

1999

Glauser Storage, L.L.C., a Utah limited liability company; Steven Glauser, an individual; Kristine G. Lofts, an individual; Richard M. Glauser, an individual; Susan G. Larsen, an individual; and Craig K. Glauser, an individual v. Dale T. Smedley, an individual, and Does I-X : Brief of Appellant

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**IN THE UTAH COURT OF APPEALS**

GLAUSER STORAGE, L.L.C., a Utah  
limited liability company; STEVEN D.  
GLAUSER, an individual; KRISTINE G.  
LOFTS, an individual; RICHARD M.  
GLAUSER, an individual; SUSAN G.  
LARSEN, an individual; and CRAIG K.  
GLAUSER, an individual,

Plaintiffs/Appellees,

vs.

DALE T. SMEDLEY, an individual, and  
DOES I - X,

Defendant/Appellant.

**ARGUMENT  
PRIORITY 15**

Civil No. 990544 CA

**BRIEF OF APPELLANTS**

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

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Utah Court of Appeals

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## **STATEMENT SHOWING JURISDICTION**

The Utah Court of Appeals has jurisdiction in this matter under the provisions of Utah Code Annotated § 78-2a-3(j) and pursuant to the Order of the Supreme Court of the State of Utah issued October 13, 1999, transferring this matter to the Utah Court of Appeals for disposition .

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW (Including standard of appellate review and supporting authority)**

**Issue I.** Whether the District Court properly excluded parole evidence concerning the intended “security” character of a certain real property conveyance, where the conveyance instrument was silent with respect to its “security” character, notwithstanding Defendant’s pre-trial proffer of evidence showing said intention of the parties to said instrument.

This issue was raised by Plaintiffs’ pre-trial Motion in Limine dated January 12, 1999 (R. 263-277), which motion was opposed by Defendant in the hearing held on January 19, 1999 (R. 226-227) and was initially determined adversely to Defendant by the Court in a telephone conference held on January 22, 1999. The issue was again raised at trial by Defendant (T. 137-139, 235) and again determined adversely to Smedley (T. 236).

*Standard of Review:* The issue of whether evidence is admissible is a question of law, where [the appellate Court] reviews for correctness, incorporating a “clearly



erroneous' standard of review for subsidiary factual determination." *Cal Wadsworth Construction v. City of St. George*, 898 P.2d 1372, 1398 (Utah 1995).

**Issue II.** Whether the District Court properly disregarded all of the uncontested testimony concerning the substance, intent and value of Defendant's substitute payment performances under the Agreement in making its Findings of Fact and Conclusions of Law. In other words, was there sufficient evidence to support the Court's Findings concerning Defendant's substitute payment performances?

This issue was raised in Plaintiffs' Objections to plaintiffs' Proposed Findings of Fact, Conclusions of Law, and Judgment. (R. 312-332, ¶¶ 7, 8, 10, 13, 14, 15, 16, 17, 18, 19, 21 and 22).

*Standard of Review:* The Supreme Court reviews the Trial Court's Findings of Fact for clear error and its legal conclusions for correctness." *Smith v. Batchelor*, 934 P.2d 643 (Utah 1997).

**Issue III.** Whether the District Court properly disregarded all uncontested testimony concerning Defendant's loss suffered by the unauthorized sale of 24.75 acres of the Salmon Property. In other words, was there sufficient evidence to support the Court's Findings concerning Defendant's loss of value?

This issue was raised in Plaintiffs' Objections to plaintiffs' Proposed Findings of Fact, Conclusions of Law, and Judgment. (R. 312-332, ¶ 23).

*Standard of Review:* The Supreme Court reviews the Trial Court's Findings of Fact for clear error and its legal conclusions for correctness." *Smith v. Batchelor*, 934 P.2d 643 (Utah 1997).

**Issue IV.** Whether the District Court properly received negative reputational evidence concerning Defendant when the subject matter of such evidence was not an element of any claim asserted by Plaintiffs.

This issue was raised by Defendant's pre-trial Motion in Limine dated January 14, 1999 (R. 278-282), which motion was opposed by Plaintiffs in the hearing held on January 19, 1999 (R. 226-227) and was initially determined adversely to Defendant by the Court in a telephone conference held on January 22, 1999. The issue was again raised at trial by Defendant and again determined adversely to Defendant. (T. 271, 276-277).

*Standard of Review:* The issue of whether evidence is admissible is a question of law, where [the appellate Court] reviews for correctness, incorporating a "clearly erroneous" standard of review for subsidiary factual determination." *Cal Wadsworth Construction v. City of St. George*, 898 P.2d 1372, 1398 (Utah 1995).

## **STATUTES AND RULES, THE INTERPRETATION OF WHICH IS OF CENTRAL IMPORTANCE TO THE APPEAL**

Rule 404(a), Utah Rules of Evidence:

- (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.

### **STATEMENT OF THE CASE**

In late 1978, Defendant Dale T. Smedley (“Smedley”) and Mel and Kathy Glauser (collectively “Glausers”) entered into a oral agreement whereby Glausers would convey to Smedley certain real property known as Melanie Acres, in consideration for which Smedley would provide to Glausers the following consideration: (1) payment of \$2,000 per month to be generated by rent from a storage facility in Davis County (the “Davis County Property”) for the remainder of Glausers individual lives; (2) payment of \$6,000 per year for vacation expenses for Glausers for at least thirteen years; (3) management of the Davis County Property, including maintenance, payment of taxes and collection of rents; (4) conveyance of title to the Davis County Property to Glausers *as security only* for the above payment obligations; and (5) establishment of an escrow account in the amount of \$300,000.00 (the “Escrow Account”) to secure the Smedley’s payment obligations and the payment of a mortgage obligation then securing the Davis County Property. (T. 135-136).

On January 29, 1979, a written Agreement prepared by Glausers' attorney, describing some, but not all of the terms of the oral agreement, was executed by the Glausers and Smedley, at or about the same time that Melanie Acres was conveyed by deed to Smedley, and the Davis County Property was conveyed by deed to Glausers. (T. 140-141) The written Agreement omitted reference to the parties' oral agreement that the conveyance of the Davis County Property to the Glausers would be reversed upon the death of the survivor of the Glausers if the payment obligations had been fulfilled. (Trial Exhibit 1)

By December 4, 1979, Glausers and Smedley had orally amended their agreement to allow Smedley to substitute certain real property in Salmon, Idaho (the "Salmon Property") for the Escrow Account, to secure Smedley's payment obligations under the agreement. At that time, Smedley conveyed a mortgage on the Salmon Property to Glausers. (T. 145-146; Trial Exhibit 4) On March 13, 1980, Smedley supplemented the mortgage with a Warranty Deed, conveying legal title to the Salmon Property to Glausers *as security only* for full performance of Smedley's payment obligations under the agreement. (T. 146-147; Trial Exhibit 5)

On July 19, 1993, Glausers conveyed 24.75 acres of the Salmon Property to Billey Isley, an unrelated third-party, by Quit Claim Deed without Smedley's consent and without payment of any consideration therefore to Smedley. (T. 68-69; Trial Exhibit 12)

During the term of the agreement, Smedley fulfilled some, but not all, of his payment obligations as they were literally set forth in the Agreement. (R. 176-185) Pursuant to

various oral agreements and arrangements made between Glausers and Smedley, Smedley conveyed other parcels of real property (T. 163-166; Trial Exhibits 19 and 34) to, and performed construction labor and material (T. 156-158; Trial Exhibits 36, 37, 38) for, Glausers in substitute performance for the portions of the payment obligations under the Agreement which he had not satisfied.

In the summer of 1994, both Glausers died, and Smedley demanded that Plaintiffs (the heirs of Glausers) reconvey to Smedley the titles to the Davis County Property and the Salmon Property. When Plaintiffs refused to reconvey the Properties, Smedley recorded “Notices of Interest” with the appropriate recorders’ offices, encumbering title to both Properties.

In June 1996, Plaintiffs brought this action to remove the encumbrances and to recover a money judgment against Smedley for the non-payment of some of the obligations in the Agreement. (R. 1) Smedley filed a Counterclaim, seeking reconveyance of the Davis County Property and the Salmon Property, and acknowledgment of the full consideration he had paid to Glausers. (R. 93)

Pursuant to pre-trial Motions in Limine, the Court (1) refused to allow Smedley to introduce any evidence at trial concerning the “security” nature of the Davis County Property conveyance and (2) allowed Plaintiffs to introduce evidence concerning Smedley’s general reputation in the community for truthfulness and voracity .

A bench trial was held before Judge Michael G. Allphin on January 18, 1999. (T. 474) In its Findings, Conclusions, and Judgment, the Court refused to recognize (1) the intent and value of Smedley's substitute payment performances, notwithstanding the fact that the evidence presented by Smedley was uncontested, and (2) the value of the Salmon Property lost to Smedley by way of Glausers' conveyance of the 24.75 acres, notwithstanding the Court's finding that the Salmon Property belonged to Smedley. (Findings are attached hereto as Addendum III) Judgment was entered in favor of Plaintiffs and against Smedley on the breach of contract and quiet title to Davis County Property claims. (R. 442-450) The Court ruled in favor of Smedley on the quiet title claim to the Salmon Property, finding that conveyance to have been made for security purposes. (Findings 31-35; R. 422-423)

Smedley has filed this appeal seeking reversal of the Judgment, remanding the matter with an order that the District Court recognize (1) Smedley's entire agreement with Smedley, (2) the security character of the Davis County Property conveyance, (3) the value of Smedley's substitute performances under the Agreement, and (4) the loss of value to the Salmon Property caused by Glausers partial conveyance thereof.

