

1999

Justin F. Pavoni and Kimberly A. Pavoni v. C. Michael Nielsen and Does 1-10 : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

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

Thomas R. Karrenberg; Anderson & Karrenberg; Attorneys for Appellees.

Alan L. Sullivan; David N. Wolf; Snell & Wilmer; Richard A. Schneider; King & Spalding; Attorneys for Appellants.

Recommended Citation

Brief of Appellant, *Pavoni v. Nielsen*, No. 990179 (Utah Court of Appeals, 1999).

https://digitalcommons.law.byu.edu/byu_ca2/2061

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

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

BRIEF

UTAH
DOCUMENT
FILE

10

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

BRIEF OF APPELLANTS

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

ALAN L. SULLIVAN
DAVID N. WOLF
SNELL & WILMER L.L.P.
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
- and -

RICHARD A. SCHNEIDER
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303

Attorneys for Plaintiffs-Appellants

THOMAS R. KARRENBORG
ANDERSON & KARRENBORG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

Attorneys for Defendants-Appellees

FILED
Utah Court of Appeals
JUN 21 1999
Julia D'Alessandro
Clerk of the Court

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| JURISDICTION | 1 |
| ISSUES PRESENTED FOR REVIEW | 1 |
| STATEMENT OF THE CASE | 3 |
| I. INTRODUCTION | 3 |
| II. SUMMARY OF THE PROCEEDINGS BELOW | 8 |
| III. STATEMENT OF THE FACTS | 9 |
| SUMMARY OF THE ARGUMENT | 14 |
| ARGUMENT | 16 |
| I. STANDARD OF REVIEW | 16 |
| II. THE PAVONIS RAISED ISSUES OF MATERIAL FACT REGARDING NIELSEN’S BREACH OF THE INDEMNIFICATION AGREEMENT | 17 |
| III. THE TRIAL COURT’S DIRECTED VERDICT AND DISMISSAL OF THE PAVONI’S CLAIMS UNDER THE INDEMNIFICATION AGREEMENT WAS ALSO IMPROPER BECAUSE, AT A MINIMUM, THE PAVONIS INCURRED NOMINAL DAMAGES | 25 |
| IV. THE PAVONIS RAISED ISSUES OF MATERIAL FACT REGARDING NIELSEN’S BREACH OF THE EARNEST MONEY SALES AGREEMENT WHICH WERE NOT ABROGATED OR MERGED INTO THE DEED | 26 |
| V. BECAUSE THE TRIAL COURT ERRED IN DIRECTING THE VERDICT AND DISMISSING THE PAVONI’S CLAIMS, THE TRIAL COURT’S AWARD OF ATTORNEY’S FEES TO NIELSEN WAS ALSO IMPROPER | 30 |

TABLE OF CONTENTS (cont.)

| | <u>PAGE</u> |
|------------------|-------------|
| CONCLUSION | 31 |

IN THE UTAH COURT OF APPEALS

JUSTIN F PAVONI and KIMBERLY A
PAVONI, individuals,

Plaintiffs/Appellants,

v

C MICHAEL NIELSEN, an individual and
DOLS 1 through 10, inclusive,

Defendants/Appellees

Appeal No 990179-CA

Priority No 15
Oral Argument Requested

BRIEF OF APPELLANTS

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

ALAN L SULLIVAN
DAVID N WOLF
SNELL & WILMER L L P
111 East Broadway Suite 900
Salt Lake City, Utah 84111
- and -
RICHARD A SCHNEIDER
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303

Attorneys for Plaintiffs-Appellants

THOMAS R KARRENBORG
ANDERSON & KARRENBORG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

Attorneys for Defendants Appellees

TABLE OF AUTHORITIES

| | <u>Page</u> |
|--|-------------|
| Cases | |
| <u>Alta Health Strategies, Inc. v. CCI Mech. Serv.,</u> 930 P 2d 280 (Utah Ct. App. 1996) | 16, 17, 25 |
| <u>Embassy Group, Inc. v. Hatch,</u> 865 P 2d 1366 (Utah Ct. App. 1993) | 26, 28 |
| <u>Gould v. Mountain States Tel. & Tel. Co.,</u> 6 Utah 2d 187, 309 P 2d 802 (1957) | 25 |
| <u>Gouldin v. Sharon's Cultural Educ. Recreational Assoc.,</u> 845 P 2d 242 (Utah 1992) | 1, 3 |
| <u>Jones, Waldo, Holbrook & McDonough v. Dawson,</u> 923 P 2d 1366 (Utah 1996) | 18 |
| <u>Kleinert v. Kimball Elevator Co.,</u> 905 P 2d 297 (Utah Ct. App. 1995) | 16 |
| <u>Management Comm. v. Graystone Pines,</u> 652 P 2d 896 (Utah 1982) | 1, 3, 16 |
| <u>Maynard v. Wharton,</u> 912 P 2d 446 (Utah Ct. App. 1996) | 26, 27 |
| <u>Robertson v. Gem Ins. Co.,</u> 828 P 2d 496 (Utah Ct. App. 1992) | 3 |
| <u>Secor v. Knight</u> 716 P 2d 790 (Utah 1986) | 26 |
| <u>Stubbs v. Hemmett,</u> 567 P 2d 168 (Utah 1977) | 26, 28, 29 |
| <u>Terry v. Panek,</u> 631 P 2d 896 (Utah 1981) | 25 |
| <u>Turtle Management, Inc. v. Haggis Management, Inc.,</u> 645 P 2d 667 (Utah 1982) | 25 |
| <u>Valcarlos v. Fitzgerald,</u> 961 P 2d 305 (Utah 1998) | 3 |
| Statutes | |
| Utah Code Ann. § 78-2-2 (1998) | 1 |

TABLE OF AUTHORITIES (Cont.)

| | <u>Page</u> |
|--|-------------|
| Other | |
| 3 Arthur L. Corbin, Corbin on Contracts § 559 (1960) | 18 |
| Restatement (Second) of Contracts § 206 (1981) | 18 |
| Utah Constitution art. VIII, sec. 3 | 1 |

JURISDICTION

This case is on appeal from a final order entered on January 27, 1999, by Judge Patricia B. Brinn of the Third Judicial District Court in and for Summit County, State of Utah. Jurisdiction of this Court is appropriate pursuant to Utah Constitution art. VIII, sec. 3, and Utah Code Ann. § 78-2-2 (1998).

