

1999

Glauser Storage, L.L.C., a Utah Limited Liability Company, dba Mountain View Storage; Steven D. Glauser, an individual; Kristine G. Lofts, an individual; Richard M. Glauser, an individual; Susan G. Larsen, an individual; Craig K. Glauser, an individual v. Dale T. Smedley, an individual; and

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Utah Court of Appeals
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Recommended Citation

Brief of Appellee, *Glauser Storage v. Smedley*, No. 990544 (Utah Court of Appeals, 1999).
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IN THE UTAH COURT OF APPEALS

<p>Glauser Storage, L.L.C., a Utah Limited Liability Company, dba Mountain View Storage; Steven D. Glauser, an individual; Kristine G. Lofts, an individual; Richard M. Glauser, an individual; Susan G. Larsen, an individual; Craig K. Glauser, an individual</p> <p>Plaintiffs/Appellees,</p> <p>-vs-</p> <p>Dale T. Smedley, an individual; and DOES I - X.</p> <p>Defendant/Appellant.</p>	<p>ARGUMENT PRIORITY 15</p> <p>Civil No. 990544 CA</p>
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BRIEF FOR APPELLEES

**APPEAL BY THE DEFENDANT FROM THE JUDGMENT, ORDER AND
DECREE ENTERED BY THE HONORABLE MICHAEL G. ALLPHIN ON
MAY 18, 1999**

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peals

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Julia D'Alesandro
Clerk of the Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.	
STATEMENT SHOWING JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
Issue I. Whether the Trial Court properly excluded Smedley’s parol evidence attempting to contradict the parties’ written 1979 Agreement (Exhibit 1) and contemporaneous Warranty Deed (Exhibit 2) after hearing the parol evidence and determining that the 1979 Agreement and Warranty Deed clearly and completely expressed the parties’ intent that the Storage Sheds conveyance was absolute?	1
Issue II. Whether the Trial Court could properly reject Smedley’s self-serving evidence of alleged substitute payments as insufficient, unreliable, inconclusive, insufficiently linked to the transactions claimed, lacking any indicia of trustworthiness, prejudicial, based on hearsay, inadmissible under Rules 403 and 601, URE, and barred by laches? 2	
Issue III. Whether the Trial Court properly rejected Smedley’s claim to an offset for Glauser’s conveyance to Bill Isley in light of its unchallenged finding that the consideration (promised release of the agricultural lease encumbering the entire property through 2007) runs with the land and therefore benefits Smedley, Glauser received no other consideration, and Smedley’s evidence was otherwise insufficient to support a finding as to the amount of acreage conveyed or the value per acre ?	4
Issue IV. Whether the Trial Court properly received evidence concerning Smedley’s bad reputation in the community for truth and veracity after he testified of alleged oral agreements contradicting the clear, unambiguous language of the 1979 Agreement and contemporaneous Warranty Deed?	5
STATUTES AND RULES	5
STATEMENT OF THE CASE	6
STATEMENT OF MATERIAL FACTS	11

SUMMARY OF THE ARGUMENT	20
ARGUMENT	22
I. The Trial Court Properly Excluded Smedley’s Parole Evidence Attempting to Contradict the Clear and Consistent Terms of the Parties’ 1979 Agreement and Contemporaneous Warranty Deed.	22
II. The Trial Court Properly Rejected Smedley’s Self-Serving Evidence of Alleged Substitute Payments as Insufficient, Unreliable, Inconclusive, Not Sufficiently Linked to the Transactions Claimed, Without any Indicia of Trustworthiness, Prejudicial, Based on Hearsay, Inadmissible under Rules 403 and 601, URE, and Barred by laches	33
A. The Trial Court was Free to Disbelieve Smedley’s Self-Serving Testimony Even if Were Uncontroverted	34
B. The Trial Court Found Smedley’s Evidence Unreliable, Untrustworthy, Prejudicial, Based on Hearsay, Inadmissible, and Barred by Laches	35
C. Smedley Fails to Challenge the Trial Court’s Conclusions that His Evidence of Substitute Payment Performances Was Inadmissible and Barred by Laches; Instead, He Merely Reargues the Same Evidence	37
D. Smedley Has Failed to Marshall the Evidence in Support of the Trial Court’s Findings	37
E. Substantial Evidence Supports the Trial Court’s Rejection of Smedley’s Self-Serving Evidence	39
F. The Trial Court Properly Held Smedley’s Evidence of Substitute Payment Performance was Barred by Laches.	42
III. The Trial Court Properly Rejected Smedley’s Claim to an Offset for Glauser’s Conveyance of a Small Portion of the Salmon Property to Bill Isley in Light of Its Unchallenged Finding That the Consideration (Isley’s Promise to Release and Agricultural Lease Encumbering the Entire Property Through 2007) Runs With the Land and Therefore Benefits Smedley Equally as Well as Glauser; Glauser Received No Other	

	Consideration, and Smedley’s Evidence Was Otherwise Insufficient to Support a Finding as to the Amount of Acreage or Value Per Acre	44
IV.	The Trial Court Properly Received Rebuttal Evidence of Smedley’s Bad Reputation for Truth and Veracity	45
V.	Smedley’s Addendum 2 Is Improper Because It is Entirely Without Foundation, Based on Inadmissible Evidence or Evidence Otherwise Rejected by the Trial Court, and Should, Therefore, Not Be Considered By This Court	47
VI.	Glausers Are Entitled to Recover Their Attorneys Fees and Costs Incurred in Connection With This Appeal	48
CONCLUSION		49

TABLE OF AUTHORITIES

Cases

<i>A.K. & R. Whipple v. Aspen Construction</i> , 977 P.2d 518 (Utah App. 1999)	3, 4
<i>Bailey-Allen Co., Inc. v. Kurzet</i> , 945 P.2d 180 (Utah App. 1997)	3, 5, 42
<i>Baker v. Taggart</i> , 628 P.2d 1283 (Utah 1981)	30, 32
<i>Barlow Society v. Commercial Security Bank</i> , 723 P.2d 398 (Utah 1986)	32
<i>Baum v. Orosco</i> , 742 P.2d 1 (N.M. App. 1987)	46
<i>Bown v. Loveland</i> , 678 P.2d 292 (Utah 1984)	23, 26, 27
<i>Buehner Block Co. v. UWC Associates</i> , 752 P.2d 892 (Utah 1988)	24
<i>Cade v. Zions First Nat. Bank</i> , 956 P.2d 1073, 1079-80 (Utah App. 1998)	24
<i>Cal Wadsworth Construction v. City of St. George</i> , 898 P.2d 1372 (Utah 1995)2, 5, 31, 46	
<i>Eie v. St. Benedict's Hospital</i> , 638 P.2d 1190 (Utah 1981)	2, 31
<i>Hall v. Process Instruments and Control</i> , 890 P.2d 1024 (Utah 1995)	2, 22, 23, 31
<i>Hansen v. Kohler</i> , 550 P.2d 186 (Utah 1976)	27
<i>Homer v. Smith</i> , 866 P.2d 622 (Utah App. 1993)	24, 34, 35
<i>Jacobson v. Jacobson</i> , 557 P.2d 156 (Utah 1976)	31, 32, 35, 42, 43
<i>Kjar v. Brimley</i> , 497 P.2d 23, 26 (Utah 1972)	25
<i>Lee v. Barnes</i> , 977 P.2d 550 (Utah App. 1999)	24
<i>Management Services Corp., v. Development Associates</i> , 617 P.2d 406 (Utah 1980) . .	48
<i>Meadowbrook, LLC v. Flower</i> , 959 P.2d 115 (Utah 1998)	48
<i>Moon v. Moon</i> , 973 P.2d 431 (Utah App. 1999)	3, 4, 38

<i>Plateau Mining Co. v. The Utah Division of State Lands and Forestry</i> , 802 P.2d 720 (Utah 1990)	43
<i>Utah State Dept. of Social Services, v. Gutierrez</i> , 753 P.2d (Utah 1988)	45, 46
<i>Ward v. Intermountain Farmers Assoc.</i> , 907 P.2d 264 (Utah 1995)	23, 30
<i>Willard Pease Oil and Gas Co. v. Pioneer Oil and Gas Co.</i> , 899 P.2d 766 (Utah 1995)	25
<i>Winegar v. Froerer Corp.</i> , 813 P.2s 104, 111 (Utah 1991)	24, 25, 26, 27, 32
<i>Young v. Young</i> , 979 P.2d 338 at 342 (Utah 1999)	2, 3, 4, 5

Statutes

Utah Code Annotated § 57-1-3	5, 31
Utah Code Annotated § 78-2a-3(j)	1, 31

Rules

Rule 403 of the Utah Rules of Evidence	5, 21, 33, 35, 37
Rule 404 of the Utah Rules of Evidence	5, 45
Rule 601 of the Utah Rules of Evidence	5, 21, 33, 34, 35, 37
Rule 607 of the Utah Rules of Evidence	45
Rule 608 of the Utah Rules of Evidence	5, 45, 46
Rule 402 of the Utah Rules of Appellate	1
Rule 52(a) of the Utah Rules of Civil Procedure	5, 7

STATEMENT SHOWING JURISDICTION

The Utah Court of Appeals has jurisdiction in the present matter pursuant to Utah Code Annotated Section 78-2a-3(j) and Rule 42 of the Utah Rules of Appellate Procedure pursuant to an order of the Utah Supreme Court issued October 13, 1999, transferring this matter to the Utah Court of Appeals for disposition.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(Including the standard for appellate review and supporting authorities)

Issue I. Whether the Trial Court properly excluded Smedley's parole evidence attempting to contradict the parties' written 1979 Agreement (Exhibit 1) and contemporaneous Warranty Deed (Exhibit 2) after hearing the parole evidence and determining that the 1979 Agreement and Warranty Deed clearly and completely expressed the parties' intent that the Storage Sheds conveyance was absolute?

This issue was first raised by Glausers pre-trial Motion in Limine dated January 12, 1999 (R. 263-277). The Trial Court heard the Motion in Limine on January 19, 1999 (R. 226-227) and granted the motion in a telephone conference held on January 22, 1999. No written order was prepared or signed. The issue arose again at trial, and after considering Smedley's parole evidence (T.137-139, 167, 235), the trial court upheld its earlier ruling barring parole evidence attempting to controvert the absolute conveyance of the Storage Sheds, as evidenced by the 1979 Agreement and Warranty Deed (T. 235-236).

Standard of Review: The issue whether evidence is admissible is a question of law, which the appellate Court reviews for correctness, incorporating a clearly erroneous

standard of review for subsidiary factual determinations. *Cal Wadsworth Construction v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995). Whether the parties have adopted a writing or writings as the final and complete expression of their bargain is a question of fact. *Eie v. St. Benedict's Hospital*, 638 P.2d 1190 at 1194 (Utah 1981). When extrinsic evidence is considered by the trial court in determining whether the agreement is integrated, the appellate court's review of the trial court's determination is limited. See e.g., *Hall v. Process Instruments and Control*, 890 P.2d 1024, 1028, FN3 (Utah 1995)(citing Utah R.Civ.P. 52(a)).

Finally, an erroneous decision to admit or exclude evidence does not constitute reversible error unless, but for the error, the outcome of the proceedings would have been different. *Cal Wadsworth Construction v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995).

Issue II. Whether the Trial Court could properly reject Smedley's self-serving evidence of alleged substitute payments as insufficient, unreliable, inconclusive, insufficiently linked to the transactions claimed, lacking any indicia of trustworthiness, prejudicial, based on hearsay, inadmissible under Rules 403 and 601, URE, and barred by laches?