### **STATEMENT OF MATERIAL FACTS**

Prior to January 29, 1979, Smedley and Melvin D. Glauser ("Mel") had established a long working relationship of almost 30 years, one with another, concerning the

development and/or construction of various real estate projects. (T. 132-133) Virtually all of the projects in which Smedley and Mel D. Glauser worked together were circumscribed and governed by oral agreements and non-written understandings. A regular course of business was established between Smedley and Melvin D. Glauser which did not include formalization of their cooperative efforts into written documentation. (T. 177-178)

In 1978, Smedley and Melvin D. Glauser entered into an oral agreement whereby Smedley would purchase from Glausers certain real property located in Davis County, known as Melanie Acres Subdivision (hereinafter "Melanie Acres"). (T. 136-137) Melanie Acres, reasonably valued at that time at approximately \$165,000.00 was conveyed to Smedley, free and clear of any liens or encumbrances. (T. 134-135) Glausers determined that rather than real estate, they desired an long-term regular income stream as consideration from Smedley for the conveyance of the Davis County Property, which constituted 86 rental storage units. The income stream agreed upon by and between Smedley and Glausers was anticipated to be sufficient to produce a regular monthly payment of \$2,000.00 plus an annual vacation account of \$6,000.00. In order to produce such an income stream, Smedley and Glausers agreed that Smedley would dedicate the Davis County Property to Glausers for the remainder of the life of the last survivor of the Glausers. (T. 136-140)

As of January 29, 1979, the unencumbered value of the Davis County Property was fairly equal to that of Melanie Acres; however, there was a mortgage lien on the property which was equal to its full value. In order to secure Smedley's obligations to provide the

promised income stream, Smedley agreed to undertake the following obligations: (1) convey the Davis County Property to Glausers; (2) manage, maintain and pay for all of the expenses of the Davis County Property; (3) pay and timely satisfy the lien mortgage against the Davis County Property; (4) pay all real estate taxes assessed against the Davis County Property; create the Escrow Account in the amount of \$300,000.00; (5) pay over to Glausers the monthly sum of \$2,000; and (6) establish a vacation account for Glausers into which he would pay the annual sum of \$6,000. (T. 136-137)

In consideration of Smedley's covenants under the agreement, Glausers agreed that (1) when the mortgage lien against the Davis County Property was paid in full and removed as an encumbrance, Glausers would release his claim upon the Escrow Account and (2) when the last survivor of the Glausers died, if Smedley had discharged all of his payment obligations, the Davis County Property would be reconveyed to Smedley. (T. 139, 167)

In connection with the oral agreement, Glausers prepared a written Agreement dated January 29, 1979, which set forth some, but not all, of the terms of the oral agreement, and which was signed by Smedley and Glauser Construction. (Trial Exhibit 1) In accordance with the oral agreement and the Agreement, Glausers conveyed Melanie Acres to Smedley, and Smedley conveyed the Davis County Property Glausers by Warranty Deed on January 29, 1979. (Trial Exhibit 2)

Later in 1979, Smedley and Glausers amended their agreement by substituting the 274 acre Salmon Property as security for Smedley's payment of the mortgage lien on the



Davis County Property, instead of the Escrow Account. (T. 145; Trial Exhibit 4) On or about March 30, 1980 Smedley and his wife conveyed title to the Salmon Property as substitute security for Smedley's obligations. (Trial Exhibit 5) In connection with the conveyance of the Salmon Property and identical to their arrangement concerning the Escrow Account, Smedley and Glausers agreed that upon Smedley's satisfaction of the mortgage lien on the Davis County Property, the Salmon Property would be reconveyed to Smedley free and clear of all liens and encumbrances which were not encumbering the Salmon Property as of March 30, 1980. (T. 147-150) As part of the amendment to the agreement, Smedley agreed to pay all property taxes assessed against the Salmon property.

In 1984, Smedley suffered a heart attack and became temporarily disabled. (T. 175) Between 1984 and 1988, because of his physical disability, Smedley became delinquent in some of the payment obligations under the agreement.

Beginning in 1988, Smedley undertook to cure the defaults in tax and vacation payments of the prior four years by providing materials and services, without charge, for and at the request of Glausers. In 1988, Smedley provided to Glausers certain construction and development improvements to Lakeview Gardens No.4, a 13-lot subdivision (the Lakeview Project") and four lots in Heritage Square No.3 (the "Heritage Project"), both properties owned by Glausers. (T. 156-159) The fair value of Smedley's services and materials on the Projects totalled \$94,626.53. (Trial Exhibits 36, 37, 38)

For the above described services and materials Glausers agreed to credit \$14,486.04, for the payment of all delinquent taxes on the Davis County property, and \$24,000.00 for four years of unfunded vacation account. Glausers agreed to retain the remaining \$56,140.29 as credit to be applied to past and future taxes due on the Salmon Property and the future vacation funding. (T. 160-162)

Additionally, as further compensation and payment for past and future obligations on both the Salmon property and the Davis County property, Smedley conveyed to Glausers three unimproved lots: Smedley Estates Lots 8 and 10 in Salmon, Idaho, conveyed on April 8, 1982; and Cottonwood Unit #3 Lot 309 in Layton, Utah, conveyed on December 19, 1988. (T. 163)

On June 19, 1993, Glausers conveyed to Isley, approximately 24 acres of the Salmon property valued by Lemhi County at \$1,800 per acre, without the consent or approval of Smedley. Smedley received no consideration or share of any proceeds paid by Isley in consideration for the Isley transaction. (T. 68-69)

In the summer of 1994, Glausers both died, having received all of their bargained consideration under the agreement, including \$2,000.00 per month for their lives from 1979 until the death of their last survivor. At the time of their death, Smedley had fulfilled all of his obligations and covenants under the agreement and was entitled to the reconveyance of both the Davis County Property and the Salmon Property. (T. 166-167)

Following Glausers' deaths, Smedley, orally and in writing, requested that Plaintiffs reconvey the Properties. (Trial Exhibits 14 and 15) Plaintiffs refused to reconvey the Properties and, on June 6, 1996, instituted this civil action against Smedley and his family. (R. 1)

### **SUMMARY OF ARGUMENT**

The District court erroneously ruled prior to the commencement of the bench trial herein, that Smedley would be unable to introduce any evidence which would vary, alter or supplement the terms of the written Agreement dated January 29, 1979, concerning the conveyance of the Davis County Property by Smedley to Glausers. That ruling was again reaffirmed during the Trial when Smedley attempted to introduce testimony concerning the security nature of the Davis County Property conveyance. The District Court's error was in its failure to comply with the mandate of *Winegar v. Froerer Corp.*, 813 P.2d 104, 110 (Utah 1991) which requires that a trial court consider eight separate elements when determining whether an absolute deed was intended to be a mortgage notwithstanding the general prohibitions of the parol evidence rule. A careful analysis of the proffered facts of this matter clearly demonstrate that it was the intent of both parties that the conveyance by warranty deed of the Davis County Property was accompanied with an oral understanding that Glausers would hold the deed only as security and reconvey it to Smedley once Smedley's payment obligations were satisfied.

The Court's second error was failing to consider the un rebutted testimony presented on behalf of Smedley to show that substitute payments were provided and accepted by Glauser, fully satisfying previous payment defaults of Smedley in his property tax and vacation funding obligations. There was no contradictory evidence offered to the absolute nature of the conveyances of three separate unimproved lots to Mr. Glauser. Neither was there any disagreement concerning the fact that Smedley provided to Glausers work and materials valued in excess of \$94,000 without reimbursement. Testimony was offered even from the Plaintiffs' themselves to the fact that at least a portion of the substitute payments were intended to have been used to satisfy prior tax payment defaults. The Court's Findings of Fact and Conclusions of Law failed to recognize the existence and value of Smedley's substitute performance.

Similarly, notwithstanding the uncontradicted evidence that as naked fee holders of the Salmon Property, Glausers made an unauthorized conveyance of 24 acres of that property to a third party. As a Trustee of the "resultant" trust created by the security conveyance of the Salmon Property, Glausers had a duty to reconvey the entire Salmon Property at such time as Smedley fulfilled his payment obligations. After the death of the Glausers, Plaintiffs as successor trustees, were responsible for that reconveyance. However, in as much as 24 acres had previously been conveyed to Mr. Isley, specific performance of that duty was made impossible. Smedley should be awarded damages or credited for the value of the 24 acres.

The District Court's final prejudicial error was in allowing prejudicial testimony as to Smedley's general reputation for truthfulness and veracity in direct violation of Rule 404(a) of the Utah Rules of Evidence. None of the claims asserted by Glausers included in their elements the issue of Smedley's general honesty or veracity. Inasmuch as those qualities were not directly an issue, Smedley's reputation for truthfulness was irrelevant and should have been excluded.

## **ARGUMENT**

### **I. The District Court erred in excluding all parol evidence concerning the security nature of the Davis County Property Conveyance.**

The heart of Smedley's defense to Plaintiffs' Complaint and basis for his Counterclaim are the factual circumstances surrounding the creation of the original agreement between Glausers and Smedley, which agreement predated the execution of the written Agreement, clarifies an omitted term of the writing, and clearly establishes the intent of the parties to limit the conveyance of the Davis County) Property to one for security purposes only.

