overruled that objection, and admitted the testimony and documents as evidence of fees incurred in connection with the Call lawsuit. (See R. at 932, 939-40; Trial Tr. quoted *infra* at pp. 9-11.) Nielsen has not appealed that ruling, and cannot now ask this Court to ignore the Pavonis' attorney's fee evidence by repeating the same objections that were made and overruled below and as to which no appeal has been filed. In short, Nielsen's challenge to the Pavonis' attorney's fee evidence is insufficient as a matter of law, and the admitted evidence of unreimbursed attorney's fees incurred in connection with the Call lawsuit constitutes damages which, by itself, require the directed verdict on the indemnification claims to be reversed.

1. The Pavonis Submitted Evidence of Attorney's Fees Arising Directly or Indirectly From the Call Litigation For Which They Were Entitled to Be Indemnified and Reimbursed.

The indemnification that Nielsen provided to the Pavonis pursuant to paragraph one of the agreement is broad.¹ Its language extends the seller's indemnity obligations beyond attorney's fees

¹ The Indemnity agreement states:

1. Seller does hereby agree to indemnify, defend, save and hold harmless, Buyer from and against any and all claims, demands, damages, losses, liens, liabilities, penalties, fines, costs and expenses (including attorney's fees), if any, arising directly or indirectly from or out of, the lawsuit Civil No. 11110 following the Buyer's purchase of the subject property.

(R. at 920; Trial Tr., pp. 94-95; Pl.'s Trial Ex. 4.)

incurred in the Pavonis' actual appearance in the Call lawsuit. The language of the Indemnity Agreement entitles the Pavonis to recover any and all losses, costs and expenses, including attorney's fees, "arising directly or indirectly from or out of the Call lawsuit."

The Pavonis introduced evidence indicating that they paid more than \$2000 in attorneys fees to resolve problems created by the easement that was granted as a direct result of the Call litigation.² (Pl.'s Exs. 35A & 35B.) Nielsen concedes that he only reimbursed the Pavonis \$2000 pursuant to the Indemnification Agreement. (Def.'s brief at 29.) Nielsen contends, however, that the evidence does not establish that these attorney's fees arose out of the Call litigation.³

Contrary to Nielsen's assertion, the Pavonis introduced evidence at trial that they incurred attorney's fees and costs that constituted damages arising directly or indirectly out of the Call litigation. Specifically, the Pavonis presented Exhibits Nos. 35A and 35B which set forth the attorney's fees that the Pavonis incurred as a result of the Call litigation. Exhibits 35A and 35B were properly introduced and received into evidence. (R. at 932, 939-40, 551.)

² Exhibits 35A and 35B demonstrate that the Pavonis paid at least \$4,977.59 in attorney's fees to resolve issues related, either directly or indirectly, to the Call litigation.

³ The Indemnification Agreement is not limited to attorney's fees incurred in the Call litigation, but is much broader, and covers attorney's fees arising from, or incurred as a result of, the Call lawsuit. Nielsen argument completely ignores his obligation to indemnify and defend the Pavonis for damages, including attorney's fees, that arose directly or indirectly out of the Call litigation. The easement which ran directly through the Pavonis' planned home site, was a direct result of Nielsen's settlement of the Call litigation. Accordingly, it is disingenuous for Nielsen to contend that the attorney's fees and costs incurred by the Pavonis in a failed attempt to resolve the problems created by the Call easement are not related, either directly or indirectly, to the Call litigation.

Moreover, if any question exists as to the meaning or scope of the indemnity provision, the terms of the agreement must be construed against Nielsen, as its drafter, (R. at 990; Trial Tr., pp. 374-75) and in favor of the Pavonis. See Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366, 1372 (Utah 1996); See also Restatement (Second) of Contracts § 206 (1981); 3 Arthur L. Corbin, Corbin on Contracts § 559 (1960).

Nielsen, through counsel, represented to the trial court that Exhibits 35A & 35B were not relevant to the attorney's fees incurred as a result of the Call litigation. (R. at 770). Nielsen's counsel further avers that the trial court sustained his objection to the introduction of Exhibits 35A & 35B. (Def.'s brief at 33.) The assertions made by Nielsen directly conflict with the trial transcript:

MR. TESCH: . . . 35-A and 35-B.

. . . .

MR. KARREBERG: 35-A, I have no objections to.

THE COURT: Received
(Plaintiff's Exhibit No. 35-A was received into evidence)

(R. at 932; Trial Tr., p. 42, lines 6-23.) (Emphasis added.)

MR. TESCH: I would like you to now take a look not at 35 but at Exhibit 35-A.
A. I have 35-A in front of me.
Q. It appears to be a legal bill from Johnson, Holbrook and Schifferli in the total amount of \$369.92; is that right?
A. Yes, sir.
Q. And the date is October 31, 1993?
A. That's what I have, yes, sir.
Q. Okay. Was this bill incurred with regard to the issues that came up with regard to the claimed easement across Lot 3 across your lot?
A. Let's see. I'm going to read what the legal services provided were.
Yes, sir, they were.
Q. You paid that bill?
A. I did.
Q. That ought to be the pages 35-A, and again we probably want to mark those Pages 1 and 2.
A. Okay. The front cover number 1?
Q. Yeah. The second one is Page 2.
Ask that that be received?

MR. KARREBERG: No objection to Pages 1 and 2, Your Honor.

THE COURT: They are received.
(Plaintiff's Exhibit No. 35-A, Pages 1 & 2 were received into evidence.)