Standard of Review: When challenging a trial court's findings "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Young v. Young*, 979 P.2d 338 at 342 (Utah 1999). "The marshaling process is not unlike becoming the devil's

advocate. Counsel [for the Appellant] must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous." *Moon v. Moon*, 973 P.2d 431 at 437 (Utah App. 1999). In *A.K. & R. Whipple v. Aspen Construction*, 977 P.2d 518, 524-25 this Court also stated "We will uphold the trial court's findings of fact if the party challenging the findings fails to appropriately marshal all the evidence supporting the findings." (citations omitted). In addition, "Findings of Fact will not be set aside unless they are against the clear weight of the evidence and clearly erroneous with due consideration given to the trial court to judge the credibility of witnesses." *Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180 at 187 (Utah App. 1997).

Legal conclusions are reviewed by this court for correctness. *Young*, 972 P.2d at 342.

Issue III. Whether the Trial Court properly rejected Smedley's claim to an offset for Glauser's conveyance to Bill Isley in light of its unchallenged finding that the consideration (promised release of the agricultural lease encumbering the entire property through 2007) runs with the land and therefore benefits Smedley, Glauser received no other consideration, and Smedley's evidence was

otherwise insufficient to support a finding as to the amount of acreage conveyed or the value per acre ?

Standard of Review: When challenging a trial court's findings "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Young v. Young*, 979 P.2d 338 at 342 (Utah 1999). "The marshaling process is not unlike becoming the devil's advocate. Counsel [for the Appellant] must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous. *Moon v. Moon*, 973 P.2d 431 at 437 (Utah App. 1999). In *A.K. & R. Whipple v. Aspen Construction*, 977 P.2d 518, 524-25, this Court stated "We will uphold the trial court's findings of fact if the party challenging the findings fails to appropriately marshal all the evidence supporting the findings. (citations omitted). In addition, "Findings of Fact will not be set aside unless they are against the clear weight of the evidence and clearly erroneous with due consideration given to the

trial court to judge the credibility of witnesses." *Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180 at 187 (Utah App. 1997).

Legal conclusions are reviewed by this court for correctness. *Young*, 979 P.2d at 342.

Issue IV. Whether the Trial Court properly received evidence concerning Smedley's bad reputation in the community for truth and veracity after he testified of alleged oral agreements contradicting the clear, unambiguous language of the 1979 Agreement and contemporaneous Warranty Deed?

This issue was raised in the Smedley's pre-trial Motion in Limine dated January 14, 1999 (R. 278-282), and was determined adversely to Defendant, after a hearing held on January 18, 1999 (R. 226-227). The issue was again raised at trial by Defendant and, once again, determined adversely to Defendant. (T. 271-273, 276-277).

Standard of Review: The issue of whether evidence is admissible is a question of law, which the appellate Court reviews for correctness, incorporating a clearly erroneous standard of review for subsidiary factual determination. However, an erroneous decision to admit or exclude evidence does not constitute reversible error unless, but for the error, the outcome of the proceedings would have been different. *Cal Wadsworth v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995).

STATUTES AND RULES

Rules, 403, 404, 601, 607, 608, Utah Rules of Evidence ("URE"), Rule 52(a), Utah Rules of Civil Procedure; U.C.A. § 57-1-3, U.C.A. § 78-2a-3(j).

STATEMENT OF THE CASE

In late 1978, Melvin Glauser ("Glauser"),¹ and Defendant/Appellant ("Smedley") entered into negotiations whereby the Glauser Construction Co., Inc. ("Glauser Construction") would convey to Smedley approximately 32 acres of building lots known as Melanie Acres in exchange for 86 storage sheds located in Davis County, Utah. Glauser and Smedley consummated the transaction on or about January 29, 1979, by executing a written agreement (the "1979 Agreement") (Exhibit 1) and exchanging Warranty Deeds to the respective properties. Smedley and his wife² executed a Warranty Deed to real property containing the 86 storage sheds in favor of Glauser Construction (hereinafter referred to as the "Storage Sheds") (Exhibit 2); and Glauser and his wife executed a Warranty Deed to Melanie Acres (Exhibit 32) in favor of Smedley and his wife. In addition to the conveyance of the Storage Sheds, the 1979 Agreement required that Smedley manage the Davis County Storage Sheds for the Glausers' benefit for the duration of their lives and to keep the units rented and fully maintained.³ In addition,

¹The individual Plaintiffs/Appellees are the children, heirs, and successors of Melvin and Kathleen Glauser and Glauser Construction. They are hereinafter referred to as the Glausers or Glauser Children. The Glauser Children are all members of Glauser Storage, which is also a successor in interest to Glauser Construction Co., Inc., and Melvin and Kathy Glauser.

²Smedley's wife Helen, and his sons Scott and Terry, together with their wives, have executed disclaimers of any interest in the respective properties at issue in this litigation (*See* Exhibit 23); and, accordingly, they were dismissed out of the law suit prior to trial.

³Smedley or various members of his family already owned and operated a large number of storage sheds adjacent to those conveyed to the Glausers.(T.137).

Smedley agreed to pay Glausers the following: (1) \$2,000.00 per month⁴ to the Glausers for the remainder of their individual lives; (2) \$6,000 per year for at least thirteen (13) years to the Glausers for vacation expenses; (3) payment of all maintenance, upkeep, and costs necessary for the payment of any and all repairs, taxes, insurance premiums, and any other costs incidental to the management of the Storage Sheds. To guarantee and secure payment of these monetary obligations, Smedley agreed to establish an escrow account in the amount of \$300,000.00. (Exhibit 1).

After entering into the 1979 Agreement, Glausers discovered there was a mortgage encumbering the Davis County Storage Sheds. Furthermore, Smedley failed to ever fund the \$300,000.00 escrow required by the 1979 Agreement. (T.144, 147).

The parties verbally agreed that Smedley would provide Glauser with other security to replace the escrow. Consequently, on or about December 4, 1979, Smedley gave the Glausers an unrecorded mortgage of 274 acres of property located in Salmon, Idaho (the "Salmon Property"), to replace the escrow account Smedley had failed to set up in breach of their 1979 Agreement. Smedley agreed to pay the taxes on the Salmon Property. (Exhibit 28). Unbeknown to Glauser, in March 1980, Smedley recorded a Warranty Deed in favor of the Glausers to approximately 211 acres of Salmon Property. (Exhibit 5).

⁴The parties acknowledged in the 1979 Agreement that the present rental income exceeded \$2,000 per month and that the additional amounts would be used to pay the maintenance and upkeep, with Smedley entitled to keep the balance of any monies collected over and above his obligations.

Over the next 14 years, Smedley breached many of his obligations to Glauser under the 1979 Agreement. Among other things, Smedley failed (1) to pay property taxes owed on the Storage Sheds, (2) to pay the \$6,000.00 annual vacation money for four years, (3) to pay property taxes on the Salmon Property, and (4) to obtain and pay for needed maintenance and roof repairs on the Storage Sheds and property. (T. 17, 40-41, 144).

In the summer of 1994, Melvin and Kathy Glauser died, and the Glauser Children took over the control and management of the Storage Sheds from the Smedleys in the fall of that year. In November 1995, Smedley recorded Notices of Interest against the Storage Sheds and the Salmon Property. (T. 169-170).

In June of 1996, the Glauser Children brought this action to clear title to the Storage Sheds and Salmon Property and to recover a money judgment against Smedley for his breaches of the 1979 Agreement. (R. 1-35). Smedley filed a counterclaim seeking reconveyance of the Storage Sheds and Salmon Property and alleging that work performed in 1988 and other property transfers cured his breaches of the 1979 Agreement. (R. 80-91).

The Glauser Children filed a pre-trial Motion in Limine to exclude Smedley's parol testimony controverting the 1979 Agreement and contemporaneous Warranty Deed conveying the Storage Sheds. (R. 263-277). The Trial Court granted the motion on January 22, 1999. At trial, the Court allowed Smedley and his son to testify as to their understanding of the Storage Sheds transaction. After hearing the Smedleys' parol

testimony of contrary intent, the Court upheld its earlier decision to exclude the parol evidence. (T. 137-139, 167 and 235-236).

Smedley also filed a pre-trial Motion in Limine seeking to prevent the Plaintiffs from presenting rebuttal evidence concerning Smedley's bad reputation in the community for truth and veracity. The Court denied Smedley's motion and allowed Plaintiffs to present rebuttal character evidence during trial. (T. 268-277).

A bench trial was held on January 28, 1999. At the trial's conclusion, the Court held:

(1) that the 1979 Agreement and contemporaneous Warranty Deed of the Storage Sheds were clear and unambiguous as to the parties intent that Smedley transfer fee title absolute to Glauser;

(2) that the Glauser Children were entitled to a decree quieting title to the Storage Sheds property in them as Glauser's successors;

(3) that the Glausers fulfilled all of their obligations under the 1979 Agreement by conveying Melanie Acres to Smedley;

(4) that Smedley breached his obligations under the 1979 Agreement by failing to pay property taxes on the Storage Sheds, failing to annually fund \$6,000 for Glausers' vacation and travel during a four year period, failing to pay property taxes on the Salmon Property, and failing to obtain and pay for necessary maintenance and upkeep on the Storage Sheds;

(5) that the Glauser Children were entitled to judgment against Smedley in the amount of \$71,701.24, together with prejudgment interest in the amount of \$41,154.67, post judgment interest, and attorneys fees apportioned to the 1979 Agreement in the amount of \$20,000.00;

(6) that Smedley's evidence of alleged substitute performances in satisfaction of his defaults was insufficient, unreliable, inconclusive, not sufficiently linked to the transactions claimed, without any indicia of trustworthiness, inadmissible under Rules 403 and 601, URE, and barred by laches;

(7) that Smedley's claim to an offset for Glauser's conveyance of between 3 and 24 acres to Bill Isley should be denied because the consideration (Isley's promise to release an agricultural lease encumbering the entire property through 2007) runs with the land and benefits Smedley, Glauser received no other consideration, and Smedley's evidence was otherwise insufficient to support a finding as to the amount of acreage conveyed or the value per acre (the evidence ranged from \$130 to \$1,800 per acre) to be attributed to the property conveyed;

(8) that the Salmon Property was substituted in place of the \$300,000.00 escrow as security for Smedley's obligations under the 1979 Agreement, and that the Glauser's judgment constitutes a lien against that property which can be foreclosed. (R. 412-440 (Findings of Fact and Conclusions of Law)).

Smedley then filed this appeal.

STATEMENT OF MATERIAL FACTS

This case involves a 1979 exchange of land transaction between Melvin and Kathy Glauser, (who both died in 1994, approximately two years before this action was commenced) and Dale Smedley, with whom Glauser had business dealings since moving from Logan to Davis County around 1954. Their business dealings primarily involved construction, development, and land deals. (T.33). In late 1978, Glauser and Smedley entered into negotiations whereby the Glauser Construction Company would convey to Smedley approximately 32 acres of building lots known as Melanie Acres in exchange for 86 Storage Sheds located in Layton, Utah, which Smedley agreed to manage (since the Smedley family already owned storage sheds contiguous to those at issue here (T.137)) for Glauser for as long as Glauser and his wife lived. The negotiations took place over the course of several weeks or even months before it was finalized. (T.32). Glauser discussed the transaction with his son Steve, who was working for Glauser Construction at the time.⁵ (T.31-32).

Glauser and Smedley consummated the transaction on or about January 29, 1979, by executing the 1979 Agreement (Exhibit 1) and exchanging Warranty Deeds (Exhibits 2 and 32) to the respective properties. Smedley and his wife executed a Warranty Deed to the real property containing the Storage Sheds in favor of Glauser Construction

⁵In discussions with his father, Steve Glauser expressed concern about rents escalating, and he wanted an escalation clause in favor of Glauser to cover that eventuality. (T.33-34) He also stated that agreement should not provide for any reversion of the Storage Sheds to Smedley.(T49-50). Glauser also told his son Steve that upon his death the Storage Sheds would "revert to the children or whoever he wanted."

(hereinafter referred to as the "Storage Sheds") (Exhibit 2); and Glauser and his wife executed a Warranty Deed to Melanie Acres (Exhibit 32) in favor of Smedley and his wife.