On January 12, 1999, two weeks prior to the trial of this matter, Plaintiffs filed a Motion in Limine seeking to prevent Smedley from introducing any "parol evidence of alleged oral agreements seeking to contradict or vary the terms of the 1979 Agreement and Warranty Deed conveying to Glauser the Davis County Property." (R. 264). In the Motion Plaintiffs acknowledge that throughout these proceedings Smedley had consistently asserted

that the parties had agreed that the Davis County Property would be reconveyed to Smedley at the death of the survivor of the Glausers. However, because the written Agreement and the Warranty Deed conveying the Davis County Property make no mention of a reversion, Plaintiffs sought to prevent evidence of the contracting parties' actual intentions. A hearing held on Plaintiffs' Motion on January 19, 1999 (R. 226) at which time counsel for Smedley outlined the nature and purpose of the anticipated testimony. Three days after the hearing, Judge Allphin informed counsel by telephone that he would not allow any such testimony.

During the trial, Plaintiffs independently raised the issue of the actual intentions of the Glausers concerning any revision of the Salmon Property, through the testimony of William Critchlaw (T. 16-17). However when Smedley began to testify concerning the oral agreement of between himself and Mel concerning the eventual reversion of title to Smedley, Plaintiffs objected. The Court ultimately refused any such testimony. (T. 137-139, 226-227).

Smedley's attempt to obtain judicial treatment of a deed as a mortgage is not novel to this matter. "[A] court of equity will treat a deed as a mortgage if it is shown that it was so intended." *Jacobson v. Jacobson*, 557 P.2d 156, 158 (Utah 1976). "In equity, a deed, absolute on its face, may be shown by parol evidence to have been given for security purposes only; and if such showing be made, equity will effect to the intention of the parties." *Kjar v. Brimley*, 497 P.2d 23, 26 (Utah 1972). "Debtors . . . frequently execute absolute deeds of conveyance to creditors with merely an oral understanding that the creditor will hold

the deed only as security and reconvey it to the debtor once the obligation is satisfied.

*Winegar v. Froerer Corp.*, 813 P.2d 104, 110 (Utah 1991).

The Utah State Supreme Court has adopted a list of "elements a court must consider when determining whether an absolute deed was intended as a mortgage." *Winegar, id.*

That list, first announced in *Brown v. Loveland*, 678 P.2d 292, 297 (Utah 1984), includes the following:

1) whether there was a continuing obligation on the part of the grantor to pay a debt or meet an obligation the deed allegedly was made to secure, (2) the question of relative values, (3) contemporaneous and subsequent acts of the parties, (4) the parties' statements, (5) the form of the written evidence of the transactions, (6) the nature of the testimony on which the parties rely, (7) the relationship between the parties, and (8) the apparent aims and purposes of the transfer.

813 P.2d at 110.

In the pre-trial hearing and again during closing argument (T. 293-299), Smedley attempted to convince the Court that an analysis of the facts of this matter would clearly demonstrate that the obvious intentions of Smedley and Glausers in consummating the 1979 conveyance of the Davis County Property to Glausers was to secure Smedley's payment obligations.

First, there was a substantial continuing obligation required of Smedley to Glausers which extended long after the date of the conveyance of the Davis County Property. Glausers admit that Smedley was required to pay \$2,000 per month, \$6,000 per year for

vacations, pay taxes and maintenance on both Davis County and Salmon Properties. (R. 176-181)

Second, a comparison of the relative values of the consideration required by the Agreement to be given by Smedley to Glausers shows a margin of over three to one in favor of the Glausers. In return for the receipt of the undeveloped Melanie Acres, valued at approximately \$165,000, Smedley paid the following:

Monthly Income of \$2,000 (for 15 years)	\$360,000
Vacation Payments (\$6,000 x 9 years)	54,000
Davis County Property	<u>165,000</u>
<u>TOTAL CONSIDERATION:</u>	\$579,000

An approximation of the numbers above were disclosed to the Court in the pre-trial hearing and were also submitted in chart form during closing argument. (T. 295-296; Addendum II attached hereto)

Third, both parties took action regarding the Davis County Property following the conveyance which would be considered consistent with their respective ownership thereof. Both paid property taxes. Smedley maintained and made certain improvements on the Property.

Fourth, Smedley was prepared to introduce evidence from several individuals that Mel Glauser had admitted to them that the Davis County Property conveyance was a temporary one, which would be reversed after the payment of a lifetime income stream. Smedley had



told many people of the security nature of the conveyance, including his sons. The Court refused to allow Smedley's sons to so testify.

Fifth, the form of the conveyance is absolute. The warranty deed purports to convey full title to the Davis County Property. The concurrently executed Agreement similarly is silent concerning any reversionary right. Smedley, however, was prepared to testify his understanding of the language of paragraph 3 of the Agreement, to mean that upon the death of the last surviving Glauser, the entire relationship concerning the Davis County Property would be terminated and all rights of Smedley restored to said Property.

Sixth, the nature of the non-hearsay testimony relied upon by Smedley is limited to himself because both Mel and Kathy Glauser have since deceased. Both parties would be able to introduce a large amount of admissible evidence, which would not be hearsay as admissions against the interest of the other respective parties. Rule 801, Utah Rules of Evidence.

Seventh, the offered testimony was unanimous that the Glasuers and the Smedleys were social friends as well as business associates. (T. 133) They had vacationed together, jointly developed real estate projects and even employed each other's children. This was not a cold commercial relationship.

Eighth, the sole and uncontroverted testimony concerning the original aim and purpose of the transaction was to allow Smedley to obtain Melanie Acres for his personal

development purposes in return for a lifetime income stream plus the opportunity to fund annual joint family vacations. Those aims were fully realized.

Each of the above items should have been proper subjects for the submission of evidence at trial. But because of the Court's pre-trial ruling, and its mid-trial sustaining of Plaintiffs' objection to Smedley's attempt to introduce testimony to those issues, Smedley was wrongly denied his opportunity to attempt to meet the "clear and convincing" burden required for his equitable claim. *Winegar*, at 110.

**II. The District Court erred in disregarding all uncontested testimony concerning the substance, intent and value of Smedley's substitute payment performances under the Agreement.**

At trial, Smedley introduced evidence in various forms concerning the following facts:

(1) As substitute payment for his defaulted obligations, Glauser accepted from Smedley two lots in Smedley Estates Subdivision, and a Cottonwood lot;

(2) As additional substitute payment for his defaulted obligations, Glauser requested and accepted from Smedley work and material furnished by Smedley for the development of two of Glausers' projects, the Heritage Project and Lakeview Project;

(3) The three lots conveyed as substitute payment were fairly valued by both Glausers and Smedley at approximately \$12,500 each; and

(4) The total value of the work and materials provided for the Heritage and Lakeview Projects, and for which no compensation was ever received by Smedley was in excess of \$94,000.00. (Trial Exhibit 37)

Notwithstanding Smedley's submission of un rebutted credible evidence as to each of the foregoing points, the District Court failed to issue any Findings of Fact recognizing the existence and value of the substitute consideration provided by Smedley, fully discharging his obligations to Glausers secured by the Davis County and Salmon Properties.

In attacking the Findings of Fact, the related Conclusions of Law, and the provisions of the Judgment based on those Findings, Smedley is burdened with the duty of marshaling all of the evidence supporting and opposing the targeted Findings. *A.K. & R. Whipple Plumbing & Heating v. Aspen Construction*, 977 P.2d 518, 524-525 (Ut. Ct. App. 1999). Smedley also acknowledges his burden to shown that the attacked Findings are "clearly erroneous." *Young v. Young*, 979 P.2d 338, 342 (Utah 1999). However, a trial court's findings of fact will be deemed clearly erroneous and set aside if they are so lacking in support as to be against the clear weight of the evidence. *Id.* Accordingly each of the above issues will be hereafter treated separately.

**A. Glausers' Acceptance of Three Lots as Substitute Performance.**

The three Lots were deeded absolutely to Glausers. (Trial Exhibits 19 and 34) The lots were listed by Glauser on a memo given to his attorney for estate planning purposes. (T. 25-26, Trial Exhibit 6). Plaintiff, Steve Glauser, admitted that Lots 8 and 10 of Smedley

Estates were conveyed to Glausers "because Dale had not performed on some of his obligations." (T. 55). Smedley testified that Cottonwood Lot 309 and Lots 8 and 10 of Smedley Estates were conveyed to Glausers as credit for prior unpaid taxes. (T. 163-165). No contrary evidence was offered. Specifically, no evidence was offered to support Finding No. 42, that the conveyances of the three lots was made only to secure Smedley's payment obligations (R. 426).

**B. Glausers' Acceptance of Work and Materials for Heritage and Lakeview Projects as Substitute Performance.**

Steve Glauser acknowledged that Smedley had provided work and materials for his father's Heritage Project and Lakeview Project. (T. 42-43, 60-62) In reviewing Smedley's list of tasks required of Smedley in each Project, (Trial Exhibits 36, 37), Steve Glauser stated that "it looks like that would be what would . . . what it would take to do that, yes." (T. 62) Steve also testified that he had assumed his father had paid for the work, but had never seen any paper work on the issue. (T. 42) Rick Glauser testified of knowing nothing about Smedley's work on the Projects. (T. 112) Smedley testified concerning the work lists prepared upon completion of each Project. (T. 156-158; Trial Exhibits 36, 37)

Question: Did he [Mel Glauser] ask you to do it?

Answer: Yes.

Question: Did he tell you he would pay for it?

Answer: Well, by agreement we was doing it in exchange for other things we were doing on taxes.

Question: On taxes?

Answer: Yes.

Question: What taxes?

Answer: On the Storage Sheds.

Question: That you hadn't paid?

Answer: That's right.

(T. 158). No other testimony was offered concerning the performance of work by Smedley on Glauser's Projects as substitute payment.

