

1999

# Justin F. Pavoni and Kimberly A. Pavoni v. C. Michael Nielsen : Brief of Appellee

Utah Court of Appeals

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A10  
DOCKET NO. 990179 CA IN THE UTAH COURT OF APPEALS

Priority No. 15  
Oral Argument Requested

COURT OF APPEALS

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

**V.**

**Defendants/Appellee.**

Priority No. 15  
Oral Argument Requested

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

-and-

Attorneys for Defendant/Appellee

Attorneys for Plaintiffs-Appellants

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

Appeal No. 990179-CA

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

**Defendants/Appellee.**

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## JURISDICTION

**1**



## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly direct a verdict against Plaintiffs on their breach of contract claim under the Indemnification Agreement when Plaintiffs failed to meet their burden of coming forward with sufficient competent evidence of damages incurred by Plaintiffs arising out of the Call Litigation for which Defendant failed to indemnify Plaintiffs?

### **Standard of Review with Supporting Authority:**

A directed verdict against a plaintiff must be sustained on appeal if, even after looking at the evidence and all reasonable inferences in a light most favorable to the plaintiff, the Court concludes that the plaintiff has failed to meet the burden of coming forward with sufficient competent evidence that would sustain a jury verdict in the plaintiff's favor. DeBry v. Cascade Enterprises, 879 P.2d 1353, 1359 (Utah 1994) (citing Charles A. Wright & Arthur R. Miller, 9 Federal Practice and Procedure § 2535 (1971)); see also Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988); Gustaveson v. Gregg, 655 P.2d 693, 695 (Utah 1982); Mel Hardman Prods., Inc. v. Robinson, 604 P.2d 913, 917 (Utah 1979).

2. Where the Indemnification Agreement required Defendant to indemnify Plaintiffs against any damages arising out of the Call Litigation, can Plaintiffs establish a claim for breach of the Indemnification Agreement without meeting their burden of coming forward with competent evidence of actual damages arising out of the Call

Litigation, and merely rely instead on the theory of nominal damages to meet their burden?

**Standard of Review with Supporting Authority:**

A directed verdict against a plaintiff must be sustained on appeal if, even after looking at the evidence and all reasonable inferences in a light most favorable to the plaintiff, the Court concludes that the plaintiff has failed to meet the burden of coming forward with sufficient competent evidence that would sustain a jury verdict in the plaintiff's favor.

v. Cascade Enterprises, 879 P.2d 1353, 1359 (Utah 1994), appeal after remand 935 P.2d 499, rehearing denied (citing Charles A. Wright & Arthur R. Miller, 9 Federal Practice and Procedure § 2535 (1971)); see also Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988); Gustaveson v. Gregg, 655 P.2d 693, 695 (Utah 1982); Mel Hardman Prods., Inc. v. Robinson, 604 P.2d 913, 917 (Utah 1979).

A cause of action on a contract indemnifying against loss or damage does not arise until the indemnitee has actually incurred loss or damage. See Greene v. Knox, 263 P.2d 928, 930 (Utah 1928); 41 Am.Jur.2d Indemnity § 44 (1995). Nominal damages are not recoverable in cases in which damages are an element of the cause of action and plaintiff has failed to prove those damages. Cf. Zok v. Alaska, 903 P.2d 574, 577 (Alaska 1995) (holding that nominal damages are recoverable without proof of actual damages if actual damages are not element of cause of action). See 22

Am.Jur.2d. Damages, § 17 (1988).

3. Did the trial court correctly direct a verdict against Plaintiffs on their claim for breach of the Earnest Money Sales Agreement when the Earnest Money Sales Agreement contained an abrogation clause providing that execution and delivery of final closing documents abrogated the agreement, and the warranty deed did not contain the promises of performance underlying the breach of contract claim?

**Standard of Review with Supporting Authority:**

A directed verdict against a plaintiff must be sustained on appeal if, even after looking at the evidence and all reasonable inferences in a light most favorable to the plaintiff, the Court concludes that the plaintiff has failed to meet the burden of coming forward with sufficient competent evidence that would sustain a jury verdict in the plaintiff's favor. DeBry v. Cascade Enterprises, 879 P.2d 1353, 1359 (Utah 1994) (citing Charles A. Wright & Arthur R. Miller, 9 Federal Practice and Procedure § 2535 (1971)); see also Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988); Gustaveson v. Gregg, 655 P.2d 693, 695 (Utah 1982); Mel Hardman Prods., Inc. v. Robinson, 604 P.2d 913, 917 (Utah 1979).

A deed abrogates a preliminary earnest money agreement containing an abrogation clause. Kelsey v. Hansen, 419 P.2d 198 (Utah 1966); accord Stubbs v. Hemmert, 567 P.2d 168, 170 n.4 (Utah 1977), citing Kelsey v. Hansen.

4. Did the trial court hold correctly that an award of attorneys' fees in favor

of Defendant is appropriate when Defendant prevailed on Plaintiffs' claim for breach of the Indemnification Agreement?

**Standard of Review with Supporting Authority:**

“Whether attorney fees are recoverable in an action is a question of law, which we review for correctness.” Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998).

See also Robertson v. Gem Ins. Co., 828 P.2d 496, 499 (Utah App. 1992).

**STATEMENT OF THE CASE**

Nature of the Case

This is an appeal from the trial court's grant of a motion for directed verdicts on Plaintiffs' claims for breach of contract under an Indemnification Agreement and an Earnest Money Sales Agreement. The trial court also directed a verdict against Plaintiffs on their claim for an accounting in connection with a \$4,500 water assessment by the Red Hawk Owners' Association, of which Mr. Nielsen was President, to enhance the water system at the real estate project known as Red Hawk. That directed verdict has not been appealed. Finally, the trial court denied Mr. Nielsen's motion for directed verdict on Plaintiffs' claim against Mr. Nielsen for fraud. The jury ultimately returned a verdict in favor of Mr. Nielsen on the fraud claim.

In the latter part of the 1980's and early part of the 1990's, Mr. Nielsen developed a real estate project in Summit County known as Red Hawk. The two-phase

project consisted of 14 20-acre lots.

In 1992, Mr. Nielsen sold one of the Red Hawk lots—Lot 3—to Plaintiffs (“Lot 3” or “the Lot”). Mr. Nielsen originally listed the Lot for \$130,000 but eventually sold the Lot to Plaintiffs for \$115,000.

At the time of the sale, a lawsuit was pending against various owners of Red Hawk lots involving a claim by the owners of a 40-acre parcel to the west of Red Hawk (the Calls) for access to their property through Red Hawk (the “Call Litigation”). The specific claim for access was along the main Red Hawk road that runs through each Red Hawk lot and then through Lot 3 and out of the Red Hawk project into the property immediately south of the Calls’ 40-acre parcel. As the developer of Red Hawk, Mr. Nielsen retained and paid for an attorney to defend the Red Hawk owners named in the Call Litigation against the Calls’ access claim. Plaintiffs were not named parties in the Call Litigation.

Prior to the sale, Mr. Nielsen informed the Plaintiffs of the Call Litigation and presented them with a written indemnity agreement (the “Indemnification Agreement”), agreeing that he would indemnify Plaintiffs from and against any and all claims, damages, costs and expenses (including attorney’s fees) arising directly or indirectly out of the Call Litigation. Plaintiffs proceeded to close on the purchase of the Lot. In connection with closing, the parties executed the Indemnification Agreement.

Over the next two years, Mr. Nielsen and Mr. Pavoni had a falling out over

various Red Hawk issues. By April 1994, Plaintiffs had threatened to sue Mr. Nielsen.

In June of 1994, legal counsel for the named Red Hawk owners in the Call Litigation proposed a settlement of that lawsuit whereby the Calls would be granted an easement along the route demanded in the lawsuit (including over Lot 3) on two conditions: (i) that the Calls agreed to relinquish the easement at such time as an alternative access route to their property could be obtained (counsel for the Red Hawk owners was working with property owners outside of Red Hawk to the south of the Calls property to obtain access for the Calls from that direction and not through Red Hawk at all); and (ii) that the easement could be relocated to avoid or minimize adverse impact on the Red Hawk owners, including the owners of Lot 3.

While the Red Hawk owners named in the Call Litigation favored the proposed settlement, Mr. Nielsen nevertheless discussed the proposal at the June 1994 annual meeting of the Red Hawk Owners' Association to ensure that all of the owners, including Plaintiffs, were in favor of the proposed settlement. Mr. Pavoni expressly indicated that Plaintiffs were willing to go along with the proposed settlement. In July 1994, therefore, the Call Litigation was settled in accordance with the proposal presented to the members of the Red Hawk Owners' Association.