The 1979 Agreement provides at paragraph 3.a: "Smedley will convey all rights, title and interest in the 'Smedley Property'[Storage Sheds]." This is the same language used in paragraph 1. by which Glauser agreed to convey to Smedley "all of his right, title and interest" in the "Glauser Property [Melanie Acres]." Neither the 1979 Agreement nor the Warranty Deeds contain any language of defeasance or reversion in connection with the Storage Sheds whatsoever.

In addition to the conveyance of the Storage Sheds, the 1979 Agreement required that Smedley manage the Davis County Storage Sheds for the Glausers' benefit for the duration of their lives and to keep the units rented and fully maintained. The Smedley family already owned and operated other storage sheds contiguous to those conveyed to the Glausers.(T.137) In addition, the 1979 Agreement obligated Smedley to perform and pay the following: (1) \$2,000.00 per month⁶ from rents to the Glausers for the remainder of their individual lives; (2) \$6,000 per year for at least thirteen (13) years to the Glausers for vacation expenses; (3) payment of all maintenance, upkeep, and costs necessary for the payment of any and all repairs, taxes, insurance premiums, and any other costs incidental

⁶The parties acknowledged in the 1979 Agreement that the rental income exceeded \$2,000 per month and that the additional amounts would be used to pay the maintenance and upkeep, with Smedley entitled to keep the balance of any monies collected over and above his obligations. (Exhibit 1)

to the management of the property. Smedley agreed to establish an escrow account in the amount of \$300,000.00 in order to guarantee and secure payment of these financial obligations and in connection with his management of the Storage Sheds. (T. 50, 115 and 136-137).

Smedley was in breach of the 1979 Agreement from the beginning. Smedley failed to fund the \$300,000.00 escrow required by the 1979 Agreement. (T. 113, 137, 144 and 146). In place of the escrow, Glauser required Smedley to provide him with other security. Consequently, on or about December 4, 1979, Smedley gave the Glausers an unrecorded mortgage of 274 acres (See Exhibit 3)⁷ of property located in Salmon, Idaho (the "Salmon Property"), in lieu of the escrow account.(T. 140, 145, 147). Smedley agreed to pay the property taxes on the Salmon Property but fell into arrears almost immediately. (T. 145; Exhibit 28). Unbeknown to Glauser, in March 1980, Smedley recorded a Warranty Deed in favor of the Glausers to approximately 211 acres of the Salmon Property (Exhibit 5). Smedley then sold to third parties the acreage representing the difference. (T.195-205; Exhibit 18).

Over the next 14 years, Smedley breached many of his obligations to Glauser under the 1979 Agreement. Among other things, Smedley failed:

(1) to pay property taxes owed on the Storage Sheds in the amount of \$20,703.38 (Exhibit 27) (T. 124-125);

⁷The Glausers later recorded the Mortgage in 1993 (Exhibit 4, Exhibit 18 Tab A).

(2) to pay the \$6,000.00 annual vacation and travel money, beginning in 1984 and continuing for a period of four (4) years for a total of \$24,000.00 (T. 160);

(3) to pay property taxes on the Salmon Property in the amount of \$8,960.86 (Exhibit 28); and

(4) to obtain and pay for needed maintenance and roof repairs in the amount of \$16,000.00 and asphalt repairs in the amount of 2,037.00 at the Storage Sheds. (T. 17, 40-41, 122-124, 144; Exhibit 26).

Glauser kept meticulous records of his business dealings and transactions and maintained a file on the 1979 Agreement and Storage Sheds. (T.42, 47-48, 105). Glauser took notes concerning his dealings with Smedley because Smedley did not keep notes or records, and Glauser had to refresh Smedley's memory concerning their dealings on many occasions. (T.47-48). Smedley testified at trial that he has entered into real estate transactions going into the millions (T.179), but acknowledged that he is not a detail man, that his family takes care of the details (T.191).

In April of 1994 Glauser moved to a condominium in Pleasant View, Utah, shortly before he died after battling cancer for several years. At the time of his move, having retired some five to seven years earlier, he took most of his files and paperwork to the dump. (T.42).

Melvin and Kathy Glauser both passed away during the Summer of 1994. Two years before their deaths, Glauser and his wife met with estate attorney William Critchlow who prepared various trusts, wills, and related documents for the Glausers. In their

meetings with Critchlow, the Glausers indicated they were very unhappy with Smedley because he had not paid them the money they were supposed to receive under the 1979 Agreement. (T.14-15, 17, 26, 28-29) Critchlow recalled that Glauser was emphatic that he had no liabilities and was debt free. (T.17)

Critchlow also testified that the Glausers considered the Storage Sheds theirs, and that it was their desire that the Storage Sheds go to their children upon their (Glausers') deaths. (T.11, 15, 17, 25; Exhibit 6) Glauser supplied Critchlow with a list of his assets to be passed on to his children through their trust upon death. (T.11, 25; Exhibit 6) Critchlow's testimony is consistent with that of Glauser's son, Richard, who asked his father before he died, "What is going to happen to [the Storage Sheds] when you die?"

Glauser responded, "That's up to you kids. You kids fight over it." (T.108)

Following Melvin and Kathy Glausers' deaths in 1994, Steve Glauser sent Smedley a notice of the Glauser family's intent to take over the control and management of the Storage Sheds from the Smedleys. (Exhibit 13) In response, Smedley sent Exhibit 14 proposing to turn over the Storage Sheds "simultaneous with [Smedley's] receiveing back from [Glausers] deeds to all of the land in Salmon, Idahodeeded – to Mel and Kathy Glauser – as extra security in place of the \$300,000 savings account described in the Smedley/Glauser contract." Smedley held back on turning over the Storage Sheds and made demands that the Glausers provide him with accountings of taxes paid, and work Smedley had performed for Glauser in 1988, and property conveyed to Bill Isley. (*See* Exhibits 14, 15, 17)

In the fall of 1994, the Glausers took over the control and management of the Storage Sheds. However, in November 1995, Smedley recorded Notices of Interest against the Storage Sheds and the Salmon Property. The parties were unable to work out their differences (*See, e.g.* Exhibit 17, 42) concerning ownership of the Storage Sheds and Salmon Property.

In June of 1996, the Glauser Children brought this action to quiet title to both the Storage Sheds and Salmon Property and to recover money damages against Smedley for his breaches of the 1979 Agreement. (R. 1-35). Smedley filed a counterclaim seeking reconveyance of the Storage Sheds and Salmon Property and alleging that work performed in 1988 and various property transfers over the years cured his breaches of the 1979 Agreement.

The Glauser Children filed a pre-trial Motion in Limine to exclude Smedley's parol testimony controverting the 1979 Agreement and contemporaneous Warranty Deed conveying the Storage Sheds. (R. 263-277). The Trial Court granted the motion on January 22, 1999.⁸ At trial, however, the Trial Court allowed Smedley and his son to testify as to their understanding of the Storage Sheds transaction. After hearing the Smedleys' parol testimony of contrary intent, the Court upheld its earlier decision to exclude the parol evidence. (T. 137-139, 167 and 235-236).

Smedley also filed a pre-trial Motion in Limine seeking to prevent the Plaintiffs from presenting rebuttal evidence concerning Smedley's bad reputation in the community

⁸No written order was ever presented to the Court for signature.

for truth and veracity. The Trial Court denied Smedley's motion and allowed Plaintiffs to present rebuttal character evidence during trial. (T. 268-277).

A bench trial was held on January 28, 1999. At its conclusion, the Trial Court held:

(1) That the 1979 Agreement and contemporaneous Warranty Deed of the Storage Sheds were clear and unambiguous as to the parties intent that Smedley transfer fee title absolute to Glauser Construction. There was nothing in the 1979 Agreement or Warranty Deed from Smedley to Glauser Construction upon which Smedley could base his claims. There are no other written documents evidencing a reversionary right in Smedley, nor any obligation on the part of Glausers or the other Plaintiffs to reconvey the Glausers Storage Sheds to Smedley or anyone else. (Exhibit "1" and Exhibit "2") ;

(2) That the Glauser Children were entitled to a decree quieting title to the Storage Sheds property in them as Glauser's successors;

(3) That the Glausers fulfilled all of their obligations under the 1979 Agreement by conveying Melanie Acres to Smedley;

(4) That Smedley breached his obligations under the 1979 Agreement by failing to pay property taxes on the Storage Sheds, failing to annually fund \$6,000 for Glausers' vacation and travel during a four year period, failing to pay property taxes on the Salmon Property, and failing to obtain and pay for necessary maintenance and upkeep on the Storage Sheds;

(5) That the Glauser Children were entitled to judgment against Smedley in the amount of \$71,701.24, together with prejudgment interest in the amount of \$41,154.67,

post judgment interest, and attorneys fees apportioned to the 1979 Agreement in the amount of \$20,000.00. Paragraph 4 of the 1979 Agreement provides for the recovery of attorneys fees and costs for any party who successfully enforces its terms. (Exhibit 1);

(6) That Smedley's evidence of alleged substitute performances in satisfaction of his defaults was insufficient, unreliable, inconclusive, not sufficiently linked to the transactions claimed, without any indicia of trustworthiness, inadmissible under Rules 403 and 601, URE, and barred by laches. Smedley claims an April 1982 conveyance to Glauser of two lots, each less than an acre, located in Smedley Estates Subdivision in Salmon, Idaho (Exhibits 19-20) was orally agreed upon by Glauser as repayment for property taxes paid by Glauser on the Salmon Property after Smedley failed to pay them. However, it was not until June 1984 that Glauser even began paying the Salmon Property taxes. (Exhibit 28). Smedley further claims he transferred a Cottonwood unit number three lot to Glausers and was not reimbursed by them for it. Smedley claims this property was transferred in consideration for some of his pending obligations in this transaction. However, the trial court ruled that the evidence presented was insufficient and unreliable in support of these claims. There was no evidence except Smedley's testimony of oral agreements during Melvin Glausers' lifetime which supported Smedley's claims. Moreover, the evidence presented showed that Melvin Glauser and Dale Smedley had ongoing business relationships for many, many years, (T. 33), and there was no way to link these particular transactions, but for the oral agreement that Smedley now claims. (R. 427).

The Trial Court also found a problem concerning the proof of value for these property transfers Smedley claims as an offset for taxes paid by Glauser. It found the evidence unreliable and inconclusive concerning what, if any, value would be ascribed to the parcels. (R. 425, T. 73-74).

Smedley claimed he performed \$56,482.00 worth of work for Glausers in Heritage Acres and in Lakeview Garden Estates in or about 1988 to offset his delinquencies and defaults on the 1979 Agreement for the previous four (4) years. The Trial Court found Smedley's testimony of work performed pursuant to an alleged oral agreement to satisfy his obligations, delinquencies, and defaults inadmissible under URE 403 and 601 because it was based on hearsay, was unfairly prejudicial, and lacked any indicia of trustworthiness. (R. 427-428).