**C. Fair Value of the Three lots.**

Glauser submitted a list of his assets to his attorney, William Critchlow, for Mr. Critchlow's use in Glauser's estate planning. (T. 11) That list includes Lots 8 and 10 of Smedley Estates at a total value of \$5,000 and Lot 309 Cottonwood #3 at a value of \$18,000. (Trial Exhibit 6). Smedley testified that he and Mel Glauser agreed that Smedley could repurchase the Cottonwood Lot for \$12,500. (T. 164). Similarly, Smedley testified that the two Smedley Estate Lots were worth \$12,500 each, based upon his sale of nearby virtually identical lots in that Subdivision. (T. 166) Although Steve Glauser admitted knowledge of the conveyance of the Smedley Estate lots, he said he didn't "have a clue" about their value. (T. 56). Billey Isley testified that he thought the Smedley Estate Lots were of little value. (T. 76). No other evidence was offered concerning the value of the Lots.

**D. Fair Value of the Work and Materials for Heritage and Lakeview Projects.**

The only direct testimony concerning the value of the work performed on the Projects by Smedley was related to the list of work performed on Smedley's accountings (Trial Exhibits 36 and 37). Smedley testified that the total work and materials for both Projects

amounted to \$124,953.24 from which he deducted repayment to Glausers of cash advances of \$29,983.17 for a total credit of \$94,970.07. (T. 159-162; Trial Exhibit 37)

Without any evidence opposing Smedley's testimony, the District Court should have found that the conveyance of the Lots and provision of work and materials to Glauser were substitute payment for between \$117,000 and \$131,500 of obligations otherwise owing to Glauser. In as much as the Court found only \$71,701.24 principal owing. Smedley was entitled to at least \$40,000 more than the defaulted payment obligations by way of the substitute performance. (R. 43, ¶ 56)

**III. The District Court erred in ignoring all uncontested testimony concerning Smedley's loss suffered by Glausers' unauthorized sale of 24.75 acres of the Salmon Property.**

Pursuant to the uncontroverted testimony offered by every witness with personal knowledge of the matter, the Court found that the 1980 Warranty Deed conveyance of the Salmon Property by Smedley to Glausers was for security purposes only and that said conveyance should be treated as a mortgage securing Smedley's obligations under the Agreement. (Judgment ¶8, R. 446). Notwithstanding the fact that Glausers held title to the Salmon Property only as security, on June 19, 1993, Glausers conveyed approximately 24.75 acres of the Salmon Property to Billy Isley, by Quit Claim Deed. (T. 68-69; Trial Exhibit 12). No consent was obtained or notice given to Smedley of said conveyance. Other than an oral commitment by Mr. Isley to release an agricultural encumbrance from the remainder of the Salmon Property, no consideration was ever paid to Glausers for the 24 acres. (T.68-

69, 85-86). Even that consideration is questionable in light of the fact that no written instrument exists memorializing said promise and that over eight year has passed and the encumbrance still remains of record. (T. 90). Of more important significance is the fact that no consideration whatsoever was given to Smedley by either Glausers or Mr. Isley for the loss of his 24 acres. (Trial Exhibit 17).

At trial, conflicting testimony was offered as to the fair value of the lost 24 acres. Mr. Isley, who had paid nothing for it, stated that it "wasn't worth very much because it was dry sage brush farm ground." (T. 73). The County Assessor's records showed the appraisal value of the lost property was \$1,800. (Trial Exhibit 43).

Notwithstanding all of said testimony, the Court failed to award any damages to Smedley as a consequence of Glausers' wrongful conveyance, even as an offset to the amounts found owing by Smedley to Glausers. Initially the District Court omitted any mention of the loss of the 24 acres in its ruling. Only after the post-trial hearing on Smedley's Objection to Findings of Fact, Conclusion of Law and Judgment, did the District Court even consider the loss suffered by Smedley as a result of Glausers' actions. (R. 319, ¶ 23). Even then, in the Judgment, Order, and Decree, the Court declared:

12. The Defendant's claim to a right of offset against the judgment amounts he owes to Glauser for the value of the acreage Glauser conveyed to Isley is denied. Plaintiffs stipulated, and the Court orders, that the promised consideration received for the conveyance to Bill Isley runs with the land and, consequently, as a result of the Court's previous finding that Smedley's conveyance to Glauser of the Idaho [Salmon]

Property is an equitable mortgage rather than an outright conveyance, that Smedley as well as Plaintiffs are entitled to the benefits of the promised consideration, release of the Agricultural Lease upon the ultimate sale of the Glauser Idaho [Salmon] Property.

In its Judgment, Order, and Decree, the District Court properly exercised its equitable powers in declaring Smedley's conveyance of the Salmon Property to Glausers as a security conveyance to be treated similarly to a mortgage. However, it failed to grasp the significance of the fact that through that conveyance Glausers held legal title to the Salmon Property, knowing that they did not enjoy the beneficial title thereto.

The imposition of a resulting trust is invoked by the equitable powers of the court where legal title to property is transferred but the intent of the parties is for the transferor to retain the beneficial interest in the property. *Boatright v. Perkins*, 894 P2d 1091 (Okla. 1995); *Estate of Hull v. Williams*, 885 P.2d 1153 (Idaho App. 1994). Upon receipt of the legal title to the Salmon Property Glausers became the trustees of a resulting trust in favor of Smedley, with the duties and liabilities of a trustee over the Salmon Property. 76 Am Jur 2d 193-194, Trusts § 162. The sole duty of a trustee in a resulting trust or a constructive trust is to convey the property to the beneficiary." 76 Am Jur 2d 363, Trusts, § 365. Glausers ignored those responsibilities and must pay to Smedley the value of that portion of the Salmon Property entrusted to them which was lost due to their malfeasance.

In ignoring the evidence of the significant loss suffered to Smedley by Glausers' wrongful conveyance to Mr. Isley, the District Court erroneously disregarded damages to be



awarded to Smedley pursuant to his Counterclaim as an offset to any amounts found owing by Smedley under the Agreement.

**IV. The District Court erred in receiving and considering negative reputational evidence concerning the truthfulness of Smedley when that was not an element of any claim asserted by Plaintiffs.**

Prior to trial, on or about January 8, 1999, Plaintiffs submitted Plaintiff's Witness List for trial which included four individuals whose anticipated testimony would be exclusively restricted to an alleged general reputation of Smedley for dishonesty in his real estate and development transactions with parties other than Glausers. (R. 218-219). No assertions were made by Plaintiffs that these reputational witnesses had any personal knowledge about any of the transactions between Smedley and Glausers.

In response to Plaintiffs' Witness List, on January 14, 1999, Smedley filed a Motion in Limine pursuant to Rule 404(a) of the Utah Rules of Evidence, requesting that the Court prohibit Plaintiffs from eliciting any reputational testimony. (R. 278-281). On January 19, 1999, a hearing was held before Judge Allphin on Smedley's Motion. Contrary to Rule 404(a), Judge Allphin ruled that Plaintiffs would be allowed to introduce testimony of Smedley's reputation generally, as long as no specific individual factual incidents were the subject of that testimony.

At trial two of the four projected witnesses were called to testify: John Scott Carter, the Layton City Community Development Director; and Beverly Miles Olsen, a real estate

agent in Davis County for 19 years. Both were asked the following questions concerning Smedley's general reputation and responded with a virtually identical answer:

Question: Do you know the general reputation of Dale Smedley for truth and voracity in and about the community of Davis County at the present time?  
Answer: Yes.  
Question: Will you please tell the Court whether it is good or bad?  
Answer: Generally his reputation is bad.

(Transcript at 271-272 [Carter] and 276 [Olsen]).

Prior to Mr. Carter's response to the first question regarding Smedley's general reputation, Smedley's counsel reasserted his objection pursuant to Rule 404(a) on the grounds that any lack of the general reputational qualities about which counsel was inquiring were not elements of any claim before the Court and therefore were irrelevant and inadmissible. (Transcript at 271-272). The Judge overruled the objection and allowed the testimony from both witnesses. (Transcript at 272).

Rule 404(a) of the Utah Rules of Evidence provides that "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." In other words, unless the character of Smedley was an element of the claim, evidence of that particular character trait of Smedley is inadmissible. *See Advisory Committee Note, Rule 404.* Similarly, the Advisory Committee for the Federal Rules of Evidence (concerning the virtually identical Federal Rule

404) concluded that character evidence in civil cases should not be admitted unless it was in issue.

Although Smedley has been unable to discover any civil cases in Utah concerning the application of this Rule to prohibit general reputational testimony, surrounding jurisdictions have supported Smedley's assertion.

**It is well-settled that evidence of the good or bad character of either party to a civil action is generally inadmissible.** *Strickland v. Jackson*, 23 N.C.App. 603, 209 S.E.2d 859, 862 (1974). Such evidence is regarded as too remote to be of substantial value, as tending to confuse the issues and unduly protract the trial and, **most importantly, as offering a temptation to the jury to reward a good life or punish a bad one instead of deciding the issues before them.**

*Feliciano v. City and County of Honolulu*, 611 P.2d 989, 991 (Haw. 1980)[emphasis added].

Similarly, the New Mexico Court of Appeals held:

We agree with defendant that character evidence is admissible in a civil case where character is an issue. [*citations omitted*] Nonetheless, the admissibility of character evidence in a civil case is narrower than in a criminal case, and the trait of character, desired to be proved by testimony in the form of opinion or evidence of reputation must be directly in issue. . . . Here, defendant's veracity was not an element of the claim [*citation omitted*] and, while credibility is always a factor in any case, it was not directly in issue here. Consequently, evidence of defendant's reputation for truthfulness was irrelevant and properly excluded.