At the June 1994 annual meeting of the members of the Red Hawk Owners' Association, Mr. Pavoni, who was outspoken in his criticism of Mr. Nielsen as president of that organization and as the developer of the project, ran for president to

replace Mr. Nielsen. Mr. Pavoni did not receive any votes besides his own for the position. Plaintiffs then decided to sell the Lot, on which they had not yet constructed a home.

In July 1994, Plaintiffs had the Lot appraised in connection with selling it. The appraisal, which did not take into account the easement granted to the Calls in connection with settlement of the Call Litigation that same month (the “Call Easement”), placed a value on the Lot of \$285,000. Plaintiffs found a buyer for the Lot and offered to sell the Lot, along with the improvements Plaintiffs had made to the Lot and certain engineering work and architectural plans, for the appraised value of \$285,000. The buyer countered at \$280,000, and the parties “split the difference,” agreeing upon \$282,500. The temporary easement granted to the Calls through settlement of the Call Litigation, the Call Easement, was not taken into account in determining the purchase price of the Lot. The buyer simply did not care about the easement.

Plaintiffs received the full appraised value of the Lot (except for a \$2,500 reduction based purely on negotiation and not on any devaluation of the Lot as a result of the Call Easement), and made a handsome profit on the Lot, even taking into account the improvements and engineering and architectural work they had paid for. They nevertheless commenced this legal action against Mr. Nielsen, alleging fraud and breach of the Earnest Money Sales Agreement and the Indemnification Agreement, and

seeking an equitable accounting concerning Mr. Nielsen's expenditures in connection with a water system assessment by the Red Hawk Owners' Association. The jury entered a verdict on the fraud claim in favor of Mr. Nielsen, and the trial court directed verdicts against Plaintiffs on the breach of contract and the accounting claims.

Acknowledging Mr. Nielsen as the "prevailing party" under the Indemnification Agreement, the trial court awarded Mr. Nielsen \$48,267.25 in attorneys' fees and costs.

#### Course of the Proceedings and Disposition Below

Plaintiffs commenced this action by filing their complaint on January 23, 1995. (R. at 0023-0032.) The complaint was amended September 16, 1996. (R. at 0072 – 0105.) The complaint asserted claims for damages based upon claims for breach of an earnest money agreement, breach of the Indemnification Agreement, fraud, and intentional infliction of emotional distress, including damages for pain and suffering from severe emotional distress. (R. at 0023-0032.) The amended complaint dropped the claim for intentional infliction of emotional distress but added a claim for punitive damages based on the fraud claim and a claim for an equitable accounting. (R. at 0072-0105.)

Mr. Nielsen answered the complaint and amended complaint, denying all allegations material to this appeal.

A jury trial was held on September 1 and 3, 1998. (R. at 0897-1013.) At the



conclusion of Plaintiffs' case, the trial court granted Mr. Nielsen's motion for directed verdict on all of Plaintiffs' claims except fraud. (R. at 1008-1011; Trial Tr. pp. 444-458.) Without Mr. Nielsen calling any additional witnesses, the case was argued to the jury, which returned a special verdict against Plaintiffs and in favor of Mr. Nielsen finding that no fraud had been committed. (R. at 0555-0556.)

On October 5, 1998, the trial court entered Findings of Fact, Conclusions of Law, and Order on Defendant's Motion for Directed Verdict. (R. at 0610-0615.) Following Defendant's motion for attorneys' fees and costs, the trial court, on January 27, 1999, executed Findings of Fact and Conclusions of Law and Order in response to that motion, denying Defendant his attorneys' fees and costs under the Earnest Money Sales Agreement, ruling that the merger doctrine eliminates any claim for attorneys' fees under that agreement, and granting Defendant his attorneys' fees and costs as the "prevailing party" under the Indemnification Agreement. (R. at 0790-0795.) Those Findings of Fact and Conclusions of Law and Order were filed January 28, 1999. (R. at 0790.)

On February 26, 1999, Plaintiffs filed a Notice of Appeal of the final judgment entering directed verdict on all of Plaintiffs' claims except the fraud claim, and of the Findings of Fact and Conclusions of Law and Order, dated January 27, 1999, regarding the trial court's award of attorneys' fees under the Indemnification Agreement. (R. at 0822-0824.)

On April 27, 1999, the trial court entered Judgment in favor of Defendant and against Plaintiffs on all of Plaintiffs' claims, and awarding attorneys' fees under the Indemnification Agreement. (R. at 1015-1018.) The April 27, 1999, Judgment contained an obvious clerical error in that the trial court awarded attorneys' fees under the Indemnification Agreement to Plaintiffs and against Defendant, rather than the opposite, and the Judgment was amended on May 24, 1999, by stipulation, to reflect the actual ruling of the trial court. (Plaintiffs' Addendum at Tab 13.) On June 1, 1999, Plaintiffs filed a second Notice of Appeal based on the April 27, 1999, Judgment, as amended May 24, 1999. (Plaintiffs' Addendum at Tab 14.) On June 18, 1999, the parties filed a joint motion to consolidate the two appeals. (Plaintiffs' Addendum at Tab 15.)

Statement of Facts Relevant to the Issues Presented for Review<sup>1</sup>

1. On or about March 31, 1992, Plaintiffs executed an Earnest Money Sales Agreement (the "Earnest Money Sales Agreement") to purchase Lot 3 of the Red Hawk

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<sup>1</sup> Plaintiffs' Statement of Facts inappropriately contains numerous recitations of facts that merely constitute Plaintiffs' version of the facts as Plaintiffs contended at trial, without regard to the fact that the particular facts are contradicted by Plaintiffs themselves or otherwise disputed in the record. See, for example, paragraphs 2, 3, 4, 5, 8, 9 and 11. This might be explained by the fact that counsel for Plaintiffs for this appeal were not Plaintiffs' trial counsel. Additionally, many of the facts recited in Plaintiffs' Statement of Facts are not relevant to the issues presented for review. *Id.* Through a one-sided recitation of the "facts," Plaintiffs apparently are attempting to influence the Court inappropriately.

Unless otherwise noted, the facts recited in Nielsen's Statement of Facts Relevant to the Issues Presented for Review are undisputed in the record.

Subdivision, Phase 1 (“Lot 3” or “the Lot”). Trial Exhibit P-1 (Plaintiffs’ Addendum at Tab 17).

2. The Earnest Money Sales Agreement contained the following abrogation clause:

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

Trial Exhibit P-1 (Plaintiffs’ Addendum at Tab 17). Mr. Pavoni testified that he understood what the abrogation clause meant. (R. at 0947; Trial Tr. p. 203.)

3. The parties executed an addendum to the Earnest Money Sales Agreement in which Nielsen agreed to install additional 3-inch gravel from the driveway entrance of Lot 3 to 20 feet beyond the western-most boundary of the proposed home site within 120 days from the date of closing, and to straighten the entrance to the driveway into Lot 3. Trial Exhibit P-1 (Plaintiffs’ Addendum at Tab 17).

4. The agreement regarding the gravel and driveway entrance was not included in the deed or other final closing documents.<sup>2</sup> Trial Exhibit D-6 (Plaintiffs’

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<sup>2</sup> The evidence at trial was disputed as to the extent of the obligation to install gravel and whether Nielsen installed the required gravel and straightened the driveway entrance. Nielsen testified that he had the driveway straightened (R. at 0984; Trial Tr. pp. 349-50), and it is undisputed in the record that Nielsen installed gravel on the driveway. (R. at 0921-22, 0953-0955, 0971, 1005; Trial Tr. pp. 100, 102-03, 227-236, 297, 434.) Nevertheless, in Plaintiffs’ Statement of Facts, Plaintiffs baldly recite that “Nielsen failed to install the gravel road as promised.” Brief of Appellants at 12, ¶ 19 of Statement of Facts. Not only does the recitation mischaracterize the record, there simply was no obligation to install a gravel road in the addendum to the Earnest Money Sales Agreement. The obligation was to install “additional 3-inch gravel.” For

Addendum at Tab 17).

