

2003

John A. Fericks; and C. Kurt Hoffman v. Pentad Properties, INC., and Joe Goodman : Brief of Appellant

Utah Supreme Court

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Jeffrey W. Shields; Ballard, Spahr, Andrews & Ingersoll; Attorneys for Appellees.

Russell C. Fericks; Zachary E. Peterson; Richards, Brandt, Miller & Nelson; Attorneys for Appellants.

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IN THE UTAH SUPREME COURT

JOHN A. FERICKS; and C. KURT
HOFFMAN,

Plaintiffs/Appellants,

vs.

PENTAD PROPERTIES, INC., and JOE
GOODMAN,

Defendants/Appellees.

Case No. 20030073-SC

BRIEF OF APPELLANT

**Appeal from the Final Order of the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable J. Dennis Frederick, District Court Judge**

JEFFREY W. SHIELDS
BALLARD, SPAHR, ANDREWS
& INGERSOLL
201 South Main Street, Suite 600
Salt Lake City, Utah 84111
Attorneys for Appellees

RUSSELL C. FERICKS [3793]
ZACHARY E. PETERSON [8502]
RICHARDS, BRANDT, MILLER
& NELSON
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
Attorneys for Appellants

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UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

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ZACHARY E. PETERSON [8502]
RICHARDS, BRANDT, MILLER
& NELSON
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
Attorneys for Appellants

LIST OF PARTIES

The parties to this proceeding are: John A. Fericks and C. Kurt Hoffman, plaintiffs/appellants; and Joe Goodman and Pentad Properties, Inc., defendants/appellees. In addition to the parties to this appeal, the Lucy Ann Soffe Trust and Carlos R. Soffe, Vaughn C. Soffe and Shirla S. Holt, as Trustees of the Lucy Ann Soffe Trust, were named as defendants. Finally, the plaintiffs listed a John Doe Buyer as a defendant. This party was never identified or served. The Lucy Ann Soffe Trust and its trustees are not parties to this appeal.

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

ISSUES

I. Did the trial court err in granting defendants' Motion for Summary Judgment, concluding, as a matter of law, that plaintiffs could prove no exceptions to the statute of frauds applied to warrant enforcement of the oral modification of REPC?

(Issue preserved in the Record at 64-83; 165-193; 194-208; 271-77; 291-95)

Standard of Review: On appeal, the appellate court reviews the facts and inferences in the light most favorable to the nonmoving party. See Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993). Whether a party is entitled to summary judgment presents a question of law, the appellate court grants no deference to the trial court's legal conclusions and reviews them for correctness. See Higgins, 855 P.2d at 235; Stangl v. Ernst Home Center, 948 P.2d 356, 360 (Utah Ct. App. 1997).

II A. Did the trial court err in concluding that there were no genuine issues of material fact which would excuse the plaintiffs from the requirement that any modifications to the Real Estate Purchase Contract be in writing signed by the parties?

(Issue preserved in Record at 64-83; 165-193; 194-208; 271-77; 291-95)

Standard of Review: No deference is given to a trial court's legal conclusions which are reviewed for correctness. See Higgins, 855 P.2d at 235; Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, 979 P2d 332.

II B. Did the trial court abuse its discretion in denying a Rule 56(f) extension to allow plaintiffs to conduct basic discovery for the purpose of determining if Appellees Pentad and Goodman (and the Soffe Defendants through Pentad/Goodman as their agents) were engaged in fraud, misrepresentation, or other artifice to deprive the plaintiffs of rights and benefits under their own Real Estate Purchase Contract with the Soffe Defendants? (Issue preserved in Record at 165-193; 194-208; 264-65; 271-77; 291-95)

Standard of Review: A trial court's denial of a Rule 56(f) motion for additional discovery time is reviewed under an abuse of discretion standard based upon whether the discovery sought by the moving party would be legally relevant to the resolution of issues on summary judgment. Campbell, Maack & Sessions, v. Debry, 2001 UT App 397, ¶6, 38 P.3d 984; American Towers Owners Assn. v. CCI Mech., Inc., 930 P.2d 1182 (Utah 1996); Holmes v. American States Ins. Co., 2000 UT App 85, 1 P.3d 552.

III. After ruling the statute of frauds barred any oral modification of the

REPC, did the trial court err in dismissing plaintiffs' claims of fraud, breach of duty and intentional interference with contract, concluding the statute of frauds precluded these causes of action as well? (Issue preserved in Record at 291-95; 320-21; 322-25)

Standard of Review: No deference is given to a trial court's legal conclusions which are reviewed for correctness. See Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, 979 P2d 332.

IV. Did the trial court err in determining that Goodman and Pentad were entitled to attorney fees and costs under the REPC as the agents of the seller? (Issue preserved in Record at 373-74; 375-86; 421-22; 423-24; 430-34)

Standard of Review: Whether attorney fees are recoverable is a question of law which is reviewed for correctness. See Selvage v. J. J. Johnson & Assocs., 910 P.2d. 1252 (Utah App. 1996).

V-VI. Was the award of attorney fees to Goodman and Pentad supported by sufficient evidence, properly allocated to covered claims, reasonable and supported by findings of fact after independent review by the trial court? (Issue preserved in Record at 373-74; 375-86; 421-22; 423-24; 430-34)

Standard of Review: Where attorney fee are awarded on summary judgment, the undisputed material facts must establish as a matter of law that the

prevailing party is entitled to the award, the amount of the award is reasonable and the award is properly attributed to covered claims. See Foote v. Clark, 962 P.2d 52, 56 (Utah 1998); Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Court App. 1989).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Resolution of the case necessarily involves application of the statute of frauds, specifically Utah Code Ann. § 25-5-3, which provides:

“Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.”

Utah Code Ann. § 25-5-3 (1953).

STATEMENT OF THE CASE

This appeal is from an Order Granting Summary Judgment which purportedly resolved all claims against all defendants, and from the Findings/Judgment awarding attorney fees and costs to Pentad and Goodman. Plaintiffs are not appealing the Summary Judgment on their claims directly against defendants Lucy Ann Soffe Trust, and the Trust’s Trustees, Carlos R. Soffe, Vaughn C. Soffe, and Shirla S. Holt (the “Soffe

Defendants”). Nor are plaintiffs appealing the Trial Court’s award of attorney fees and costs to the Soffe Defendants.

STATEMENT OF FACTS

This case involves a Real Estate Purchase Contract (“REPC”) for purchase of undeveloped commercial property in Salt Lake County, Utah. Plaintiffs (C. Kurt Hoffman (“Hoffman”) and John Fericks (“Fericks”)) were the buyers for a purchase price of \$313,000. The Soffe defendants were the sellers. Defendant/Appellee Joe Goodman (“Goodman”) was the sellers’ real estate agent. Defendant/Appellee Pentad Properties, Inc. (“Pentad”) was the real estate brokerage which employed Goodman. (**R. at 54-55, 77-82**) A \$5,000 earnest money payment was deposited by plaintiffs with Pentad on February 1, 2002 when the parties signed the REPC. An additional \$10,000 non-refundable earnest money deposit was due on April 6, 2002. (**R. at 55, 77-82**).

In a telephone call between Hoffman and Goodman on March 26, 2002, plaintiffs arranged a 30-day extension of the April 6, 2002 deadline with Goodman, as agent for the sellers. Goodman committed to create a written memorial of the extension. (**R. at 195-97**) During this same conversation, Goodman discussed a possible tenant to lease space in the building plaintiffs proposed to build on the subject property. (**R. at 196**) On April 5, 2002, Hoffman again called Goodman regarding the extension. Goodman

apologized for not confirming the extension and vowed to care of it that day. **(R. at 196)**

The next day, April 6, 2002, plaintiffs, in reliance on Goodman's representations, did not tender the second earnest money payment—although they were willing and able to make the payment at that time. **(R. at 199, 273-74)**

On April 8, 2002, the very next business day after the April 6, 2002 deadline, Goodman and Pentad, on behalf of the sellers, notified plaintiffs that the deadline for the additional earnest money had expired and sellers considered the REPC void. **(R. at 197, 207, 271-74)** At this point, however, the sellers, through Goodman and Pentad, did not indicate another buyer had been lined up to buy the property. **(R. at 207)** After receiving the April 8 letter voiding the deal, Fericks inquired about the extension. During these conversations with Goodman and Carlos Soffe, the seller, plaintiffs learned that sellers, with the assistance of Goodman and Pentad, had been negotiating with new buyers who were offering more money and a quicker closing date. **(R. at 273)** More importantly, the statements of Goodman and Pentad, and other related circumstances, suggested that the negotiations with the later buyer were occurring contemporaneous with the requests for an extension of the April 6 deadline. **(R. at 273)**

Based on the curious timing of the new buyer and the apparent misrepresentations of Goodman and Pentad, plaintiffs filed their Complaint on May 6,

2002, and tendered the additional earnest money by deposit with the Court Clerk pursuant to Utah Code Ann. § 78-27-1. **(R. at 1-17)** The Complaint sought the following relief against the indicated defendants:

- i. Against Pentad and Goodman: breach of real estate professional statutory and common law standards of care with regards to rights of third parties **(R. at 4-5)**;
- ii. Against Pentad and Goodman: intentional interference with contractual and economic interests **(R. at 5)**;
- iii. Against Pentad and Goodman: fraud and/or misrepresentation regarding the 30-day extension on the deadline for the additional earnest money deposit **(R. at 5)**;
- iv. Against Soffe Defendants: specific performance under the REPC **(R. at 5)**;
- v. Against Soffe Defendants: breach of contract **(R. at 5)**;
- vi. Against a John Doe Buyer: for declaratory judgment of no interest in the property as competing buyer **(R. at 5)**.