The Trial Court found the oral agreement that Smedley testified to regarding the transfer of the Cottonwood unit three lot was inadmissible, as well, for the same reasons. (*Id.*)

The Trial Court also rejected as inadmissible Smedley's Exhibit 38, a photocopy of a ledger for numerous reasons, including hearsay and laches. (R424-426 Findings of Fact 50-51; 437-438, Conclusions of Law 19, 23). The 1988 work Defendant Smedley alleged as satisfaction of his defaults and delinquencies was performed six years prior to Mr. and Mrs. Glausers's passing away and should be barred by laches due to his unreasonable delay and lack of diligence in failing to make any assertion or to memorialize the same with Glausers while they were still alive. (R. 429);

(7) That Smedley's claim to an offset for Glauser's conveyance of between 3 and 24 acres to Bill Isley should be denied because the consideration (Isley's promise to release an agricultural lease encumbering the entire property through 2007) runs with the land and benefits Smedley, Glauser received no other consideration, and Smedley's evidence was otherwise insufficient to support a finding as to the amount of acreage conveyed or the value per acre (the evidence ranged from \$130 to \$1,800 per acre) to be attributed to the property conveyed;

(8) That the Salmon Property was substituted in place of the \$300,000.00 escrow as security (an equitable mortgage) for Smedley's obligations under the 1979 Agreement, and that the Glausers' judgment constitutes a lien against that property which can be foreclosed.⁹(See R.411-441)

SUMMARY OF THE ARGUMENT

The Trial Court properly excluded Smedley's parole evidence attempting to contradict the clear, consistent, and unambiguous terms of the parties' 1979 Agreement and contemporaneous Warranty Deed evidencing the parties' intent that the Storage Sheds

⁹Smedley appeals only the Trial Court's parole evidence ruling and conclusion that the Storage Sheds conveyance was absolute; the Trial Court's rejection of his alleged substitute payment performances and offset for the conveyance to Bill Isley; and the admission of rebuttal character evidence of his bad reputation for truth and veracity in the community. Smedley does not challenge either the Trial Court's rulings on inadmissibility of his evidence (except the parole testimony) or barring the same based on laches; nor does he challenge the amount of the damages or the evidence going to Smedley's defaults (most of which was stipulated), or the award of attorneys fees. Glausers have not appealed that portion of the judgment that the Salmon Property constitutes security for Smedley's obligations under the 1979 Agreement.

transfer was an absolute conveyance of fee title. There is no evidence to the contrary, except for Smedley's testimony of an alleged oral agreement contradicting the plain terms of the documentary evidence.

The Trial Court properly rejected Smedley's self-serving evidence of alleged substitute payments as insufficient, unreliable, inconclusive, not sufficiently linked to the transactions claimed, without any indicia of trustworthiness, prejudicial, based on hearsay, inadmissible under Rules 403 and 601, URE, and barred by laches. The Trial Court was free to disbelieve Smedley's self-serving testimony even if it were uncontroverted. Smedley fails to challenge the Trial Court's conclusions that his evidence of substitute payment performances was inadmissible and barred by laches; instead, he merely reargues the same evidence. Smedley has also failed to marshal the evidence in support of the Trial Court's findings. Substantial evidence in the record supports the Trial Court's rejection of Smedley's self-serving testimony.

The Trial Court properly rejected Smedley's claim to an offset for Glauser's conveyance of a portion of the Salmon Property to Bill Isley in light of its unchallenged finding that the consideration (Isley's promise to release the Agricultural Lease encumbering the entire Salmon Property through the year 2007) runs with the land and, therefore, benefits Smedley who is the equitable owner of the land. Glauser received no other consideration, and Smedley's evidence was otherwise insufficient to support a finding as to the amount of acreage or value per acre.

The Trial Court properly received rebuttal evidence of Smedley's bad reputation for truth and veracity, after Smedley testified of alleged oral agreements contradicting the clear, consistent, and unambiguous terms of the operative documents, which testimony placed his character for truthfulness directly in issue.

Smedley's addendum 2 is improper because it is entirely without foundation, based on inadmissible evidence or evidence otherwise rejected by the Trial Court, and should, therefore, not be considered by this Court.

Finally, Glausers are entitled to recover their attorneys fees and costs incurred in connection with this appeal, pursuant to paragraph 4 of the 1979 Agreement. The Trial Court's award of attorneys fees is unchallenged on appeal.

ARGUMENT

I. The Trial Court Properly Excluded Smedley's Parole Evidence Attempting to Contradict the Clear and Consistent Terms of the Parties' 1979 Agreement and Contemporaneous Warranty Deed.

Smedley wrongly asserts that the Trial Court erred in excluding his parole evidence that the conveyance of the Storage Sheds to Glauser was only in the nature of a security interest. The operative documents overwhelmingly support the Trial Court's ruling excluding Smedley's self-serving testimony.

The parole evidence rule "operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract." *Hall v. Process Instruments and Control, Inc.*, 890 P.2d 1024, 1026 (Utah

1995).¹⁰ Before considering the applicability of the parole evidence rule, the trial court should first make a preliminary determination whether the parties intended the written agreement to be an integration.¹¹ *Id.* at 1026-1027 (Utah 1995). To resolve this question of fact, any relevant evidence is admissible. *Id.* However, the trial court need only conduct a "preliminary consideration" of the parole evidence offered to prove the parties' intentions. *Ward v. Intermountain Farmers Assoc.*, 907 P.2d 264, 268 (Utah 1995). If the parole evidence is not reasonably supported by the language of the contract, then the parole evidence should be disregarded and the parties' intentions determined solely from the language of the contract:

If after considering such evidence the court determines that the interpretations contended for are reasonably supported by the language of the contract, then extrinsic evidence is admissible to clarify the ambiguous terms. [citations omitted]. Conversely, if after considering such evidence, the court determines that the language of the contract is not ambiguous, then the parties' intentions must be determined solely from the language of the contract. *Id.*

¹⁰Smedley makes no claim of mutual mistake, fraud or inequitable conduct on the part of the Glausers in his attempt to reform the 1979 Agreement and contemporaneous Warranty Deed of the Storage Sheds. *See Bown v. Loveland*, 678 P.2d 292, 295 (Utah 1984) ("To reform a written warranty deed or any written instrument, the plaintiff must show mutual mistake of the parties or mistake on the part of one and fraud or inequitable conduct on the part of the other, as a result of which the instrument reflects something neither party had intended or agreed to.").

¹¹In defining an integrated contract the Supreme Court has stated that semantics are not important. What is significant is whether or not there is a "final and complete expression of their bargain." *See e.g., Hall* 890 P.2d at 1027 (Utah 1995).

Similarly, in *Homer v. Smith*, 866 P.2d 622, 629 (Utah App. 1993), this Court stated:

If contract terms are clear and unambiguous, we normally interpret them according to their plain and ordinary meaning without resorting to extrinsic evidence.

Accordingly, the parol evidence rule requires a determination whether the 1979 Agreement and Warranty Deed are clear and unambiguous (integrated) concerning the nature of the conveyance to Glauser. Smedley, in essence, is claiming that an alleged oral agreement contradicts the 1979 Agreement and contemporaneous Warranty Deed absolute terms and therefore renders them ambiguous. (Appellant's Brief at 14-19) However, that two parties claim different meanings does not mean a contract is ambiguous:

Contract terms are not necessarily ambiguous simply because one party seeks to endow them with a different meaning than that relied upon by the drafter. *Buehner Block Co. v. UWC Associates*, 752 P.2d 892 at 895 (Utah 1988).

This Court has further clarified what is required for ambiguity to exist:

To be ambiguous a contract must evidence emit two viable and reasonable interpretations: However, "a contract provision is not necessarily ambiguous just because one party gives that provision a different meaning than another party does. To demonstrate ambiguity, the contrary positions of the parties must each be tenable." *Cade v. Zions First Nat. Bank*, 956 P.2d 1073, 1079-80 (Utah App. 1998).

Courts must first examine the documents themselves to determine the intent of the parties before turning to extrinsic evidence. *Winegar v. Froerer Corp.*, 813 P.2s 104, 111 (Utah 1991); *see also Lee v. Barnes*, 977 P.2d 550 at 552 (Utah App. 1999). When

determining the meaning of written instruments, traditional rules of contract construction apply. *Id.* at 108. "It is a basic rule that intent of the parties is to be determined from the writing[s themselves]..." *Willard Pease Oil and Gas Co. v. Pioneer Oil and Gas Co.*, 899 P.2d 766, 770 (Utah 1995). "If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement." *Winegar*, 813 P.2d at 108 (citations omitted). "A court may only consider extrinsic evidence if, after careful consideration, the contract language is ambiguous or uncertain." *Id.* (citation omitted). "Whether an ambiguity exists in a contract is a question of law" for the Judge. *Id.* (citation omitted). A contract provision is ambiguous when it is "susceptible to more than one reasonable interpretation due to uncertain meaning of the terms, missing terms, or other facial deficiencies." *Willard Pease Oil*, 899 P.2d at 770.

Based upon the Court's examination of the Warranty Deed and collateral 1979 Agreement, there are three (3) possible results that can occur:

1. If the contemporaneous collateral writing (1979 Agreement) contains language of reversion or defeasance (e.g., that the lender will reconvey the property to the borrower when the debt is paid), then the question of whether the parties intended to establish a debtor-creditor relationship is a question of fact, and parol evidence is admissible to determine whether the deed and the agreement should be construed as a mortgage. See e.g., *Kjar v. Brimley*, 497 P.2d 23, 26 (Utah 1972);

2. If the language of the collateral writing (1979 Agreement) contains no reversion or defeasance language, but is ambiguous concerning whether the transaction is intended as an absolute conveyance or a security, then parol evidence is admissible to help establish intent. *Winegar*, 813 P.2d at 111; and

3. If the collateral writing (1979 Agreement) contains no reversion or defeasance language and unambiguously expresses that the transfer is a conveyance of all the grantor's interest in the property, then the intention of the parties must be determined from the words of the collateral written agreement and the court should find as a matter of law that the conveyance was absolute. *Id.* At 108, 111.

This case clearly falls within the third category. The Glausers presented overwhelming documentary evidence that Smedley's conveyance of the storage sheds to Glauser Construction was absolute. Not only is the Warranty Deed absolute on its face, but the parties' 1979 Agreement states unequivocally: "Smedley will convey [to Glauser] all rights, title and interest in the 'Smedley Property'[Storage Sheds] set forth in Exhibit 'A.'" This is the same language used in paragraph 1. by which Glauser agreed to convey to Smedley "all of his right, title and interest" in Melanie Acres.

There is no language whatsoever suggesting the Storage Sheds were security for monetary obligations or evidencing any right of reversion or defeasance in either the 1979 Agreement or in the Warranty Deed given to Glauser.¹² Smedley testified that he read the

¹²Because the language of the 1979 Agreement and Warranty Deed are clear, concise, and unambiguous concerning the absolute nature of the Storage Sheds conveyance, Smedley's reliance on the eight (8) factor test in *Bown v. Loveland*, 678 P.2d

1979 Agreement many times before signing it (T.140), and that he clearly understood the difference between a mortgage or security interest and an absolute conveyance (T.181-182). Indeed, the [January 29]1979 Agreement's entirely separate provision in one paragraph for a \$300,000.00 escrow as "security" for his additional management and related monetary obligations, while separately obligating him in a different paragraph to convey "all rights, title and interest" to the Storage Sheds in another, belies the very nature of Smedley's argument.

Smedley's handwritten note (Exhibit 33), dated December 6, 1979, which speaks in terms of granting Glauser a mortgage on the Salmon Property while acknowledging that Glauser "owned" the Storage Sheds, further exposes Smedley's disingenuous argument:

December 6, 1979

Melvin Glauser has been given a Mtg on approx 274 acres at Salmon Idaho till \$300000.00 is put in Savings account in the name of Dale T. Smedley to guarantee \$2000 per month Return on storage sheds owned by Melvin D. Glauser.

Also Mtg on storage shed of approx \$105000 must be paid off before mtg on Salmon property can be released.

Dale T Smedley (*Id.*)

292, 297 (Utah 1984); (*See* Appellants Brief at 16-19), is misplaced. Those factors have only been applied in cases involving either (1) a deed with no collateral written agreement, *see, e.g. Bown, supra*, or (2) a deed together with a collateral agreement found to be ambiguous, *see, e.g. Winegar v. Froerer Corp.*, 813 P.2d 104, 110-111 (Utah 1991); *Hansen v. Kohler*, 550 P.2d 186 (Utah 1976). Application of the *Bown* factors in cases such as this, wherein the collateral written agreement clearly and unambiguously provides for an absolute conveyance consistent with the contemporaneous Warranty Deed, would mean the Parol Evidence Rule could never be applied to bar oral testimony offered to contradict the documents.