(R. at 939, Trial Tr., pp. 169-70.) (Emphasis added.)

MR. TESCH: Please take a look now at Page 3 of 35-A.

A. Yes, sir, I'm there.

Q. Okay. And there appears to be a check on the top. I think we've already discussed that. That was payment for the prior bill. And then there is a second check to that same law firm on January 10 of '94, for the amount of \$79.44. And do you recall what that bill was for?

MR. KARREBERG: Your Honor, I'm going to object because we don't have the bill, the best evidence rule, and it's hearsay.

....

THE COURT: **The objection is overruled.** It does go to the weight and not to the ultimate issue of admissibility.

MR. TESCH: And, lastly, there is a check dated February 15, 1994, in the amount -- to Johnson, Holbrook Schifferli in the amount of \$1,105.48. And what was that for?

A. That was also for issues related to the easement.

MR. TESCH: I'd ask that the third check be received.

MR. KARREBERG: **Same objection to the third check, Your Honor.**

THE COURT: **Overruled. It's received.**
(Plaintiff's Exhibit No. 35-A, Page 3 was received into evidence.)

(R. at 939-40; Trial Tr., pp. 171-72.) (Emphasis added.)

MR. TESCH: The next page would be -- Page 4 of Exhibit 35 appears to be a check dated April 8, 1994, to the law firm of J, H & S. Does that refer to Johnson, Holbrook & Schifferli?

A. Yes sir, it does.

Q. And it's in the amount of \$1,116?

A. Yes, sir.

Q. And do you recall what that invoice or bill was incurred with regard to?

A. This is issues related to the easement.

MR. TESCH: **I would ask that it be received.**

MR. KARREBERG: **Same objection.**

THE COURT: Same ruling.

(Plaintiff's Exhibit No. 35-A, Page 4 was received into evidence.)

(R. at 940, Trial Tr., pp. 172-73.) (Emphasis added.)

MR. TESCH: Next is a check to Johnson, Holbrook Schifferli June 6th, 1994, in the amount of \$358.60 with an invoice number on it. And what was that for?

A. Same.

MR. TESCH: Move its admission.

MR. KARRENBERG: Same objection, Your Honor.

THE COURT: Overruled. It's received.

(Plaintiff's Exhibit No. 35-A, Page 5 was received into evidence.)

(R. at 940, Trial Tr., p. 173, lines 13-22.) (Emphasis added.)

. . . .

MR. TESCH: Please take a look now at Exhibit 35-B.

A. I have it in my hands.

Q. And the top check is a check to McMurray & McMurray, Dale & Parkinson on June 6th, 1994, in the amount of \$1,948.15. It says "May 20, 1994 invoice." Do you recall writing that check?

A. Yes, sir, I do.

Q. And what was that for?

A. For legal services provided with relation to the easement issue.

(R. at 940; Trial Tr., p. 174, lines 15-25.)

. . . .

MR. TESCH: I ask that that check be received.

MR. KARRENBERG: Same objection, Your Honor.

THE COURT: Overruled. It is received.

(Plaintiff's Exhibit No. 35-B, Page 1 was received into evidence.)

(R. at 940; Trial Tr., p. 175, lines 4-9.) (Emphasis added.)

On appeal, Nielsen's counsel continues to tell this Court that the trial court did not admit the checks paid to the law firms of Johnson, Holbrook & Schifferli and McMurray, McMurray, Dale & Parkinson as evidence from which the jury could conclude that the Pavonis' paid legal fees and costs resulting either directly or indirectly from the Call litigation. (Def's brief at 32-33.) Nielsen's self-serving statement that "[t]he trial court obviously concluded the legal work performed by this particular firm was in connection with this action" (Def.'s brief at 33) conflicts with the trial testimony memorialized above and is at odds with the fact that these canceled checks were admitted into evidence. The trial court would not have included the canceled checks contained in Exhibits 35A and 35B in the collection of materials to be reviewed by the jury, if it had already decided that the jury was precluded from assessing whether this evidence constituted damages related to Nielsen's breach of the Indemnity Agreement.⁴

Exhibits 35A and 35B demonstrate that Nielsen breached the Indemnification Agreement by failing to reimburse the Pavonis for the attorney's fees and costs they incurred to resolve issues related, either directly or indirectly, to the Call litigation. In concluding that the Pavonis were not damaged by the Call lawsuit, the trial court ignored proof that Nielsen reimbursed only a portion (\$2,000.00) of the attorney's fees incurred by the Pavonis as a result of the Call lawsuit. Accordingly, the trial court's conclusion that the Pavonis did not present evidence of damages

⁴ The trial court sustained Nielsen's counsel's objection to the admission of one check in the amount of \$741.05 which is contained within Exhibit 35B. For Nielsen to contend that the court's refusal to admit one check contained in Exhibit 35B resulted in the exclusion of the other canceled checks set forth in Exhibit 35B misrepresents the record in this case. (R. at 175-78.)

caused by Nielsen's breach of the indemnification agreement is erroneous and its decision to direct a verdict should be reversed.⁵

The trial court directed a verdict in Nielsen's favor and dismissed the Pavonis' claims that Nielsen breached the Indemnification Agreement, because it concluded that the Pavonis' evidence did not establish that they incurred any damage arising out of the Call lawsuit.⁶ (R. at 610-15, 1008-11; Trial Tr., pp. 444-59.) However, the issue here is not whether the evidence preponderates in favor of one party or the other; that is the role of the jury. As long as the Pavonis have produced evidence raising issues of fact, then a directed verdict is inappropriate. See Alta Health Strategies, Inc., 930 P.2d at 284-87. In the instant case, the Pavonis presented evidence that they incurred costs and attorney's fees as a result of Nielsen's breach of the Indemnification Agreement. Accordingly, this Court should reverse the trial court's grant of directed verdict, vacate its award of attorney's fees and remand this case for further proceedings.