ISSUES PRESENTED FOR REVIEW

I. Did the trial court err in directing a verdict against plaintiffs' indemnification claims on the basis of its belief that there was no evidence of damages, where the trial court failed to view the evidence in the light most favorable to plaintiffs, overlooked evidence in the record of various unreimbursed expenses and losses covered by the Indemnification Agreement and mistakenly focused instead on plaintiffs' profit on the sale of the underlying real property which in no way redressed the unreimbursed losses for which plaintiffs were indemnified and entitled to recover?

Standard of Review:

"[O]n appeal from a directed verdict, we must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained." Gouldin v. Sharon's Cultural Educ. Recreational Assoc., 845 P.2d 242, 243 (Utah 1992) (quoting Management Comm. v. Graystone Pines, 652 P.2d 896-898 (Utah 1982)).

2. Did the trial court err in directing a verdict and dismissing plaintiffs' indemnification claims on the grounds that plaintiffs allegedly did not introduce evidence of actual damages, where defendant's breach of the Indemnification Agreement in itself entitled plaintiffs to recover nominal damages?

Standard of Review:

"[O]n appeal from a directed verdict, 'we must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained.'" Gourdin v. Sharon's Cultural Educ. Recreational Assoc., 845 P.2d 242, 243 (Utah 1992) (quoting Management Comm. v. Graystone Pines, 652 P.2d 896, 898 (Utah 1982)).

3. Did the trial court err in directing a verdict and dismissing plaintiffs' claims of breach of the Earnest Money Sales Agreement by failing to find that defendant's promises contained therein to make various improvements to the property after closing were promises collateral to the contract of sale, and thus, were not extinguished by the merger doctrine nor by the Agreement's abrogation clause?

Standard of Review:

"[O]n appeal from a directed verdict, 'we must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party,

the directed verdict cannot be sustained.” Gouldin v. Sharon’s Cultural Educ. Recreational Assoc., 845 P.2d 242, 243 (Utah 1992) (quoting Management Comm. v. Graystone Pines, 652 P.2d 896, 898 (Utah 1982)).

4 In light of the trial court’s improper grant of directed verdict, did the trial court also err in awarding attorneys fees to defendant?

Standard of Review:

Whether attorney fees are recoverable in an action is a question of law, which we review for correctness.” Valcarice v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998). See also Robertson v. Gem Ins. Co., 828 P.2d 496, 499 (Utah Ct. App. 1992).

STATEMENT OF THE CASE

I. INTRODUCTION

This Court should reverse the trial court’s decision to grant a directed verdict, vacate its award of attorney’s fees to defendant C. Michael Nielsen (“Nielsen”) and remand this case for further proceedings. This case involves Nielsen’s failure to fulfill promises and obligations contained within an Earnest Money Sales Agreement and Indemnification Agreement.

This case arose out of Nielsen’s sale to Justin and Kimberly Pavoni (the “Pavonis”) of a 20-acre parcel of property in the Red Hawk Subdivision in Park City, Utah (hereinafter the “property”) (R. at 916-921, 948, Trial Tr. pp. 77-78, 97-98, 206, Pl.’s Trial Exs. 1 & 1A, Def.’s Trial Ex. 6.) The property was an ideal site for the Pavoni’s dream home, and the

Pavonis bargained with Nielsen and agreed in writing as part of the purchase agreement that they would be able to build their home at a specifically identified prime location on the 20-acre parcel. (R. at 917-19, 1000-01; Trial Tr., pp 81-92, 413-418; Pl.'s Trial Exs. 1 & 1A.) Nielsen sold the property and the Pavonis agreed to buy it with the understanding that there would be nothing that would interfere with their planned home site and use of the property. (R. at 920-21, 943-44, 1001; Trial Tr., pp. 93-98, 186-88, 417.)

Shortly before closing, however, Nielsen advised the Pavonis for the first time that neighboring property owners (the Calls) were claiming a right of way easement over the Pavoni's property. (R. at 920; Trial Tr., pp. 93-94.) Nielsen knew, and had known for some time, that the claimed easement went through the Pavoni's planned home site, but he did not disclose this to the Pavonis. (R. at 920, 975; Trial Tr., pp. 96, 314-15). Instead, Nielsen minimized the issue and told the Pavonis that the Call easement would not be a problem, because he would take care of the situation. (R. at 920, 944, 1001; Trial Tr., pp. 94, 188, 417.) Nielsen gave the Pavonis an Indemnification Agreement promising to defend and indemnify them against all losses and damages of any sort whatsoever that might arise out of the Calls' claim to an easement over the Pavoni's property. (R. at 920-21, 943-44, 1001-03; Trial Tr., pp. 187-90, 341-42, 390-391, 416-427; Pl.'s Trial Ex. 4.)

Based on Nielsen's representations and the promises contained in the purchase and indemnification agreements, the Pavonis purchased the property for \$115,000 in July 1992. (R. at 921, 1001; Trial Tr., pp. 98-99, 416-17.) In the ensuing two-years, in preparation for ultimately building their home on the property, the Pavonis made many improvements to the

20-acre parcel, greatly increasing its value. (R. at 923-24, 930-31, 933-37, 963; Trial Tr., pp. 106-12, 133-38, 146-63, 264; Pl's Trial Exs. 22, 23, 24, 25, 29.) In the meantime, the value of property in this subdivision also escalated generally. (R. at 977; Trial Tr., p. 323.)