Plaintiffs sought relief variously against the defendants including: damages, specific performance, punitive and exemplary damages, and statutory damages under Utah Code

Ann. § 61-2-17(4). **(R. at 5-6)**

In very short order, defendants filed motions to dismiss **(R. at 27-53)**; the plaintiffs filed an Amended Complaint **(R. at 54-60)**; defendants answered the amended complaint **(R. at 114-26; 130-42; 143-46)**; defendants filed motions for summary judgment **(R. at 84-113, 127-29)**; plaintiffs opposed summary judgment on the legal merits and requested a Rule 56(f) extension for additional time to conduct discovery **(R. at 165-93)**; Plaintiffs issued requests for production of documents to Goodman and Pentad and noticed the deposition of Pentad's principle broker, Greg Shields, for August 29, 2002. **(R. at 264-65)** A hearing was held by the trial court on the Motions for Summary Judgment on August 19, 2002. **(R. at 266-67, 284)** Based upon the language in the REPC which required all changes to be in writing signed by parties, the trial court announced summary judgment in favor of all defendants. **(R. at 284)**

Objections followed with regard to the form and scope of the proposed Order submitted to the trial court which covered not only the claims brought directly under the REPC, but also the common law and statutory claims, particularly against Pentad and Goodman. **(R. at 291-95)** In spite of these objections, on September 30, 2002 the trial court entered the Order Granting Motion for Summary Judgment. It disposed of all claims against all defendants. **(R. at 320-21, 322-25)**

Applications for attorney fees and costs were subsequently granted over the objections of plaintiffs that argued (1) defendants Pentad and Goodman were not parties to the REPC and had no statutory or contractual basis upon which to be awarded legal expenses; (2) the claims asserted against Pentad and Goodman were not contractual in nature and did not arise out of the REPC; and (3) the requested fees were not reasonable or supported by proper evidence and findings. (**R. at 326-39, 340-61, 362-64, 365-69, 373-74, 375-86, 396-417, 421-22, 423-24, 428-29, 430-34, 435-37**)

SUMMARY OF ARGUMENTS

On appeal, plaintiffs argue the trial court erred in three primary respects: (1) granting summary judgment, (2) disposing of all claims against Goodman and Pentad based on the statute of frauds, and (3) awarding Goodman and Pentad attorney fees. Specifically, plaintiffs have alleged sufficient facts to show that the oral agreement extending the deadline is enforceable as a matter of law. Additionally, plaintiffs submitted sworn affidavits which indicate that material issues of fact exist, precluding summary judgment. Plaintiffs timely submitted discovery requests to Goodman and Pentad requesting information to support their claims. Plaintiffs requested the trial court grant them time to conduct this basic discovery pursuant to Rule 56(f). This request was denied, and plaintiffs had no opportunity to conduct basic discovery.

On the issues of the award of attorney fees to Goodman and Pentad, plaintiffs assert that the trial court erred in finding that Goodman and Pentad were entitled to attorney fees under the REPC. Goodman and Pentad are not parties or even third-party beneficiaries of the REPC. In addition to having no contractual or statutory basis for receiving fees, the award of attorney fees was not properly supported nor reasonable given the length and complexity of this litigation.

ARGUMENT

- I. Where the Parties Have an Enforceable Contract that Satisfies the Statute of Frauds, the Statute of Frauds Does Not Preclude a Subsequent Oral Modification of a Non-Material Term of the Contract.

The trial court erred in concluding that under the Statute of Frauds an oral agreement modifying when a second earnest money deposit was due was unenforceable as a matter of law. Defendants argued and the trial court ruled¹ that because the contract was for real property the statute of frauds required any oral modification of the contract to be in writing to be enforceable. Although the statute of frauds may apply to any alteration or modification of a written contract, “a recognized and accepted exception to the statute

¹ The trial court made no findings of fact or conclusions of law in granting defendants’ Motion for Summary Judgment. At the hearing on defendants’ motion, the court received no evidence and the arguments by counsel followed their briefs. Accordingly, plaintiffs will refer to defendants’ arguments below because these arguments are the legal bases for the court’s grant of summary judgment.

of frauds provides, “[i]f a party has changed his position by performing an oral modification so that it would be inequitable to permit the party to found a claim upon the original agreement[,] . . . the modified agreement should be held valid.”” Fisher v. Fisher, 907 P.2d 1172, 1176-77 (Utah Ct. App. 1995) (applying exception to statute of frauds to contract for purchase of real estate) (quoting White v. Fox, 665 P.2d 1297, 1301 (Utah 1983); Bamberger Co. v. Certified Prods., Inc., 88 Utah 194, 201, 48 P.2d 489, 492 (1935), *aff’d on reh’g*, 88 Utah 213, 53 P.2d 1153 (1936)). This rule of law applies to all contracts, “even if the agreement being modified unambiguously indicates that any modifications must be in writing.” R.T. Nielson Co. v. Cook, 2002 UT 11, ¶13 n.4, 40 P.3d 1119 (citing Prince v. R.C. Tolman Const. Co., Inc., 610 P.2d 1267, 1269 (Utah 1980)). Utah case law recognizes that parties frequently orally modify contracts that must be in writing, and, in certain circumstances, these oral modifications are enforceable notwithstanding statutory or contractual provisions to the contrary. *See* Allen v. Kingdon, 723 P.2d 394, 396-97 (Utah 1986) (recognizing that oral modification of real estate contract may be enforceable where it would be inequitable based on parties’ performance under contract and oral modification); Fisher, 907 P.2d at 1176-77; Holt v. Katsanevas, 854 P.2d 575, 579-80 (Utah Ct. App. 1993) (oral modification of real estate contract could be enforced notwithstanding statute of frauds and trial court should not have

granted summary judgment on the issue).

In Fisher, the parties entered into a contract for the sale of real property. According to the buyers of the property, the seller orally agreed to postpone annual escrow payments of \$10,000. See Fisher, 907 P.2d at 1174-76. After the seller died, the seller's heirs argued that any oral agreement to postpone the escrow payments was unenforceable under the statute of frauds. The trial court and Court of Appeals disagreed and determined that the oral modification was enforceable because the buyers had changed their position and partially performed on the contract in reliance on the oral agreement. See id. at 1176-77.

Like the buyers in Fisher, plaintiffs in this case changed their position and continued to perform under the contract. Specifically, the plaintiffs had already tendered one earnest money payment on the contract. Additionally, plaintiffs were continuing to perform on the contract by taking the following actions: (1) completing their due diligence as set forth in the REPC; (2) working with the City of South Jordan for approval of development plans for the property, i.e. feasibility; (3) assembling investor money to fund the project; and (4) arranging surveys and architectural planning for the site. (R. at 195-98) Due to delays with the City of South Jordan, plaintiffs sought an extension for the payment of the second earnest money payment. Goodman and Pentad, on behalf of

the sellers, agreed to this extension. Importantly, the requested extension was not due to plaintiffs' inability to tender the required earnest money, concerns about feasibility of the plans or doubts about buying the land. (R. at 199, 271-74)

In reliance on the oral agreement, plaintiffs did not tender the earnest money payment by the deadline set forth in the REPC and continued with their feasibility study. As noted, plaintiffs were willing and able to tender the second earnest money deposit by the required deadline. (R. at 199, 274). As further corroboration of this fact, plaintiffs tendered the money to court in conjunction with filing the complaint on May 6, 2002. (R. at 4). A few days after the deadline, Goodman and Pentad, on behalf of the sellers, sent a letter indicating the contract was void due to the failure to tender the second earnest money agreement. Shortly after this letter, plaintiffs learned that the sellers, using Goodman and Pentad, had already arranged for a different buyer for the land at a higher price. Accordingly, plaintiffs lost their opportunity to purchase the land and wasted their time and effort in conducting a feasibility study.

Defendants argued the rule of law in R.T. Nielsen and Prince was not applicable because those cases did not involve a contract which needed to satisfy the statute of frauds. Instead, defendants argued Mills v. Brody, 929 P.2d 360 (Utah 1996); Stangl v. Ernst Home Center, 948 P.2d 356 (Utah Ct. App. 1997); Wardley Corp. Better

Homes & Gardens v. Burgess, 810 P.2d 476 (Utah Ct. App. 1991) controlled the issue and required any oral modification to be in writing to be enforceable. Indeed, in the circumstances presented in these cases, enforcement of the purported oral modification is not warranted. For example, in Stangl, the issue was whether promissory estoppel precluded the defense of statute of frauds. See Stangl, 948 P.2d at 360. First, the Court of Appeals discussed prior Utah case law on the issue. See id. at 360-65. Specifically, the Court of Appeals found that Utah Supreme Court had “recognized the limited application of the doctrine of promissory estoppel to the statute of frauds” Id. at 362 (citing McKinnon v. The Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, 529 P.2d 434 (Utah 1974)). The Stangl and McKinnon opinions recognized that “a mere promise to execute a written contract and a subsequent refusal to do so is insufficient to create an estoppel” Id. at 363 (quoting McKinnon, 529 P.2d at 436-37). Because the parties in Stangl had never entered into a written lease agreement, the court concluded the statute of frauds was available as a defense.

In contrast to Stangl where the issue was whether an oral agreement to enter into a contract was enforceable, the buyer and seller in this case had entered into written agreement which fully satisfied the statute of frauds. The analysis in Stangl has no relevance to whether or not an oral agreement to modify a non-material term of a valid

written contract is enforceable. Stangl addresses the statute of frauds in the context of negotiations prior to the parties actually entering into a contract.