5. Prior to closing,<sup>3</sup> Nielsen informed Plaintiffs of the pending Call Litigation to gain access through Red Hawk and the lis pendens recorded against the Lot as a result of that litigation. E.g., R. at 1005-1006; pp. 434-38. Nielsen had his own attorney defending the named Red Hawk owners and offered to indemnify Plaintiffs from and against any expenses they might incur as a result of that litigation through an agreement that provided in pertinent part as follows:

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.

Trial Exhibit P-4 (Plaintiffs' Addendum at Tab 19).

6. Plaintiffs paid \$115,000 for the Lot (R. at 0948; Trial Tr. pp. 206-207),

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purposes of this appeal of the directed verdict and whether or not the directed verdict was properly granted based on the abrogation clause, however, the factual issues of whether or not the gravel was installed and the driveway straightened are not pertinent, even though Plaintiffs go out of their way to mischaracterize the record and recite their own version of such facts.

<sup>3</sup> Although not indicated in Plaintiffs' Statement of Facts, the record is also disputed as to when Nielsen informed Plaintiffs of the lis pendens and Call Litigation. Plaintiffs contend they were told "just prior to closing," and Nielsen contends that he told Plaintiffs of the Call Litigation at an early point in the months-long period between showing the Lot and closing, and that he had numerous conversations with Plaintiffs concerning this matter. Like the gravel issue, the precise timing of Nielsen's notification is not pertinent to this appeal, but the dispute is being pointed out inasmuch as Plaintiffs take the liberty to recite their own version of the facts rather than the facts in the record.

although the Lot was listed at \$130,000. (R. 0981; Trial Tr. p. 337.) The Lot was valued at \$130,000 even with the Calls' claim of an easement over the Lot. (R. at 0981; Trial Tr. p. 337.) Nielsen testified hypothetically that the Call Easement at the time of the sale of the Lot to Plaintiffs—which was not granted until two years later in settlement of the Call Litigation—would diminish the value of the Lot by possibly a couple of thousand dollars (R. at 0981, Trial Tr. pp. 336-37), but the reduction from \$130,000 to \$115,000 took into account more than any such hypothetical diminishment in value.

7. Counsel for Nielsen in the Call Litigation proposed to Nielsen and the other named defendants in that action that they settle the Call Litigation by granting a temporary easement over the main Red Hawk road and through Lot 3, as originally requested by the Calls, on the condition that the Calls would relinquish the easement rights over Red Hawk and Lot 3 at such time as an alternative access right could be obtained to the Call property from the south, and that the temporary easement could be reasonably relocated to reduce the impact on Red Hawk owners. (R. at 0982; Trial Tr. pp. 340-41).

8. Nielsen specifically addressed the issue of the proposed settlement with all of the Red Hawk owners, including Plaintiffs, at the June 15, 1994, annual meeting of the Red Hawk Owners' Association. (R. at 0970; Trial Tr. p. 295.) At that meeting, Mr. Pavoni expressly indicated that he was willing to go along with the proposed

settlement of the Call Litigation and did not object to the proposed settlement. (R. 0971, 0989; Trial Tr. pp. 296, 369-71.) The Call Litigation was then settled with the conditions proposed by Nielsen's counsel. Trial Exhibit D-9 (Plaintiffs' Addendum at Tab 33); R. at 0996; Trial Tr. p. 398.

9. Plaintiffs presented no competent evidence that they incurred any damage arising out of the Call Litigation based on a diminution in the value of the Lot as a result of the right-of-way easement. The Lot was appraised through an appraisal dated July 21, 1994, at a value of \$285,000. Trial Exhibit D-1 (Plaintiffs' Addendum at Tab 30); R. at 0962; Trial Tr. p. 262. The appraisal took into account the improvements that Plaintiffs had made to the Lot. (R. at 0961-0962; Trial Tr. pp. 259-262.) The appraisal did not take into account the Call Easement, which was established by way of a settlement of the Call Litigation dated July 11, 1994. (R. at 0962; Trial Tr. p. 262.)

10. Plaintiffs offered to sell the Lot to their buyer for the appraised value of \$285,000. (R. at 0963; Trial Tr. p. 266.) The buyer countered by offering to purchase the Lot for \$280,000. (R. at 0963; Trial Tr. p. 265.) Mr. Pavoni testified that they merely "split the difference" and agreed on a sales price of \$282,500.<sup>4</sup> (R. at

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<sup>4</sup> In their Statement of Facts, Plaintiffs recite that the selling price of the Lot was below the appraised value, and that Nielsen never paid Plaintiffs for the diminution in the value of the Lot by imposition of the easement (paragraphs 32 and 33 of Plaintiffs' Statement of Facts, Brief of Appellants at 14). As the facts recited above show conclusively, there was simply no diminution of value as a result of the Call Easement granted through settlement of the Call Litigation. Reasonable minds cannot differ on the facts to be determined from the evidence elicited from Mr. Pavoni himself in this regard.

0963; Trial Tr. p. 267.) The sale of the Lot included all of the improvements Plaintiffs had made to the Lot, as well as the engineering and architectural work that the Plaintiffs had paid for in connection with their ownership of the Lot. (R. 0963-0964; Trial Tr. pp. 266-270).

11. Plaintiffs presented no competent evidence that they incurred any damage arising out of the Call Litigation based on attorney's fees for which they were not indemnified by Nielsen. The record is clear that Nielsen voluntarily gave Plaintiffs a check dated July 28, 1994, in the amount of \$2,000 to cover attorney's fees Plaintiffs might have incurred arising out of the Call Litigation. Trial Exhibit P-6 (Plaintiffs' Addendum at Tab 20). The payment was accompanied by a note from Nielsen to Mr. Pavoni indicating that he did not know how much Plaintiffs had incurred in fees for their attorney, Eric Schifferli, but that if more had been incurred to let him know. Id. There is no evidence in the record that Plaintiffs ever let Nielsen know of any additional fees. There is no evidence in the record that Plaintiffs ever submitted any statement of legal fees to Nielsen or made any demands to Nielsen that he pay any additional fees for legal work arising out of the Call Litigation.

12. Although Nielsen paid Plaintiffs \$2,000 to cover Mr. Schifferli's fees arising out of the Call Litigation, Nielsen was not required under the Indemnification Agreement to pay Plaintiffs' attorney's fees incurred as a result of an enforcement action against him under that agreement. Trial Exhibit P-4 (Plaintiffs' Addendum Tab

19).

13. The only evidence in the record pertaining to Plaintiffs' attorney's fees – whether for fees arising out of the Call Litigation or fees incurred in enforcing the Indemnification Agreement -- consists of copies of checks from Plaintiffs to their lawyers, with only Mr. Pavoni's own testimony that some of the checks were for "issues related to the easement." See R. at 0939-0942; Trial Tr. pp. 170-181. The attorneys who performed the legal work were not listed on Plaintiffs' witness list and did not testify as to the nature of the work they performed. Save for one billing statement in the amount of \$369.92, there were no billing statements from those attorneys offered or entered into evidence. There was simply no further evidence whatsoever to distinguish between fees arising from the Call Litigation and fees arising from enforcement of the Indemnification Agreement to recover damages allegedly incurred by Plaintiffs as a result of the grant of the Call Easement through settlement of the Call Litigation.<sup>5</sup>

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<sup>5</sup> Plaintiffs mischaracterize the record in this regard. See paragraphs 15, 16 and 17 of Plaintiffs' Statement of Facts (Brief of Appellee at 12). In paragraph 15, for example, Plaintiffs state that they "incurred legal fees in excess of \$2,000 as a result of the Call litigation." (Emphasis added.) While Plaintiffs established that they incurred legal fees in excess of \$2,000, none of the citations to the record contain competent evidence that the fees arose out of the Call Litigation as opposed to the efforts to enforce the Indemnification Agreement against Nielsen. For example, Plaintiffs cite to the Trial Transcript at pp. 132-135 in support of the factual recitation in paragraph 15. The testimony in those pages fails to tie the fees to the Call Litigation versus the Indemnification Agreement:

Q: And this is check number—this is a check from Red



14. There is no competent evidence in the record that the Call Easement rendered Plaintiffs' architectural plans and topographical studies useless, as Plaintiffs inappropriately recite in paragraph 28 of Plaintiffs' Statement of Facts. The reference to the record (Trial Tr. pp. 284-85) contains only testimony that the architectural plans and topographical studies were included in the sale of the Lot to Plaintiffs' buyer, and that Plaintiffs did not increase the sales price of the Lot beyond the appraised value to

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Hawk Ranch payable to you for the amount of \$2,000 for attorney fees; is that right?