After the Pavonis purchased the property, Nielsen--instead of resolving the Calls' claim of an easement in favor of the Pavonis by extinguishing any claim of an easement over the property--settled the Call litigation in July 1994 and granted the Calls an easement affecting up to 2 acres of the Pavoni's 20-acre plot. (R. at 6, 925, 927, 929, 996-97; Trial Tr., pp. 113-14, 121-22, 130-31, 396-99; Def.'s Trial Ex. 9.) Most egregiously, the Call easement went directly through the Pavoni's planned home site. (Id.) 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. (R. at 974, 977-78; Trial Tr., pp. 309-11, 321-27.) Nielsen estimated the minimum reduction in value to be at least "a couple of thousand dollars." (R. at 981; Trial Tr., p. 336.) Nielsen's conservative estimate--which itself concedes that the Pavonis were damaged--does not account for the fact that the Pavonis were prevented from building their home at the location they selected.

Faced with the imposition of an easement on the property running through their agreed upon home site, the Pavonis decided, in September 1994, to sell the property and attempt to recover their losses and damages caused by Nielsen. (R. at 963; Trial Tr., pp. 266-67.) Reflecting the improvements that the Pavonis made to the property and the generally escalating land prices, the property was eventually appraised at \$285,000. (R. at 963; Trial Tr., p. 266.) The Pavonis were ultimately able to sell the property for \$282,500, or \$2,500

less than the appraised value. (R. at 963; Trial Tr., pp. 266-67.) The Pavonis were never repaid for the diminution in value, nor were they repaid for the costs of architectural plans that they had paid to layout the planned home site on the property, nor for all of the attorney's fees that they had incurred in attempting to defend against the Call litigation and resulting easement. (R. at 921-22, 930, 940-41; Trial Tr., pp. 100-02, 172-77; Pl.'s Trial Exs. 35A & 35B.)

In addition, Nielsen did not fulfill his obligations contained within the Earnest Money Sales Agreement, including his promise to install a gravel driveway and widen the driveway. (R. at 921, 923, 930, 966; Trial Tr., pp. 100, 106-08, 133-35, 279; Pl.'s Trial Exs. 1 & 1A.) Specifically, the Earnest Money Sales Agreement provided, inter alia, that Nielsen would install additional three-inch gravel from the driveway entrance to twenty feet beyond the western-most boundary of the Pavoni's selected home site within one hundred twenty days after the closing date. (R. at 919, 923, 966; Trial Tr., pp. 90-91, 106, 279; Pl.'s Trial Exs. 1 & 1A.) Nielsen failed to install the above-described gravel road as promised, and ten months after the road was supposed to have been completed, the Pavonis paid approximately \$4,500 to have it installed. (R. at 921, 923, 930; Trial Tr., pp. 100, 106-08, 133-35; Pl.'s Trial Ex. 7.) The Pavonis asked Nielsen to reimburse them for the cost of installing the gravel road, but Nielsen refused to pay. The Earnest Money Sales Agreement also provided that Nielsen would widen and straighten the driveway entrance. (R. at 924, 966; Trial Tr., pp. 110, 279; Pl.'s Trial Exs. 1 & 1A.) Nielsen did not widen or straighten the driveway entrance to the property as promised. (R. at 924; Trial Tr., p. 110.)

Therefore, the Pavonis filed suit against Nielsen seeking to recover for breach of these agreements, and also seeking recovery against Nielsen for fraudulent misrepresentations. (R. at 1-32) At trial, despite evidence of Nielsen's breach and the damages related thereto, including Nielsen's own admission of a diminution in the property's value as a result of the Call easement, the trial court directed a verdict against the Pavonis on the Indemnification Agreement, finding that because they had made a profit on the sale of the property, they were not entitled to recovery. (R. at 610-15, 1011; Trial Tr., pp. 458-59.) The trial court overlooked the fact that the Call easement had diminished the property's value (R. at 974, 977-78; Trial Tr., pp. 309-11, 321-27), and also overlooked proof that the Pavonis had not been repaid for the various costs that they had incurred for architectural plans and attorney's fees that went for naught in light of Nielsen's resolution of the Call litigation. (R. at 921-22, 930, 940-41; Trial Tr., pp. 100-01, 172-77; Pl.'s Trial Exs. 35A & 35B.)

In addition, the trial court directed a verdict and dismissed the Pavoni's claims under the Earnest Money Sales Agreement, finding that all promises and undertakings of the Earnest Money Sales Agreement had merged into the deed of conveyance and been extinguished. (R. at 610-15, 1008; Trial Tr., pp. 444-47.) In doing so, the trial court overlooked the fact that the Pavonis sought to enforce promises in the Earnest Money Sales Agreement that were collateral to and that were to be honored after the date of conveyance, and thus, were not extinguished by the conveyance itself. The trial court also ordered the Pavonis to pay Nielsen's attorney's fees because the Indemnification Agreement included within it a "prevailing party" clause. (R. at 790-95.)