On the other hand, in both Burgess and Mills the parties had entered into enforceable written agreements. See Burgess, 810 P.2d at 476-77; Mills, 929 P.2d at 361-62. In Burgess, the parties had entered into a written listing agreement for a six-month period. See Burgess, 810 P.2d at 476-77. Under the agreement, if the realtor found a buyer for the property, the seller would owe the realtor a commission. The day before the expiration of the listing agreement the realtor claimed the seller orally agreed to extend the listing agreement for an additional six-months. The Court of Appeals adopted the analysis of an Ohio court which recognized the oral modification was a “new contract” and modified an “essential term” of the contract. See id. at 478. Furthermore, the Utah Supreme Court had previously recognized the “unyielding duty upon real estate agents and brokers to obtain written listing agreements or face the risk of nonpayment.” Id. at 477. Based on that important policy concern with respect to real estate commission contracts and the fact that the oral modification went to a material term which essentially created a new contract, the court applied the statute of frauds and found the oral agreement unenforceable. See id. at 478.

Unlike Burgess, the parties did not orally modify an essential term of the

contract or create a new contract. In this case, the plaintiffs secured an oral agreement from Goodman and Pentad, on behalf of the sellers, for an extension of time for tendering a second earnest money payment. This extension did not affect the closing date or final payment price for the land. None of the essential terms of the contract (*i.e.* the legal description of the subject property, the parties to the contract, the sale price, and date and means of final payment) was modified or extended. It is well-established that an oral modification to a non-essential term of a contract required to be in writing is enforceable notwithstanding the statute of frauds' requirements. See, e.g., Allen, 723 P.2d at 396 (oral agreement that modifies material term of contract must be in writing); Holt, 854 P.2d at 579 (same); James H. Moore & Associates Realty, Inc. v. Arrowhead At Vail, 892 P.2d 367, 372 (Col. Ct. App. Div. III 1995) (contract subject to statute of frauds may be orally modified "so long as the oral modification does not relate to a material condition of that contract"); Reno v. Beckett, 555 F.2d 757, 764 (10th Cir. 1977) (oral modification to non-essential term of contract is enforceable notwithstanding statute of frauds). Stated differently, an oral modification of a contract subject to the statute of frauds is allowed so long as the modification does not affect a material term thus causing the underlying contract to not satisfy the statute of frauds.

The date upon which the additional earnest money deposit of \$10,000 was

due is not a material part of the REPC. The material elements of a contract for the sale of real property include the identity of the parties, the identity of the property, the agreed closing and the agreed price. See, e.g., English v. Standard Optical Co., 814 P.2d 613, 616 (Utah Ct. App. 1991) (setting out essential parts of lease contract as property identity, term, rental amount and period); Coulter & Smith, Ltd. v. Russell, 1999 UT App 55, ¶12, 976 P.2d 1218 (noting essential terms of option contract include price and property description). Importantly, this modification did not affect the stated closing date in the REPC of February 15, 2003. In this case, the REPC, with the oral modification, was still enforceable and still satisfied the statute of frauds.

Finally, defendants cited Mills for further support that courts will not enforce oral agreements. In Mills, the lessee of a condominium sought to exercise an option to purchase the condominium. The lessor argued that the lessee's attempt to exercise the option orally was insufficient and that any oral agreement to extend the deadline to exercise the option was unenforceable under the statute of frauds. See Mills, 929 P.2d at 361-62. Most of the opinion in Mills addresses whether the lessee's exercise of the option was sufficient. See id. at 362-364. In addressing whether the oral agreement to extend the deadline was enforceable, the court stated the recognized rule that the statute of frauds requires a written agreement to extend an option deadline, in the

absence of an estoppel. See id. at 364. Accordingly, Mills does not alter or contradict the analysis set forth in Fisher, Allen, Holt or Stangl. Because the lessee failed to argue estoppel, the trial court correctly ruled that any oral agreement to extend the option deadline was unenforceable, and the appellate court could not consider whether any equitable considerations warranted an exception to the statute of frauds. See id. at 364.

In this case, plaintiffs argued that summary judgment was improper for several reasons: (1) the parties orally agreed to modify the deadline for the second earnest money agreement, (2) the oral agreement was enforceable because it modified a non-material term of the REPC; and (3) the defendants relied to their detriment on the oral modification by continuing to pursue their development plans for the property, continuing their dialogue with the City of South Jordan and not tendering the second earnest money payment by the deadline; and (4) enforcement of the contract without the oral modification would be inequitable based on plaintiff's change in position in reliance on the oral agreement. Cf. Madsen v. Anderson, 667 P.2d 44, 47 (Utah 1983) (law abhors forfeiture of property and forfeiture is disfavored where notice to a buyer is either uncertain as to required future performance or misleads buyer into thinking forfeiture will not be enforced).

As the above authorities provide, defendants were not entitled to judgment

as a matter of law on the issue of the statute of frauds. Utah law provides for clear exceptions to the statute of frauds. First, an oral modification may be enforced when it does not affect a material term of the contract. In this case, the REPC was still a valid and enforceable contract with the oral modification. Second, an oral modification may be enforced when a party has changed its position in reliance on the oral agreement and partially performed on the contract. Here, plaintiffs had tendered money and were in the process of conducting a feasibility study. Plaintiffs, in reliance on the agreement, did not tender the second required payment by the deadline, and based on defendants' subsequent acts, plaintiffs lost their opportunity to purchase the property. Accordingly, it would be inequitable to enforce the REPC without the oral modification of the second earnest money deadline. At the very least, as the above cases indicate and as more fully set forth in the second argument, the issue of the oral modification, plaintiffs' reliance and change in position, and the application of the statute of frauds present factual issues which would preclude a grant of summary judgment.

II. Given the Disputed Issues of Material Fact and the Lack of Opportunity to Conduct Discovery, the Trial Court's Grant of Summary Judgment Was Error and Denial of Plaintiff's Rule 56(f) Request Was an Abuse of Discretion.

The application of the statute of frauds to this case presents factual issues

precluding summary judgment. Plaintiffs argued factual issues existed, promptly served discovery requests on Goodman and Pentad and requested time to conduct discovery under Rule 56(f) of the Utah Rules of Civil Procedure. The trial court denied plaintiffs' requests and granted defendants' motion for summary judgment, depriving plaintiffs of the opportunity to investigate their claims.

A. Resolution of Plaintiffs' Contract Claims Necessarily Required Determination of Material Issues of Fact.

The trial court erred in granting summary judgment because disputed issues of material facts existed. "Summary judgment is appropriate only when no genuine issue of material fact exist and the moving party is entitled to judgment as a matter of law." Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). The opinion in Holt v. Katsanevas, 854 P.2d 575 (Utah Ct. App. 1993) is instructive on this issue. In Holt, the parties entered into contract for the sale of real property. The parties subsequently orally modified the contract. See id. at 579. Although neither party denied entering into the oral agreement, the terms of the agreement were disputed. The seller argued that oral agreement was unenforceable under the statute of frauds. See id. In reversing the trial court's grant of summary judgment to the seller, the Court of Appeals stated: "Therefore, if we conclude that the parties genuinely dispute the terms of their oral agreement and the

dispute is material because plaintiffs could enforce the version of oral agreement they describe, we must reverse the trial court's grant of summary judgment against plaintiffs." Id. at 580. Furthermore, the court stated: "Plaintiffs could establish materiality by proving that its version of the disputed oral agreement could be found enforceable as a matter of law." Id. The court went on to reverse the grant of summary judgment to allow plaintiffs to fully present their claims because plaintiffs' allegations indicated disputed issues of material fact. See id. at 580-81.

Although Goodman and Pentad, on behalf of the sellers, vigorously dispute entering into any oral agreements with plaintiffs to extend the deadline, the fact that the parties in Holt did not dispute an oral agreement was made does not distinguish that case from the present for two reasons: (1) on appeal, this court must view the facts and inferences in the light most favorable to the nonmoving party which means this court on appeal must accept that the parties did enter into an oral modification; and (2) the defendant in Holt, like defendants in this case, argued any oral modification was unenforceable as a matter of law. The court in Holt faced the same issue as presented here: Whether the trial court properly granted summary judgment finding the statute of frauds rendered an oral modification of a contract for real property unenforceable.

Under Holt, if plaintiffs can prove a set of facts which would support an

enforceable oral modification, summary judgment is not appropriate. In this case, plaintiffs have submitted sworn affidavits alleging an oral modification of a contract which excuses them from tendering the second earnest money payment by the deadline set forth in the contract. (R. at 194-208; 271-77) Additionally, plaintiffs attached records and correspondence which tends to corroborate their sworn testimony and the allegations that an oral agreement to extend the deadline was made. (R. at 194-208; 271-77)

Plaintiffs have not alleged any additional modifications of any material terms of the contract, such as the parties, the property, the price or the closing date. Finally, plaintiffs have alleged facts to show a change in their position and continued performance based on their reliance on the oral agreement. Specifically, plaintiffs' performed on the contract by taking the following steps: (1) completing their due diligence as set forth in the REPC; (2) working with the City of South Jordan for approval of development plans for the property; (3) assembling investor money to fund the project; and (4) arranging surveys and architectural planning for the site. (R. at 195-98) These allegations are sufficient to show continued and partial performance under the contract and to create a disputed issue of material fact. Furthermore, if proven at trial, these facts are sufficient to make the oral agreement enforceable. Plaintiffs' affidavits indicate disputed issues of material fact, and accordingly, the trial court erred in granting defendants' motion for summary judgment.

B. Because Plaintiffs' Claims Were Viable as a Matter of Law and Plaintiffs Served Discovery Requests in a Timely Manner, Denial of the Rule 56(f) Request to Conduct Discovery Was An Abuse of Discretion.