A: Yes, sir, it is.

Q: Was that the total extent of the attorneys fees that you had incurred up to the time that you had hired trial counsel?

A: No, sir.

That exchange still does not indicate whether the fees arose out of the Call Litigation or were incurred in efforts to enforce the Indemnification Agreement. The prevailing party attorney's fee provision of the Indemnification Agreement expressly provides for the recovery of attorney's fees "incurred prior to commencement of legal action." Trial Exhibit P-4 (Plaintiffs' Addendum at Tab 4). That is precisely what the law firm of McMurray, McMurray, Dale & Parkinson was doing for the Plaintiffs. The firm's first communication to Nielsen indicated that they were retained to pursue an action against Nielsen under the Indemnification Agreement. See Trial Exhibit p. 17 (Plaintiff's Addendum at Tab 22).

In Paragraph 16, Plaintiffs state that they "demanded that Nielsen reimburse them for the legal fees incurred as a result of the Call litigation." They cite to the Trial Transcript at p. 391. There is no testimony on that page or anywhere else in the transcript that supports this factual recitation.

In paragraph 17, Plaintiffs state that "Nielsen did not reimburse the Pavonis for legal fees in excess of \$2,000 incurred as a result of the Call litigation." The only cite is to allegations in the original complaint and the amended complaint, presumably because there is no evidence in the record that Plaintiffs incurred legal fees in excess of \$2,000 as a result of the Call Litigation as opposed to their enforcement efforts under the Indemnification Agreement.

reflect the plans and studies. There is no testimony that the plans and studies were rendered useless. Indeed, the reasonable conclusion from inclusion of the plans and studies in the sale is that they were of some value. If they were useless, why include them in the sale?

### **SUMMARY OF ARGUMENT**

This Court should affirm the trial court's entry of directed verdict on the Indemnification Agreement because Plaintiffs failed to meet their burden of coming forward with sufficient competent evidence to establish that they incurred damages arising out of the Call Litigation.

There is no evidence in the record that Plaintiffs ever made any demand of Nielsen to indemnify them for any specific damages they now claim as a result of the Call Litigation.

The evidence in the record is clear and uncontroverted that the improvements Plaintiffs made to the Lot they purchased from Nielsen were included in the sale of the Lot to Plaintiffs' subsequent buyer.

The evidence is also clear and uncontroverted that the engineering and architectural work product paid for by Plaintiffs in connection with their ownership of the Lot was included in the sale of the Lot to Plaintiffs' subsequent buyer.

There is no competent evidence that Plaintiffs incurred attorney's fees arising out of the Call Litigation in excess of the \$2,000 Nielsen voluntarily paid to Plaintiffs as

Nielsen's estimate of what Plaintiffs might have incurred in being advised with respect to the Call Litigation. Plaintiffs did not have their attorneys testify at trial as to the nature of the work they performed, and Plaintiffs did not even offer billing statements that would describe the nature of the legal work and whether the work was related to the Call Litigation or the enforcement action against Nielsen under the Indemnification Agreement, which would fall under the prevailing party attorney's fee provision of that agreement rather than give rise to a claim for indemnity under the agreement. In that connection, the only competent evidence pertaining to the legal work performed by the law firm of McMurray, McMurray, Dale & Parkinson is that the work was related to the action against Nielsen and not to the Call Litigation itself.

Finally, there is no competent evidence in the record that Plaintiffs were damaged by any alleged diminution in the value of the Lot as a result of the easement granted to the Calls in settlement of the Call Litigation just before Plaintiffs sold the Lot. Plaintiffs received the full appraised value of the Lot--which appraisal did not take into account the recently granted easement--less \$2,500 resulting from "splitting the difference" between the buyer's counteroffer and Plaintiffs' original offer, and not from the Call Easement. If anyone was damaged by any diminution in value, it was the buyer--who did not care about the easement--but certainly not the Plaintiffs.

This Court should affirm the trial court's entry of directed verdict on Plaintiffs' claim of breach of the Earnest Money Sales Agreement based on the abrogation clause

contained in that agreement. Although the evidence is controverted as to whether the promised gravel was installed and the driveway straightened, there is no dispute that the Earnest Money Sales Agreement contained an abrogation clause and that the promises regarding the gravel and driveway entrance were not included in the deed, which, under Utah law, is the final real estate contract. Mr. Pavoni testified at trial that he understood the abrogation clause. Execution and delivery of the deed served to abrogate the Earnest Money Sales Agreement, including the provisions regarding installation of additional 3-inch gravel and straightening the driveway entrance.

The attorneys' fee award entered by the Court was based on the prevailing party attorney's fee provision in the Indemnification Agreement. The award is challenged by Plaintiffs only on the basis that the motion for directed verdict under the Indemnification Agreement should not have been granted. If that directed verdict is affirmed, the attorneys' fee award shall stand. Contrary to Plaintiffs' contention in this appeal, reversal of the directed verdict under the Earnest Money Sales Agreement would have no impact whatsoever on the attorneys' fee award under the Indemnification Agreement.

Accordingly, this Court should affirm both directed verdicts and the attorneys' fee award entered under the Indemnification Agreement.

## ARGUMENT

### I. PLAINTIFFS HAVE FAILED TO MARSHALL THE EVIDENCE

The Plaintiffs have failed to properly marshal the evidence supporting the trial court's directed verdict against them. In its most recent pronouncement on motions for directed verdict, the Utah Supreme Court stated:

A directed verdict at the close of a plaintiff's case in chief assumes that the plaintiff has not met his or her burden of proof. Thus, "in reviewing a grant of a directed verdict, we view all facts and the inferences drawn therefrom in the light most favorable to the nonmoving party." Nay v. General Motors Corp., 850 P.2d 1260, 1261 (Utah 1993). "We reverse a directed verdict [only] when the evidence [so viewed] is sufficient to permit a reasonable jury to find for the nonmovant." Id. at 1263.

Gilbert v. Ince, 372 Utah Adv. Rep. 47 (July 20, 1999) (emphasis added).

In this case, although the Plaintiffs have attempted to point out all the evidence they presented that they believe would support a verdict in their favor, they have utterly failed to take any notice whatsoever of the contradictory evidence presented during their own case-in-chief that entirely undermined their claims. For instance, Plaintiffs point to the testimony of the Defendant, Mr. Nielsen, that the easement across Lot 3 may have diminished the value of the property by "possibly a couple thousand dollars." (Brief of Appellants at 20). They fail, however, to inform the Court that their own client, Mr. Pavoni, testified unequivocally that the \$2,500 difference between the \$285,000 appraised value of the property and the \$282,500 price for which the Pavonis sold the lot had nothing to do with the easement, but rather was the result of simply

“splitting the difference” between the \$285,000 asking price and the buyer’s \$280,000 initial counteroffer. (R. at 0963; Trial Tr. p.265-67). Thus, Plaintiffs’ own testimony, which Plaintiffs failed to marshal, proved that there was no diminution in value of the property due to the temporary, movable easement.

The trial court was convinced that, viewing all the evidence presented by Plaintiffs in their case-in-chief, and the evidence elicited on cross-examination, Plaintiffs did not come forward with sufficient evidence from which any reasonable jury could have found in their favor. Plaintiffs have painted a one-sided picture of what their own evidence showed, distorting the scintilla of favorable evidence they presented and ignoring the mountain of evidence brought forth during the Plaintiffs’ case-in-chief from their own witnesses that discredited their convoluted story. When all the evidence is looked at as a whole, it is clear that Plaintiffs’ case-in-chief could not have supported a jury verdict in their favor and thus the directed verdict against them was appropriate and should be upheld.

II. A DIRECTED VERDICT AGAINST PLAINTIFFS ON THEIR INDEMNIFICATION CLAIM IS PROPER BECAUSE THE EVIDENCE IN THE RECORD DOES NOT ESTABLISH THAT PLAINTIFFS WERE ENTITLED TO BE INDEMNIFIED

A. Standard of Review.

On appeal from a directed verdict, this Court should apply the same standard as that imposed by the trial court and is limited to the evidence contained in the record on appeal. Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608 (Utah 1982)(same

rules that apply on trial level are applied on appeal for directed verdict); Wilderness Bldg. Systems, Inc. v. Chapman, 699 P.2d 766 (Utah 1985)(review is limited to evidence contained in record on appeal). Even considering the evidence in the light most favorable to the Plaintiffs, this Court still must find that the evidence contained in the record is sufficient to establish a prima facie case in favor of the Plaintiffs. Highland Const. Co. v. Union Pacific R. Co., 683 P.2d 1042, 1045 (Utah 1984).