⁵ Nielsen further misrepresents the record in this case by claiming that the Pavonis never elicited any demand that Nielsen reimburse them for their damages, including attorneys fees that resulted either directly or indirectly from the Call litigation. (Def's brief at 28-29.) By letter dated April 25, 1994, the Pavonis' attorney, Robert Dale notified Nielsen's attorney, Jon V. Harper, that Nielsen was required to pay the Pavonis for the damages, including attorney's fees, that have resulted from the Call lawsuit. (Pl.'s ex. 17.) Mr. Dale further indicated that if Nielsen refused to pay, a complaint would be filed against him. *Id.*

⁶ Nielsen's counsel continues to misrepresent the proper standard of review by claiming that "Plaintiffs failed to establish sufficient evidence of damages for which Plaintiffs were entitled to be indemnified under the Indemnification Agreement." (Def's brief at 25.) If the Pavonis sought the reversal of an unfavorable jury verdict, then they would be required to marshal the evidence and show that there was insufficient evidence to sustain the verdict. However, to successfully overturn a directed verdict, the Pavonis need only show that some evidence was presented that supports the elements of their claim. It is then left to the jury to determine whether they find the evidence sufficient to sustain a jury verdict in plaintiff's favor. See Alta Health Strategies, Inc., 930 P.2d at 284; Management Comm. of Graystone Pines Homeowners Assoc. v. Graystone Pines, Inc., 652 P.2d 896, 897 (Utah 1982); Grossen v. Afton, 369 Utah Adv. Rep. 29, 32 (Utah App. 1999); Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah App. 1995).

2. The Pavonis Submitted Evidence of Architectural Fees Wasted on Account of the Call Litigation for Which They Were Not Reimbursed in Their Subsequent Sale of the Property.

The trial court disregarded the evidence of damages incurred by the Pavonis as a result of the Call lawsuit, which was presented at trial. The evidence of damages included the cost of custom architectural plans designed for a specific site on the lot, that were rendered useless by the grant of the easement to the Calls in settlement of the Call lawsuit. Mr. Pavoni testified that he paid an architect \$5,500 for a survey, topographic depictions, site plans and design specifications for the home. (R. at 921-22; Trial Tr., pp. 100-01). These plans were rendered useless by the Call easement. (R. at 963-64; Trial Tr., pp. 267-68.)

The Pavonis, stripped of their desired building location by Neilsen's resolution of the Call litigation, decided to sell their property. In their agreement with the new buyer, the Pavonis agreed to provide the buyer with the architectural plans. (R. at 964; Trial Tr., pp. 269-70.) The Pavonis' selling price to the new buyer was not increased for including an agreement to provide their house plans. *Id.* at 284-85. Moreover, the testimony at trial established that the Pavonis ultimately did not transfer their house architectural plans to the new buyer. *Id.* at 285. In any event, the plans were useless to the Pavonis in light of the resolution of the Call litigation, and they suffered an unreimbursed loss of \$5,500.

Nielsen disputes that these facts and claims are supported by the record. (Def.'s brief at 18-19.) However, Mr. Pavoni testified at trial that the sales price of the property was not increased, despite the fact that he offered these architectural plans to the buyer. (R. at 968; Trial Tr., pp. 284-85.) Turning the standard of review on its head, Nielsen chooses to infer that the Pavonis must have benefited from including the plans in the sale. (Def.'s brief at 18-19, 27.) However, this Court is required to construe the facts, and all reasonable inferences drawn therefrom, in the light most

favorable to the Pavonis. Mr. Pavoni's direct testimony on the subject, and the reasonable inferences drawn therefrom, would have been sufficient for the jury to conclude that the Pavonis were damaged by the existence of the Call easement, which ran directly through their intended building site and, thus, rendered the architectural plans useless.

Neisen responds to this evidence by arguing that the Pavonis "sold" their architectural plans to the next buyer, and thus suffered no loss. Yet, the evidence, viewed in the light most favorable to the Pavonis, shows that the Pavonis did not receive any consideration for the plans and did not receive any benefit from them themselves due to the resolution of the Call litigation. Indeed, Nielsen's own "marshaling of the evidence" shows that the land - without the plans - was appraised for \$285,000. The Pavonis sold the land for less - \$282,500. Under Nielsen's argument, the purchase price would have had to be \$5,500 higher than the appraisal in order for it to be said that the Pavonis covered their architectural loss by selling the plans to the new purchaser. Alternatively, under Nielsen's argument, \$5,500 of the \$282,500 purchase price represented repayment for the architectural plans, indicating that the Pavonis did not receive the appraised value for their property of \$285,000. Under either analysis, the Pavonis suffered an unreimbursed loss of \$5,500, and it cannot be said on this record that there was no evidence of any such loss.

3. The Pavonis Submitted Evidence That the Call Easement Diminished the Value of the Property, and Gave Rise to Reimbursable Losses.