*Baum v. Orosco*, 742 P.2d 1, 3 (N.M. 1987). Finally, the Kansas Supreme Court required the "strict" enforcement of its version of Rule 404 in declaring that "evidence may not be admitted for the purpose of proving the defendant's inclination, tendency, attitude or disposition to commit a civil wrong." Furthermore, that court declared that "Evidence that a person committed a civil wrong on a specified occasion is inadmissible to prove his or her

disposition to commit a civil wrong on another specified occasion." *Brunett v. Albrecht*, 810 P.2d 276, 280 (Kan.1991).

The issues determined by the Court in this matter were based solely upon a quiet title claim, and a breach of contract claim. Neither of these claims require the proof of any element relating to honesty, voracity, or strength of reputation or character. The unnecessary insertion of these issues into the trial were clearly prejudicial in nature. In fact the Court based its Findings related to the issues raised in Points III and IV above, in part upon its declaration that the testimony of Smedley lacked "any indicia of trustworthiness." (R. 428, ¶¶ 48 and 49). No evidence other than that received from Mr. Carter and Ms. Olsen was elicited concerning any alleged untruthfulness of the Smedley. Pursuant to Rule 403, Utah Rules of Evidence, Plaintiffs should have been prohibited from calling either of the "character" witnesses for the purpose of giving any testimony concerning the alleged reputation or bad character of Smedley. Such testimony should correctly have been excluded since its "probative value [was] substantially outweighed by the danger of unfair prejudice."


### **CONCLUSION**

Based on the foregoing analysis, Smedley requests that this Court set aside the Findings of Fact and Conclusions of Law issued by Judge Allphin, reverse the Judgment entered herein, and remand the matter for a new trial with instructions (1) that the District Court allow Smedley to introduce relevant and credible evidence as to the true character of the Davis County Property conveyance as supplemental to the written Agreement, (2) that

the District Court recognize and give Smedley credit for the work provided and real property conveyed to Glausers in full and substitute satisfaction of Smedley's payment obligations under the Agreement, and (3) that the District Court refuse any attempt to introduce reputational evidence of Smedley which is not specifically required to prove an element of Plaintiffs' claims.

RESPECTFULLY SUBMITTED this 8 day of November, 1999.

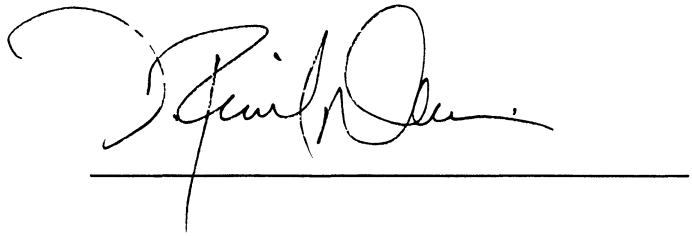
CALLISTER NEBEKER & McCULLOUGH

By:   
\_\_\_\_\_  
T. Richard Davis  
Attorneys for Appellant Dale T. Smedley

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of BRIEF OF APPELLANTS was served by United States mail, first class postage prepaid, on the 8 day of November 1999, on the following:

Craig L. Taylor  
CRAIG L. TAYLOR, P.C.  
47 NORTH 300 WEST, SUITE 3  
KAYSVILLE, UTAH 84037

A handwritten signature in black ink, appearing to read "Craig L. Taylor", is written over a horizontal line.

267455 1

## **ADDENDUM**

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



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~~ 250,000.00 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 A. Lamane  
Notary Public  
Residing at Layton, Utah.

**GLAUSER vs. SMEDLEY  
CHART OF CONSIDERATION**

Strict Construction of Agreement per Glauser

**SMEDLEY RECEIVES:**

Melanie Acres  
32 acres land  
Value: approx. **\$165,000**

**GLAUSER RECEIVES:**

Income Stream  
\$2,000 per month for 15  
years **\$360,000**

Vacation value  
\$6,000 per year for 13  
years **\$78,000**

Storage Sheds  
**\$143,140 to \$165,000**

Salmon Property  
**\$156,451 to \$300,000**

**TOTAL: \$737,591 to \$903,000**

**GLAUSER vs. SMEDLEY  
CHART OF CONSIDERATION**

Strict Construction of Agreement per Glauser as Performed

**SMEDLEY RECEIVES:**

Melanie Acres  
32 acres land  
Value: approx. **\$165,000**

Tax assistance on Sheds  
**\$20,703**

Tax assistance on Salmon  
**\$8,960**

Vacation waiver  
**\$24,000**

**TOTAL \$218,663**

**GLAUSER RECEIVES:**

Income Stream  
\$2,000 per month for 15  
years **\$360,000**

Vacation value  
\$6,000 per year for 13  
years **\$78,000**

Storage Sheds  
**\$143,140 to \$165,000**

Salmon Property  
**\$156,451 to \$300,000**

Smedley Estates Lots  
**\$5,000 to \$25,000**

Cottonwood Unit 3 Lot  
**\$12,500**

Heritage Acres and Lakeview  
Garden work  
**\$56,482**

**TOTAL: \$737,591 to \$996,982**

Craig L. Taylor (A4421)  
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Attorneys for Plaintiffs  
447 North 300 West, Suite 3  
Kaysville, UT 84037  
Telephone: (801) 544-9955  
Fax: (801) 544-9977

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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY  
STATE OF UTAH

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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	:	FINDINGS OF FACT AND
individual; Susan G.	:	CONCLUSIONS OF LAW
Larsen, an individual;	:	
Craig K. Glauser, an	:	
individual	:	Civil No. 960700199
	:	
Plaintiffs,	:	
	:	Judge Michael G. Allphin
-vs-	:	
	:	
Dale T. Smedley, an	:	
individual; and DOES I - X.	:	
	:	
Defendants,	:	

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Trial in this matter was regularly conducted on the 28th day of January 1999, before the Honorable Michael G. Allphin, one of the Judges of the above-entitled Court. Plaintiffs Steven D. Glauser, Richard M. Glauser, Susan G. Larsen, and Craig K. Glauser, appeared personally and as members of Plaintiff Glauser

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Storage, L.L.C. Plaintiffs were represented by their attorneys Craig L. Taylor and Thomas Price of the law firm Craig L. Taylor, P.C. The Defendant Dale T. Smedley appeared personally, and was represented by his attorney, T. Richard Davis of the law firm Callister, Nebeker & McCullough. The Court having heard the testimony of the parties and other witnesses, having received exhibits into evidence and reviewed the same, having received certain stipulations of the parties, having reviewed the files and records herein, having taken the matter under advisement, and being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

1. Glauser Storage, L.L.C. ("Glauser Storage"). is the fee title owner of certain real property, which is the subject of this action, located in Davis County, State of Utah, more particularly described as follows.

Beginning at a point North 0008'30" East 1266.57 feet and North 89034'30" West 1368.86 feet from the South East corner of Section 4; Township 4 North, Range 1 West, Salt Lake Meridian; thence South 89001'50" West 108.05 feet; thence South 0036'02" East 206.17 feet; thence North 89043'07" East 105.36 feet; thence North 0008'30" East 207.47 feet to the point of beginning. Together with the R/WS described in 653-391

Beginning at a point 1220.86 feet North 89034'30" West along Section line and 596 feet North 0008'30" East parallel to the East line of Section 4 from the South East corner of Section 4; Township 4 North Range 1



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West, Salt Lake Meridian; running thence North 0008'30" East 327 feet; thence North 89034'30" West 148 feet; thence South 0008'30" West 327 feet; thence South 89034'30" East 148 feet to the point of beginning. Together with R/W described in 653-391.

2. Glauser Storage is the successor in interest of Glauser Construction Co. Inc. ("Glauser Construction") and Melvin D. Glauser and Kathleen Glauser, both of whom are deceased. (Glauser Construction Co. Inc. and Melvin D. Glauser and Kathleen Glauser are sometimes hereinafter collectively referred to as "Glauser"). The individual plaintiffs, Steven D. Glauser, Kristine G. Lofts, Richard M. Glauser, Susan G. Larsen, and Craig K. Glauser, are each members of Glauser Storage and are the heirs of Melvin D. Glauser and Kathleen Glauser.

3. The "Glauser Storage Sheds" consist of 86 storage sheds constructed on the real property described in paragraph 1 above, located in the city of Layton, Davis County, State of Utah. The Glauser Storage Sheds and the real property upon which they are constructed, described in paragraph 1 above, are hereinafter referred to as the "Glauser Storage Sheds Property."

4. The individual plaintiffs, Steven D. Glauser, Kristine G. Lofts, Richard M. Glauser, Susan G. Larsen, and Craig K. Glauser are joint fee title owners of record of approximately 188 acres of real property located in Lemhi County, state of Idaho, which is also the subject of this action and is hereinafter

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referred to as the Glauser Idaho Property. The Glauser Idaho Property is legally described as follows:

The S½S½SE½SE½; S½S½SW½SE½; S½S½SE½SW½ and the S½S½SW½SW½ in Section 1, Township 21 N., Range 21 E., Boise Meridian, ALSO the S½S½SE½SE½; S½S½SW½SE½; S½S½SE½SW½ in Section 2, Township 21 N., Range 21 E., Boise Meridian, ALSO a parcel of land located in the NE½NW½ and the NW½NE½ of Section 11, Township 21 N., Range 21 E., Boise Meridian, described as follows: Beginning at the Northwest corner of the NE½NW½ of said section, run thence South, 544 feet; thence East, 820 feet; thence North, 60 feet; thence East, 100 feet; thence South, 60 feet; thence East 1720 feet; thence North, 544 feet; thence West, 2640 feet to the POINT OF BEGINNING.