A directed verdict is appropriate when the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented, and that those facts do not support the claim presented. E.g., Cornia v. Wilcox, 898 P.2d 1379 (Utah 1995). “Motions for directed verdicts ... are often made *against* a party asserting a cause of action. When entered against a plaintiff, they amount to a determination that the plaintiff has failed to meet the burden of coming forward with sufficient evidence to sustain a jury verdict.” See, Gilbert v. Ince, 372 Utah Adv. Rep. 47 (July 20, 1999); DeBry v. Cascade Enterprises, 879 P.2d 1353, 1359 (Utah 1994) (citing Charles A. Wright & Arthur R. Miller, 9 Federal Practice and Procedure § 2535 (1971)).

The question in this appeal is not whether there is literally no evidence supporting the Plaintiffs’ claim for breach of the Indemnification Agreement but whether there is sufficient evidence upon which a reasonable jury could properly find a verdict for Plaintiffs on that claim. As discussed below, the evidence in the record is

insufficient to establish breach of the Indemnification Agreement. This Court, like the trial court below, can conclude appropriately that, based on the evidence in the record, there can be but one conclusion as to the verdict that reasonable persons could have reached--that the facts do not establish a claim for breach of contract.

B. Plaintiffs Failed to Establish Sufficient Evidence of Damages for Which Plaintiffs Were Entitled to Be Indemnified Under the Indemnification Agreement.

To establish a claim for breach of the Indemnification Agreement, Plaintiffs had the burden to establish that Nielsen failed to indemnify them “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] ....” The evidence in the record simply fails to establish any such claims, demands, damages, losses, liens, liabilities, penalties, fines, costs or expenses incurred by the Plaintiffs as a direct or indirect result of the Call litigation. Directed verdict on this claim, therefore, is justified.

Plaintiffs contend that the trial court, in granting directed verdict, ignored three ways in which they were allegedly damaged: (i) the survey, site plan and plans and specifications for the home Plaintiffs had intended to build on the lot, for which they had paid, were rendered useless by the Call Easement; (ii) existence of the Call Easement forced them to sell the Lot at less than the appraised value; and (iii) they incurred attorney’s fees related to the Call litigation and distinct from this lawsuit



against Nielsen for which they were not reimbursed. Analysis of the evidence in the record pertaining to each of those three damage claims demonstrates that Plaintiffs have failed to meet the burden of coming forward with sufficient evidence to sustain a jury verdict of damages. See Gilbert v. Ince, supra; DeBry v. Cascade Enterprises, supra.

1. The Engineering and Architectural Work Was Included as Part of Plaintiffs' Subsequent Sale of the Lot and Did Not Constitute Damages Incurred by Plaintiffs

Although Plaintiffs introduced extensive evidence at trial that they spent several thousand dollars improving the Lot, contending initially at trial that those expenditures constituted damages under the Indemnification Agreement, they ultimately admitted at trial that the price they received when they sold the Lot included the property and all of the improvements. (R. at 963; Trial Tr. p. 266.) Apparently, they now concede that they were not entitled to reimbursement for such expenses, and do not contend on appeal that those improvements are part of their claim of breach of the Indemnification Agreement.

Moreover, there is no evidence in the record that the engineering and architectural work Plaintiffs paid for in connection with the Lot was rendered useless by the Call Litigation. While Plaintiffs claim repeatedly throughout the Brief of Appellants that the engineering and architectural work was “rendered useless” by the Call Easement (Brief of Appellant at 7, 13, 15, 18 and 24), there is no testimony in the

record to support that oft-repeated claim.<sup>6</sup> Indeed, no witness testified that such work was rendered useless by the Call Litigation. On the contrary, the evidence in the record is undisputed that the product of this work (the survey and house plans and specifications) was explicitly made part of the sale of the lot. See Trial Exhibit D-7 (Plaintiffs' Addendum at Tab 32). The Addendum to the Real Estate Purchase Contract between Plaintiffs and the buyers of the Lot clearly required Plaintiffs, as part of the sale, to deliver the engineering work (survey and utility specifications) to the buyers and to provide the home plans and specifications to the buyers as well. Id. While Mr. Pavoni testified that the sales price was not increased as a result of delivering the survey and utility specifications (R. at 968; Trial Tr. pp. 284-85), that testimony does not establish or create an inference in any way that the Call Litigation rendered that work useless, resulting in damage to the Plaintiffs. Indeed, a requirement to convey these items as part of the sale creates, if anything, an inference of value--not the opposite.

2. The Evidence Is Not Sufficient to Establish that Nielsen Failed to Indemnify Plaintiffs for Damages Under the Indemnification Agreement Based on Attorneys' Fees

The Indemnification Agreement required Nielsen to indemnify Plaintiffs for their

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<sup>6</sup> Indeed, Plaintiffs do not cite in their brief to any such testimony in the record. Plaintiffs' cite to the record in support of the allegation in Plaintiffs' Statement of the Facts that this work was rendered useless is only to Mr. Pavoni's testimony (Trial Tr. pp. 284-85) that the sales price of the Lot when Plaintiffs subsequently sold the Lot in 1994 was not increased to reflect the obligation to deliver the survey and utility specifications as part of the sale.

attorney's fees, "if any, arising directly or indirectly from or out of, the lawsuit Civil No. 11110 [the Call Litigation]." Trial Exhibit P-4 (Plaintiff's Addendum at Tab 19). The evidence in the record is simply not sufficient to establish that Nielsen breached the Indemnification Agreement based on the alleged failure to pay attorney's fees incurred by Plaintiffs arising out of the Call Litigation.

There is no evidence in the record that Plaintiffs made any demand that Nielsen indemnify them for any legal fees they allegedly incurred arising out of the Call litigation. Similarly, there is no evidence that Plaintiffs ever provided Nielsen with any statement of legal fees they allegedly incurred arising out of the Call Litigation. There is no evidence, therefore, that Nielsen failed to indemnify Plaintiffs pursuant to any request for indemnification for attorney's fees incurred in connection with the Call Litigation.

The only evidence in this regard is communication from Nielsen's attorney and from Nielsen himself voluntarily offering to pay any such attorney's fees. In that connection, Nielsen's attorney, Mr. Harper, communicated as follows through a letter dated July 11, 1994, to the attorney retained by Plaintiffs to commence a lawsuit against Mr. Nielsen under the Indemnification Agreement:

It is true that Mr. Nielsen offered to pay the expenses of Eric Schifferli to represent the Pavonis' interests in the Call litigation. Mr. Nielsen intends to do that. It is not true that Mr. Nielsen has offered to pay the Pavonis' attorneys' fees to evaluate and prosecute a lawsuit against him, i.e., the fees they are incurring as a result of Mr. Schifferli turning the matter over to litigation counsel for purposes of pursuing claims against Mr. Nielsen. Moreover, Mr. Nielsen has not agreed to pay attorneys' fees regarding extraneous issues such as

the gravel issue.

Trial Exhibit P-38, p. 3 (Plaintiffs' Addendum at Tab 29)(emphasis added). Nielsen followed up that communication by providing Plaintiffs with a check dated July 26, 1999, in the amount of \$2,000 for "Legal Fees—Call litigation," with a separate, accompanying handwritten note stating:

Justin,

I don't know what Eric's fees were. This is a guess, if I owe you more on Eric's bill then drop me a note.

Mike

Trial Exhibit P-6 (Plaintiffs' Addendum at Tab 20). There is no evidence that Plaintiffs ever did provide Nielsen with any statement(s) of legal fees from their attorneys or informed Nielsen of the amount Plaintiffs claimed they were owed in attorney's fees. Indeed, the only billing statement of legal fees in the record is one for \$369.92, and while that statement contains a description of legal work apparently relating to the Call Litigation, it also patently describes legal work wholly unrelated to the Call Litigation. See Trial Exhibit P-35A (Plaintiffs' Addendum at Tab 28). Nevertheless, the record is clear that Nielsen paid \$2,000 in attorney's fees under the Indemnification Agreement even without any demand to indemnify Plaintiffs for any particular amount.

The record, therefore, fails to establish a breach of the Indemnification Agreement inasmuch as there is no evidence therein that Nielsen failed to indemnify Plaintiffs for any amount requested by Plaintiffs.