The documentary evidence provides altogether no support for Smedley's allegation that the Storage Sheds were to revert back to him or that Glauser merely bargained for the Storage Sheds to secure a \$2,000.00 per month income stream from rents for life, together with an annual vacation fund of \$6,000.00. If the Storage Sheds were conveyed for security purposes, as Smedley contends, the 1979 Agreement could have so stated. Moreover, it would have been unnecessary to provide, as the 1979 Agreement did, for "security" in the form a \$300,000.00 escrow to guarantee and secure performance and payment of the monetary obligations.

Nowhere in the 1979 Agreement does it state that the escrow was "additional" security. Instead, the escrow was the security -- for the additional management and monetary considerations required of Smedley. That the Storage Sheds were an absolute conveyance of fee title is the only consistent reading of the 1979 Agreement, the contemporaneous Warranty Deed, and other documents.

The Glauser children as well as Melvin Glauser's estate attorney, William Critchlow, testified, consistent with the documents, that Glausers treated the Storage Sheds as an absolute fee simple conveyance. They testified that not only was the property to be inherited by the children (T. 17, 34 & 108), but that Melvin and Kathy Glauser were upset that Smedley had failed to abide by his obligations under the 1979 Agreement (T. 17). This testimony is consistent with and supports the terms of 1979 Agreement and Warranty Deed, proving that the Glausers always considered the conveyance an absolute and outright transfer.

In contrast, Smedley's only evidence of a contrary intent consisted of his own self-serving testimony. However, contrary to Smedley's argument on appeal, the Trial Court did, in fact, hear Smedley's parol evidence attempting to contradict the 1979 Agreement and Warranty Deed: (T.137-139 & 167):

Q[.By Mr. Davis] As you talked about this issue, when the – who was supposed to be the ultimate recipient of the storage sheds at the end of the obligations being performed?

A[.] "Smedleys."

Mr. Taylor: I'm going to object.

The Witness: It was a lifetime agreement.

The Court: Mr. Taylor?

Mr. Taylor: I'm going to object on the grounds of the Court's prior ruling.

The Court: Sustained.

Mr. Davis: Your honor, Mr. Taylor has taken – made that type of question throughout the entire proceeding up to this point of at least three of the witnesses.

The Court: Mr. Taylor?

Mr. Taylor: Parol Evidence only bars evidence which would contradict, vary or modify the terms of the written agreement and the witnesses that [I] inquired of gave testimony supporting that agreement.

Mr. Davis: Parol Evidence Rule is not a rule of evidence. It's a contract law – substantive contract law and it goes to the fact whether the contract can be changed. Does not go to the fact as to whether evidence can be taken from a witness. The court has a right to listen to this and especially in light of the fact Mr. Taylor opened the door, I think the court should listen to this testimony and then if the court wants to stand by its prior decision and not modify that contract, that's up to the court.

The Court: Well, Mr. Taylor, given the fact you have opened the door, I will reserve ruling on the objection and allow you to go ahead counsel. (emphasis added).

Mr. Davis: Thank you.

Q[.] Mr. Smedley, I'm sorry. We kind of stepped on your answer. What was discussed between you and Mr. Glauser as to the ultimate disposition of the storage sheds?

A[.] ...It was supposed to be back to Smedleys'....

A[.] They [the storage sheds] would be back to us [Smedleys'].

Upon the conclusion of Smedley's testimony and subsequent testimony by his son, Terry, the trial court upheld its prior ruling that Smedley's parol evidence was inadmissible. (T. 235-236). Thus, the Trial Court did, in fact, conduct a "preliminary consideration" (See e.g., *Ward* 907 P.2d at 268 (citations omitted)) of the parol testimony before determining it was inadmissible. No other testimony or documents tending to establish a contrary intent were offered and refused. No proffers were made. Thus, the Trial saw or heard all evidence sought to be introduced, even if it ultimately ruled some inadmissible.

The trial Court's actions are consistent with the Utah Supreme Court's decisions in *Ward*, 907 P.2d 264 at 268, and *Baker v. Taggart*, 628 P.2d 1283, 1284 (Utah 1981) (claim that deed was a mortgage failed). In its Findings of Fact and Conclusions of Law, the Trial Court ruled that "the 1979 Agreement (Plaintiffs' Exhibit 1) is clear on its face and unambiguous in its terms relating to the parties' intent that Defendant Smedley transfer fee title absolute to the Davis County Storage Sheds to Glauser Construction in exchange for the Glausers' conveyance of fee title to the Melanie Acres Property. The Warranty Deed from the Smedleys to Glauser Construction further evidences the intent that the conveyance of the Davis County Storage Sheds Property to Glauser Construction was an outright conveyance of fee title absolute." (R. 416-417, 431; Exhibits "1" "2" and "33").

Implicit in the Trial Court's findings is a determination that the 1979 Agreement coupled with the Warranty Deed was a final and complete expression of the parties' intent -- an integration. Because Smedley and his son were allowed to testify concerning their

alleged understanding of the parties' intent before the Trial Court's final decision to exclude the parole evidence, its determination is factual and subject to a higher standard of deference than that given a trial court's legal conclusions. *See e.g., Eie v. St. Benedict's Hospital*, 638 P.2d 1190 at 1194 (Utah 1981); *Hall v. Process Instruments and Control*, 890 P.2d 1024, 1028 & FN3 (Utah 1995). Accordingly, the District Court properly excluded Smedley's parole evidence of any alleged oral understandings or verbal agreements construing the 1979 Agreement and Warranty Deed to Glausers as a mortgage and this Court should uphold that determination.

Finally, even if the Trial Court wrongly excluded Smedley's parole evidence, under any analysis, it is harmless error because the "likelihood of a different outcome [is not] sufficiently high to undermine confidence in the verdict.'" *Cal Wadsworth Const. v. City of St. George*, 898 P.2d at 1378-79 (Utah 1995)(citation omitted). Smedley's excluded evidence is part of the record, and even if it were deemed admissible, it falls short of overcoming Smedley's heavy burden.

When a party asserts that a deed is a mortgage because of a parole agreement, he must overcome the presumption that fee title is conveyed by the deed. Utah Code Ann. § 57-1-3. Accordingly, "certain basic rules which give support to the solidarity of deeds create obstacles to [Smedley's] contention." *Jacobson v. Jacobson*, 557 P.2d 156 at 158 (Utah 1976). As stated, the first rule is that a Warranty Deed is "presumed to convey the entire fee simple title." *Id.*

Smedley's second hurdle in attacking the Warranty Deed's conveyance of fee title is his "burden of proving otherwise by clear and convincing evidence." *Id.* The burden of "clinching" in the Court's mind, of leaving no "reasonable doubt" as to the nature of the conveyance, rested squarely on Smedley. To rebut this presumption, "the party claiming that a warranty deed was a mortgage must show by **clear and convincing evidence** that the conveyance was actually intended as a mortgage." *Winegar* 813 P.2d 104, 110 (citations omitted) (emphasis added). "In the absence of such clear and convincing evidence, the presumption is that the instrument of conveyance is what it purports to be. The reason for this presumption is clear: to enhance the security of the title to real property." *Baker v. Taggart*, 628 P.2d 1283, 1284 (Utah 1981) (claim that deed was a mortgage failed) (citations omitted).

In sum, the strength alone of the documentary evidence compels the conclusion that the conveyance was absolute. Moreover, the duplicitous nature of Smedley's claim,¹³ his clear understanding of the difference between an outright conveyance and a security interest, his having read and understood the 1979 Agreement many times prior to signing it¹⁴, his being in a position all along to protect himself, his long delay (15 years) in

¹³See *Jacobson v. Jacobson*, 557 P.2d 156, 158 (Utah 1976) ("[T]he trial court was not compelled to believe the testimony given in their own self interest; particularly so when it showed duplicity.")(claim that warranty deed was really an equitable mortgage failed).

¹⁴In *Barlow Society v. Commercial Security Bank*, 723 P.2d 398, 401 (Utah 1986), the Utah Supreme Court held, "Absent fraud, duress, mistake, or the like attributable to the grantee, a competent grantor will not be permitted to attack or impeach his own deed."

asserting his claim while being in a position to protect himself, and the prejudice resulting from Melvin Glauser's intervening death, require much more convincing evidence than Smedley's own self-interested statements or those of his children. (T. 139, 167 and 235-236)

The Glauser Children, on the other hand, need not offer any rationale or theory justifying the absolute conveyance to Glauser Construction twenty (20) years earlier. The Warranty Deed and 1979 Agreement speak for themselves and are the best evidence of the parties' intent. Accordingly, the Glausers respectfully ask this Court to uphold the Trial Court's Findings and Conclusions regarding the Storage Sheds because the conveyancing terms of the 1979 Agreement and contemporaneous Warranty Deed (Exhibits 1 and 2) are clear, internally consistent, and do not lend themselves to possible second meanings, definitions, or interpretations.

II. The Trial Court Properly Rejected Smedley's Self-Serving Evidence of Alleged Substitute Payments as Insufficient, Unreliable, Inconclusive, Not Sufficiently Linked to the Transactions Claimed, Without any Indicia of Trustworthiness, Prejudicial, Based on Hearsay, Inadmissible under Rules 403 and 601, URE, and Barred by laches

Smedley presented evidence, mostly in the form of self-serving testimony, that certain transfers of lots and some subdivision improvement work in 1988 cured his defaults and satisfied his delinquent obligations under the 1979 Agreement. (R.427, Finding of Fact 45). However, the Trial Court rejected Smedley's self-serving evidence as insufficient, unreliable, inconclusive, not sufficiently linked to the transactions claimed (his defaults), lacking any indicia of trustworthiness, inadmissible under Rules 403 and

601, URE, and because it was based on hearsay, and barred by laches. (R.427-429, 436-438).

On appeal, Smedley wrongly asserts that his evidence was uncontroverted and that the Trial Court erroneously disregarded it. Even though Melvin Glauser is no longer alive to tell his side of the story, the Glausers strongly disagree with Smedley's assertion that his evidence was uncontroverted. See Section II.E., below. Moreover, even assuming, *arguendo*, that Smedley's self-serving testimony was uncontroverted, the Trial Court was not required to believe or accept that evidence. *Homer v. Smith*, 866 P.2d 622, 627 (Utah App. 1993).

A. The Trial Court was Free to Disbelieve Smedley's Self-Serving Testimony Even if Were Uncontroverted

In *Homer*, this Court upheld a Trial Court's rejection of uncontroverted evidence in a prescriptive easement case involving a similar situation:

When acting as the fact-finder, the **trial court is entitled to assess the witnesses and to weigh the evidence** and draw reasonable inferences therefrom.[citations omitted].

. . . .

[The Smiths'] testimony was uncontroverted because the Dewey's were no long alive at the time of trial. In its written findings, however, the trial court stated that the **Smiths' testimony concerning the Deweys was "self-serving and not believable** in view of [the Smiths'] conduct, demeanor and substantive testimony during trial."

. . . . Clearly, the fact-finder is in the best position to judge the credibility of witnesses and is **free to disbelieve their testimony** [citations omitted]. The trial court did just that here, and we give due regard to the court's opportunity to judge the credibility of the witnesses.[emphasis added]

Id.; see also, *Jacobson v. Jacobson*, 557 P.2d 156 at 158 (Utah 1976)("the trial court was not compelled to believe the testimony given in [a party's own] self-interest").

B. The Trial Court Found Smedley's Evidence Unreliable, Untrustworthy, Prejudicial, Based on Hearsay, Inadmissible, and Barred by Laches

Similar to *Homer* and *Jacobson*, the Trial Court was not compelled to believe Smedley's testimony. It held Smedley's evidence concerning the transfer of lots in satisfaction of his defaults was "insufficient and unreliable in support of [his] claims."