After the Court entered an order formalizing its directed verdict rulings and findings and entitlement to attorney's fees in favor of Nielsen, the Pavonis timely filed this appeal. (R. at 822-24.) Subsequently, the trial court entered an order reflecting the amount of attorney's fees to be \$48,267.25. (Addendum at 10) The Pavonis have also appealed that order and have moved to consolidate the two appeals and address the common issues in this single brief. (Addendum at 11, 14, 15)

II. SUMMARY OF THE PROCEEDINGS BELOW

On January 23, 1995, the Pavonis sued Nielsen for (1) breach of the Earnest Money Sales Agreement; (2) breach of the Pavoni Indemnity Agreement; (3) fraud; and (4) an accounting of monies paid to the Red Hawk Home Owner's Association. (R. at 1-32.) The Pavonis filed an Amended Complaint and Jury Demand on September 16, 1996. (R. at 72-105.) The case was tried before a jury on September 1 and 3, 1998. (R. at 897-1013.) At the conclusion of the Pavoni's case, Judge Brian granted Nielsen's motion for directed verdict and dismissed all of the Pavoni's claims, except the fraud claim. (R. at 610-15, 1008-11; Trial Tr., pp. 444-59.) The fraud claim was presented to the jury, and the jury returned a verdict in favor of Nielsen. (R. at 555-56.)

On January 28, 1999, the trial court entered its Findings of Fact and Conclusions of Law and Order, wherein the court memorialized its decision to dismiss the Pavoni's claims for breach of the Earnest Money Sales Agreement and Indemnity Agreement and also

awarded Nielsen his attorney's fees and costs pursuant to the Indemnity Agreement.¹ (R. at 790-95.) The Pavonis filed the instant appeal on February 26, 1999. (R. at 822-24.) On April 27, 1999, the trial court issued a judgment, wherein the court awarded plaintiffs \$48,767.25 in attorney's fees and costs. (Addendum at 12) The Judgment, dated April 28, 1999, contained a clerical error as it awarded attorney's fees and costs to plaintiffs, instead of defendant. (Id.) By stipulation, this Judgment was amended on May 24, 1999, to reflect the actual ruling of the trial court. (Addendum at 13) On June 1, 1999, the Pavonis filed a second Notice of Appeal. (Addendum at 14) On June 18, 1999, the parties moved to consolidate the two appeals for purposes of briefing, oral argument and decision. (Addendum at 15) The Pavonis seek to reverse the trial court's decision to grant Nielsen's motion for directed verdict and vacate its award of attorney's fees and costs to Nielsen.

III. STATEMENT OF THE FACTS

1. On or about March 31, 1992, the Pavonis executed an Earnest Money Sales Agreement with Nielsen for the purchase of real property located in the Red Hawk Subdivision, Phase I, and described as Lot No. 3 (hereinafter the "property"). (R. at 916; Trial Tr., p. 77; Pl.'s Trial Ex. 1.)

2. The Pavonis communicated to Nielsen their desire to build on a specific site within the property and were adamant about the location of the house on the property. The

¹ The January 28, 1999 Order did not specify the amount of attorney's fees and costs awarded to Nielsen. On October 21, 1998, a hearing was held to allow the parties to present their arguments with respect to the reasonableness and apportionment of attorney's fees. (R. at 837-68.)

Pavonis clearly communicated to Nielsen that they had no interest in the property unless they could build on the specific site. (R. at 917-19, 966, 1000; Trial Tr., pp. 81-90, 277-78, 413-15.)

3. The Pavonis also communicated to Nielsen that they wanted to build on this precise area of the property because it offered an excellent view, privacy, and protection from the elements. (R. at 917, 1000-01; Trial Tr., pp. 82, 413-15.)

4. To ensure that they would be able to build on their desired site, the Pavonis included Paragraph 8 of the Earnest Money Sales Agreement, which specifically states that the transaction is expressly contingent upon “written acceptance, from the Seller, of the Buyer’s proposed overall site plan.” (Pl.’s Trial Exs. 1 & 1A.)

5. On or about May 30, 1992, the Pavonis showed Nielsen their desired building site, and he assured them that they would be able to build on site. (R. at 916-19; Trial Tr., pp. 81-90.) This was memorialized in paragraph 8 of the June 3, 1992 Addendum to the Earnest Money Sales Agreement. (R. at 919; Trial Tr., p. 89; Pl.’s Trial Exs. 1 & 1A.)

6. Just prior to closing, Nielsen notified the Pavonis that a Lis Pendens had been placed on the property by J. Allen and Margaret Call, whereby the Calls sought a right-of-way easement over the property. (R. at 920; Trial Tr., p. 93; Pl.’s Trial Ex. 3.)

7. Nielsen represented to the Pavonis that the Call lawsuit had been commenced against himself and other owners of Red Hawk. (R. at 920; Trial Tr., pp. 93-94.)

8. Nielsen further represented that the Calls’ claims of right-of-way easement over the property would not present a problem for the Pavonis because Nielsen would

construct another road to satisfy the Calls' right-of-way claim. (R. at 920, 983, 994, 1002-03; Trial Tr., pp. 93-94, 347-48, 423-26; Pl.'s Ex. 38.)

9. Nielsen repeatedly and consistently represented to the Pavonis that the Calls' claim would not interfere with the Pavoni's desired building site. (R. at 920-21, 943-44, 1001; Trial Tr., pp. 96-98, 187-88, 417.)

10. In July of 1992, Nielsen and the Pavonis entered into an agreement whereby Nielsen agreed to, among other things, defend and indemnify the Pavonis "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 Call lawsuit (hereinafter the "Indemnification Agreement"). (R. at 920; Trial Tr., pp. 94-95; Pl.'s Trial Ex. 4.)

11. In reliance upon Nielsen's representations that the Pavonis would have the unqualified ability to build on their desired site and that Nielsen would fully redress any adverse impact the Call lawsuit might have on them, on or about July 10, 1992, the Pavonis executed the necessary documents to close the sale/purchase of the property. (R. at 921, 1001; Trial Tr., pp. 99, 417.)

12. The Pavonis purchased the property for One Hundred Fifteen Thousand Dollars (\$115,000). (R. at 948; Trial Tr., pp. 206-07; Def.'s Trial Ex 6.)