Additionally, the evidence in the record fails to establish that the various attorney's fees incurred by Plaintiffs arose out of the Call Litigation – as opposed to attorney's fees “incurred in enforcing or attempting to enforce any of the terms, covenants, or conditions of [the Indemnification] Agreement, including costs incurred prior to commencement of legal action.” See Trial Exhibit P-4 (Plaintiffs' Addendum at Tab 19).<sup>7</sup> Indeed, the evidence in the record would lead reasonable minds to conclude that the facts show that the work was incurred in enforcing the Indemnification Agreement rather than arising out of the Call Litigation.

The customary way in which attorney's fees are established is for the attorney providing the legal services to testify by way of oral testimony or affidavit as to the nature of the work performed. Indeed, the Utah Code of Judicial Administration requires attorneys to file affidavits with the court and set forth specifically the nature of the work performed. See Rule 4-505, Rules of Judicial Administration. Plaintiffs, however, failed to designate their attorneys on their witness list and did not call any of the attorneys to testify at the trial below. The reasonable inference is that the attorneys would have testified that their work involved enforcement of the Indemnification Agreement rather than work related to the Call Litigation. Moreover, other than one

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<sup>7</sup> The Indemnification Agreement contains a prevailing party attorney's fees provision for reasonable attorney's fees incurred in enforcing the Indemnification Agreement. See paragraph 5 of Trial Exhibit P-4. Attorney's fees under that provision are unrelated to attorney's fees arising out of the Call Litigation itself, the latter of which would give rise to a duty on the part of Nielsen to indemnify.

billing statement in the amount of \$369.92, Plaintiffs did not even introduce any billing statements to establish the nature of the legal work performed and that the legal fees incurred in fact arose out of the Call Litigation rather than Plaintiffs' own enforcement efforts and eventual lawsuit under the Indemnification Agreement.

The only evidence offered by Plaintiffs to establish that legal fees were incurred arising out of the Call Litigation consisted of various checks for legal fees from Plaintiffs to their lawyers. (See Trial Exhibit P-35A pages 3 and 4, and Trial Exhibit P-35B page 2.) Only Mr. Pavoni – not the attorneys themselves – testified as to the nature of the work performed in connection with those checks. (R. at 0939; Trial Tr. pp. 170-181.) That testimony fails to establish that the work performed by the various attorneys was in connection with the Call Litigation rather than enforcement of the Indemnification Agreement.

Mr. Pavoni, who was unqualified and not competent to testify as to the work performed by his attorneys, nevertheless testified that the work performed by the law firm of Johnson, Holbrook & Schifferli, in connection with the checks paid by Plaintiffs to that firm, was for “issues related to the easement.” (R. at 939-940; Trial Tr. pp. 170-173.) That testimony fails entirely to distinguish between work relating to the Call Litigation (an action to recognize the Call Easement) and work relating to enforcement of the Indemnification Agreement (an action to recover damages allegedly

incurred by Plaintiffs as a result of the establishment of the Call Easement).<sup>8</sup>

Moreover, the testimony fails to distinguish between work performed by that firm in connection with the Call Litigation and the other disputes existing between Plaintiffs and Nielsen which were also asserted in this action, such as, for example, the gravel and driveway issues, a dispute involving pond work, a boundary line dispute, and homeowner association accounting issues. (See, e.g., R. at 0023-0032 and 091-0105.)

The Court, like the trial court below, can conclude as a matter of law that this evidence does not establish Plaintiffs' claim for attorney's fees arising out of the Call Litigation as opposed to relating to some other work.

Additionally, Plaintiffs introduced a copy of various checks to the law firm of McMurray, McMurray, Dale & Parkinson (Trial Exhibit P-35B, page 2) with no accompanying billing description and without any attorney from that firm testifying as

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<sup>8</sup> Plaintiffs apparently fail to understand this distinction. Indeed, at the trial, in questioning Mr. Pavoni about the \$2,000 payment voluntarily made by Nielsen to cover any attorney's fees incurred by Plaintiffs in connection with the Call Litigation, Plaintiffs' counsel asked: "Was that [the \$2,000 payment] the total extent of the attorneys fees that you had incurred up to the time that you had hired trial counsel?" Mr. Pavoni responded, "No, sir." (R. at 0930; Trial Tr. p. 133.) The testimony offers nothing to support a claim that the \$2,000 payment did not cover the total extent of Plaintiffs' attorneys' fees incurred in connection with the Call Litigation as opposed to enforcement of the Indemnification Agreement against Mr. Nielsen.

Plaintiffs' counsel on appeal, nevertheless, then cite to this testimony as evidence creating a disputed issue of material fact regarding attorney's fees. (Brief of Appellant at 22.) In doing so, however, Plaintiffs blatantly mischaracterize the testimony by citing the above exchange as support for the following assertion: "At the trial, Mr. Pavoni testified that he paid more than \$2,000 in attorney's fees in a failed effort to resolve the problems created by the Call litigation." (Emphasis added.) The testimony says nothing of the sort.

to the nature of the legal services performed in connection with the payments made by the Plaintiffs. (R. at 940-942; Trial Tr. at pp. 174-80.) As he did regarding the work performed in connection with the checks to Johnson, Holbrook & Schifferli, Mr. Pavoni testified that all of the work performed by McMurray, McMurray, Dale & Parkinson was “related to the easement issue.” (R. at 941; Trial Tr. at p. 177.) In sustaining an objection by Nielsen’s counsel, the trial court itself – immediately after Mr. Pavoni testified that all of the work performed by this firm “related to the easement issue”--then asked Mr. Pavoni about the nature of the legal work performed by McMurray, McMurray, Dale & Parkinson:

THE COURT: Sustained. What was the legal work?

MR. PAVONI: The legal work was: He came up to the site, got a feel for what the situation actually was and got a history of the case and proceeded with the case. Does that answer – I’m not sure if that’s what you are looking for, but that’s what happened.

(R. at 941; Trial Tr. at 177.) (Emphasis added.) Thus, after testifying that all of the work of this firm was “related to the easement issue,” Mr. Pavoni testified that the firm’s work was in connection with the enforcement action against Nielsen under the Indemnification Agreement and not in connection with or arising out of the Call Litigation. The trial court obviously concluded that the legal work performed by this particular firm was in connection with this action. That conclusion is supported totally by the first letter written on behalf of Plaintiffs by Mr. Dale of McMurray, McMurray, Dale & Parkinson, dated April 25, 1994. See Trial Exhibit P-17 (Plaintiffs’ Addendum



at Tab 22). That letter provides in pertinent part as follows:

Dear Mr. Harper:

I have been retained by Mr. and Mrs. Pavoni regarding their claim against Mr. Nielsen on his Indemnification Agreement to the Pavonis for the Allen and Margarete Call lawsuit that seeks an easement across the Pavonis' Lot 3 in the Red Hawk Subdivision. I have been told that you represent Mr. Nielsen.

This letter is to inform you, and Mr. Nielsen through you, that we are in the process of preparing a complaint against Mr. Nielsen on his indemnity....

(*Id.*; emphasis added.)

Based on Mr. Pavoni's testimony in response to the question by the trial court and the admission of his attorney in the correspondence dated April 25, 1994, reasonable minds can only conclude that, when Mr. Pavoni testified that the legal work performed by Mr. Dale was "related to the easement issue," such reference could only have been made in the context of an action against Mr. Nielsen under the Indemnification Agreement. Thus, reasonable minds can only conclude that those fees did not arise out of the Call Litigation but in enforcing the Indemnification Agreement against Mr. Nielsen.

When reasonable minds would not differ on the facts to be determined from the evidence presented, such facts are not disputed and may form the basis for a directed verdict. See DeBry v. Cascade Enterprises, 879 P.2d 1353, 1359 (Utah 1994). Plaintiffs' evidence regarding attorneys' fees—consisting only of copies of checks to law firms and only of Mr. Pavoni's testimony that the work was for "issues related to

the easement”--is insufficient to distinguish between damages in the form of attorney’s fees arising from the Call Litigation under the Indemnification Agreement and attorney’s fees incurred in their efforts to enforce the Indemnification Agreement. The trial court’s grant of the directed verdict motion in this regard, therefore, was appropriate and should be affirmed.