In addition to the evidence of unreimbursed attorney's fees and costs for architectural services, the Pavonis also submitted evidence that their property, burdened by the Call easement, was worth less than it would have been without such an easement. Nielsen himself admitted that land with an easement is worth less than the land without an easement. He also estimated that the

imposition of the Call easement could have reduced the value of the Pavonis' property anywhere from \$2,000 to 50% of the value of the property without an easement.⁷

Nielsen responds to this evidence by asserting that the Pavonis received the full appraisal value of their property, less only \$2,500 that Nielsen attributes to the give and take of arms-length negotiation. Nonetheless, viewing the evidence in the light most favorable to the Pavonis, the Pavonis bargained for a piece of property without the Call easement, and received a piece of property burdened with the Call easement (which covered up to 2 acres of the 20 acre piece of property). The Pavonis received property that was worth at least \$2,000 less than what they had bargained for, and this represents a loss covered by the Indemnification Agreement.

It is not disputed that the property appraised for \$285,000 and sold for \$282,500. (R. at 963; Trial Tr., pp. 266-67; Def.'s Trial Exs. 1 & 7.) Nielsen contends that the sale's price of the property was not impacted by the Call easement, but, instead, was the result of a negotiation between the buyer and seller, wherein the buyer offered \$280,000 and the parties met in the middle. (R. at 963, Trial Tr., p. 267.) In contrast, evidence was presented, in the form of Nielsen's testimony, that suggested the value of their property was diminished because of the existence of the Call easement. (R. at 974, 977, 981; Trial Tr., pp. 310, 321-22, 336.) The merits of the parties' positions with respect to the effect of the easement on the property value should have been considered by the jury. Unfortunately, the trial court directed the verdict in this case and prevented the jury from resolving

⁷ At trial, the Pavonis presented evidence indicating that the value of the property was diminished as a result of the Call easement. On direct examination, Nielsen admitted that the Pavonis' property value was reduced because of the existence of the Call easement. (R. at 974, 977, 978, 981; Trial Tr., p. 310, lines 16-21, 25, p. 311, lines 2-7, p. 321, lines 24-25, p. 322, lines 13-15, p. 323, lines 11-13, p. 323, line 14, p. 336, lines 6-12, 24-25, p. 327.)

whether, and to what amount, the Pavonis had been damaged by the Call lawsuit and the existence of the Call easement.

C. THE PAVONIS WERE ENTITLED TO RECOVER NOMINAL DAMAGES FOR NIELSEN'S GRANTING OF AN EASEMENT IN BREACH OF THE INDEMNIFICATION AGREEMENT.

Even if the Pavonis had not presented evidence of actual damages in the form of unreimbursed attorney's fees, architectural fees, and diminution in value, the Pavonis were entitled to nominal damages, in any event, due to Nielsen's breach of the Indemnification Agreement. The Indemnification Agreement was an undertaking by Nielsen, not only to indemnify the Pavonis against losses, but to "defend" them against any "liability" arising out of the Call litigation -- in other words, to defend them against the imposition of any easement as a result of the Call litigation. Nielsen was obligated to defend the Pavonis and to extinguish the Calls' claimed easement. Instead, Nielsen breached that agreement by settling the Call litigation and agreeing to recognize an easement in favor of the Calls running through the Pavonis' property and directly through their planned and agreed upon home site. There could not be any clearer breach of the agreement.

Nielsen never directly responds to this argument in his brief. Nielsen argues that the Indemnification Agreement is strictly an indemnity, and is breached only if Nielsen refuses to pay an indemnified actual loss upon demand. Nielsen argues that the Pavonis have not shown any unreimbursed loss or expense that they incurred as a result of the Call litigation, and thus, have not proved any breach which could entitle the Pavonis to actual or nominal damages. Of course, as summarized above, the Pavonis did indeed produce evidence of unreimbursed expenses and losses which Nielsen failed to pay upon demand, resulting in a breach of the agreement.

But, beyond this, Nielsen never explains his breach of the agreement resulting from his capitulation to the Calls and his failure to defend the Pavonis. The language of the Indemnification

Agreement created not only an indemnification obligation, but a duty to defend. The duty to defend is different from and broader than the duty to indemnify. See generally Deseret Federal Savings and Loan Assoc. v. United States Fidelity & Guaranty Co., 714 P.2d 1143, 1146 (Utah 1986) ("The duty to defend is broader than the duty to indemnify") Nielsen overlooks this language of the Indemnification Agreement as it applies to the circumstances of this case.

The evidence, viewed in the light most favorable to the Pavonis, shows that Nielsen promised to permit the Pavonis to build their dream house at a particular site on the property. Nielsen also promised that the Call lawsuit would not present any obstacle to the Pavonis' plan. (R. at 925; Trial Tr., p. 113.) Nielsen promised in the Indemnification Agreement to defend the Pavonis' interest in this regard, but he then breached that promise by capitulating to the Calls. For that breach, he is accountable under Utah law for at least nominal damages. The trial court, in granting a directed verdict, ruled that "[w]ithout proof of damages, the Plaintiffs cannot recover for any alleged breach." (Plaintiffs' Addendum at Tab 9, paragraph 4.) This conclusion is contrary to Utah law.

Under Utah law, "[n]ominal damages are recoverable upon a breach of contract if no actual or substantial damages resulted from the breach or if the amount of damages have not been proven." Alta Health Strategies, Inc. v. CCI Mechanical Service, 930 P.2d 280, 286 (Utah App. 1996). Nielsen breached the Indemnification Agreement by failing to defend the Pavonis and extinguishing the claim of the easement, and he is liable for nominal damages, even if no actual damages could be proved.