13. By check dated July 28, 1994, Nielsen paid the Pavonis Two Thousand Dollars (\$2,000) for legal fees resulting from the Call lawsuit as required by the Indemnification Agreement. (R. at 930, 994; Trial Tr., pp. 132, 388; Pl.'s Trial Ex. 6.)

14. In connection with paying the Pavonis Two Thousand Dollars (\$2,000), Nielsen wrote Mr. Pavoni a note stating that he was not aware of the exact amount of attorney's fees incurred by the Pavonis, and inviting the Pavonis to contact him if the fees exceeded \$2,000. (Pl.'s Trial Ex. 6.)

15. The Pavonis incurred legal fees in excess of \$2,000 as a result of the Call litigation. (R. at 930, 940-41; Trial Tr., pp. 132-35; Pl.'s Trial Exs. 35A & 35B.)

16. The Pavonis demanded that Nielsen reimburse them for the legal fees incurred as a result of the Call litigation. (R. at 994; Trial Tr., p. 391; Pl.'s Trial Ex. 17.)

17. Nielsen did not reimburse the Pavonis for legal fees in excess of \$2,000 incurred as a result of the Call litigation. (R. at 26, 29, 97-98.)

18. The Addendum dated June 3, 1992 to the Earnest Money Sales Agreement provided in paragraph 9 that Nielsen would install additional three-inch gravel from the driveway entrance on the property to a point twenty feet beyond the Western-most boundary of the Pavoni's selected home site within one hundred twenty days from the closing date. (R. at 919, 923, 966; Trial Tr., pp. 90-91, 106, 279; Pl.'s Trial Exs. 1 & 1A.)

19. Nielsen failed to install the above-described gravel road as promised, and ten months after the road was supposed to have been completed, the Pavonis had it installed at their own expense in the amount of approximately Four Thousand Five Hundred Dollars (\$4,500). (R. at 921, 923, 930; Trial Tr., pp. 100, 102-03, 133-35; Pl.'s Trial Ex. 7.)

20. The Pavonis made demand on Nielsen for the amount it took to have the gravel road installed, and Nielsen refused to pay. (R. at 27-28.)

21 The Addendum dated June 3, 1992 to the Earnest Money Sales Agreement provided in paragraph 9 that Nielsen would widen and straighten the driveway entrance, as he had previously promised the Pavonis on or about May 30, 1992 (R at 924, 966, Trial Tr pp 109-10, 279, Pl 's Trial Exs 1 & 1A)

22 Nielsen did not widen or straighten the driveway entrance to the Property (R at 924, Trial Tr , p 110)

23 In the Spring of 1993 the Pavonis contracted with an architect to prepare construction plans for a custom home on the selected building site for Five Thousand Five Hundred Dollars (\$5,500) (R at 921-22, Trial Tr , pp 100-01)

24 The Pavonis made numerous improvements to the property including, inter alia, installing utility lines that increased the value of the property (R at 923-24, 930-31, 933-37, 963, Trial Tr , pp 106-12, 133-38, 146-63, 264, Trial Exs 22, 23, 24, 25, 29)

25 In connection with resolving the Call lawsuit, Nielsen granted a right-of-way easement through the property and directly through the Pavoni's selected building site (R at 6, 924, 927, 929, 975-76, Trial Tr , pp 112-14, 315-19, 121-22, Def 's Trial Ex 9)

26 The Call easement occupied up to 2 acres of the Pavonis 20-acre property (R at 977, Trial Tr , pp 320-21)

27 The Call easement interfered with the Pavoni's ability to construct their home on their desired building site (R at 944, 967, Trial Tr , p 191)

28 The Call easement also rendered the Pavoni's architectural plans and topographical studies useless (R at 968, Trial Tr , pp 284-85)

29 Because of the Call's easement passed directly through the Pavoni's desired building site, the Pavonis decided to sell their property and attempt to recover any and all losses due to the Call easement from Nielsen (R at 929, Trial T1 , p 131)

30 Between 1992 and 1994, the values of the properties in the Red Hawk Subdivision escalated (R at 977, Trial T1 , p 323)

31 In September, 1994, as a result of the escalating land values and because of substantial improvements the Pavonis made to the property, the Pavonis sold their property for \$282,500 (R at 963, Trial T1 , pp 265-66)

32 The selling price, however, was \$2,500 below the property's appraised value (R at 963, Trial T1 , pp 265-66)

33 Nielsen never paid the Pavonis for the diminution in value of the property by the imposition of the easement. The Pavonis were also not reimbursed for the architectural plans (\$5,500), nor for their attorney's fees incurred in defending and assessing the implications of the Call lawsuit (R at 1-32 , Pl 's Trial Ex 17)

34 Despite the evidence of these damages, the trial court directed a verdict on the indemnification claim, finding no damage merely because the Pavonis sold their property for a profit over their original purchase price (R at 610-15, 1011, Trial T1 , pp 458-59)

SUMMARY OF THE ARGUMENT

The trial court erroneously directed a verdict and dismissed the Pavoni's claim that Nielsen breached the Indemnification Agreement. The trial court based its decision on its finding that because the Pavonis sold their property for a profit, they did not present any

evidence that they were damaged by Nielsen's breach of the Indemnity Agreement. However, the Pavonis introduced evidence at trial that they incurred unreimbursed attorney's fees as a result of the Call lawsuit. The evidence also demonstrated that the Pavoni's custom architectural plans were rendered useless by the Call easement and that the value of the property was diminished by the easement which resulted from the Call lawsuit. At trial, the parties disputed the effect that the Call easement had on the Pavoni's property value. The Pavonis, however, were entitled to recover at least nominal damages, in any event, based on Nielsen's breach of the Indemnification Agreement. Therefore, it was improper for the trial court to direct a verdict and prevent the jury from determining whether Nielsen breached the Indemnity Agreement, and, if so, the extent of the Pavoni's damages. The Pavonis respectfully request that this Court reverse the decision of the trial court, vacate the accompanying award of attorney's fees and remand the case for a trial on those issues as to which the trial court directed the verdict.