The trial court abused its discretion when it granted summary judgment less than three and one half months after the Complaint was filed and before defendants discovery responses to plaintiffs' written discovery requests were due. Utah law provides that "summary judgment should not be granted if discovery is incomplete since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion." Downtown Athletic Club v. Horman, 740 P. 2d 275 (Utah Ct. App. 1987). Further, under Rule 56(f) of the Utah Rules of Civil Procedure, summary judgment is inappropriate where the moving party has exclusive control of the facts. See Utah R. Civ. P. 56(f). "Courts generally construe this rule liberally in favor of the nonmoving party to allow for adequate discovery that may create genuine issues of fact sufficient to defeat a motion for summary judgment." Jones v. Bountiful City Corp., 834 P.2d 556, (Utah Ct. App. 1992) (affirming denial of Rule 56(f) request on the basis that discovery would not have aided plaintiff in proving negligence claim). The Court of Appeals has articulated two factors that a trial court should examine in ruling on a Rule 56(f) request: "(1) whether the party submitting the motion is merely attempting to gain

‘additional discovery time to uncover purely speculative facts after substantial discovery has already been conducted,’ and (2) ‘whether the other party has appropriately responded to discovery requests.’” Campbell, Maack & Sessions v. Debry, 2001 UT App 397, ¶9, 38 P.3d 984 (citations omitted).

This action was filed on May 6, 2002 with an Amended Complaint filed on June 6, 2002. (R. at 1-17; 54-60) On July 22, 2002, plaintiff, without an attorney planning meeting or scheduling order in place, served discovery on defendants and noticed a deposition for August 29, 2002. (R. at 264-65) The trial court granted defendants motion for summary judgment from the bench on August 19, 2002 before defendants answered plaintiffs’ discovery requests. (R. at 284) Defendants moved the court for a protective order to avoid answering plaintiffs’ discovery on August 23, 2002. (R. at 285-90) The court granted defendants motion for a protective order and entered the final order disposing of all claims on September 27, 2002. (R. at 320-25)

Presumably, the trial court denied plaintiffs’ discovery requests because it determined plaintiffs’ claims failed as a matter of law. See, e.g., Holmes v. American States Ins. Co., 2000 UT 85, ¶¶26-27, 1 P.3d 552 (rule 56(f) request properly denied where plaintiff had no claim as a matter of law). As the argument in section one indicates, however, plaintiffs in this case had a viable claim that the oral agreement was

enforceable under exceptions to the statute of frauds. Additionally, plaintiffs submitted sworn affidavits which disputed material issues of fact. Plaintiffs' affidavits set forth allegations which supported their claims in the Amended Complaint.

In this case, the trial court's denial of plaintiffs' Rule 56(f) request was an abuse of discretion as it deprived plaintiffs of the opportunity to investigate and develop their claims. Plaintiffs complied with the substance of Rule 56(f) by indicating what evidence was sought in its pending discovery and the method for obtaining this evidence—pending discovery requests. See Campbell, Maack & Sessions, 2001 UT App 397 at ¶9. (R. at 178-79) Plaintiffs submitted written discovery and noticed up depositions. Plaintiffs were deprived of the opportunity to depose the principal parties of this litigation to determine and identify the true nature and scope of the agreements reached after the REPC was executed and to determine the facts relevant to the second transaction between the Soffe Trust and John Doe Buyer. Since plaintiffs dealt primarily with Joe Goodman and Pentad and because no depositions or formal discovery occurred prior to the court's grant of summary judgment, plaintiffs could not submit detailed affidavits regarding the dealings between the seller and its agent. In fact, plaintiffs prior to the court's grant of summary judgment did not even know the identity or the terms of the contract between seller and John Doe Buyer. Plaintiffs should have been allowed to

conduct at least some initial discovery to prove the allegations as set forth in its Complaint.

III. The Statute of Frauds Provides No Basis for Dismissing With Prejudice Plaintiffs' Claims of Fraud, Breach of Duty and Intentional Interference With Contract.

After determining the statute of frauds made the oral modification unenforceable, the trial court erred in disposing of the remainder of plaintiffs' claims which did not implicate the statute of frauds or require enforcement of the oral modification to succeed. The trial court ruled the oral modification was unenforceable as a matter of law, and therefore, the statute of frauds barred all plaintiffs' claims because each depended in some way on the oral modification being enforceable. The trial court's legal conclusion that each of plaintiffs' claims was barred as a matter of law is a legal conclusion reviewed for correctness. See Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, 979 P2d 332.

On this issue, the trial court adopted the argument set for in defendants' response to plaintiffs' objection to the proposed order granting summary judgment. (R. at 320-21). In arguing the court should dispose of all plaintiffs' claims, defendants relied on Stangl v. Ernst Home Center, 948 P.2d 356 (Utah Ct. App. 1997). In Stangl, the Court of Appeals stated: "Fraud, generally, cannot be predicated upon the failure to perform a

promise or contract which is unenforceable under the statute of frauds, for the promisor has not, in a legal sense, made a contract; and therefore, he has the right, both in law and equity, to refuse to perform.” Id. at 362 (quoting McKinnon v. The Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, 529 P.2d 434 (Utah 1974)). In both Stangl and McKinnon, the parties had not entered into any contracts. See id. at 357-360; McKinnon, 529 P.2d at 435-36. Accordingly, the court correctly noted an oral promise to enter into a contract was unenforceable and any claims related to the oral promise were similarly deficient.

In this case, however, an enforceable written contract, the REPC, existed. Subsequent to entering into the REPC with sellers, plaintiffs attempted to get an extension of time to tender the second earnest money payment. The sellers of the property had a right to receive the payment by the deadline. Based on the representations of Goodman and Pentad, on behalf of the sellers, plaintiffs believed that the sellers were agreeable to payment of the money after the deadline set forth in the contract. On this point, the Stangl court stated: “‘An exception is recognized when a misrepresentation as to the future operates as an abandonment of an existing right of the party making the representation, i.e., the promise as to the future conduct must constitute a manifestation that the promisor will abandon an existing right which he possesses.’” Id. at 362

(quoting McKinnon, 529 P.2d at 436).

This statement contemplates the exact circumstances of this case. The sellers had a right under the REPC to receive the second earnest money payment by the date set forth in the contract. Plaintiffs requested an extension to tender this payment. Based on the representations made to them, plaintiffs believed sellers were agreeable to the extension and acted in reliance on the representation. Unbeknownst to plaintiffs, sellers and their real estate agent were working with other buyers who would pay more for the property. After the deadline for the second earnest money payment past, plaintiffs were informed that the sellers considered the REPC void for lack of payment of the second earnest money payment. If proven, these facts would not implicate the statute of frauds as they are based on the parties' course of dealing and the rights and obligations set forth in the REPC. Furthermore, these facts would support claims of breach of duty, fraud and interference with contract.

IV. Because Goodman and Pentad Are Not Parties to the REPC, No Basis Exists for Awarding Them Attorney Fees.

Utah law requires a contractual or statutory basis for recovery of attorney fees by a successful litigant. See Baldwin v. Burton, 850 P.2d 1188, 1198 (Utah 1993); Martindale v. Adams, 777 P.2d 514, 516 (Utah Ct. App. 1989) (owner/lessor who is not a

party to construction contract between lessee and contractor can not be liable for attorney fees based on contract). “Whether attorney fees are recoverable in an action is a question of law, which is reviewed for correctness.” Wardley Corp. v. Welsh, 962 P.2d 86, 91 (Utah Ct. App. 1998). Neither of Goodman nor Pentad are parties to the REPC. They are identified only in Paragraph 5 as agents for the seller, and in fact, Pentad’s effort to represent the plaintiffs as Buyer under the REPC was explicitly deleted. (R. at 10)

The REPC does provide: “in any action arising out of this Contract, the prevailing party shall be entitled to costs and reasonable attorney’s fees.” In this sentence, the word “party” has the ordinary meaning associated with a party to the contract, as used consistently throughout the REPC. There is no justification for reading the term beyond the four corners of the document to include parties to any litigation involving the REPC. In fact, the Utah Court of Appeals has addressed this issue in interpreting an attorney fee provision in a real estate sales contract. See Wardley Corp. v. Welsh, 962 P.2d 86, 92 (Utah Ct. App. 1998). In Welsh, the real estate broker, Wardley, sued the seller of real property for its commission. After prevailing on its request for its commission, the broker requested its attorney fees as third-party beneficiary of the purchase agreement between the seller and buyer. See id. at 91-92. The language in Welsh is identical to the language in the REPC, which awards attorney fees to the

prevailing party in any action arising out of the contract. See id. at 91.

In analyzing the attorney fee provision, the Court of Appeals recognized that “attorney fees authorized by contract are awardable only in accordance with the explicit terms of the contract and only to the extent permitted by contract.” Id. at 92 (citation omitted). The court focused on the word party in the attorney fee provision. In construing this term, the court stated: “We have examined the contract as a whole and located the words ‘party’ and ‘parties’ in a variety of provisions. In these contract provisions, those words are used in a way that can logically refer only to the direct parties to the contract—Welsh, the seller, and Peterson, the buyer—not to the potentially much larger group of parties to the litigation growing out of the contract.” Id. at 92. The court went on to state: “Harmonizing all the terms of this contract, we conclude the words ‘party’ and ‘parties’ refer only to the signatories to the contract—Welsh [seller] and Peterson [buyer]. Only Welsh [seller] and Peterson [buyer] therefore may enforce the attorney fees provision against each other.” Id.²

At the trial court, Goodman and Pentad attempted to distinguish Welsh by arguing it had no application because it was an action by the broker against the seller

² Indeed, the sellers, who are not a party to this appeal, applied for and were properly awarded their fees by the trial court. Plaintiffs did not object to the basis for awarding fees or the amount of fees claimed by the sellers.

rather than an action by the buyer against the seller and its broker. As the analysis in Welsh indicates, such a distinction is not relevant when interpreting the plain language of the REPC. Although Goodman and Pentad are referenced as the buyer's agent in the contract, this reference does not make them parties to the contract. Specifically, Goodman and Pentad had no rights or obligations under the contract. They simply were the seller's agent. Their obligation was to facilitate the transaction as directed by their principle, the sellers. In return, Goodman and Pentad were entitled to receive a commission on the transaction under a commission agreement entered into between seller and Goodman and Pentad. The mere fact that Goodman and Pentad were named as defendants in this litigation does not entitle them to an award of attorney fees.