Nielsen tries to suggest that his capitulation to the Calls was not a breach of the Indemnification Agreement because he argues that the Pavonis approved the settlement of the Call litigation and the easement through his property. This claim is contradicted by the record. Mr. Pavoni testified that "never did I once -- did I once say that I wanted this thing settled over my

property -- never. No, sir. " (R. at 961; Trial Tr., p. 257.) Nielsen may point to evidence in support of his claim that Mr. Pavoni consented to the settlement of the Call lawsuit, but this is at best a disputed issue and not one that justifies a directed verdict for Nielsen or insulates him from the breach of the agreement that he committed by agreeing to an easement through the Pavonis' property.

To date, Nielsen has escaped liability by claiming that his conduct caused no damage to the Pavonis. The record shows otherwise, but even it did not, "a party who has breached a contract will not ordinarily escape liability merely because the amount of damages is uncertain." Alta Health Strategies, Inc., 930 P.2d at 286.

D. NIELSEN'S PROMISES IN THE EARNEST MONEY SALES AGREEMENT WERE NOT ABROGATED OR MERGED INTO THE DEED, AND WERE BREACHED.

Turning to the Earnest Money Sales Agreement, the directed verdict there must likewise be reversed. The Pavonis sought to enforce a promise made by Nielsen referenced in Paragraph 6 of the Earnest Money Sales Agreement and set forth in Addendum "A" as follows:

Seller agrees to install additional 3-inch gravel from driveway entrance in Lot #3 to 20 feet beyond Western-most boundary of the home site within 120 days from date of closing. Seller will widen and straighten the driveway entrance as discussed with Seller on May 30, 1992.

(Plaintiffs' Addendum at Tab 17; Pl.'s Trial Ex. 1.)

In granting Nielsen's motion for a directed verdict, the trial court relied on the doctrine of merger. The trial court held that the Pavonis' claims that Nielsen breached the Earnest Money Sales Agreement were abrogated and merged into the deed.⁸ (R. at 610-15, 1008; Trial Tr., pp. 444-47.) The trial court's conclusion was erroneous, however, because the Pavonis' claims of breach of

⁸ Below, the trial court adopted Nielsen's argument that the exceptions to the merger doctrine were inapplicable to the Pavonis' claims because, upon delivery of the deed, the abrogation clause precluded all claims not contained in the express warranties. (R. at 612, 1008; Trial Tr., pp. 444-47.)

contract included claims that Nielsen failed to fulfill promises contained in the Earnest Money Sales Agreement that were collateral to the contract of sale.⁹ (R. at 98-99.) The trial court ruled that, under the doctrine of merger, the Pavonis could not enforce Nielsen's future promise to install gravel within 120 days because that promise was merged into and extinguished by Nielsen's conveyance of the deed at closing. Yet, as the Pavonis demonstrated in their opening brief, Utah case law governing the doctrine of merger recognizes various exceptions, including an exception which provides that a promise of future conduct collateral to delivery of the deed remains enforceable and is not extinguished by conveyance of the deed. Under this rule, a promise to install gravel 120 days after closing is not extinguished by the conveyance of the deed.

Nielsen now responds to that argument by contending that his circumstances are not covered by the "collateral rights" exception because the Earnest Money Sales Agreement here contains an abrogation clause which does not expressly recite a collateral rights exception. Nielsen's argument is fatally flawed because the Utah cases that recognize the collateral rights exception have done so even in cases involving the very same abrogation clause contained in the Earnest Money Sales Agreement at issue here. See Maynard v. Wharton, 912 P.2d 446, 449 (Utah App. 1996); Compare Embassy Group, Inc. v. Hatch, 865 P.2d 1366, 1368 (Utah App. 1993).

Nielsen contends that the collateral rights exception to the merger doctrine does not apply to cases where a real estate purchase contract or earnest money agreement contains an abrogation clause. In support of this position, Nielsen cites Schafir v. Harrigan, 879 P.2d 1384, 1392 (Utah

⁹ "The merger doctrine has four discrete exceptions: (1) mutual mistake in the drafting of the final documents; (2) ambiguity in the final documents; (3) existence of rights collateral to the contract of sale; and (4) fraud in the transaction." Maynard v. Wharton, 912 P.2d 446, 450 (Utah App. 1996), cert. denied, 919 P.2d 1208 (Utah 1996); accord Secor v. Knight, 716 P.2d 790, 793 (Utah 1986); Stubbs v. Hemmert, 567 P.2d 168, 169-70 (Utah 1977); Embassy Group, Inc. v. Hatch, 865 P.2d 1366, 1371-72 (Utah App. 1993).

App. 1994). However, Schafir does not address the applicability of any of the commonly applied exceptions to the merger doctrine. In Schafir, the plaintiff claimed that the seller of real property breached a warranty contained in the Earnest Money Sales Agreement regarding the seller's duty to provide notice of any prior or existing building code violations concerning the home. Id. at 1391 & n.15. The Earnest Money Sales Agreement also contained an abrogation clause that stated: "[e]xecution of a final real estate contract, if any, shall abrogate this agreement." Id. at 1392. The court in Schafir correctly held that delivery of the deed precluded the plaintiffs from enforcing the terms of warranty contained in the Real Estate Sales Agreement "unless that warranty, or another similar one, is contained in the warranty deed or, by its terms, survives the deed and acceptance of the warranty deed." Id. (emphasis added.) The Real Estate Sales Agreement at issue in Schafir did not survive the acceptance of the warranty deed because it did not contain any obligations collateral to the contract of sale, such as promises to perform after the delivery of the deed. In contrast, Nielsen does not dispute that the Earnest Money Sales agreement at issue in this case contains future promises to perform.¹⁰ Accordingly, the Schafir case does not support Nielsen's contention that the exceptions to the merger doctrine are inapplicable because the Earnest Money Sales Agreement contained an abrogation clause.