3. The Evidence Is Not Sufficient to Establish that Nielsen Failed to Indemnify Plaintiffs for Damages Under the Indemnification Agreement Based on an Alleged Diminution in Value of the Lot

From the very outset of this action, and continuing through the trial and this appeal, Plaintiffs have claimed disingenuously that they were damaged as a result of an alleged diminution in the value of the Lot as a result of the settlement of the Call Litigation imposing a temporary easement over the Lot and were forced to sell the Lot for \$2,500 under the appraised value. (R. at 0027 and 0963; Trial Tr. pp. 266-67.) The evidence is undisputed that the sale of the Lot for \$2,500 under the appraised value had absolutely nothing to do with the Call Litigation and easement. Reasonable minds can only conclude, therefore, that such alleged damage did not arise out of the Call Litigation and did not give rise to any duty on the part of Nielsen to indemnify Plaintiffs.

In connection with the sale of the Lot, Plaintiffs had the Lot appraised to determine value for sale to the eventual buyer. (R. at 0962; Trial Tr. p. 261; see Trial Exhibit D-1 at Plaintiffs’ Addendum Tab 30.) The Lot appraised for \$285,000. (R. at

0963; Trial Tr. p. 266.) The appraisal, dated July 21, 1994, did not take into account the existence of the Call easement, agreed to through settlement of the Call Litigation just days before. (Trial Exhibit D-1; R. at 0962; Trial Tr. p. 262.) It is uncontroverted that Plaintiffs and their buyer arrived at the sale price of \$282,500 simply through negotiation, i.e., Plaintiffs offered \$285,000 (the appraisal value) and the buyer countered at \$280,000, with the parties splitting the difference and agreeing on \$282,500. (R. at 0963; Trial Tr. pp. 265-67.) The compromise at \$282,500--\$2,500 below the appraised value--had absolutely nothing to do with the Call Litigation or easement. (R. at 0963; Trial Tr. p. 267.) Yet Plaintiffs disingenuously continue to assert that Plaintiffs were damaged under the Indemnification Agreement by this diminution of \$2,500. (Brief of Appellants at 20.)

Plaintiffs also contend that the trial court ignored evidence of a diminution in value of the Lot based on Mr. Nielsen's testimony in connection with certain hypotheticals presented to him by Plaintiffs' trial counsel. (Brief of Appellants at 19-21.) Mr. Nielsen was asked whether every easement in favor of a neighbor going across a piece of property would diminish the value of the property, and Nielsen responded candidly that he thought the value would be diminished, depending on the extent of the use of the easement. (R. at 974; Trial Tr. p. 310.) Nielsen went on to say that, in the case of the easement granted to the Calls in settlement of the Call litigation in July 1994, the easement "would be a diminished value of possibly a couple

of thousand dollars.”<sup>9</sup> (R. at 981; Trial Tr. p. 336.)

Contrary to Plaintiffs’ contention, this testimony is not evidence creating a material issue of fact for the jury. There are two problems with Plaintiffs’ contention. First, the Call easement was not granted until July 1994, when the Call Litigation was settled. (See Trial Exhibit D-9.) The Lot was not burdened with an easement at the time of Plaintiffs’ purchase of the Lot from Nielsen in 1992.<sup>10</sup> If there was a diminution in the value of the Lot, it occurred just prior to Plaintiffs’ sale of the Lot in 1994. Any diminution in value, however, did not affect Plaintiffs’ sales price because the sales price was based on an appraisal that did not take into account the Call easement. If there was a diminution in value of “possibly a couple of thousand dollars,” the party affected by the diminution in value would have been Plaintiffs’ buyer, who was informed of the Call easement and “didn’t care about the easement.”

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<sup>9</sup> Plaintiffs mischaracterized Mr. Nielsen’s testimony in this regard in the Brief of Appellants. In the Statement of the Case section, Plaintiffs state, “Nielsen admitted at trial that the Pavoni’s property burdened with an easement was obviously worth less than the Pavoni’s property without an easement....Nielsen estimated the minimum reduction in value to be at least ‘a couple of thousand dollars.’” (Brief of Appellants at 5.) (Emphasis added.) Nielsen actually only estimated that the diminished value would be “possibly a couple of thousand dollars.” (R. at 981; Trial Tr. p. 336.) (Emphasis added.)

<sup>10</sup> Plaintiffs contend that their damages for the diminution of their property’s value should be measured at the time they purchased the Lot in 1992. (Brief of Appellants at 20, n. 4.) At the time they purchased the Lot in 1992, however, the Call easement had not been granted. There was simply a lis pendens recorded against the Lot, and Nielsen’s testimony that the Lot was worth \$130,000.00 even with an easement is uncontroverted. With knowledge of the lis pendens, the Lot sold for \$115,000.00 – well below its value.

(See R. at 0963; Trial Tr. p. 264.)

Second, even if the Lot was diminished in value “by possibly a couple of thousand dollars” at the time of Plaintiffs’ purchase of the Lot, Nielsen testified that he priced the lot in 1992 at \$130,000, taking into account any potential diminution in value. (R. at 0981; Trial Tr. p. 337.) Ultimately, through negotiation, the parties agreed to a price of \$115,000. Nielsen’s testimony in response to a possible diminution in value simply does not create a material issue of fact that should have gone to the jury.

Based on the evidence presented at trial, reasonable minds could not infer facts that would establish that Plaintiffs were damaged by any diminution in value of the Lot as a result of the Call easement, and a directed verdict in this regard was appropriate.

C. Plaintiffs Cannot Establish a Breach of the Indemnification Agreement Without Establishing Actual Damages

Plaintiffs erroneously contend that the directed verdict on their claim under the Indemnification Agreement was improper based on the contract theory of nominal damages. (Brief of Appellant at 25-26.) Plaintiffs rely on Alta Health Strategies, Inc. v. CCI Mech. Serv., 930 P.3d 280 (Utah App. 1996), in which this Court reversed a directed verdict on a contract claim for failure to introduce sufficient evidence to establish actual damages. This Court ruled that, even if actual damages are not proven, directed verdict was inappropriate because nominal damages are recoverable for breach of contract. 930 P.2d at 286. That case is completely inapposite to this case involving

breach of an agreement to indemnify for damages, and Plaintiffs' contention is completely misguided.

While nominal damages are recoverable in a breach of contract claim, to establish a breach of the Indemnification Agreement Plaintiffs must establish: (i) that they incurred damages arising out of the Call Litigation; and (ii) that Nielsen failed to indemnify them for those damages. Without actual damages, there is nothing for Nielsen to indemnify, and therefore Nielsen could not breach the Indemnification Agreement. The directed verdict is based on the failure of Plaintiffs to establish a breach of contract, i.e., a failure on the part of Plaintiffs to establish any damages they incurred as a result of the Call Litigation for which Nielsen did not indemnify them.

To carry out Plaintiffs' logic, Nielsen would be in breach of the Indemnification Agreement the very instant he executed it. There were no actual damages incurred by the Plaintiffs but, because of the theory of nominal damages, Nielsen would have breached the agreement. Such a contention is absurd.

Obviously, without establishing actual unreimbursed damages, Plaintiffs cannot establish a breach of the Indemnification Agreement. Plaintiffs' challenge to a directed verdict on this basis must be rejected.

III. A DIRECTED VERDICT AGAINST PLAINTIFFS ON THEIR CLAIMS UNDER THE EARNEST MONEY SALES AGREEMENT IS PROPER BASED ON THE ABROGATION CLAUSE WITHIN THAT AGREEMENT

The Earnest Money Sales Agreement contains an abrogation clause that provides: “Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.” (Trial Exhibit P-1, page 4, paragraph O.) Nielsen relied on the abrogation clause in moving for directed verdict on Plaintiffs’ claims that he had failed “to install additional 3-inch gravel” on a section of Plaintiffs’ driveway,<sup>11</sup> and that he failed to straighten the driveway entrance.<sup>12</sup> The trial court agreed that the abrogation clause served to abrogate the Earnest Money Sales Agreement upon closing and execution of the deed and granted the motion for directed verdict in this regard.

While Plaintiffs’ analysis on this issue focuses on the merger doctrine and the

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<sup>11</sup> There was no dispute at trial that Nielsen actually did install additional gravel on Plaintiffs’ driveway. The dispute merely centered on how much gravel Nielsen actually installed, and how much gravel he was required to install. Plaintiffs contended that they paid \$4,500 to install gravel on their driveway in addition to the gravel installed by Nielsen. While Nielsen agreed to install “additional 3-inch gravel” on portions of the driveway, the amount of gravel for which Plaintiffs were seeking reimbursement would have covered the driveway more than a foot deep in gravel, which was clearly not contemplated in the addendum language. (R. at 0954; Trial Tr. pp. 228-29.)