Additionally, the fact that Goodman and Pentad had an agency relationship with a party to a contract does not entitle Goodman and Pentad to fees under the contract. Appellants are not aware of any Utah case law awarding fees to a non-party to a contract on the basis of an agency relationship to a party to the contract. That Goodman and Pentad could bind the sellers by virtue of the agency relationship is similarly unavailing. This agency relationship is common in real estate transactions and is not a basis to make the real estate agent a party to the purchase contract. The real estate agent's rights and obligations flow from the listing agreement entered into with the seller. This agreement

provides the amount of the commission which compensates the real estate agent for his/her efforts. The listing agreement is not a part of the purchase agreement. Courts examining the issue of whether a real estate agent/broker are parties to a purchase contract have found that only the buyer and seller are parties to the contract. See, e.g., Welsh, 962 P.2d at 91-92 (only signatories of purchase contract are parties entitled to fees under contract); Harris v. Richard N. Groves Realty, Inc., 315 So. 2d 528, 529 (Fla. Ct. App. 4th Dis. 1975) (real estate purchase contract contemplates formal party to contract and real estate broker is not a party); c.f. Harwig v. Downey, 56 P.3d 1220, 1221-22 (Colo. Ct. App. 2002) (tenants who were not a party to land purchase contract could not recover fees under contract as intended beneficiaries). Because Goodman and Pentad are not parties to the REPC, the trial court erred in awarding them attorney fees.

V. If Goodman and Pentad Are Parties to the REPC, The Claims Against Goodman and Pentad Were Not Covered by the REPC.

The trial court abused its discretion in awarding Goodman and Pentad the entire amount of the requested fees. “An award of attorney fees must be based on evidence and supported by findings of fact.” Footte v. Clark, 962 P.2d 52, 56 (Utah 1998). A party seeking the award of attorney fees has the burden of producing evidence to support the requested award. See id. at 55. This evidence must include an allocation between: (1) time and effort spent on causes of action for which attorney fees are allowed

by contract or statute; and (2) time and effort spent on causes of action for which there is no allowance for attorney fees. Id.; see also, R.T. Neilsen Co. v. Cook, 2002 Utah 11, 40 P.3d 1119; Cottonwood Mall Co. v. Sine, 830 P.2d 266, 269-70 (Utah 1992). “The trial court, in turn, must make an independent evaluation of the reasonableness of the requested fees in light of the parties’ evidentiary submissions.” Footte, 962 P.2d at 55.

Goodman and Pentad have made no attempt to allocate the efforts of their counsel between claims under the REPC and claims outside the REPC. This omission is most likely because no contractual claims were asserted against Goodman and Pentad, and therefore there were no fees to allocate to covered claims. The plaintiffs’ Complaint, and their First Amended Complaint, contain six causes of action. The first three, directed specifically at Goodman and Pentad, are outside the REPC. They are: (1) for breach of statutory and common law standards of care for real estate agents with regard to the rights and interests of third parties; (2) for intentional interference with the contractual and economic interests of plaintiffs vis-a-vis the selling party, the Soffe Trust; and (3) for fraud or misrepresentation with regard to verbal communications. The Fourth, Fifth and Sixth Causes of action are not directed at Goodman and Pentad at all. They are: (4) for specific performance against the Soffe Trust requiring it to sell the property to plaintiffs pursuant to the REPC; (5) in the alternative, for damages against the Soffe Trust for breach of the REPC; and (6) against the John Doe Buyer for declaratory determination

that his competing and subsequent purchase agreement was subordinate to the plaintiffs' REPC with the Soffe Trust.

The causes of action asserted against Goodman and Pentad are not contractual claims that "arise out of" the REPC. Thus, no contractual or statutory basis exists for an award of attorney fees on independent claims which rely upon the enforceability of an oral contract or the reliability of oral representations. Even if Goodman and Pentad can be construed as "parties" under the REPC, because they have failed to allocate their fees among covered and uncovered causes of action, there is no evidentiary basis upon which an award of attorney fees can be made.

VI. Goodman and Pentad's Requested Fees Are Not Reasonable In Light of the Length and Complexity of the Litigation.

When determining the reasonableness of fees and expenses, a trial court should answer four questions:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988).

The principal issue in the present case is the second Dixie/Bracken factor—how much of the work performed was reasonably necessary to adequately defend Pentad and Goodman. This factor is an accumulation of a number of analytical questions, including: the difficulty of the litigation; the efficiency of the attorneys in presenting the case; the fees customarily charged in the locality for similar services; the amount in controversy; the result obtained; and the expertise and experience of the attorneys involved. See id. at 989.

As a preliminary matter, however, Mr. Shields' rate is not customary for attorneys in Salt Lake City, Utah. Mr. Shields started this matter with a rate of \$220 which increased to \$240, on the high side of local rates, and then finally increased to \$265 when he switched firms in the middle of this litigation. (R. at 340-43) No evidence was submitted to verify that these rates are customary. A comparison of the rate charged by the seller's counsel, which is admittedly low, highlights the problem with Mr. Shields' rate. (Compare R. at 340-43 (\$220-\$265) with R. at 365-66 (\$125)). The standard under

Utah law is not the rate an attorney can charge in the area, but the rate customarily charged in the area. Mr. Shields may have clients that he can bill at \$265/hour, but that rate is not customary in Utah for routine real property disputes.

Under the circumstances of this case, the total amount of requested fees by Goodman and Pentad is simply breathtaking for approximately 4-5 months of non-complex litigation involving no discovery. The initial Complaint in this matter was filed on May 6, 2002. (R. at 1-17). The court granted summary judgment on August 19, 2002. (R. at 284) The court's ruling was entered to include all causes of action on September 27, 2002. (R. at 320-21). During that time, no discovery occurred. There was no document productions or voluntary disclosures, and no attorney planning conference. The first pleading filed by the Pentad defendants was their May 31, 2002 Motion To Dismiss. That pleading is based upon interviews of Pentad's owner, Greg Shields (brother of Pentad's attorney, Jeff Shields), and Pentad's co-defendant and agent, Joe Goodman, both of whom were available to Pentad's counsel at the touch of a telephone. The pleading relied upon the review of a six-page standard REPC document. The

pleading included some generic research on the legal standard under Rule 12(b)(6) of the Utah Rules of Civil Procedure. The legal authority is cited in the standard annotation of the Utah Code. The pleading does contain some good research on contract interpretation and the Statute Of Frauds, but the research is neither extensive nor unduly sophisticated.

Goodman and Pentad next filed an Answer to plaintiffs' Amended Complaint and an accompanying Motion For Summary Judgment, both on June 21, 2002. The Answer relied largely on facts fleshed out in the Motion To Dismiss. The Memorandum In Support Of Motion For Summary Judgment substituted the legal standard for Rule 56 of the Utah Rules of Civil Procedure in place of the Rule 12(b)(6) standard, but it is otherwise almost verbatim with the Memorandum in Support of the Motion To Dismiss.

On July 19, 2002, the Pentad defendants filed a Reply Memorandum In Support of Motion For Summary Judgment and an Affidavit from Mr. Goodman himself. The Reply Memorandum, a nineteen-page document, again contains some excellent research and effective argument, but again most of it is based upon a third pass at the

basic legal authorities already cited. The Goodman Affidavit is thorough, but the seven-page document is based principally on Mr. Goodman's review of plaintiffs' allegations rather than on special investigation and unique drafting effort of Goodman and Pentad's counsel.

Plaintiffs recognize that Goodman and Pentad's counsel had to prepare for hearing on August 19th, prepare a proposed Order, and respond to the plaintiffs' Objection to the Order. Finally, of course, Goodman and Pentad's counsel had to prepare the Motion For Award Of Attorney Fees, a five-page pleading, and a supporting Affidavit, a document with three pages of text.

The proposition urged on the Court by Goodman and Pentad is that this effort is worth \$27,699.56. It is not. With regard to the reasonableness of attorney fees, "what an attorney bills or the number of hours spent on a case is not determinative" of what is reasonable and appropriate. Dixie State Bank v. Bracken, 764 P.2d at 990; see also Mountain States Broadcasting v. Neale, 776 P.2d 643, 649 n.10 (Utah Ct. App. 1989). Furthermore, "the trial judge [is] not necessarily compelled to accept such self-

interested testimony whole cloth and make such an award.” Beckstrom v. Beckstrom, 578 P.2d 520, 523-24 (Utah 1978).

Another problem with the reasonableness of Goodman and Pentad’s requested attorney fees is that, from the billing statements, they appear to pertain in several regards to communications and coordination with Pentad’s professional insurer through its adjuster, Samye Hoss. Time spent administering a collateral contractual issue for Pentad (and presumably for Goodman, Pentad’s employee) should not be charged to the plaintiffs.

All of the foregoing concerns are complicated by the failure to allocate the specific effort between causes of action which are covered by the contractual attorney fee clause and those which are not. The decision of Goodman and Pentad to focus on oral modification of the written contract—the primary point of the claims directed solely at the sellers—as the lynch pin of the claims against themselves, was effective but it did not thereby qualify Goodman and Pentad to participate as “parties” for all of the rights and interests under the REPC. All in all, the trial court was left with an insufficient

evidentiary basis upon which to decide the appropriate amount of legal expenses, even if Goodman and Pentad had a contractual right to obtain their recovery.

CONCLUSION

Based on the foregoing, plaintiffs request this court reverse the trial court's grant of summary judgment on each claim asserted against Goodman and Pentad. A determination that summary judgment was not proper would necessarily require a reversal of the award of attorney fees. Also, the court should remand this matter in order to allow the parties to conduct discovery. In the event this court finds the trial court's grant of summary judgment was proper, this court should still reverse the trial court's award of attorney fees as neither Goodman nor Pentad were parties to the REPC which provide the sole basis for the award. Assuming, the Goodman and Pentad were entitled to attorney fees, this court should remand the award to comply with Utah law and for entry of a reasonable award consistent with these principles.