(R.427, Finding of Fact 46). The Trial Court appropriately observed,

There is no evidence except Smedley's testimony of oral agreements during Mel Glauser's lifetime; Mel Glauser and Smedley had ongoing business relationships for many, many years, and there is no way to link these particular transactions, but for the oral agreement that Smedley now claims." (*Id.*)

Moreover, concerning Smedley's valuation of the lots, the Court found Smedley's evidence "unreliable and inconclusive. (R.427, Finding of Fact 47).

These flaws could reflect the Trial Court's assessment of Smedley's credibility and demeanor; or simply denote the court was unpersuaded by Smedley's inconsistent and self-serving presentation. Smedley's evidence of work on Heritage Acres and Lakeview Garden Estates allegedly in satisfaction of his defaults was similarly defective:

Smedley's testimony of work performed pursuant to an alleged oral agreement to satisfy his obligations, delinquencies, and defaults [is] inadmissible under Rules 403 and 601 of the Utah Rules of Evidence because **it is based on hearsay, the probative value of the evidence is outweighed by the danger of unfair prejudice, and the evidence lacks any indicia of trustworthiness.** That evidence is being offered to allegedly

satisfy obligations, delinquencies, and defaults pursuant to an inadmissible oral agreement. (R.437-38, Conclusion of Law 19) [emphasis added]

In addition to his inadmissible oral testimony, Smedley's documentary evidence was fatally defective as well:

In connection with Defendant's Exhibit 38, which is a photocopy of a ledger kept by Mr. Glauser, the Court finds that Mr. Glauser did not total this. It appears that at some point in time perhaps April 15 of 1988, the parties were reviewing their business transaction. Mr. Glauser may have brought this to Mr. Smedley, but there is no way for the Court to determine whether that was the final resolution as it pertained to the development of those lots. It appears from the Court's original exhibit that it was after the fact, it could be Mr. Smedley's, but it appears not to be Mr. Glauser's. It was done in pencil, and the Court has no reason to believe that perhaps there weren't other transactions. There are payments to Mr. Smedley, several on this ledger, but the court has no way to know whether or not there were further payments being made. **Accordingly, the Court finds inadmissible the alleged oral agreement and the evidence that Mr. Smedley is presenting to the court in connection with Defendant's Exhibit 38.** (R.428-29, 438, Finding of Fact 50, Conclusion of Law 21).

Finally, the Trial Court properly determined that Smedley's assertion of an oral agreement that work performed in 1988 satisfied his defaults is barred by laches due to his long delay in making these assertions coupled with the unfair prejudice to the Glausers in attempting to refute his allegations:

[T]he 1988 work Defendant Smedley alleges as satisfaction of his defaults and delinquencies was performed six years prior to Mr. And Mrs. Glauser's passing away, and the Court finds that Smedley's claims of work performed allegedly to satisfy his defaults and obligations should be **barred by laches due to his unreasonable delay and lack of diligence in failing to make any assertions or to memorialize the same with Glauser while he was alive, and the unfair prejudice to Plaintiffs as a result of Smedley's waiting until after the Glausers' deaths to make this assertion.** (R.429, 438, Finding of Fact 51, Conclusion of Law 22)

C. Smedley Fails to Challenge the Trial Court's Conclusions that His Evidence of Substitute Payment Performances Was Inadmissible and Barred by Laches; Instead, He Merely Reargues the Same Evidence

As demonstrated in the previous section, the Trial Court ruled that Smedley's evidence of substitute payment performances was inadmissible because it was grounded on an alleged oral agreement based on hearsay, prejudicial, and lacked any indicia of trustworthiness. That evidence was also barred by laches due to Smedley's long delay in asserting his claims and the resulting prejudice to the Glausers in attempting to respond to contentions only their deceased father could adequately address. (R.427-429 Findings of Fact 45-51; 437-438 Conclusions of Law 17-22). Smedley's brief nowhere challenges the Trial Court's rulings of inadmissibility under Rules 403 and 601, URE, or the hearsay rule; nor does he challenge the Trial Court's ruling barring evidence of substitute payment performance related to Heritage Acres and Lakeview Garden Estates in 1988 under the doctrine of laches.

Instead, Smedley inappropriately reargues his same evidence on appeal. However, because the Trial Court found Smedley's evidence inadmissible or rejected it for other reasons, his efforts to reargue the same evidence must be rejected once again.

D. Smedley Has Failed to Marshall the Evidence in Support of the Trial Court's Findings

Cursory review of Smedley's brief reveals he has entirely failed to meet his obligation to marshal the evidence¹⁵ in support of the Trial Court's findings. (*Appellant's*

¹⁵See Issue II, Standard of Review, *supra*.

Brief at Section II, pp. 19-22). Instead, he simply reargues his evidence, most of which the Trial Court ruled was either inadmissible or unreliable, and contends both that it wasn't directly controverted and that the Trial Court was obligated to accept it. Both contentions are wrong.

As shown in Section E, below, there was ample evidence that indirectly contradicted the oral agreements Smedley alleges satisfied his defaulted obligations under the 1979 Agreement. And, as already demonstrated in Section II.A., above, the Trial Court was not obligated to believe or accept Smedley's self-serving testimony of oral agreements. However, even in the absence of those defects, Smedley failed to marshal the evidence supporting the Trial Court's findings, and this Court should, therefore, uphold the Trial Court's findings:

When an appellant fails to meet the "heavy burden" of marshaling the evidence (citation omitted) we "'assume[] that the record supports the findings of the trial court,'" (citation omitted). **Here Mr. Moon simply reargued his own evidence. Accordingly, because Mr. Moon has failed to marshal the evidence supporting the trial court's findings and then to show that the findings are unsupported, we affirm the trial court's construction of the ambiguous alimony provisions of the divorce decree.** (Emphasis added). *Moon v. Moon*, 973 P.2d 431 at 437 (Utah App. 1999).

Smedley simply reargues his same facts. He cannot idly assert that Glausers presented no contradictory evidence, which thus eliminated his duty to marshal. The Court's findings rejected his evidence as either inadmissible, unreliable, or barred by laches. Evidence supporting those findings is what Smedley was required to marshal. Alternatively, if there is no duty to marshal, it is only because Smedley has not adequately challenged

those findings on appeal. Figuratively speaking, Smedley's appeal attempts to focus the issues on the color of the bricks, when the Trial Court bulldozed the foundation of his building.

E. Substantial Evidence Supports the Trial Court's Rejection of Smedley's Self-Serving Evidence

This section treats the substantial evidence in the Record to support the Trial Court's findings, which rejected Smedley's self-serving testimony of substitute payment performances for various reasons enumerated above. Even setting aside the fact that Smedley's testimony throughout the record is directly contradicted by the clear and unambiguous terms of the operative documents, there are many other credibility factors bearing on the believability of his testimony.

Smedley's history throughout the 15 years covered by the transactions at issue reveals a disregard for meeting his obligations. From the beginning, Smedley was in default under the 1979 Agreement, and his defaults and breaches continued until Glauser died. (Exhibit 1; T.140, 144). Indeed, William Critchlow testified that the Glausers were very unhappy with Smedley in 1992 (well after Smedley's alleged substitute performances) because he had not paid his obligations under the 1979 Agreement owed them money. (T.14-15, 17, 21, 26, 28) .

Steve Glauser testified that Smedley had failed to live up to other obligations (T.40) to the Glausers, which Smedley never disputed. For example, Smedley had supposedly transferred to Glauser seven improved lots in Layton, which the family

learned after the Glausers' deaths consisted of three unimproved lots having no ingress or egress. (T.40-41).

Lots 8 and 10 in Smedley Estates in Salmon, Idaho which Smedley conveyed to Glauser, allegedly in satisfaction of property taxes Melvin Glauser had paid on the 211 acres of Salmon Property, turned out to be "worthless" because they could not be developed due to their inadequate size and location by the stream; they could not have a well or septic tank, nor would the city issue a building permit for them. (T.76, 80-82; Exhibits 19-20). There was no way to combine lots 8 and 10 in order to create a lot that could be developed, without purchasing lot 9 which separated them. (Exhibit 20). Even then, the properties were too close to the stream to allow development.

Steve Glauser also testified, without rebuttal from Smedley, that there were always invoices that came from Smedley to his father, that Melvin Glauser kept detailed notes and records and always had to refresh Smedley's memory concerning their transactions. (T.48). He further testified he thought his "dad had paid [Smedley] everything [on Lakeview Gardens] and everything was complete or cleaned up on that." (T.42).

Smedley admitted his accountings for Heritage Square (Exhibit 36) and Lakeview Gardens (Exhibit 37) were prepared after the fact, were not dated, and were not signed by any of the parties. He admitted to having no invoices on those projects. (T.176-177).

Smedley testified that he understood the various kinds of deeds (quit claim, special, and warranty), real estate contracts, lien notices, and mortgages (T.181-182); that his real estate transactions over the years go into the millions, with most of them

involving oral agreements (T.179-180). Smedley acknowledged that he is not a detail man (T.186, 191), but now is claiming to remember the particulars of his oral agreements with Melvin Glauser 20 years earlier. Smedley asserted that he did not understand the need to protect his alleged reversionary interest in the storage sheds by recording it until this lawsuit (T.182-183), but understood that he could have placed such a clause in the deed or required a return deed placed in escrow had he felt it necessary. (T.184-186).

The evidence showed Smedley gave Glauser an unrecorded mortgage on the 274 acre Salmon Property (Exhibit 3) in December 1979, then covertly recorded a warranty deed to a 211 acre smaller parcel in March 1980 (Exhibit 5), then sold off the property comprising the difference to third parties. (T.195-205 & Exhibit 18). Later, his own demand letters accused Glauser of disposing of this very property which Smedley had sold. (See Exhibits 17 & 15 at p.2) .

These facts, individually and collectively, together with many other inconsistencies and inadequacies in Smedley's evidence, could serve as a basis for the Trial Court's findings rejecting Smedley's evidence. Smedley's self-serving testimony of oral agreements concerning substitute payment performance are unsubstantiated and uncorroborated. As the Trial Court observed, he produced no written documentation or other "indicia of trustworthiness" that could either substantiate his oral agreement claims or tie the substitute performances to the 1979 Agreement or his defaults thereunder. (R.426-428, 437-438).

"Trial courts are accorded great discretion in determining factual matters. They are in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole...'[T]he factfinder is free to weigh the conflicting evidence presented and to draw its own conclusions'" (emphasis added). *Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180 at [9] (Utah App. 1997). Accordingly, this Court should affirm the Trial Courts findings rejecting Smedley's evidence for the reasons set forth above.

F. The Trial Court Properly Held Smedley's Evidence of Substitute Payment Performance was Barred by Laches.

Smedley's evidence of substitute payment performance was properly excluded under the doctrine of laches on at least two fronts: First, there is no question that Smedley waited at least six (6) years, and in any event, until after Melvin Glauser's death to assert his claim that Smedley allegedly performed work to satisfy his defaults and obligation under the 1979 Agreement. (See Exhibits 14, 15, & 17; T.188-192;172-174) This delay was unreasonable and the lack of diligence in failing to make any assertion or to at least memorialize the same with Melvin Glauser while he was still alive, and the resulting unfair prejudice to the Glausers as a result of Smedley's waiting until after Melvin Glauser's death clearly invokes the doctrine of laches. *See e.g., Jacobson v. Jacobson*, 557 P.2d 156 (Utah 1976) (eight years delay in bringing suit; laches applied due to delay and disadvantage resulting from death before trial of father (one of the grantees) – who was still alive at the time of suit).

The *Jacobson* court further stated:

[A] court of equity is reluctant to reward a party who has been dilatory in seeking his remedy. As is sometimes said, equity aids the vigilant. The requirement that laches must involve a delay; and also that because of the delay there has resulted some disadvantage to the other party is met here. **In addition to the delay of eight years in bring this suit, circumstances have intervened so that the delay has indeed placed the defendants at a substantial disadvantage. The father, Clyde A. Jacobson originally a defendant herein, has now passed away, so his testimony as to his version of the transaction is no longer available.** It is also shown that the property has greatly increased in value; and that a portion of it has been conveyed to a third party. (emphasis added).