Nielsen also cites Kelsey v. Hansen, 419 P.2d 198 (Utah 1966), in support of his claim that promises of future performance contained in the Earnest Money Sales Agreement which are collateral to the contract of sale are abrogated by the delivery of the deed as a matter of law. However, Kelsey is also distinguishable from this case. In Kelsey, the plaintiff executed a

¹⁰ Nielsen concedes that material issues of fact exist as to whether Nielsen fully performed with respect to his promises to lay gravel and straighten the Pavoni's driveway. (Def's brief at n. 11 & 12.)

“preliminary, loosely drawn and almost incoherent Earnest Money Receipt” wherein the defendants agreed “to buy and pay for certain extras--drapes and the like.” *Id.* at 198. Nielsen correctly points out that the court in *Kelsey* held that the abrogation clause contained in the warranty deed relieved the defendants of liability. However, Nielsen’s conclusory statement that the “Earnest Money Agreement [in *Kelsey*] contemplated future performance” (Def’s brief at 42) is not supported by the text of the decision. Unlike the instant case, the defendants’ promise to buy and pay for “certain extras--drapes and the like” was not specifically set forth in the Earnest Money Agreement to be performed within a specific time after closing. The court in *Kelsey* actually recognized that a promise collateral to the delivery of a deed may survive the delivery of the deed. *Id.* at 199. However, the *Kelsey* court decided not to apply the collateral rights exception to “a preliminary, loosely drawn and almost incoherent Earnest Money Receipt . . . that really amounted only to signed notes of a contemplated future transaction for the delivery of a deed.” *Id.* at 198-99.

The instant case is clearly distinguishable from *Kelsey*. Here, the Earnest Money Sales Agreement is neither loosely drawn nor incoherent. Instead, the agreement specifically confers upon Nielsen the obligation to install gravel within 120 days after closing.¹¹

Espinoza v. Safeco Title Ins. Co., 598 P.2d 346 (Utah 1979), cited by Nielsen, also fails to support his assertion that a future promise to perform after the delivery of the deed, which promise is collateral to the delivery of the deed, is extinguished by an abrogation clause. In *Espinoza*, there was no collateral promise at issue. Accordingly, the court correctly held that all of the promises contained in the Earnest Money Agreement, including the promise to pay attorney’s fees, merged into and were abrogated by the delivery of the deed. *Id.* at 348.

¹¹ The earnest Money sales agreement also required Nielsen to straighten the Pavoni’s driveway after closing.

The case styled Embassy Group, Inc. v. Hatch, 865 P.2d 1366 (Utah App. 1993), cited by Nielsen, is also inapposite to his position. Nielsen contends that Embassy Group stands for the proposition that the exceptions to the merger doctrine do not apply to situations where abrogation clauses exist in the underlying earnest money and real estate purchase contracts. Despite the existence of an abrogation clause, however, this Court in Embassy Group expressly recognized that exceptions to the merger doctrine may still be applicable. *Id.* at 1371. In Embassy Group, this Court stated that “[t]he merger doctrine is not without its exceptions, which include fraud, mistake, and the existence of collateral rights in the contract of sale.” *Id.* (citing Secor v. Knight, 716 P.2d 790, 793 (Utah 1986)). Moreover, this Court delineated situations in which the collateral rights exception to the merger doctrine applies despite the existence of an abrogation clause:

C. Collateral Rights

The collateral rights exception applies when the seller's performance involves some act collateral to the conveyance of title, with the result that those obligations "survive the deed and are not extinguished by it." Stubbs v. Hemmert, 567 P.2d 168, 169 (Utah 1977). Thus, when the contract of sale contains terms collateral to the conveyance of title, the deed cannot be said to be the intended performance of those terms, which necessarily survive after the conveyance. Secor v. Knight, 716 P.2d 790, 793 (Utah 1986).

Collateral terms may take various forms. For example, the supreme court found collateral terms to exist in Stubbs, where the earnest money and exchange agreement required the seller to remove certain equipment from the property at issue. The court held that the *agreed-upon removal was collateral to the conveyance and hence that it survived the delivery of the deed*; accordingly, the supreme court affirmed the trial court's admission of the earnest money agreement to prove the term. Stubbs, 567 P.2d at 170.

The supreme court has likewise defined those instances in which collateral rights are not implicated. Relevant to the instant case is the Secor court's conclusion that "covenants relating to title and encumbrances are not considered to be collateral because they relate to the same subject matter as the deed." Secor, 716 P.2d at 793

Applying merger, the Secor court held that the buyers were subject to restrictive covenants not present in the earnest money agreement but alluded to in the warranty deed, which referred to "restrictions of record." Id. at 792-94. In other words, because the restrictions related directly to title, they bound the buyers, despite the absence of those covenants in the merged earnest money agreement. Id.

Id. at 1372.