<sup>12</sup> The driveway entrance was straightened. The dispute centered on which party--if not both parties--performed the work. Nielsen testified that he had the driveway entranced straightened (R. at 0984; Trial Tr. pp. 349-50), and Plaintiffs contended that they had their contractor straighten the entrance. The dispute is not relevant to the grant of directed verdict based on the abrogation clause.

collateral rights exception thereto to justify its objection to the directed verdict on the claims under the Earnest Money Sales Agreement, the appropriate focus should be on the abrogation clause of that agreement. See, e.g., R. at 1008; Trial Tr. pp. 446-47.

This Court recently has acknowledged the significance of the existence of an abrogation clause in extinguishing and rendering unenforceable all prior terms, making the warranty deed preeminent:

The merger doctrine has been routinely applied when the antecedent agreement contains an abrogation clause. Embassy [Group, Inc. v. Hatch], 865 P.2d 1366, 1371 (Utah App. 1993)]. The Utah Supreme Court has also recognized that for purposes of an abrogation clause, a deed is equivalent to a final real estate contract. Espinoza v. Safeco Title Ins. Co., 598 P.2d 346, 348 (Utah 1979).

Schafir v. Harrigan, 879 P.2d 1384, 1392 (Utah App. 1994).

In Schafir, the Ernest Money Sales Agreement contained an abrogation clause even more narrow than the abrogation clause in this case. That clause stated that “[e]xecution of a final real estate contract, if any, shall abrogate this agreement.” 879 P.2d at 1392. The Plaintiffs claimed that the Defendants breached the warranty contained in the Earnest Money Sales Agreement regarding notice of any building code violations concerning the home. This Court ruled that the Plaintiffs could not argue that the Defendants breached the warranty in question unless that warranty, or another similar one, was contained in the warranty deed or, by its terms, survived the delivery and acceptance of the warranty deed. Id.

Similarly, in Kelsey v. Hansen, 419 P.2d 198 (Utah 1966), the Supreme Court



of Utah enforced an abrogation clause in an earnest money agreement providing that “it is further agreed that execution of the final contract shall abrogate this earnest money receipt.” In the earnest money agreement, there was an agreement “to buy and pay for certain ‘extras’—drapes and the like.” 419 P.2d at 198. While such an agreement contemplated future performance and would most likely constitute an exception to the merger doctrine as a collateral promise, the court nevertheless abrogated that promise under the abrogation clause in that earnest money agreement.

In another Supreme Court of Utah case involving an abrogation clause, Espinoza v. Safeco Title Ins. Co., 598 P.2d 346 (Utah 1979), the court again abrogated an earnest money agreement based on a standard abrogation clause. In that case, the attorney’s fee clause of the earnest money agreement was abrogated and fees were not awarded because the warranty deed did not contain such a clause. Id. at 348.

Plaintiffs specifically rely on Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977) to support their contention that promises of future performance are immune from abrogation under an abrogation clause. (Brief of Appellants at 28-29.) That case is distinguishable, however, because the court relies solely on the merger doctrine rather than an abrogation clause to uphold an agreement involving future performance. Indeed, the Court acknowledged the lack of an abrogation clause and noted that the result would have been different if there had been an abrogation clause, citing to Kelsey v. Hansen, *supra*, 567 P.2d at 170, n.4.

In Stubbs, the earnest money agreement provided that the seller could remove from the building certain equipment and shelving after delivery of the deed. 567 P.2d at 170. The court enforced that agreement under the collateral rights exception to the merger doctrine. Id. The court specifically distinguished that case, however, from Kelsey v. Hansen, supra, noting that there was not an abrogation clause in Stubbs, as there was in Kelsey. 567 P.2d at 170, n.4.<sup>13</sup> This same distinction is noted by Judge Billings in the Embassy Group decision:

The merger doctrine has been routinely applied when an antecedent agreement contains an abrogation clause. For example, in applying merger in the Secor case, the court considered, inter alia, a clause providing that “execution of the final contract shall abrogate this earnest money receipt and offer to purchase.” Secor, 716 P.2d at 792. Furthermore, the supreme court has recognized that a deed is tantamount to a final real estate contract and usually abrogates a preliminary earnest money agreement containing an abrogation clause. Espinoza v. Safeco Title Ins. Co., 598 P.2d 346, 348 (Utah 1979); Kelsey v. Hansen, 18 Utah 2d 226, 227, 419 p.2d 198, 198 (1966); Accord Stubbs, 567 P.2d at 170 n. 4 (*citing Kelsey for the proposition that an abrogation clause extinguishes the underlying agreement*).

865 P.2d at 1371 (emphasis added).

Plaintiffs also rely on Maynard v. Wharton, 912 P.2d 446 (Utah App. 1996), in which this Court analyzed issues under an earnest money agreement relating to title in the context of the common law doctrine of merger. While the opinion contains dictum stating that an abrogation clause is a contractual statement of the common law doctrine of merger, the case cannot be read to conflict with the Utah Supreme Court opinions

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<sup>13</sup> Similarly, there is no mention of an abrogation clause in Secor v. Knight, 716

such as Kelsey v. Hansen and Schafir v. Harrigan, which enforced abrogation clauses in the context of promises of future performance, and Stubbs v. Hemmert, which expressly distinguished between the existence or lack of an abrogation clause. While an abrogation clause might be a contractual statement of the common law doctrine of merger, reading Maynard v. Wharton to import the exceptions to the merger doctrine into the contract itself would fly in the face not only of established Utah case law interpreting and applying abrogation clauses but also in the face of basic principles of contract interpretation.

The language in the abrogation clause is clear. Mr. Pavoni testified that he understood the language. If the gravel was not installed or the driveway not straightened by closing, the parties were free to provide expressly that the requirements either survived closing, like they did the terms of the Indemnification Agreement, or to incorporate them into the final real estate contract, the deed. The parties did neither, and those terms were abrogated along with the rest of the Earnest Money Sales Agreement.

In this case, the existence of the abrogation clause serves to extinguish the Earnest Money Sales Agreement except the warranties expressly contained therein in paragraph C. The intent of the parties in this regard is reflected in their execution of such an agreement containing such a provision. Reasonable minds cannot differ in this regard, and the directed verdict, entered as a matter of law, was appropriate.

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P.2d 790 (Utah 1986), a case applying the merger doctrine and cited by Plaintiffs.

IV. THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES TO NIELSEN IS PROPER SO LONG AS THE DIRECTED VERDICT ON THE CLAIM UNDER THE INDEMNIFICATION AGREEMENT IS AFFIRMED

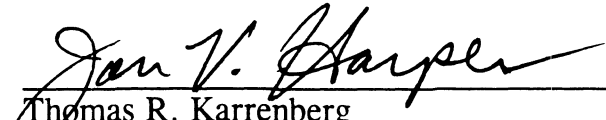
Plaintiffs' Section V of the Brief of Appellant is misleading and must be clarified and corrected. Plaintiffs erroneously contend that "[b]ecause the trial court's directing the verdict and dismissing the claims of breach of the Indemnity [sic] Agreement and breach of the Real Estate Purchase [sic] Agreement was improper, the award of attorney's fees to Nielsen is also untenable." (Brief of Appellant at 31.) (Emphasis added.) The claim under the Earnest Money Sales Agreement is irrelevant to the award of attorneys' fees under the Indemnification Agreement. No attorneys' fees were awarded under the Earnest Money Sales Agreement. A decision by this Court affirming the directed verdict on the Indemnification Agreement claim should have no impact whatsoever on the award of attorneys' fees under that agreement, regardless of this Court's ruling on the Earnest Money Sales Agreement claim.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's directed verdicts dismissing Plaintiffs' claims under the Indemnification Agreement and the Earnest Money Sales Agreement.

RESPECTFULLY SUBMITTED this 2nd day of August, 1999.

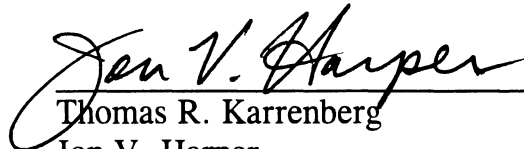
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CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of the foregoing BRIEF OF APPELLEES on this 2nd day of August, 1999, to the following:

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