DATED this 30 day of July, 2003.

RICHARDS, BRANDT, MILLER
& NELSON



RUSSELL C. FERICKS
ZACHARY E. PETERSON
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

~~Certificate~~ ^{Brief} I HEREBY CERTIFY that a true and correct copy of the foregoing
Certificate was delivered via U.S. Mail on this 30 day of July, 2003, to the following:

Jeffrey W. Shields, Esq.
BALLARD SPAHR ANDREWS &
INGERSOLL
201 South Main Street, Suite 600
Salt Lake City UT 84111
fx: 531-3001



ADDENDUM

F I L E S T A T E P U R C H A S E C O N T R A C T

This is a legally binding contract. Parties to this contract may agree, in writing, to alter or delete provisions of this contract.
Seek advice from your attorney or tax advisor before entering into a binding contract.

EARNEST MONEY RECEIPT

The Buyer, C. Kurt Hoffman and John A. Fericks, or their assigns, offers to purchase the Property described below and delivers as **Earnest Money Deposit \$5,000.00**** in the form of a check to:

- ☒ the Brokerage, to be deposited within three business days after **Acceptance** of this Offer to Purchase by all parties.
☐ the Title/Escrow Company identified below.

Brokerage or Title/Escrow Company: Pentad Properties, Inc.

Address: 349 S. 200 E. Suite 330

Received By: _____ Date: _____

Phone Number: 801-350-0100

(If Title/Escrow Company) for deposit no later than: _____ Date: _____

OFFER TO PURCHASE

1. **PROPERTY:** See attached Exhibit "A"

Address: Approximately 1150 W. South Jordan Parkway, South Jordan, Utah

City, County & State: South Jordan, Salt Lake, Utah

For legal description, see ☐ attached Addendum # _____; ☒ preliminary title report, when available, as provided below.

1.1 INCLUDED ITEMS. Unless excluded herein, this sale shall include all fixtures presently attached to the Property. The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: N/A

1.2 EXCLUDED ITEMS. These items are excluded from this sale: N/A

2. **PURCHASE PRICE & FINANCING:** The Buyer agrees to pay for the Property as follows:

\$5,000.00** **Earnest Money Deposit**

\$ **Loan Proceeds:**

☐ Representing the liability to be assumed by Buyer under an existing assumable loan (☐ with ☐ without Seller being released of liability) in this approximate amount with ☐ Buyer ☐ Seller agreeing to pay any loan transfer and assumption fees. Any net differences between the approximate balance of the loan shown above and the actual balance at **Closing** shall then be adjusted in

☐ Cash ☐ Other: _____

☐ From new institutional financing on terms no less favorable to the Buyer than the following:

_____ Interest Rate for first period prior to adjustment, if any.

_____ Amortization Period

_____ Term

Other than these, the loan terms shall be the best obtainable under the loan for which the Buyer applies below.

☐ From Seller-held financing, as described in the attached **Seller Financing Addendum**.

\$10,000.00** **Other:** Additional earnest money due April 6, 2002

\$298,000.00 **Balance of Purchase Price** in cash at closing.

\$313,000.00 **TOTAL PURCHASE PRICE**

3. **CLOSING:** This transaction shall be closed on or before February 15, 2003. **Closing** shall occur when: (a) Buyer and Seller have signed and delivered to each other (or to the escrow/title company), all documents required by this Contract, by the Lender, by written escrow instruction signed by the Buyer and Seller, and by applicable law; (b) the moneys required to be paid under these documents have been delivered to the escrow/title company in the form of collected or cleared funds; and (c) the deed which the Seller has agreed to deliver under **Section 6** has been recorded. Seller and Buyer shall each pay one half of the escrow **Closing** fee, unless otherwise agreed by the parties in writing.

Taxes and assessments for the current year, rents and interest on assumed obligations shall be prorated as set forth in this Section. All deposits on tenancies shall be transferred to Buyer at Closing. Prorations set forth in this Section shall be made as of ☒ date of Closing; ☐ date of possession; ☐ other _____.

4. **POSSESSION:** Seller shall deliver possession to Buyer within 12 hours after Closing.

5. **CONFIRMATION OF AGENCY DISCLOSURE:** At the signing of this Contract, the Listing Agent, Joe Goodman, Pentad Properties, Inc., represents ☒ Seller ☐ Buyer and the Selling Agent, ~~Greg Shields, Pentad Properties, Inc.~~, represents ☐ Seller ☒ Buyer. Buyer and Seller confirm that prior to signing this Contract, written disclosure of the agency relationship was provided to him/her. () Buyer's Initials () Seller's Initials. Pentad Properties, Inc. to receive 6% commission out of the sale proceeds at closing.
CHARLES KURT HOFFMAN
CAROL ANN BERRY

6. **TITLE TO PROPERTY AND TITLE INSURANCE:** (a) Seller has, or shall have at Closing, free title to the Property and agrees to convey such to Buyer by ☒ general ☐ special warranty deed, free of financial encumbrances as warranted under Section 10.6; (b) Seller agrees to pay for and furnish Buyer at Closing, with a current standard form Owner's policy of title insurance in the amount of the Total Purchase Price; (c) the title policy shall conform with Seller's obligations under subsections (a) and (b). Unless otherwise agreed under Section 8.4, the commitment shall conform with the title insurance commitment provided under Section 7.1.

☐ The Buyer elects to obtain a full-coverage extended ALTA policy of title insurance under 6(b). The cost of this coverage, above that of a standard Owner's policy, shall be paid for by the ☒ Buyer ☐ Seller. Also, the cost of a full-coverage ALTA survey shall be paid for by the ☒ Buyer ☐ Seller.

7. **SPECIFIC UNDERTAKINGS OF SELLER AND BUYER:**

7.1 **SELLER DISCLOSURES.** The Seller will deliver to the Buyer the following Seller Disclosures no later than the number of calendar days indicated below which shall be days after Acceptance:

	(days)
<input type="checkbox"/> (a) a Seller Property Condition Disclosure for the Property, signed and dated by Seller:	_____
<input checked="" type="checkbox"/> (b) a commitment of the policy to title insurance required under Section 6, to be issued by the title insurance company chosen by Seller, including copies of all documents listed as Exceptions on the Commitment:	<u>45</u>
<input checked="" type="checkbox"/> (c) a copy of all loan documents relating to any loan now existing which will encumber the Property after Closing:	<u>10</u>
<input checked="" type="checkbox"/> (d) a copy of all leases and rental agreements now in effect with regard to the Property together with a current rent roll:	<u>10</u>
<input type="checkbox"/> (e) operating statements of the Property for its last _____ full fiscal years of operation plus the current fiscal year through _____, certified by the Seller or by an independent auditor:	_____
<input type="checkbox"/> (f) tenant Estoppel agreements:	_____

Seller agrees to pay any charge for cancellation of the title commitment provided under subsection (b).

If Seller does not provide any of the Seller Disclosures within the time periods agreed above, the Buyer may either waive the particular Seller Disclosure requirement by taking no timely action, or the Buyer may notify the Seller, in writing, within 10 calendar days after the expiration of the particular disclosure time period that the Seller is in Default under this Contract and the remedies under Section 16 are at the Buyer's disposal. The holder of the Earnest Money Deposit shall, upon receipt of a copy of Buyer's written notice, return to the Buyer the Earnest Money Deposit without the requirement of further written authorization from the Seller.

7.2 **BUYER UNDERTAKINGS.** The Buyer agrees to:

☐ (a) Apply for approval of the assumption or funding of the loan proceeds described in Section 2 by completing, signing, and delivering to the Lender the initial loan application and documentation required by the Lender and by paying all fees as required by the Lender (including appraisal fee) no later than _____ calendar days after Acceptance; and

☐ (b) No later than _____ calendar days after Acceptance, obtain from the Lender to whom application is made under subsection (a) a written commitment to approve the assumption of the existing loan or to fund the new loan subject only to changes of conditions in Buyer's credit worthiness and to normal loan closing procedures; or, if Buyer elects, providing Seller with absolute assurance, within the same time frame, that the proceeds required for funding the Total Purchase Price are available.

These Buyer Undertakings are at the sole expense of the Buyer and are material elements of this Contract for the

benefit of both the Buyer and the Seller.

If Buyer does not initiate any **Buyer Undertaking** and provide Seller with written confirmation in the time agreed above, the Seller may either waive the particular **Buyer Undertaking** requirement by taking no timely action or the Seller may notify the Buyer in writing within 10 calendar days of the expiration of the particular undertaking time period that the Buyer is in **Default** under this **Contract** and that the remedies under **Section 16** are at the Seller's disposal. The holder of the **Earnest Money Deposit** shall, upon receipt of a copy of Seller's written notice, deliver to the Seller the **Earnest Money Deposit** without the requirement of further written authorization from the Buyer.

7.3 ADDITIONAL DUE DILIGENCE. The Buyer shall undertake the following **Additional Due Diligence** elements at its own expense and for its own benefit for the purpose of complying with the **Contingencies** under **Section 8**:

- ☒ (a) Ordering and obtaining an appraisal of the **Property** if one is not otherwise required under **Section 7 2**,
- ☒ (b) Ordering and obtaining a survey of the **Property** if one is not otherwise required under **Section 6**
- ☒ (c) Ordering and obtaining any environmentally related study of the **Property**,
- ☒ (d) Ordering and obtaining a physical inspection report regarding and completing a personal inspection of the **Property**,
- ☒ (e) Requesting and obtaining verification that the **Property** complies with all applicable federal, state and local laws, ordinance and regulations with regard to zoning and permissible use of the **Property**.