In the present case, Nielsen's promises to lay gravel and straighten the driveway should have been viewed as collateral because those promises of future performance do not relate directly to title or its conveyance.¹² See Maynard v. Wharton, 912 P.2d 446, 450 (Utah App. 1996), cert. denied, 919 P.2d 1208 (Utah 1996); accord Secor v. Knight, 716 P.2d 790, 793 (Utah 1986); Stubbs v. Hemmert, 567 P.2d 168, 169-70 (Utah 1977). Accordingly, the trial court erred by concluding that these collateral promises did not survive the delivery of the deed.¹³

Nielsen attempts to distinguish Maynard v. Wharton, 912 P.2d 446, 449-50 (Utah App. 1996), cert. denied, 919 P.2d 1208 (Utah 1996), a case cited and relied on by the Pavonis in their initial brief. In Maynard, this Court recognized that "[t]he doctrine of merger is 'routinely applied when an antecedent agreement contains an abrogation clause.'" Id. (quoting Embassy Group, 865 P.2d at 1371.) In fact, the Maynard court stated that "[a]n abrogation clause is a contractual

¹² The court in Embassy Group did not apply the collateral rights exception to the merger doctrine because the promises contained in the earnest money and real estate purchase contracts related only to the estate to be conveyed upon delivery of title. 865 P.2d at 1373.

¹³ Nielsen's contention that the exceptions to the merger doctrine do not apply to agreements that contain an abrogation clause is logically flawed. If the abrogation clause effectively eliminates all promises, even future promises to perform that are collateral to the deed, contained in the Earnest Money Sales Agreement upon delivery of the deed, then Nielsen's promise to install gravel within 120 days after closing was without meaning. "Contracts 'should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions.'" Baker v. Barnes, 367 Utah Adv. Rep. 40 (Utah App. 1999) (quoting ELM, Inc. v. M.T. Enters., Inc., 968 P.2d 861, 863 (Utah App. 1998) (citing Nielsen v. O'Reilly, 848 P.2d 664, 665 (Utah 1992))).

statement of the common law doctrine of merger.” Maynard, 912 P.2d at 450. Despite the existence of an abrogation clause, the Maynard Court expressly acknowledged the “four discrete exceptions” to the merger doctrine, which include, *inter alia*, that rights expressed in an Earnest Money Sales Agreement that are “collateral to the contract of sale” are not merged into the deed upon delivery. Id.

Nielsen contends that reading Maynard to require the application of the exceptions to the merger doctrine to earnest money agreements that contain an abrogation clause conflicts with the case law cited above. Contrary to Nielsen’s assertion, Maynard does not conflict with Utah case law. Maynard, like the other cases addressing the merger doctrine and its exceptions, recognizes that promises contained in an earnest money agreement that relate only to the conveyance of title are extinguished by the delivery of the deed. Like the cases cited above, Maynard also recognizes that promises that are collateral to the delivery of the deed are not abrogated or extinguished by the merger doctrine. Therefore, contrary to Nielsen’s argument, the doctrine of abrogation or merger does not apply to the breaches of contract asserted by the Pavonis in this case.¹⁴

In the case at bar, the Pavonis presented evidence which raised issues of material fact regarding Nielsen’s breach of the Earnest Money Sales Agreement, including, but not necessarily

¹⁴ Nielsen’s contention that applying the collateral rights exception to the merger doctrine conflicts with the parties’ intent is also untenable. (Def’s brief at 44.) “The question of whether a specific term is or is not collateral, and hence whether the term will or will not merge into the deed, is determined by the intent of the parties.” Maynard, 912 P.2d at 450 (quoting Secor, 716 P.2d at 793.) “Generally, when contract interpretation will be determined by extrinsic evidence of intent, it becomes a question of fact.” Records v. Briggs, 887 P.2d 864, 871 (Utah App. 1994). As previously discussed, a directed verdict is improper where issues of material fact exist. See Alta Health Strategies, Inc., 930 P.2d at 284; Management Comm. of Graystone Pines Homeowners Assoc. v. Graystone Pines, Inc., 652 P.2d 896, 897 (Utah 1982); Grossen v. Afton, 369 Utah Adv. Rep. 29,32 (Utah App. 1999); Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah App. 1995).

limited to, Nielsen's promises of future performance to make improvements to the property. The terms of an earnest money contract are not extinguished by the merger doctrine "when the delivery of the deed [is] less than full performance of the seller's obligations." Stubbs, 567 P.2d at 169-70. See also Maynard v. Wharton, 912 P.2d 446, 450 (Utah App. 1996), cert. denied, 919 P.2d 1208 (Utah 1996); accord Secor v. Knight, 716 P.2d 790, 793 (Utah 1986); Embassy Group, Inc. v. Hatch, 865 P.2d 1366, 1371-72 (Utah App. 1993).

In the instant case, the evidence introduced at trial was more than sufficient for the jury to conclude that "the delivery of the deed was less than full performance of the seller's obligations." The Earnest Money Sales Agreement required Nielsen "to install additional 3-inch gravel from driveway entrance on Lot #3 to 20 feet beyond Western-most boundary of the home site within 120 days from date of closing." (R. at 919, 926, 966; Trial Tr., pp. 90-91, 279; Pl.'s Trial Exs. 1 & 1A.) The Earnest Money Sales Agreement also provided that Nielsen would widen and straighten the driveway entrance. (R. at 924, 966; Trial Tr., pp. 109-10, 279; Pl.'s Trial Exs. 1 & 1A.) This evidence was introduced at trial by way of exhibit and through the testimony of Justin Pavoni, Kimberly Pavoni and C. Michael Nielsen. Id. At trial, Nielsen and the Pavonis disputed what obligations were conferred on Nielsen by these provisions in the Earnest Money Sales Agreement. For example, the parties disputed what amount of gravel was required and what constituted straightening and widening the driveway.¹⁵ (R. at 914, 946, Trial Tr., pp. 110, 199.) What cannot be disputed, however, is that the language of the agreement and the evidence introduced at trial demonstrated that this work was to be done after closing.