ALSO: The NE½NE½ and the N½N½SE½NE½ in section 11, Township 21 N., Range 21 E., Boise Meridian, and ALSO the NW½NW½; N½N½SW½NW½, N½N½SE½NW½ and the NE½NW½ in section 12, Township 21 N., Range 21 E., Boise Meridian, all located in Lemhi County, State of Idaho. EXCEPTING THEREFROM: A part of the Northwest Quarter of Section 12, Township 21 N. Range 21 E., Boise Meridian: Beginning at the Northeast corner of said Quarter Section, and running thence South, 1628.0 feet; thence West, 1070.27 feet; thence North, 1628.0 feet; thence East, 1070.27 feet to the POINT OF BEGINNING... AND FURTHER EXCEPTING THEREFROM: A part of the SW½ of Section 1 and a part of the SE½ of Section 2, Township 21 North, Range 21 East, Boise Meridian: Beginning at the SW corner of said Section 1; thence East 1401.11 feet; thence North 3 degrees West 355 feet; thence West 3,036.11 feet; thence South 355 feet more or less to the South Section Line of said Section 2; thence East 1,635 feet more or less to the Point of Beginning

5. Dale T. Smedley, the Defendant in this action, claims an interest in the two parcels of real property which are the subject of this action by having filed and recorded certain

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Notices of Interest against each of the properties after the deaths of Melvin and Kathleen Glauser.

6. On or about January 29, 1979, Defendant Smedley entered into an Agreement whereby Smedley and Glauser agreed to exchange a subdivision known as Melanie Acres, containing at least 40 building lots owned by Glauser for real property containing 86 storage sheds owned by Smedley, together with some other considerations, required of Smedley, including: (1) the continued management and payment of maintenance, upkeep and taxes on the Glauser Storage Sheds Property for the benefit of Glauser for as long as Mel and Kathleen Glauser lived; (2) a guaranteed income stream of \$2,000.00 per month to Mel and Kathleen Glauser for as long as they lived; (3) the provision of an annual vacation fund of \$6,000.00 per year for Mel and Kathleen Glauser for as long as they lived; and (4) the establishment of a \$300,000.00 escrow securing Smedley's payment and performance of these obligations. The Agreement was reduced to writing and presented to the court in form of Plaintiff's Exhibit No. 1 (hereinafter the "1979 Agreement").

7. The Court finds that the 1979 Agreement (Plaintiffs' Exhibit 1) is clear on it's face and unambiguous in its terms relating to the transfer of title of each of the properties to the respective parties. The Court finds from the 1979 Agreement

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that it was the intention of the parties that Defendant Smedley transfer Fee Title in the Glauser Storage Sheds Property to Glauser Construction in exchange for Glauser's transfer of Fee Title in the Melanie Acres property to Smedley.

8. In accordance with the 1979 Agreement, Defendant Smedley and his wife Helen conveyed fee title to the Storage Sheds to Glauser Construction pursuant to a Warranty Deed dated January 29, 1979 (Plaintiffs' Exhibit 2); and Mel and Kathleen Glauser conveyed the Melanie Acres property to the Smedleys pursuant to a Warranty Deed dated January 29, 1979 (Defendant's Exhibit 32).

9. Defendant Smedley claims an interest or estate in the Glauser Storage Sheds Property adverse to that of the Plaintiffs. The Court finds that there is nothing within the 1979 Agreement or the Warranty Deed from Smedleys to Glauser Construction upon which Defendant Smedley may base his adverse claim. Moreover, there are no other written documents existing evidencing a reversionary right in Smedley, nor any obligation on the part of Glauser or the other Plaintiffs to reconvey the Glauser Storage Sheds to Smedley or anyone else.

10. The Court finds from the 1979 Agreement (Plaintiffs' Exhibit 1) entered into by the parties and the Warranty Deed from Smedleys to Glauser Construction (Plaintiffs' Exhibit 2) that Defendant Smedley has no interest in the Glauser Storage Sheds;

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that the Notice of Interest Smedley caused to be recorded against the Glauser Storage Sheds Property is null and void and of no force or effect; and that the Court should enter an order quieting title to the Glauser Storage Sheds Property in Glauser Storage and the other individual plaintiffs.

11. Pursuant to paragraph 4 of the 1979 Agreement (Plaintiffs' Exhibit 1), the Court finds that the Plaintiffs are entitled to recover reasonable attorneys' fees and expenses against the Defendant, which is considered in more detail below.

12. Concerning Plaintiff's claim of Breach of Contract on the part of the Defendant, the Court finds that Plaintiffs' predecessors in interest fulfilled all of their obligations under the 1979 Agreement by conveying to Smedley the real property described in paragraph 1 of the 1979 Agreement known as Melanie Acres.

13. Pursuant to the 1979 Agreement, and for and in consideration of Glauser's conveyance of the Melanie Acres property to Smedley, Smedley covenanted and promised to manage the rental storage units affixed to the real property and agreed to keep the units rented and fully maintained for the benefit of Glauser, and agreed to pay Glauser each month the sum of \$2,000.00 beginning with the month of February 1979.

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14. The parties acknowledged in the 1979 Agreement that the rental income then currently exceeded the sum of \$2,000.00 per month, and that the additional rental income would 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.

15. Smedley further covenanted and promised pursuant to the 1979 Agreement, and for and in consideration of Glauser's conveyance of Melanie Acres, to establish a credit line in the amount of \$6,000.00 per year to pay for any and all costs and expenses incurred by Glausers for travel, recreation, or incidental expenses incurred for vacations.

16. At the discretion of the Glausers, the amount of \$6,000.00 per year could be used in that year or be accumulated from one year to the next. It was agreed between the parties that the account should continue for a period of at least thirteen years through the year 1991, and thereafter should continue so long as either Mel Glauser or his wife lived.

17. The evidence produced at the time of trial, indicates that beginning in 1984, and continuing for a period of four (4) years, Smedley breached his obligation to annually fund the \$6,000.00 for the benefit of Mel Glauser or Kathy Glauser to be

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used for travel expenses in the amount of \$24,000.00, and the Court should award the Plaintiffs' judgment against Defendant in the amount of \$24,000.00. The Court took this figure from the admission by Mr. Smedley both in his testimony and other written documents that he provided indicating that it was his belief that he owed Glauser \$24,000 for the travel expenses for four years beginning in 1984 through 1987.

18. The Court finds that Defendant Smedley further breached his obligations provided in the 1979 Agreement, in that he failed to pay the property taxes on the Glauser Storage Sheds during the period of 1979 through 1994.

19. The parties stipulated in connection with Plaintiffs' Exhibit 27 that the amount of the property taxes that Defendant failed to pay was \$20,703.38, as follows:

<u>Amount</u>	<u>Tax Year</u>
2,458.45	1984
3,545.11	1985
3,641.99	1986
3,651.52	1987
3,143.22	1988
989 48	1989
<u>3,273 61</u>	1990

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\$ 20,703.38

20. The Court should award the Plaintiffs' judgment against Defendant in the amount of \$20,703.38.

21. The Court finds that Smedley further breached his obligation under the 1979 Agreement in that he failed to pay or provide for the maintenance, upkeep, and costs necessary for repairs.

22. One of the witnesses, Terry Smedley, who managed the storage sheds from 1988 until they were turned over to the Glausers, testified that in the spring of 1994, the roofs were worn out, and that the storage sheds didn't look good, and the asphalt was bad. He further testified that in March 1994, Gary Egbert was hired to do some roof repair.

23. The Court finds that in January and February 1995, additional roof repairs were needed in the amount of \$16,000.00. Plaintiffs' Exhibit 26 shows that Plaintiffs paid \$6,000.00 on January 30, 1995, and \$10,000.00 on February 10, 1995, for roof repairs. The Court finds that these repairs are reasonably attributed to the roofs being worn out prior to the Glausers taking control of the Storage Sheds in late October of 1994, and the Court should, therefore, award Plaintiffs judgment against the Defendant in the amount of \$16,000.00.



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24. Plaintiffs' Exhibit 26 shows that Plaintiffs paid the sum of \$2,037.00 for asphalt repairs on July 10, 1995. The Court finds that these asphalt repairs were needed were attributable to that time when Defendant Smedley had the responsibility for the maintenance of the Glauser Storage Sheds Property. Accordingly, the Court should enter judgment in favor of Plaintiffs and against the Defendant in the amount of \$2,037.00

25. The Plaintiffs' remaining claims for repair and maintenance should be denied for lack of proof that those items were a result of inadequate maintenance during the period that the Smedleys had the responsibility for maintenance and upkeep.

26 Defendant Smedley agreed in the 1979 Agreement with Glauser to pay the amount of \$300,000.00 into an escrow with First National Bank to secure Smedley's obligations as described above. All of the parties in this lawsuit acknowledged that Defendant Smedley failed to fund the \$300,000.00 escrow to guarantee and secure his obligations.

27 The 1979 Agreement was orally modified with respect to the \$300,000.00 escrow in order to provide for other security to guarantee Smedley's payment and performance of his above-mentioned obligations.

28. In place of the escrow, Smedley gave Glauser a Mortgage on 274.97 acres in Salmon, Idaho as evidenced by the Mortgage

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executed by Smedleys on the fourth day of December 1979, and presented to the Court in the form of Plaintiffs' Exhibit 3.

29. In addition, and in connection with Smedley's conveyance of the Mortgage to Glauser as security for his obligations, Smedley promised to pay the property taxes on that Salmon, Idaho Property.

30. As shown in Plaintiffs' Exhibit 28, beginning with the Tax Year 1983 and continuing to the present, Defendant Smedley failed to make those tax payments in the stipulated amount of \$8,960.86, and the Court should enter judgment in favor of Plaintiffs against the Defendant in the amount of \$8,960.86.