The trial court also granted Nielsen's motion for directed verdict and dismissed the Pavoni's claim that Nielsen breached the Earnest Money Sales Agreement. The trial court's decision was based on its conclusion that the provisions, terms and obligations contained within the Earnest Money Sales Agreement merged with the deed. The trial court erred, however, because it failed to recognize that Nielsen's promises to perform after closing are collateral to the sale of the property, do not merge with the deed, and thus, remain enforceable after delivery of the deed. The claims at issue in the instant case include, *inter alia*, Nielsen's promise to install additional gravel on the Pavonis driveway within 120 days

after closing. The express language of the Earnest Money Sales Agreement, as well as the testimony of Justin and Kimberly Pavoni, indicate that Nielsen breached this promise. Therefore, the trial court erred by not allowing the jury to weigh this evidence and determine whether Nielsen breached the Earnest Money Sales Agreement. The Pavonis are entitled to an order reversing the directed verdict and remanding the case for a trial on this issue.

ARGUMENT

I. STANDARD OF REVIEW

“Under 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 Ct. App. 1996), cert. denied, 936 P.2d 407 (Utah 1997). 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 Ct. 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)).

In the instant case, the trial court either ignored the above standard in granting Nielsen's motion for directed verdict, or the trial court completely disregarded the evidence that was introduced at trial which presented material issues of fact that required determination by the jury.

II. THE PAVONIS RAISED ISSUES OF MATERIAL FACT REGARDING NIELSEN'S BREACH OF THE INDEMNIFICATION AGREEMENT

Particularly when all of the evidence presented at trial is viewed in a light most favorable to the Pavonis, it cannot be said that Nielsen is entitled to judgment as a matter of law regarding the Pavoni's claim that Nielsen breached the Indemnification Agreement. It is not for the court to weigh the evidence which has been presented. Because the evidence raised questions of material fact, the trial court's directed verdict was improper.

The trial court directed a verdict in Nielsen's favor and dismissed the Pavoni's claims that Nielsen breached the Indemnification Agreement, because it concluded that the Pavoni's evidence did not establish that they incurred any damage arising out of the Call lawsuit. (R. at 610-15, 1008-11, Trial Tr., pp. 444-59) However, in addressing a motion for a directed verdict, the issue 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 were damaged as a result of Nielsen's breach of the Indemnification Agreement.

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)

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

Despite the broad language of the Indemnification Agreement, 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

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. 374-5) 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).

specifications for the home (R at 921-22, Trial 11 , pp 100-01) These plans were rendered useless by the Call easement and the Pavonis subsequently decided to give these topographical documents to the purchaser (R at 963-64, Trial T1 , pp 267-68)

In addition the Pavonis presented evidence indicating that the value of the property was diminished as a result of the Call easement In fact, upon direct examination, Nielsen admitted that the Pavoni's property value was reduced because of the existence of the Call easement

MR TFSCH Sure If I understand you correctly, every easement in favor of a neighbor going across a piece of property would diminish it, the value of the property it's going over, in some way or other And it would be more depending on the severity of the use of the easement?

THE WITNESS Yes I would say that if I understand your question correctly

MR TESCH Uh-huh Every piece of property does not have an easement versus it does have an easement, then you are saying that the property with an easement would have a diminution of value? That's a true statement?

THE WITNESS Yes, I would say that's correct

(R at 974 Trial T1 p 310 lines 16-21 25, p 311 lines 2-7)

MR TESCH [D]o you have an opinion as to whether or not that easement by judgment diminished the value of Lot 3?

THE WITNESS: I would say that the value of the property with that easement would be less than that property without an easement

MR. TESCH: [H]ow much would the value of the lot have been diminished, what amount of money?

THE WITNESS: It probably would have been a little bit.

(R. at 977; Trial Tr., p. 321, lines 24-25, p. 322, lines 13-15, p. 323, lines 11-13, p. 323, line 14)

...

Q Mr. Nielsen, based on all the hypotheticals we have, assuming the existence of a roadway through the Call property that you agreed to in the judgment and that it had a like use only for the Call property as it currently exists and as it existed, rather, in July 1992, how much would that have reduced the value of Lot 3? How much money?

...

THE WITNESS: I would say it would be a diminished value of possibly a couple of thousand dollars.

(R. at 981; Trial Tr., p. 336, lines 6-12, 24-25)³

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

Nielsen also conceded that, depending on the extent of the use of the easement, the existence of the easement could diminish the value of the Pavoni's property by as much as 50%. (R. at 978, Trial Tr., p. 327)

met in the middle (R at 963, Trial T1, 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 T1, 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 ⁴ Unfortunately, the trial court directed the verdict in this case and prevented the jury from resolving whether, and to what amount, the Pavonis had been damaged by the Call lawsuit and the existence of the Call easement

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 It is important to note that the indemnification agreement is not limited to attorney's fees incurred in the Call lawsuit, but is much broader, and covers attorney's fees arising from, or incurred as a result of, the Call lawsuit

In the instant case, the Pavonis introduced evidence at trial that they incurred attorney's fees and costs that constituted damages arising directly or indirectly from or 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

⁴ Below, the Pavonis' trial counsel argued that the Pavonis' damages for the diminution of their property's value should be measured at the time the Pavonis purchased the property (R at 1010, Trial T1, pp 454-55) Therefore, based on Nielsen's own admission, the Pavonis paid \$115 000 for property that was worth no more than \$113,000 Nielsen's testimony in itself, constitutes proof of damages (R at 981, Trial T1, pp 336-37)

Exhibits 35A and 35B were introduced and received into evidence (R at 551, 932, 939-40, Trial Tr pp 42 lines 6-23 169-70, 171-72, 174, lines 15-25)

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 . It is undisputed that Nielsen paid the Pavonis \$2,000 pursuant to his obligation to reimburse them for damages including attorney's fees, resulting either directly or indirectly from the Call litigation (R at 930, Trial Tr , pp 132-33) At 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 (R 930, Trial Tr , pp 132-33, Pl s Trial Ex 6)

Specifically, Mr Pavoni testified as follows

MR TESCH: Mr Pavoni, I'm handing you Exhibit No. 6 and ask you if you recognize that exhibit?