¹⁵ Nielsen continues to dispute these facts. (See Def.'s brief at n.3, 11 & 12.) This demonstrates that material issues of fact exist which render the trial court's grant of directed verdict improper. See Alta Health Strategies, Inc. v. CCI Mech. Serv., 930 P.2d 280, 284 (Utah App. 1996), cert. denied, 936 P.2d 407 (Utah 1997).

As a matter of law, the merger doctrine does not insulate Nielsen from liability for promises to perform after the date of closing that are collateral to the contract of sale. If the trial court had not erroneously directed a verdict in Nielsen's favor, the Pavonis would have had the burden of proving their breach of contract claims by a preponderance of the evidence. Whether Nielsen breached the Earnest Money Sales Agreement by failing to perform promises which were collateral to the contract of sale is a question for the jury based upon the facts presented at trial. The trial court erred, as a matter of law, by disregarding evidence which raised issues of material fact and directing a verdict, rather than allowing the jury to determine these issues of fact. Accordingly, the trial court erred in concluding that the Pavonis' claims with respect to Nielsen's breach of the Earnest Money Sales Agreement merged into or were abrogated by the deed. Therefore, this Court should reverse the trial court's grant of directed verdict and remand this case back to the trial court for further proceedings.

Moreover, Nielsen's promises with respect to the installation of gravel survived the closing even under Nielsen's literal reading of the abrogation clause. The abrogation clause in the Earnest Money Sales Agreement provides as follows:

Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.

(Plaintiffs' Addendum at Tab 17; Pls' Ex. 1, ¶ O.) Thus, under a literal reading of the abrogation clause, all Earnest Money Sales Agreement promises are allegedly abrogated unless they fall into the category of "express warranties." What Nielsen fails to acknowledge is that his promises with respect to the installation of gravel are included within the category of express warranties. The Earnest Money Sales Agreement contains paragraph 6 which provides as follows:

6. SELLER'S WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: see Addenda "A" and "B" attached

(Plaintiffs' Addendum at Tab. 17; Pls' Ex. 1, ¶6.) The referenced Addendum "A" is attached to the Earnest Money Sales Agreement and includes within Paragraph 9 Nielsen's promise to install gravel as set forth above. Therefore, Nielsen's promise to install gravel is included in the Earnest Money Sales Agreement as one of the seller's warranties, and under the express terms of the abrogation clause, these express warranties survived.

Thus, whether the doctrine of merger and its collateral rights exception is applied, or if the abrogation clause is implemented as written, Nielsen's promise to install gravel survived and was not extinguished by the closing. The evidence at trial was plainly in dispute as to whether Nielsen fulfilled his obligation to install gravel in accordance with the Earnest Money Sales Agreement, and the jury should have been given the opportunity to decide the issue. (R. at 923; Trial Tr., p. 106.)

In sum, the trial court's directed verdicts against the Pavonis' claims under the Indemnification Agreement and the Earnest Money Sales Agreement were erroneous. The trial court made an award of attorney's fees to Nielsen based upon its erroneous directed verdict rulings and that award of attorney's fees likewise must be set aside. This case must be remanded to the trial court for a new trial.

E. BECAUSE THE TRIAL COURT ERRED IN DIRECTING THE VERDICTS AND DISMISSING THE PAVONIS' CLAIMS, THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO NIELSEN WAS IMPROPER.

The Indemnification Agreement provides:

If any legal action under this Agreement or by reason of any asserted breach of it, [t]he prevailing party "shall be entitled to recover all costs and expenses, including reasonable attorney's fees, incurred in enforcing or attempting to enforce any of the terms, covenants, or conditions of this Agreement, including costs incurred prior to commencement of legal action.

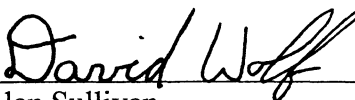
The trial court concluded that Nielsen was “the prevailing party” with respect to the dispute involving the Indemnification Agreement, based on the verdict which the court directed in his favor. Because the trial court’s directing the verdict and dismissing the claims of breach of the Indemnity Agreement was improper, the award of attorney’s fees to Nielsen is also untenable.

III. CONCLUSION

The trial court erred in directing the verdicts in this case. The trial court failed to consider the evidence presented demonstrating that the Pavonis had been damaged by Nielsen’s breach of the Indemnity Agreement. The trial court also misapplied the doctrine of merger. For the foregoing reasons, this Court should reverse the trial court’s judgment, vacate its award of attorney’s fees to Nielsen and remand this matter to the trial court for further proceedings.

DATED this 10th day of September, 1999.

SNELL & WILMER L.L.P.

A handwritten signature in cursive script, appearing to read "David Wolf", is written over a horizontal line.

Alan Sullivan

David N. Wolf

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I do hereby declare that on this 10th day of September, 1999, I caused to be mailed two

(2) true and correct copies of the foregoing, postage prepaid, to each of the following:

Thomas R. Karrenberg, Esq.
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