31. The Court finds that the parties intended that the Salmon, Idaho Property was to be used as security for the Smedley obligations under the 1979 Agreement.

32. On March 13, 1980, Smedley made a conveyance by Warranty Deed (Plaintiffs' Exhibit 5), which was recorded on March 13, 1980, as document number 151496 in the Lemhi County Recorder's Office, State of Idaho, to Plaintiffs' predecessor in interest, Melvin D. Glauser, of approximately 211 acres of the Salmon, Idaho Property. The Court finds that this conveyance was given to Glauser as a security for Smedley's obligations under the 1979 Agreement, rather than as an outright conveyance of the property.

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33. The Court finds that the intent of the parties in connection with that subsequent conveyance was that Mr. Glauser wanted further security in having Fee Title so that Mr. Smedley could not continue to transfer or convey off pieces of this property, which he had done during the period 1979-80.

34 The Court finds that because the Warranty Deed was given as a security, that this Court lacks jurisdiction to deal with the Glauser Idaho Property described in paragraph 4 above. It appears to the Court that the appropriate remedy for the Plaintiffs in this case would be to file an action in the State of Idaho to foreclose their Warranty Deed as an Equitable Mortgage or security interest in that property.

35. The Plaintiffs are entitled to foreclose the Glauser Idaho Property, because Smedley breached his obligations under the 1979 Agreement which were secured by his conveyance of the Glauser Idaho Property to Plaintiffs' predecessor in interest, but Plaintiffs must do so in Idaho.

36. In or about June 1993, Mel and Kathy Glauser conveyed to Bill Isley by Quit Claim Deed a portion of the Salmon, Idaho Property, for and in consideration of Isley's promise to release his rights in an Agricultural Lease encumbering the entire Salmon, Idaho parcel through the year 2007 at such time as that Property encumbered by the Agricultural Lease is sold. Bill Isley

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testified that the amount of property conveyed was approximately 5 or 6 acres. Other evidence indicated that the amount was approximately 24 acres, and the discrepancy may have been due to overlapping deeds in the chain of title. The amount is unclear.

37. Smedley claims the right to an offset against the judgment amounts he owes to Glauser for the value of the acreage Glauser conveyed to Isley.

38. The evidence of values for the Idaho Property ranged from \$130 per acre, as testified to by Bill Isley, to \$1,800 per acre as testified to by the Smedleys.

39. Mel and Kathy Glauser received no other consideration except Isley's promise to release the Agricultural Lease upon the ultimate sale of the Idaho Property.

40. The Court finds that the evidence is insufficient to support a finding as to the amount of property conveyed to Isley or the value per acre to be attributed to the property so conveyed.

41. The Court finds that the promised consideration received for the conveyance to Bill Isley runs with the land and, consequently, as a result of the Court's previous finding that Smedley's conveyance to Glauser of the Glauser Idaho Property is an equitable mortgage rather than an outright conveyance, that Smedley as well as Glauser are entitled to the benefits of the

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promised consideration, that is, release of the Agricultural Lease upon ultimate sale of the Glauser Idaho Property.

Plaintiffs are in agreement and stipulated that Bill Isley's promise to release the Agricultural Lease should be treated as running with the Land.

42. Plaintiffs stipulated, and the Court finds that the conveyances by Smedley to Glauser Construction Co. of Lots 8 and 10 in Smedley Estates Subdivision Phase 2 Block 3, Lemhi County, Idaho, should be treated in the same manner as the Glauser Idaho Property, that is, as an equitable mortgage securing Smedley's obligations to Glauser which the Court has found are in default, as set forth above. Thus, as with the Glauser Idaho Property, Plaintiffs are entitled to foreclose their interest in Lots 8 and 10 in the appropriate Court having jurisdiction over real property in Lemhi County, Idaho.

43. While the Court has found that in many of these areas the Defendant Smedley breached his obligations, there were some additional areas which the court didn't have sufficient evidence to conclude that a breach existed, including, for instance, with respect to the \$2,000.00 per month rental income.

44. Some of the documents indicate perhaps all of the \$2,000.00 per month was not paid during the relevant period as well.

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45. Defendant Smedley claims that he transferred Lots 8 and 10 in Smedley Estates Subdivision Phase 2 Block 3, Lemhi County, Idaho, to Glauser in consideration for taxes on the Idaho property. The Defendant further claims that he transferred a Cottonwood unit number three lot and was not reimbursed by Glauser for it, and that it was also transferred in consideration for some of his obligations in this transaction.

46. Even though it is possible that Smedley's transfer of the two lots in Smedley Estates in Idaho might very well link with the payment of the taxes, the evidence is insufficient and unreliable in support of these claims. 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.

47. The Court also finds that there is a problem concerning the proof of value for these pieces of property that Smedley claims would offset the taxes. The evidence was unreliable and inconclusive concerning what, if any, value would be ascribed to the parcels

48. The Defendant further alleges that he performed \$56,482.00 worth of work for Glauser in Heritage Acres and in

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Lakeview Garden Estates in or about 1988 to offset his delinquencies and defaults for the previous four (4) years. With regard to Defendant Smedley's testimony of work performed pursuant to an alleged oral agreement to satisfy his obligations, delinquencies, and defaults, the Court finds this evidence 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.

49. The Court finds that the oral agreement that Defendant Smedley testified to regarding the transfer of the Cottonwood unit three lot is inadmissible, as well, for the same reasons.

50. 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

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not to be Mr. Glausers. 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.

51. Finally, the 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's 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 assertion 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.

52. Because the Court has found that the Defendant has breached his obligations under the 1979 Agreement and has inappropriately filed a Notice of Interest against the Glauser Storage Sheds Property, the Court finds that pursuant to paragraph 4 of the 1979 Agreement, the Court should award



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Plaintiffs' attorney's fees, because they have prevailed in that portion in the cause of action that deals specifically with the 1979 Agreement, and with the Glauser Storage Sheds Property.

53. Plaintiffs have not prevailed as it relates to the Quiet Title Action on the Glauser Idaho Property.

54. Having considered the Plaintiff's Affidavit of Attorney's Fees and Expenses relating to the portion of this action on which they have prevailed, the Court finds that reasonable attorney's fees to prosecute this action is in the amount of \$20,000.00, and the court should award judgment against Defendant on behalf of Plaintiffs for attorney's fees and expenses in the amount of \$20,000.00.

55. The Court finds that the judgment amounts to be awarded Plaintiffs as set forth above, in the total amount of \$71,701.24 (exclusive of attorneys fees) are fixed as of particular times and the amounts of the losses can and have been calculated with mathematical certainty.

56. Consequently, except as to the attorneys fees awarded, Plaintiffs should be awarded prejudgment interest at the rate of 6% per annum on the \$71,701.24 total amount (exclusive of attorneys fees) awarded, in the amount of \$41,154.67 through March 31, 1999, with prejudgment interest accruing at the rate of \$11.79 per diem until judgment is entered, together with

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postjudgment interest on all of the above amounts, and including the \$20,000.00 attorneys fees awarded, at the legal rate thereafter until all of the above sums are paid in full.

From the foregoing Findings of Fact, the Court now makes and adopts its:

CONCLUSIONS OF LAW

1. The 1979 Agreement (Plaintiff's 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 Glauser Storage Sheds Property 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 Glauser Storage Sheds Property to Glauser Construction was an outright conveyance of fee title absolute.

2. Plaintiff Glauser Storage, L.L.C., and the individual Plaintiffs as members of Glauser Storage, are awarded a judgment and decree quieting title in and to the Glauser Storage Sheds Property more particularly described as follows:

Beginning at a point North 0008'30" East 1266.57 feet and North 89034'30" West 1368.86 feet from the South East corner of Section 4; Township 4 North, Range 1 West, Salt Lake Meridian; thence South 89001'50" West 108.05 feet; thence South 0036'02" East 206.17 feet; thence North 89043'07" East 105.36 feet; thence North

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0008'30" East 207.47 feet to the point of beginning.  
Together with the R/WS described in 653-391

Beginning at a point 1220.86 feet North 89034'30" West  
along Section line and 596 feet North 0008'30" East  
parallel to the East line of Section 4 from the South  
East corner of Section 4; Township 4 North Range 1  
West, Salt Lake Meridian; running thence North  
0008'30" East 327 feet; thence North 89034'30" West  
148 feet; thence South 0008'30" West 327 feet; thence  
South 89034'30" East 148 feet to the point of  
beginning. Together with R/W described in 653-391.

3. Defendant Smedley has no interest in the Glauser Storage Sheds Property described in paragraph 2 above; his filing for record the Notice of Interest against the Glauser Storage Sheds Property is in breach of the 1979 Agreement and is null and void and of no force or effect; and the Court should enter a judgment and decree quieting title in the above-described property in and to the Plaintiff, Glauser Storage, as against the Defendant Smedley and all others claiming by, through, or under Defendant Smedley.

4. Plaintiffs are awarded judgment against Defendant Smedley in the amount of \$24,000.00 for his failure to pay to Mel and Kathy Glauser the annual sum of \$6,000.00 for travel expenses for the years 1984 through 1987 in breach of the 1979 Agreement.

5. Plaintiffs are awarded judgment against Defendant Smedley in the amount of \$20,703.38 for property taxes owed on the Glauser Storage Sheds Property during the years 1984 through

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1990 for which Defendant Smedley was obligated but failed to pay in breach of the 1979 Agreement, and which property taxes were paid by the Glausers.