A: I do.

MR TESCH: And this is check number--this is a check from Red Hawk Ranch payable to you for the amount of \$2000 for attorney fees, is that right?

A: That is correct, sir.

Q: And attached thereto is a note from Mike Nielsen, is that correct?

A: Yes sir, it is.

Exhibits 35A & 35B consist of canceled checks made payable to the Pavoni's attorneys and invoices from the Pavoni's attorneys. The sum of the checks and invoices entered into evidence through Exhibits 35A & 35B actually equals \$5,929.56. The discrepancy between the exhibits and the trial testimony is rendered unimportant by the fact that both sums are greater than the \$2,000 that Nielsen paid to the Pavonis, and thus, constitute evidence of damages resulting from Nielsen's breach of the Indemnification Agreement.

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

A. No sir.

(R. at 930; Trial Tr., pp. 132-33.)

Accordingly, the testimony of Mr. Pavoni, together with the invoices and checks contained in Exhibits 35A and 35B, is more than sufficient evidence for a jury to conclude that the Pavonis were damaged in the amount of at least \$2,977.59 in connection with paying attorney's fees to resolve the issues that arose from the Call litigation.⁶ Evidence was admitted that showed that the Pavonis incurred attorney's fees relating directly or indirectly to the Call lawsuit that were not reimbursed by Nielsen. (R. at 930, 940-41; Trial Tr., pp. 312-33, 172-80; Pl.'s Trial Exs. 35A & 35B.) These attorney's fees constitute damages relating to Nielsen's breach of the Indemnity Agreement and, thus, render the trial court's grant of a directed verdict improper.

The trial court's error appears, in part, to be the result of its failure to distinguish between attorney's fees incurred by the Pavonis relating to the Call litigation as contrasted with the attorney's fees incurred by the Pavonis in their suit against Nielsen. Fees incurred either directly or indirectly as a result of the Call litigation should have been considered by

⁶ The record is unclear as to whether Exhibit 35 was also received into evidence. Exhibit 35 consists of a summary of the Pavoni's legal fees in the amount of \$8388.55. (Addendum at 28) Exhibit 35 specifically states that these legal fees do not include fees that the Pavonis paid to their trial attorneys. This exhibit is contained within the exhibits in the trial court's record. Moreover, Judge Brian's clerk has marked Exhibit 35 as offered and received. (R. at 551.) Nielsen's counsel objected to Exhibit 35 when it was originally introduced into evidence. (R. at 932; Trial Tr., p. 142.) The trial court did not sustain or overrule this objection, but, instead reserved this issue until additional foundation could be laid. *Id.*

the jury as damages at trial. Fees incurred in the Pavoni v. Nielsen lawsuit were properly reserved for post-trial consideration. On at least two occasions during trial, the trial court prevented the Pavoni's counsel from eliciting testimony to clarify that the attorney's fees constituted damages incurred as a result of the Call litigation, as opposed to fees incurred in the instant case. (R. at 941, 944; Trial Tr., pp. 178, 181.) The trial court mistakenly believed that any issues regarding attorney's fees should be resolved by the court after trial. Id. Therefore, the trial court directed the verdict without considering the attorney's fees incurred by the Pavonis as a result of the Call litigation. The trial court subsequently refused to consider these fees as damages at the close of the case based on the circular logic that it had already granted a directed verdict. (R. at 725-42, 865; Trial Tr., p. 29.) Either way, it was error--evidence of unpaid attorney's fees covered by the Indemnification Agreement was ignored.

The cost of the architectural plans that were rendered obsolete by the Call easement, the diminution of the property's value and the attorney's fees paid by the Pavonis to resolve issues relating to the Call litigation, all constitute damages incurred by the Pavonis "arising directly or indirectly from or out of, the [Call] lawsuit." Accordingly, the trial court erred by directing a verdict and preventing the jury from considering the Pavoni's claim that Nielsen breached the Indemnity Agreement. Therefore, the Pavonis respectfully request that this Court reverse the trial court's ruling and remand this case back to the trial court for further proceedings. Upon remand, the trial court's award of costs and attorney's fees to Nielsen should also be vacated.

III. THE TRIAL COURT'S DIRECTED VERDICT AND DISMISSAL OF THE PAVONI'S CLAIMS UNDER THE INDEMNIFICATION AGREEMENT WAS ALSO IMPROPER BECAUSE, AT A MINIMUM, THE PAVONIS INCURRED NOMINAL DAMAGES

While the Pavonis were able to quantify their damages through evidence introduced at trial, all that was required to defeat Nielsen's motion for directed verdict was to demonstrate a breach of contract, which alone supports an award of nominal damages. In Alta Health Strategies, Inc. v. CCI Mech. Serv., 930 P.2d 280, 286 (Ct. App. 1996), cert. denied, 936 P.2d 407 (Utah 1997), this Court reversed the trial court's grant of directed verdict. Like the instant case, the plaintiff's claims in Alta Health were dismissed because the trial court concluded that the plaintiff failed to introduce sufficient evidence of damages.