Seller agrees to cooperate fully with Buyer's completing these **Due Diligence** matters and to make the **Property** available as reasonable and necessary for the same.

8. CONTINGENCIES: This offer is subject to the Buyer's approving, in its sole discretion, the **Seller Disclosures**, the **Buyer Undertakings** and **Additional Due Diligence** matters in **Section 7**. However, the Buyer's discretion in approving the terms of the loan under **subsection 7 2 (b)** is subject to Buyer's covenant with regard to minimally acceptable financing terms under **Section 2**.

8 1 Buyer shall have 55 calendar days after the times specified in **Sections 7 1 and 7 2** for receipt of **Seller Disclosures** and for completion of **Buyer Undertakings** to review the content of the disclosures and the outcome of the undertakings. The latest applicable date under **Sections 7 1 and 7 2** applies for completing a review of the content of **Additional Due Diligence** matters under **Section 7 3**.

8 2 If Buyer does not deliver a written objection to Seller regarding a **Seller Disclosure**, **Buyer Undertaking**, or **Due Diligence** matter within the time provided in **Section 8 1**, that item will be deemed approved by Buyer.

8 3 If Buyer objects, Buyer and Seller shall have 5 calendar days after receipt of the objections to resolve Buyer's objections. Seller may, but shall not be required to, resolve Buyer's objections. Likewise, the Buyer is under no obligation to accept any resolution proposed by the Seller. If Buyer's objections are not resolved within the stated time, Buyer may void this **Contract** by providing written notice to Seller within the same stated time. The holder of the **Earnest Money Deposit** shall, upon receipt of a copy of Buyer's written notice, return to Buyer the **Earnest Money Deposit** without the requirement of any further written authorization from Seller. If this **Contract** is not voided by Buyer, Buyer's objection is deemed to have been waived. However, this waiver does not affect warranties under **Section 10**.

8 4 Resolution of Buyer's objections under **Section 8 3** shall be in writing and shall become part of this **Contract**.

9. SPECIAL CONTINGENCIES: This offer is made subject to the terms of attached Addendum # ONE.

10. SELLER'S LIMITED WARRANTIES: Seller's warranties to Buyer regarding the **Property** are limited to the following:

10 1 Seller will deliver possession of the **Property** to Buyer with any private well or septic tank serving the **Property** in working order and in compliance with governmental regulations.

10 2 Seller will be responsible for repairing any of Seller's moving-related damage to the **Property**,

10 3 At **Closing**, Seller will bring current all financial obligations encumbering the **Property** which are assumed in writing by Buyer and will discharge all such obligations which Buyer has not so assumed,

10 4 As of **Closing**, Seller has no knowledge of any claim or notice of an environmental, building or zoning code violation regarding the **Property** which has not been resolved.

11. VERIFICATION OF WARRANTED AND INCLUDED ITEMS: After all contingencies have been removed and before **Closing**, the Buyer may conduct a "walk-through" inspection of the **Property** to determine whether or not items warranted by Seller in **Sections 10 1, 10 2, 10 3, and 10 4** are in the warranted condition and to verify that items included in **Section 1 1** are presently on the **Property**. If any item is not in the warranted condition, Seller will correct, repair or replace it as necessary or, with the consent of Buyer and (if required) Lender, escrow an amount at **Closing** to provide for such repair or replacement. The Buyer's failure to conduct a "walk-through" inspection or to claim during the "walk-through" inspection that the **Property** does not include all items referenced in **Section 1 1** or is not in the condition

warranted in *Section 10*, shall constitute a waiver of Buyer's rights under *Section 10* and of the warranties contained in *Section 10*.

12. CHANGES DURING TRANSACTION: Seller agrees that no changes in any existing leases shall be made, no new leases entered into and no substantial alterations or improvements to the Property shall be undertaken without the written consent of the Buyer.

13. AUTHORITY OF SIGNERS: If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person signing this **Contract** on its behalf warrants his or her authority to do so and to bind Buyer or Seller and the heirs or successors in interest to Buyer or Seller. If the Seller is not the vested Owner of the **Property** but has control over the vested Owner's disposition of the **Property**, the Seller agrees to exercise this control and deliver title under this **Contract** as if it had been signed by the vested Owner.

14. COMPLETE CONTRACT: This instrument (together with its Addenda, any attached Exhibits, and **Seller Disclosures**) constitutes the entire **Contract** between the parties and supersedes all prior dealings between the parties. This **Contract** cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION: The parties agree that any dispute or claim relating to this **Contract**, including but not limited to the disposition of the **Earnest Money Deposit** and the breach or termination of this **Contract**, shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller Mediation Rules of the American Arbitration Association. Each party agrees to bear its own costs of mediation. Any Agreement signed by the parties pursuant to the mediation shall be binding. If mediation fails, the procedures applicable and remedies available under this **Contract** shall apply. Nothing in this *Section* shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court, serving the Seller by means of summons or as otherwise permitted by law, and recording a *lis pendens* with regard to the action provided that the Buyer permits the Seller to refrain from answering the complaint pending mediation. Also, the parties may agree in writing to waive mediation.

16. DEFAULT: If Buyer defaults, Seller may elect to either retain the **Earnest Money Deposit** as liquidated damages or return the **Earnest Money Deposit** and sue Buyer to enforce Seller's rights. If Seller defaults, in addition to the return of the **Earnest Money Deposit**, Buyer may elect to either accept from Seller as liquidated damages a sum equal to the **Earnest Money Deposit** or sue Seller for specific performance and/or damages. If Buyer elects to accept the liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. Where a *Section* of this **Contract** provides a specific remedy, the parties intend that the remedy shall be exclusive regardless of rights which might otherwise be available under common law.

17. ATTORNEY'S FEES: In any action arising out of this **Contract**, the prevailing party shall be entitled to costs and reasonable attorney's fees.

18. DISPOSITION OF EARNEST MONEY: The **Earnest Money Deposit** shall not be released unless it is authorized by: (a) *Sections 7.1, 7.2 and 8.3*; (b) separate written agreement of the parties, including an agreement under *Section 15* if (a) does not apply; or (c) court order.

19. ABROGATION: Except for express warranties made in this **Contract**, the provisions of this **Contract** shall not apply after **Closing**.

20. RISK OF LOSS: All risk of loss or damage to the **Property** shall be borne by Seller until **Closing**.

21. TIME IS OF THE ESSENCE: Time is of the essence regarding the dates set forth in this transaction. Extensions must be agreed to in writing by both parties. Performance under each *Section* of this **Contract** which references a date shall be required absolutely by **5:00 P.M., Mountain Time** on the stated date.

22. COUNTERPARTS AND FACSIMILE (FAX) DOCUMENTS: This **Contract** may be signed in counterparts, and each counterpart bearing an original signature shall be considered one document with all others bearing original signature. Also, facsimile transmission of any signed original document and re-transmission of any signed facsimile transmission shall be the same as delivery of an original.

23. ACCEPTANCE: Acceptance occurs when Seller or Buyer, responding to an offer or counteroffer of the other; (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or the other party's agent that the offer or counteroffer has been signed as required.

24. OFFER AND TIME FOR ACCEPTANCE: Buyer offers to purchase the property on the above terms and conditions. If Seller does not accept offer by 5:00 ☐ AM ☒ PM Mountain Time, February 6, 2002, this offer shall lapse, and the holder of the Earnest Money Deposit shall return it to the Buyer.

[Signature]
(Buyer's Signature)

(Offer Reference Date)

C. E. Hoffman, Jr.
Buyer's Name (please print)

1800 INTERLAKEN DR apt 17
(Notice Address)

435-615-1769
(Phone Number)

ACCEPTANCE/REJECTION/COUNTER OFFER

☐ **Acceptance of Offer to Purchase:** Seller **Accepts** the foregoing offer on the terms and conditions specified above.

Charles R. Doffe
(Seller's Signature)

2/1/02
(Date)

(Time)

Seller's Name (please print)

(Notice Address)

(Phone Number)

☐ **Rejection:** Seller **Rejects** the foregoing offer.

(Seller's Initials) _____ (Date) _____ (Time)

☐ **Counter Offer:** Seller present for Buyer's **Acceptance** the terms of Buyer's offer subject to the exceptions or modifications as specified in attached **Counter Offer #** _____.

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures (One of the following alternatives must therefore be completed)

A. ☐ I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures

SIGNATURE OF SELLER

SIGNATURES OF BUYER

Date

Date

Date

Date

B. ☐ I personally caused a final copy of the foregoing contract bearing all signatures to be mailed on _____, 2002 by Certified Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer, Sent by _____.

Seller's Initials () Date _____ Buyer's Initials () Date _____

ADDENDUM # ONE
TO REAL ESTATE PURCHASE CONTRACT

This is an ADDENDUM to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of February 1, 2002 including all addenda and counter offers, between C. Kurt Hoffman and John A. Fericks, or their assigns, as Buyer(s) and Lucy Ann Soffe Trust as Seller(s). The following terms are hereby incorporated as part of the REPC, and to the extent those terms modify or conflict with any provisions of the REPC, these shall control. All other terms of the REPC not modified shall remain the same.

1. **Earnest Money:** Buyer shall deposit with Seller an additional \$10,000 of non-refundable earnest money on or before April 6, 2002. If Buyer fails to deliver said earnest money to Seller by April 6, 2002 Seller may void this contract at its option. Buyer shall have until April 6, 2002 to conduct its due diligence and to complete a feasibility study of the site. If Seller has not received written notice from Buyer of Buyer's desire to void the contract prior to April 6, 2002, then the original \$5000.00 earnest money shall become non-refundable.

2. **Final Purchase Price:** The final purchase price shall be based on a rate of \$6.20 per square foot as determined by a survey of the property. If, however, Buyer chooses to close on the property prior to August 1, 2002, then the purchase price shall be based on a rate of \$6.00 per square foot.