6. Plaintiffs are awarded judgment against Defendant Smedley in the amount of \$16,000.00 for roof repairs paid for by Plaintiffs on the Glauser Storage Sheds Property in January and February 1995 which are attributable to the roofs being in a state of disrepair prior to the Glauser Storage Sheds Property being turned over to Plaintiffs, and for which repairs Defendant Smedley was obligated, but failed, to pay, in breach of the 1979 Agreement.

7. Plaintiffs are awarded judgment against Defendant Smedley in the amount of \$2,037.00 for asphalt repairs paid for by Plaintiffs on the Glauser Storage Sheds Property in July 1995, which are attributable to the asphalt being in a state of disrepair prior to the Glauser Storage Sheds Property being turned over to Plaintiffs, and for which repairs Defendant Smedley was obligated, but failed, to pay, in breach of the 1979 Agreement.

8. Plaintiffs' remaining claims for repair and maintenance are denied for lack of proof that those items were the result of Smedley's failure to maintain the property with respect to those

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items in a state of repair during the time for which he was responsible.

9. Defendant Smedley failed to fund the \$300,000.00 escrow to secure and guarantee his payment and performance of his other obligations under the 1979 Agreement, which constituted a breach thereof. Consequently, the Parties orally modified the 1979 Agreement with respect to the provision of security for Glauser, and Smedley gave Glauser a Mortgage to certain real property located in Salmon, Lemhi County, Idaho.

10. In connection with Smedley's conveyance of the Salmon, Idaho Property to Glauser, Defendant Smedley promised to pay the property taxes, but he has failed to make those tax payments from and after the Tax Year 1983 to the present in breach of his agreement, requiring the Glausers to make said payments, in the stipulated amount of \$8,960.86.

11. Plaintiffs are awarded judgment against Defendant Smedley in the amount of \$8,960.86 for his failure to pay property taxes on the Salmon, Idaho Property.

12. In or about March 13, 1980, Smedley gave to Plaintiffs' predecessor in interest, Melvin D. Glauser, a Warranty Deed, which was recorded on March 13, 1980, as document number 151496 in the Lemhi County Recorder's Office, State of Idaho, to a portion of the property originally conveyed by Mortgage, and,

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consequently, the Plaintiffs are now the record title owners of approximately 186 acres referred to as the Glauser Idaho Property, which is more particularly described as follows:

The S½S½SE½SE½; S½S½SW½SE½; S½S½SE½SW½ and the S½S½SW½SW½ in Section 1, Township 21 N., Range 21 E., Boise Meridian, ALSO the S½S½SE½SE½; S½S½SW½SE½; S½S½SE½SW½ in Section 2, Township 21 N., Range 21 E., Boise Meridian, ALSO a parcel of land located in the NE¼NW¼ and the NW¼NE¼ of Section 11, Township 21 N., Range 21 E., Boise Meridian, described as follows: Beginning at the Northwest corner of the NE¼NW¼ of said section, run thence South, 544 feet; thence East, 820 feet; thence North, 60 feet; thence East, 100 feet; thence South, 60 feet; thence East 1720 feet; thence North, 544 feet; thence West, 2640 feet to the POINT OF BEGINNING.

ALSO: The NE¼NE¼ and the N½N½SE¼NE¼ in section 11, Township 21 N., Range 21 E., Boise Meridian, and ALSO the NW¼NW¼; N½N½SW¼NW¼, N½N½SE¼NW¼ and the NE¼NW¼ in section 12, Township 21 N., Range 21 E., Boise Meridian, all located in Lemhi County, State of Idaho. EXCEPTING THEREFROM: A part of the Northwest Quarter of Section 12, Township 21 N. Range 21 E., Boise Meridian: Beginning at the Northeast corner of said Quarter Section, and running thence South, 1628.0 feet; thence West, 1070.27 feet; thence North, 1628.0 feet; thence East, 1070.27 feet to the POINT OF BEGINNING... AND FURTHER EXCEPTING THEREFROM: A part of the SW¼ of Section 1 and a part of the SE¼ of Section 2, Township 21 North, Range 21 East, Boise Meridian: Beginning at the SW corner of said Section 1; thence East 1401.11 feet; thence North 3 degrees West 355 feet; thence West 3,036.11 feet; thence South 355 feet more or less to the South Section Line of said Section 2; thence East 1,635 feet more or less to the Point of Beginning

13. The Court concludes, however, that the parties intended the Glauser Idaho Property to be used as security for Defendant Smedley's obligations under the 1979 Agreement, and the

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conveyance by Warranty Deed was given as a security interest rather than as an outright conveyance and will be treated as an Equitable Mortgage.

14. Because the Warranty Deed was given as security, the Court lacks jurisdiction to deal with the Glauser Idaho Property described in paragraph 12 above. It appears to the Court that the appropriate remedy for the Plaintiffs will be to file an action in Lemhi County, Idaho, to foreclose their Warranty Deed as an Equitable Mortgage or security interest in that property.

15. Plaintiffs are entitled to foreclose their interest in the Glauser Idaho Property in the judgment amounts set forth herein, together with prejudgment and postjudgment interest, reasonable attorneys' fees, expenses, and costs, because of Smedley's breaches of his obligations under the 1979 Agreement, but they must do so in Idaho.

16. The conveyance by Smedley to Glauser Construction Co. of Lots 8 and 10 in Smedley Estates Subdivision Phase 2 Block 3, Lemhi County, Idaho, shall be treated in the same manner as the Glauser Idaho Property, that is, as an equitable mortgage securing Smedley's obligations to Glauser which the Court has found to be in default, as set forth above. Thus, as with the Glauser Idaho Property, Plaintiffs are entitled to foreclose

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their interest in Lots 8 and 10 in the appropriate Court having jurisdiction over real property in Lemhi County, Idaho.

17. Defendant Smedley failed to show by sufficient or reliable evidence that he transferred the lots in Smedley Estates and Cottonwood unit number 3 in consideration for the property taxes owed on the Idaho property. 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 claimed by Smedley.

18. The Court further concludes that Smedley's evidence concerning what value, if any, might be ascribed to these lots, is unreliable and inconclusive.

19. Defendant Smedley's testimony that he performed \$56,482.00 worth of work in 1988 pursuant to an alleged oral agreement in satisfaction of his obligations, defaults, and delinquencies, is inadmissible under Rules 403 and 601 of the Utah Rules of Evidence. That evidence 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



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satisfy obligations, delinquencies, and defaults pursuant to an inadmissible oral agreement.

20. Defendant Smedley's testimony of an alleged oral agreement regarding the transfer of the Cottonwood unit 3 is inadmissible as well for the same reasons.

21. Defendant Smedley's testimony concerning an alleged oral agreement in 1988 and the evidence that Mr. Smedley presented to the court concerning Defendant's Exhibit 38 is inadmissible.

22. Finally, the work Defendant Smedley alleges to have performed in 1988 to satisfy his defaults and obligations is barred by laches due to his unreasonable delay and lack of diligence in failing to make any assertion 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.

23. Defendant's claim to a right of offset against the judgment amounts he owes to Glauser for the value of the acreage Glauser conveyed to Isley is denied. Plaintiffs stipulated, and the Court concludes, that the promised consideration received for the conveyance to Bill Isley runs with the land and, consequently, as a result of the Court's previous finding that Smedley's conveyance to Glauser of the Idaho Property is an

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equitable mortgage rather than an outright conveyance, that Smedley as well as Plaintiffs are entitled to the benefits of the promised consideration, release of the Agricultural Lease upon ultimate sale of the Glauser Idaho Property.

24. Plaintiffs are awarded judgment against Defendant Smedley in the amount of \$20,000.00 for reasonable attorney's fees and expenses pursuant to paragraph 4 of the 1979 Agreement, inasmuch as Defendant Smedley has breached his obligations under the 1979 Agreement, and Plaintiffs have prevailed on that part of their cause of action that deals specifically with the 1979 Agreement, and with the Glauser Storage Sheds and Property.

25. The judgment amounts awarded Plaintiffs as set forth above, in the amount of \$71,701.24 (exclusive of attorneys fees) are fixed as of a particular time and the amount of the losses can and have been calculated with mathematical certainty.

26. Except as to the attorneys fees awarded, Plaintiffs are awarded prejudgment interest at the rate of 6% per annum on the \$71,701.24 total amount (exclusive of attorneys fees) awarded, in the amount of \$41,154.67 through March 31, 1999, with prejudgment interest accruing at the rate of \$11.79 per diem until judgment is entered, together with postjudgment interest on all of the above amounts, and including the \$20,000.00 attorneys fees

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awarded, at the legal rate thereafter until all of the above sums  
are paid in full.

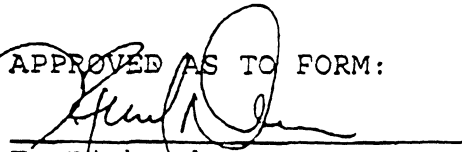
27. Plaintiffs are awarded their costs of this action.

DATED this 18<sup>th</sup> day of May, 1999.

BY THE COURT:

  
Michael G. Allphin  
District Judge

APPROVED AS TO FORM:

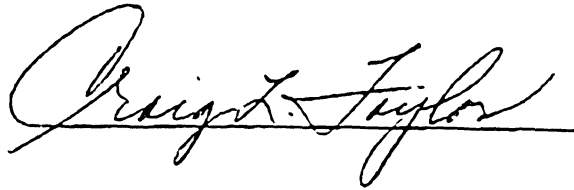
  
T. Richard Davis  
Attorney for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on the 17TH day of May, 1999, a true copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was hand-delivered to the following:

T. Richard Davis, Esq.  
CALLISTER, NEBEKER & McCULLOUGH  
Gateway Tower East, Suite 900  
10 East South Temple  
Salt Lake City, Utah 84133

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