Id. at 286-87. In reversing the trial court, this Court recognized that:

“nominal damages are recoverable upon a breach of contract if no actual or substantial damages resulted from the breach or if the amount of damages has not been proven.” Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 670 (Utah 1982). Likewise, a party who has breached a contract will not ordinarily escape liability merely because the amount of damages is uncertain. Gould v. Mountain States Tel. & Tel. Co., 6 Utah 2d 187, 193, 309 P.2d 802, 805-06 (1957); accord Terry v. Panek, 631 P.2d 896, 897-98 (Utah 1981). Therefore, even if the amount of damages was not proven, the court still should not have granted a directed verdict on the breach of warranty and breach of contract claims.

Id. at 286.

Here, Pavoni showed that Nielsen breached the Indemnity Agreement by settling the Call litigation, granting an easement through the Pavoni's property, and failing to defend the Pavoni's interests. (R. at 979-80, 991, 993, 996-98; Trial Tr., pp. 329-30, 332-33, 379, 385-

86, 399-405) Accordingly, the trial court erred by directing a verdict in Nielsen's favor and preventing the Pavonis from presenting their claims under the Indemnification Agreement and recovering at least nominal damages

IV. THE PAVONIS RAISED ISSUES OF MATERIAL FACT REGARDING NIELSEN'S BREACH OF THE EARNEST MONEY SALES AGREEMENT WHICH WERE NOT ABROGATED OR MERGED INTO THE DEED

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

The trial court's conclusion was erroneous, however, because the Pavoni's claims of breach of contract included claims that Nielsen failed to fulfill promises contained in the Earnest Money Sales Agreement that were collateral to the contract of sale. (R. at 98-99) The trial court erroneously failed to apply the well-established exceptions to the merger doctrine. "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 Ct. App.), cert. denied, 919 P.2d 1208 (Utah 1996), accord Secor v. Knight, 716 P.2d 790, 793 (Utah 1986), Stubbs v. Hemmett, 567 P.2d 168, 169-70 (Utah 1977), Embassy Group, Inc. v. Hatch, 865 P.2d 1366, 1371-72 (Utah Ct. App. 1993)

Paragraph O of 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 ” The trial court adopted Nielsen’s argument that the exceptions to the merger doctrine were inapplicable to the Pavoni’s claims because, upon delivery of the deed, the abrogation clause precluded all claims not contained in the express warranties (R at 612, 1008, Trial T1 , pp 444-47) In Maynard v Wharton, 912 P 2d 446, 449-50 (Utah Ct App), cert. denied, 919 P 2d 1208 (Utah 1996), this Court addressed the effect of an abrogation clause with identical language as that found in this case. The Maynard court stated that “[t]he abrogation clause at issue here is typical, it provides “Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement ” Id at 450. 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 statement of the common law doctrine of merger ’ Maynard, 912 P 2d at 450. The Maynard Court then 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. Therefore, contrary to Nielsen’s argument below which the trial court adopted, the doctrine of abrogation or merger does not apply to the breaches of contract asserted by the Pavonis in this case.

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 limited to, Nielsen’s promises of future performance to make improvements to

the property. As the Utah Supreme Court stated in Stubbs v. Hemmert, 567 P 2d 168, 169-70 (Utah 1977)

[I]f the original contract calls for performance by the seller of some act collateral to conveyance of title, his obligations with respect hereto survive the deed and are not extinguished by it. Whether the terms of the contract are collateral, or are part of the obligation to convey and therefore unenforceable after delivery of the deed, depends to a great extent on the intent of the parties with respect thereto. When seller's performance is intended by the parties to take place at some time after the delivery of the deed it cannot be said that it was contemplated by the parties that delivery of the deed would constitute full performance on the part of the seller, absent some manifest intent to the contrary.

Id. (emphasis added)

"Collateral terms may take various forms." Embassy Group, Inc., 865 P 2d at 1372. For example, in Stubbs, the parties executed an earnest money and exchange agreement which provided that the seller could remove from the building "all equipment and shelving" except the "two walk-in coolers with their cooling equipment." 567 P 2d at 170. In Stubbs, it was clear from the testimony that the parties intended that plaintiff should be allowed to leave his equipment and shelving in the building until after the delivery of the deed. Accordingly, in Stubbs, the Utah Supreme Court found that the breaches complained of by the plaintiffs related to future performance by the defendant and, thus, were not extinguished by the doctrine of merger. *Id.*

In determining whether the provisions in an earnest money sales agreement are collateral to the delivery of the deed and title to the subject lot, it is necessary to look at the

parties' intent Stubbs, 567 P 2d at 169-70 "When [the] seller's performance is intended by the parties to take place at some time after the delivery of the deed it cannot be said that it was contemplated by the parties that delivery of the deed would constitute full performance on the part of the seller, absent some manifest intent to the contrary" Id. Stated another way 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" Id.

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 (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

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 Pavoni's 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.

V. BECAUSE THE TRIAL COURT ERRED IN DIRECTING THE VERDICT AND DISMISSING THE PAVONI'S CLAIMS, THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO NIELSEN WAS ALSO 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

Upon remand, the trial court's award of costs and attorney's fees to Nielsen should also be vacated.

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.

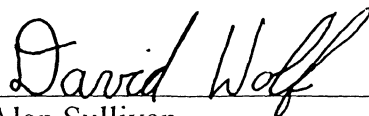
The trial court concluded that Nielsen was "the prevailing party" with respect to the dispute involving the Indemnification Agreement, based on the verdict which the court directed in his favor. Because the trial court's directing the verdict and dismissing the claims of breach of the Indemnity Agreement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

CONCLUSION

The trial court erred in directing the verdict 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 21st day of June, 1999.

SNELL & WILMER L.L.P.

A handwritten signature in cursive script, reading "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 21st day of June, 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.
ANDERSON & KARREBERG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

David Wolf