Similarly, Smedley waited until after the deaths of Melvin and Kathy Glauser in 1994 to assert any of his claims raised in this action. (Exhibits 14, 15, & 17). That is a delay of fifteen (15) years to assert any claim of right to the Storage Sheds under the 1979 Agreement, and a delay of at six (6) years after Smedley's alleged substitute payment performance. Glauser had retired some five to seven years prior to his death and had taken most of his records to the dump when he moved from the family home only months before he passed away. Smedley's delay left the Glauser family at an extreme disadvantage in attempting to refute his specious claims.

Laches bars a claim or asserted right "when there has been a delay by one party causing a disadvantage to the other party." *Plateau Mining Co. v. The Utah Division of State Lands and Forestry*, 802 P.2d 720 at 731(Utah 1990). The Trial Court properly barred Smedley's self-serving evidence claiming work in 1988 at Heritage Acres and Lakeview Gardens constituted substitute payment performance for his monetary defaults under the 1979 Agreement. That determination is unchallenged on appeal.

III. The Trial Court Properly Rejected Smedley's Claim to an Offset for Glauser's Conveyance of a Small Portion of the Salmon Property to Bill Isley in Light of Its Unchallenged Finding That the Consideration (Isley's Promise to Release and Agricultural Lease Encumbering the Entire Property Through 2007) Runs With the Land and Therefore Benefits Smedley Equally as Well as Glauser; Glauser Received No Other Consideration, and Smedley's Evidence Was Otherwise Insufficient to Support a Finding as to the Amount of Acreage or Value Per Acre

Bill Isley testified at trial that in consideration of the property Glauser conveyed to him at Salmon, he promised to release his lessee's interest in an agricultural lease (Exhibit 31) encumbering the entire Salmon Property through the year 2007. (T. 85-86). Sometime earlier, a number of property owners had tried, unsuccessfully, through litigation, to break the lease. And it was undisputed that the recorded lease made the property unmarketable. Isley had purchased the lease from the original lessee and owned the right to farm the ground or to sublease.

The Trial Court ruled that Isley's promise to release his interest in the agricultural lease runs with the land and therefore benefits Smedley, owner of equitable title to the Salmon Property. (R.438, Conclusion of Law 23; 424-426, Findings of Fact 36-41). The Trial Court also found that the Glausers received no other consideration for the transfer. (R.425, Finding of Fact 39). Those findings and conclusions are unchallenged by Smedley on appeal. Accordingly, since Smedley received the full benefit of the consideration for the transfer, his claim for an offset was properly denied.

Moreover, his claim for an offset was properly denied for yet another reason. The Trial Court found that the evidence was insufficient to support a finding as to the amount

of property conveyed to Isley or the value per acre attributable to the property. The evidence was in dispute concerning the acreage actually transferred to Isley (R. 424-425 and T. 69, 84-85,), and the value per acre ranged from \$130 to \$1800 per acre. (R. 424-425 & T. 74-75, 243-244, 262-263).

When acting as the fact finder, a trial court must be given considerable deference in its assessment and analysis of the witnesses and testimony presented at trial. *See e.g., Bailey-Allen Co., v. Kurzet*, 945 P.2d 180 at 186 (Utah App. 1997). Since the Trial Court was unable to find any indicia of reliability or persuasiveness in Smedley's evidence, this Court should defer to its findings in regards to that evidence.

IV. The Trial Court Properly Received Rebuttal Evidence of Smedley's Bad Reputation for Truth and Veracity

Rules 404, 607, and 608, URE, allow evidence of a person's character or a trait of character to be admitted as evidence during trial. Rule 608, URE, states:

(a) Opinion and Reputation Evidence of Character. **The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation**, but subject to these limitations: (1) **the evidence may refer only to character for truthfulness or untruthfulness**, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. (emphasis added).

The Utah Supreme Court in *Utah State Dept. of Social Services, v. Gutierrez*, 753 P.2d 501 at 505 (Utah 1988) held: **"Utah Rule of Evidence 608(a) permits evidence of untruthfulness to be admitted to attack a witness's credibility."** (emphasis added).

Concerning general non-specific reputation evidence, the Court further noted: "We agree

. . . that **character evidence is admissible in a civil case where character is in issue.**"

Gutierrez at 505 id.(emphasis added). See also *Baum v. Orosco*, 742 P.2d 1 (N.M. App. 1987) (Cited by the Appellant).

At trial, Smedley testified concerning various alleged oral agreements that contradict the clear and unambiguous terms of the documentary evidence. That put his character for truth and veracity directly in issue. Glausers then presented two character witness on rebuttal: John Scott Carter, Layton City Community Development Director (T.268-273), and Beverly Olson, a real estate agent in Davis County for over 20 years (T.273-276). After foundation for their testimony was established, each testified that Smedley's reputation for truth and veracity in and about the community was bad. Each of the character witnesses stayed within the parameters of URE 608 in that they did not testify concerning specific untruthful statements or acts of dishonesty on the part of Smedley (T. at 268-276), although Smedley was certainly free on cross examination to test their knowledge and recollection of specific instances of conduct, but declined.

Glausers submit that even if the Trial Court's admission of character evidence were improper, the error was harmless in that there was sufficient evidence before the Court, other than the specific character evidence, to support the Trial Court's findings rejecting Smedley's testimony for the many reasons enumerated above. (*See, e.g.* Sections II.E. and II.F.). Thus, "the likelihood of a different outcome [is not] sufficiently high" without consideration of the character evidence, to justify reversal. *Cal Wadsworth Construction v. St. George*, 898 P.2d 1372, 1378-79 (Utah 1995).

V. Smedley's Addendum 2 Is Improper Because It is Entirely Without Foundation, Based on Inadmissible Evidence or Evidence Otherwise Rejected by the Trial Court, and Should, Therefore, Not Be Considered By This Court

Smedley's Addendum "2" was never received into evidence by the trial court, is entirely without foundation, based on evidence that is inadmissible or otherwise rejected by the Trial Court, and, therefore, should not be considered by the Court. (*See generally* the Trial Court's Index and Supplemental Index). The Addendum wrongly includes the Salmon Property (The Trial Court determined Glausers merely possessed an equitable mortgage rather than fee title) on the Glausers' side of the ledger, while excluding from Smedley's the income retained by the Smedleys from managing the Storage Sheds. Furthermore, it fails to account for the amounts Glausers paid for taxes on the Storage Sheds, Salmon Property, and for repairs and maintenance, which were Smedley's obligations, and for which the Trial Court awarded damages. Finally, the most glaring defect is the Addendum's failure to account for the time value of money or factor in the appreciation or growth over time of Melanie Acres. What would the same 32 acres of developed property be worth today, as opposed the value Smedley ascribes to the property twenty years ago? Smedley offered no competent evidence of values. Consequently, Addendum 2 is incomplete, at best, and entirely without foundation; therefore, it should be rejected without consideration by this Court.

VI. Glausers Are Entitled to Recover Their Attorneys Fees and Costs Incurred in Connection With This Appeal

Glausers are entitled to an award of attorneys fees and costs incurred on this appeal. Paragraph 4 of the 1979 Agreement (Exhibit 1) clearly states:

In the event of default of either party that the party not in default shall be entitled to reasonable court costs and attorney's fees incurred in the enforcement of this agreement, whether or not suit is commenced.

The Trial Court quieted title in the Glausers to the Storage Sheds conveyed pursuant to the 1979 Agreement and awarded them damages for Smedley's breaches thereof. Accordingly, it awarded the Glausers their attorney's fees apportioned to those claims relating to, or arising out of, the 1979 Agreement in the amount of \$20,000.00. (R. 429-430). Smedley never contested the award of attorneys fees at trial, nor does he challenge the award on appeal. Smedley's contentions on appeal all go to issues involving the 1979 Agreement. Glausers have not cross-appealed any issues found against them at trial. Accordingly, if the Glausers are successful on appeal, this Court should award the Glausers all attorneys fees and costs incurred herein:

The majority of jurisdictions have recognized that the contractual obligation to pay attorney's fees incurred in enforcing a contract should include those incurred on appeal....The parties here agreed to pay reasonable attorney's fees if it became necessary to enforce the contract. If plaintiff is required to defend its position on appeal at its own expense plaintiff's rights under the contract are thereby diminished. We therefore adopt the rule of law that a provision of payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial..." (emphasis added). *Management Services Corp., v. Development Associates*, 617 P.2d 406 (Utah 1980). See Also; *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah 1998).

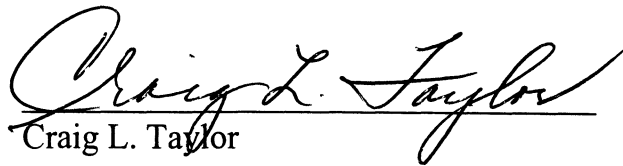
The Glausers prevailed at trial, and they were awarded their attorneys fees and costs, which award has not been challenged on appeal. Based on the foregoing, if successful on appeal, the Glausers respectfully request an award of their attorneys fees and costs incurred in connection with this appeal.

CONCLUSION

Based upon the foregoing, Plaintiffs/Appellees (Glausers) respectfully request this Court to affirm the "Findings of Fact and Conclusions of Law" (R.412-440) and the "Judgment, Order, and Decree" (R.442-450) entered by the Trial Court in their entirety, together with an award of the Glausers' attorneys fees and costs incurred in connection with this appeal.

Respectfully submitted this 17th day of February, 1999.

CRAIG L. TAYLOR P.C.

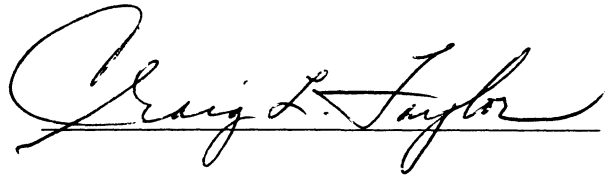
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Craig L. Taylor
Roger W. Griffin
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered a true and correct copy of
BRIEF OF APPELLEE on the 7th day of February, 2000, to the following:

CALLISTER, NEBEKER & McCULLOUGH
% T. Richard Davis
Attorneys for Defendant/Appellant
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, Utah 84133

A handwritten signature in cursive script, reading "Craig L. Taylor", is written over a horizontal line.

ADDENDUM

1. **1979 Agreement (Exhibit 1)**
2. **Warranty Deed (Exhibit 2)**
3. **Statutes & Rules:**

Statutes

Utah Code Annotated § 57-1-3	7
Utah Code Annotated § 78-2a-3(j)	2

Rules

Rule 403 of the Utah Rules of Evidence	7
Rule 404 of the Utah Rules of Evidence	7
Rule 601 of the Utah Rules of Evidence	7
Rule 607 of the Utah Rules of Evidence	7
Rule 608 of the Utah Rules of Evidence	7
Rule 52(a) of the Utah Rules of Civil Procedure	7

Addendum 1
(1979 Agreement)

A G R E E M E N T

THIS AGREEMENT, entered into this 29th day of January, 1979,
by and between DALE T. SMEDLEY, hereinafter called "Smedley",
and GLAUSER CONSTRUCTION COMPANY, INC., hereinafter called
"Glauser",

W I T N E S S E T H:

WHEREAS, Glauser owns certain real property located in
the North Half of the Southeast Quarter of Section 14, Township
4 North, Range 2 West, Salt Lake Meridian, as set forth in
Exhibit "A" attached hereto, and

WHEREAS, said property is subject to certain liens and
encumbrances of record, and

WHEREAS, Smedley is the owner of certain real property
and improvements thereon consisting of eighty-six (86) storage
units, which property is described more particularly by Exhibit
"A" attached hereto, and

WHEREAS, Smedley desires to acquire the Glauser property
described above and proposes to exchange, as partial payment
thereof, the Smedley property set forth in Exhibit "A", and

WHEREAS, in addition to exchange of real property between
the parties, Smedley is required to provide additional con-
sideration to Glauser,

NOW, THEREFORE, it is agreed between the parties as fol-
lows:

1. Exchange, Description. Glauser agrees to convey
to Smedley all of his right, title and interest to that real
property described as "Glauser Property" and set forth in
Exhibit "A" attached hereof, said Exhibit being made a part
of this agreement as if fully set forth at this time.

2. Inspection. Smedley acknowledges having heretofore

Addendum "1"

examined the Glauser property and the recorded chain of title as reflected by the records of the Davis County Recorder's office; and Smedley does hereby accept said property in its present condition subject to all liens, mortgages, easements, and/or encumbrances of any kind which are either a matter of record or subject to visible inspection on the premises.

3. Payment. For and in consideration of the conveyance set forth in Paragraph 1 above, Smedley agrees to pay to Glauser the following:

a. Smedley will convey all rights, title and interest in the "Smedley Property" set forth in Exhibit "A" attached hereto, subject to the right and obligation of Smedley to manage said rental units affixed to the realty. Smedley agrees to keep said units rented and fully maintained for the benefit of Glauser and agrees to pay to Glauser each month the sum of Two thousand dollars (\$2,000.00), said payments to be made beginning the month of February, 1979, and to continue thereafter in accordance with the terms of this agreement. Said payments shall be made on or before the last day of each month. It is acknowledged between the parties that the present rental income on the storage units exceeds the sum of \$2,000.00 per month. Said additional rental income shall be used by Smedley to provide the maintenance, upkeep, and costs necessary for the payment of any and all repairs, taxes, insurance premiums, and any other costs incidental to the management of the real property. Smedley agrees to assume full responsibility for any expenses incidental to the maintenance and upkeep of the premises and agrees to indemnify and hold Glauser harmless therefrom. In the event and at such time as said rental units may increase in rental value, it is then agreed between the

parties that any additional revenue realized from said rental shall be split between the parties on a proportional basis which the increased rental value has to the present rental value as of the date of this agreement.

Smedley's obligations for maintenance and the management of the properties as set forth above shall continue so long as Mel Glauser or his wife, Kathy Glauser, shall live; following the death of the survivor of either of them, Smedley's obligation on said property as set forth in this agreement shall cease.

b. Smedley further agrees to establish a credit line at Beehive Travel, or some other travel agency as agreed to between the parties in writing, in an amount of Six Thousand Dollars (\$6,000.00). Said amount or line of credit shall be payable to the order of Mel Glauser and/or Kathy Glauser to pay for any and all costs and expenses incurred by Glausers for travel/recreation or incidental expenses incurred therein up to said amount. It is agreed between the parties that said line of credit shall be used exclusively for the purpose of travel and/or recreation by Glausers, or any person which they may designate, and said benefit may be accumulated from one year to the next at the discretion of Glausers; however, said line or account of credit shall have no cash surrender value of any kind whatsoever.

It is agreed between the parties that this account shall continue for a period of at least thirteen (13) years until credit has been made for the year of February 1991, and said account shall continue in existence so long thereafter as either Mel Glauser or his wife may live.

To guarantee the funding on this account, Smedley

agrees to pay in escrow with First National Bank of Layton securities in an amount of at least Three hundred thousand dollars (\$300,000.00), which sum may be payable to said travel and recreation account in annual increments as described hereinabove in the event Smedley fails to annually fund said line of credit. Said escrow may also be used to guarantee and pay that Two thousand dollars (\$2,000.00) per month obligation set forth in Paragraph 3a. above in the event or upon the condition that rental income from the properties fails to produce sufficient revenue to meet that obligation. Said security shall not be removed from said bank without written authorization of Glauser, and Smedley agrees to furnish to Glauser annually verification of said securities on deposit with said bank, together with the initial escrow agreement directing the bank to make said payments on or before March 31st of any year that Smedley has not made the funding deposit called for herein.

4. Default. Each of the parties agree that in the event of default of either party that the party not in default shall be entitled to reasonable court costs and attorney's fees incurred in the enforcement of this agreement, whether or not suit is commenced. Each party shall be entitled to all rights of redress and remedies accorded by law in the event of default.

5. Fire Insurance Policy. Smedley agrees that during the life of Mel and/or Kathy Glauser to keep the Smedley properties referred to hereinabove insured in an amount not less than \$ ~~340,000~~ 125,000.00 *Smedley*.

6. Risk of Loss. Risk of loss with regard to the "Smedley Properties" described in Exhibit "A" shall rest with Smedley during the lifetime of either Mel Glauser or Kathy Glauser, and loss of the structures attached to said realty shall not

abrogate the terms of this agreement nor the obligation and/or rights of the parties.

7. Time, Waiver. Time is of the essence with respect to the obligations of the parties hereunder, including the obligation of Smedley to make payments called for herein. Should Glauser fail to insist on strict performance on the part of the Buyer, and specifically, should Smedley make payments in amounts less than the amounts, or at times different than the times provided for herein, such shall not be deemed to alter the terms of this contract as to the remedies of Glauser herein set forth or available to him under law, and such shall not be construed to be a waiver or relinquishment for the future of any such obligations on the part of Smedley.

8. Notice. Any notice required or permitted to be given hereunder shall be deemed to have been served when such has been delivered to the following addresses or placed in the United States Mail, postage prepaid, and addressed to:

Glauser: Glauser Construction Company, Inc.
1121 E. Sherwood Drive
Kaysville, Utah 84037

Smedley: Dale T. Smedley
Route 1, Mountain Green
Morgan, Utah

9. Successors. This agreement shall be binding on the parties hereto and their successors or assigns in accordance with the terms of this agreement.

IN WITNESS WHEREOF, the undersigned parties have executed this agreement in duplicate, either of which may constitute an original, this 29th day of January, 1979.

GLAUSER CONSTRUCTION COMPANY, INC.

By Mel Glauser
MEL GLAUSER

Dale T. Smedley
DALE T. SMEDLEY

State of Utah)
County of Davis) SS

Subscribed and sworn to before me this 16th day of February, 1979.

Wesley D. Lawrence
Notary Public
Residing at Layton, Utah.

Addendum 2
(Warranty Deed)

- Recorded at Request of SECURITY TITLE COMPANY JAN 30 1979 # 70464
at 3⁴⁰ P. M. Fee Paid \$ 7.00 CAROL DEAN PAGE, DAVIS COUNTY RECORDER
by Grace Van Sweden Dep. Book 751 Page 239 Ref.: 86-4
71819 > 471-100

521665

WARRANTY DEED

DALE T. SMEDLEY and HELEN B. SMEDLEY, his wife, grantors,
of Mountain Green, County of Morgan, State of Utah, hereby
CONVEY and WARRANT to
GLAUSER CONSTRUCTION CO., INC.

of Kaysville County of Davis, State of Utah, grantee
TEN DOLLARS and other good and valuable considerations, for the sum of
of land in Davis County, State of Utah: the following described tract

See Schedule "A" attached hereto, and by reference made a part
hereof.



Indexed
☐ Entered
☐

WITNESS, the hands of said grantor^s, this 29th day of
January, A. D. 19 79

Signed in the Presence of

STATE OF UTAH,

County of DAVIS

ss.

On the 29th day of January, A. D. 19 79
personally appeared before me DALE T. SMEDLEY and HELEN B. SMEDLEY, his wife,

the signers of the within instrument, who duly acknowledged to me that they executed the
same.

Notary Public.

My commission expires April 4, 1982 Residing in Kaysville, Utah

240 SCHEDULE "A"

PARCEL 1: Beginning at a point North 0°08'30" East 1266.57 feet and North 89°34'30" West 1368.86 feet from the Southeast corner of Section 4, Township 4 North, Range 1 West, Salt Lake Meridian, in the City of Layton, and running thence South 89°01'50" West 108.05 feet; thence South 0°36'02" East 206.17 feet; thence North 89°43'07" East 105.36 feet; thence North 0°08'30" East 207.47 feet to the point of beginning.

TOGETHER WITH AND SUBJECT TO THE FOLLOWING RIGHT OF WAY:
A right of way 30.0 feet wide, 15.0 feet on each side of the following center line: Beginning at the Northeast corner of said property, and running thence South 0°08'30" West 685.57 feet.

ALSO: A right of way on the following: Beginning at a point North 0°08'30" East 1266.57 feet and North 89°34'30" West 1368.86 feet parallel to the South Section line from the Southeast corner of said Section 4, and running thence South 0°08'30" West 20.0 feet; thence South 89°34'30" East 98.0 feet; thence South 0°08'30" West 308.57 feet; thence North 89°34'30" West 98.0 feet; thence South 0°08'30" West 30.0 feet; thence South 89°34'30" East 98.0 feet; thence South 0°08'30" West 302.0 feet; thence North 89°34'30" West 98.0 feet; thence South 0°08'30" West 25.0 feet; thence South 89°34'30" East 98.0 feet; thence South 0°08'30" West 707.2 feet, more or less, to the North line of a Highway; thence South 79°58' East 50.78 feet along said Highway; thence North 0°08'30" East 1448.6 feet, more or less, to the North line of the South Half of the Southeast Quarter of said Section 4; thence North 89°34'30" West 50.0 feet along said line; thence South 0°08'30" West 47 feet, more or less, to a point South 89°34'30" East of beginning; thence North 89°34'30" West 98.0 feet to the point of beginning.

PARCEL 2: Beginning at a point 1220.86 feet North 89°34'30" West along the Section line and 596.0 feet North 0°08'30" East parallel to the East line of Section 4, from the Southeast corner of Section 4, Township 4 North, Range 1 West, Salt Lake Meridian, in the City of Layton, and running thence North 0°08'30" East 327.0 feet; thence North 89°34'30" West 148.0 feet; thence South 0°08'30" West 327.0 feet; thence South 89°34'30" East 148.0 feet to the point of beginning.

TOGETHER WITH AND SUBJECT TO A RIGHT OF WAY OVER THE FOLLOWING:
Beginning at the Northeast corner of said property and running thence North 89°34'30" West 50.0 feet; thence South 0°08'30" West 1050.0 feet, more or less, to the North line of a Highway; thence South 79°58' East 50.78 feet along said Highway; thence North 0°08'30" East 1058.5 feet, more or less, along a line 1220.86 feet West of the East line of said Section 4, to the point of beginning.

Addendum 3
(Statutes & Rules)

57-1-3. Grant of fee simple presumed.

A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended.

History: R.S. 1898 & C.L. 1907, § 1971; C.L. 1917, § 4871; R.S. 1933 & C. 1943, 78-1-3.

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47; 1996, ch. 159, § 19; 1996, ch. 198, § 49.

Rule 42. Consolidation; separate trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Compiler's Notes. - This rule is similar to Rule 42, F.R.C.P.

Cross-References. - Separate trials authorized, U.R.C.P. 20(b).

Rule 52. Findings by the court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) *Waiver of findings of fact and conclusions of law.* Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

History: Amended effective Jan. 1, 1987.

Compiler's Notes. - This rule is similar to Rule 52, F.R.C.P.

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

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

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

History: Amended effective October 1, 1992; February 11, 1998.

Rule 601. General rule of competency.

(a) *General rule of competency.* Every person is competent to be a witness except as otherwise provided in these rules.

(b) *Statement of declarant in action for declarant's wrongful death.* Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action for wrongful death.

(c) *Statement of deceased declarant offered in action against declarant's estate.*

(1) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear.

(2) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

History: Amended effective October 1, 1992.

Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

History: Amended effective October 1, 1992.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is similar to Rule 20, Utah Rules of Evidence (1971).

Rule 608. Evidence of character and conduct of witness.

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(c) *Evidence of bias.* Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

History: Amended effective October 1, 1992.