☐ Seller ☐ Buyer shall have until _____ ☐ A.M. ☐ P.M. **Mountain Time**, _____, 2002, to accept these terms in accordance with *Section 23* of the REPC.

Charles R. Soffe 2/1/02
☐ Buyer ☒ Seller Signature Date

☐ Buyer ☐ Seller Signature Date

ACCEPTANCE/REJECTION/COUNTER OFFER

CHECK ONE:

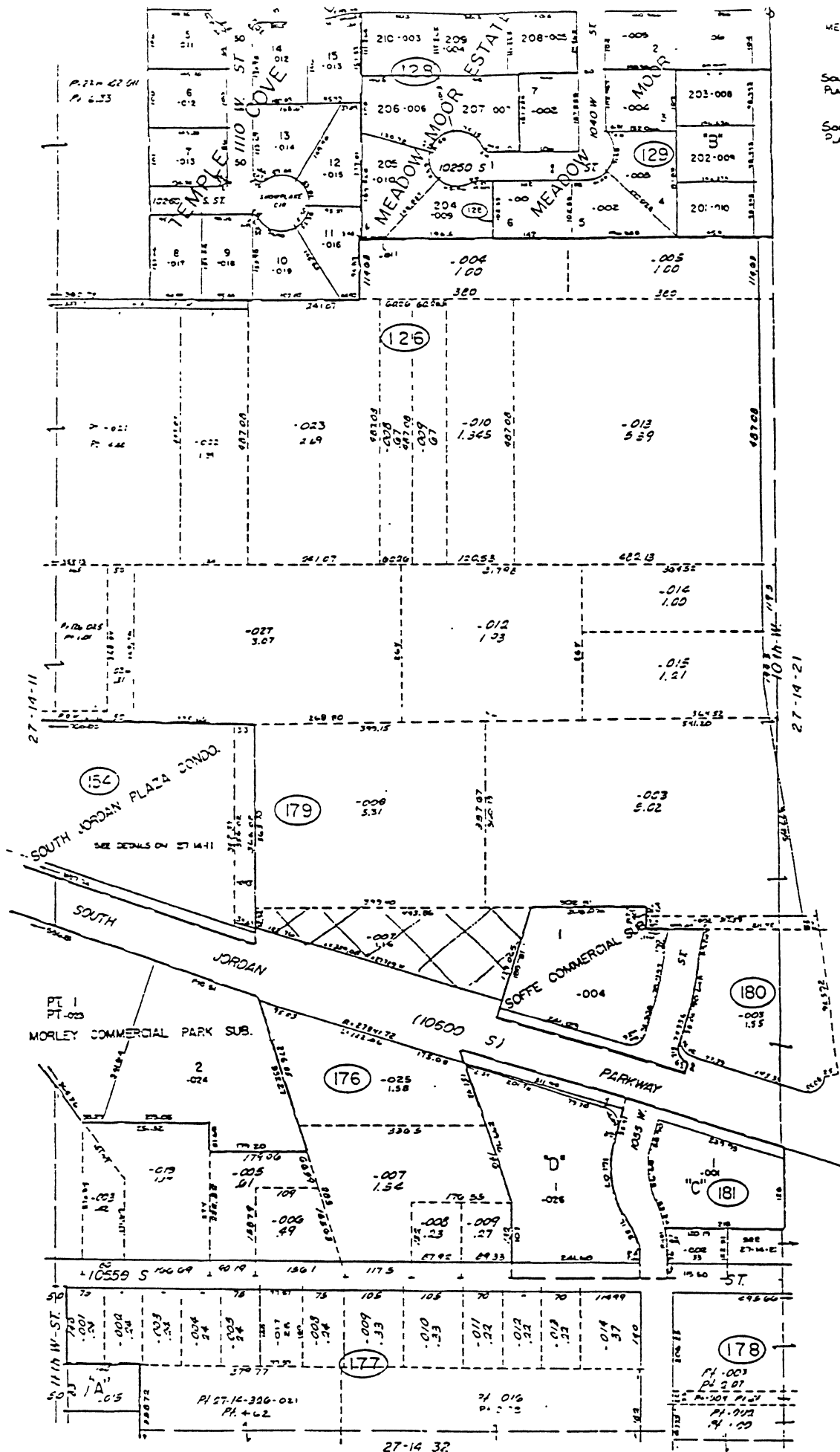
☒ Acceptance: ☐ Seller ☐ Buyer hereby accept these terms

CS 02-01-02
☐ Buyer ☐ Seller Signature Date Time

☐ Buyer ☐ Seller Signature Date Time

☐ Rejection: ☐ Seller ☐ Buyer rejects these terms
____ (Initials) _____ (Date) _____ (Time)

☐ Counter Offer: ☐ Seller ☐ Buyer presents as a counter offer the terms set forth on the attached Counter Offer # _____. Unless accepted, this offer shall lapse.



MEADOW MOOR EST. - 105
 PL 2
 SOUTH JORDAN PARKWAY
 PLAT A SUB
 SOUTH JORDAN PARKWAY
 PLAT B SUB

SALT LAKE COUNTY (throughout the county) is a copyright ©1990
 PREPARED BY SALT LAKE COUNTY ORDER
 This map is not intended to represent an actual physical boundary or a survey of the property being surveyed.

SALT LAKE CO.
 E. 1/2 NW 1/4 SEC. 14 T.3S. R.1W.

SCALE: 1" = 100'

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

C KURT HOFFMAN Et al,	:	MINUTES
Plaintiff,	:	LAW & MOTION
	:	
	:	
vs.	:	Case No: 020903870 MI
	:	
JOE GOODMAN Et al,	:	Judge: J DENNIS FREDERICK
Defendant.	:	Date: August 19, 2002

Clerk: cindyb

PRESENT

Plaintiff's Attorney(s): RUSSELL C. FERICKS
Defendant's Attorney(s): DALE E. ANDERSON
JEFFREY WESTON SHIELDS

Video

Tape Number: 1 Tape Count: 9:22-10:17

HEARING

Defendants' Joint Motion for Summary Judgment or Motion to Dismiss is argued to the Court by respective counsel and granted for the reasons stated on the record. Attorney Shields to prepare the appropriate order.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN FERICKS, et al,	:	MINUTE ENTRY RULING
Plaintiff(s),	:	CASE NO. 020903870 MI
vs.	:	Judge J. Dennis Frederick
LUCY ANN SOFFE TRUST, et al,	:	Date: September 27, 2002
Defendant(s),	:	

After review of the pleadings and upon receipt of the Notice to Submit for Decision (Defendants' Motion for Protective Order) filed September 24, 2002 and Notice to Submit for Decision (Plaintiffs' Objection to Proposed Order on Motion for Summary Judgment) filed September 24, 2002, the Court rules as follows:

1. Moving Defendants' Motion for Protective Order is granted for the reasons specified in the supporting memorandum.

2. Plaintiffs' Objection to the Proposed Order on Summary Judgment is denied for the reasons stated in the opposing memoranda. The Summary Judgment Order accurately reflects this Court's ruling and is executed September 27, 2002.

Case No. 020903870 MI

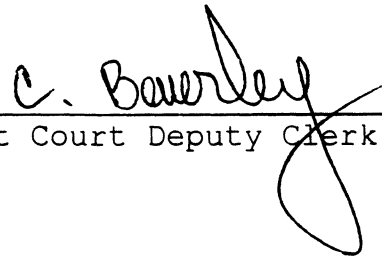
CERTIFICATE OF MAILING

I certify that on the 30th day of September, 2002, I sent by first class mail, a true and correct copy of the attached document to the following:

Jeffrey Weston Shields
201 South Main Street
Suite 600 - One Utah Center
Salt Lake City, UT 84111-2215

Russell C. Fericks
50 South Main Street
Key Bank Tower, 7th floor
P.O. Box 2465
Salt Lake City, UT 84110-2465

Dale E. Anderson
635 - 18th Avenue
Salt Lake City, UT 84103



District Court Deputy Clerk

FILED DISTRICT COURT
Third Judicial District

SEP 30 2002

SALT LAKE COUNTY

By [Signature]
Deputy Clerk

JEFFREY WESTON SHIELDS, ESQ. (USB #2948)
Ballard Spahr Andrews & Ingersoll, LLP
Attorneys for Defendants Pentad Properties, Inc and
Joe Goodman
One Utah Center - Suite 600
201 South Main Street
Salt Lake City, UT 84111-2215
Telephone: (801) 531-3000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JOHN FERICKS; and KURT HOFFMAN,

Plaintiffs,

VS.

LUCY ANN SOFFE TRUST; CHARLES R. SOFFE, AS Trustee of the Lucy Ann Soffe Trust and individually; PENTAD PROPERTIES, INC; JOE GOODMAN individually, and JOHN DOE BUYER,

Defendants.

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT OF
DEFENDANTS PENTAD,
GOODMAN AND THE SOFFE,
DEFENDANTS, AND DISMISSING
PLAINTIFFS' AMENDED
COMPLAINT**

Civil No. 020903870

Judge Frederick

The Motions of Defendants Pentad Properties, Inc. and Joe Goodman (collectively “Pentad Defendants”) to Dismiss or, in the Alternative for Summary Judgment (“Motion for Summary Judgment”), and the joinder in the Motion for Summary Judgment by Defendants Lucy Ann Soffe Trust, Carlos Soffe, Von Soffe and Shirla Holt as trustees (collectively “Soffe

Defendants”) came duly before the Court for hearing, the Honorable J. Dennis Frederick, District Court Judge, presiding, on August 19, 2002 at the hour of 9:00 a.m. Pentad Defendants were represented by their counsel of record, Jeffrey Weston Shields, Esq. of and for Ballard Spahr Andrews & Ingersoll, LLP. The Soffe Defendants were represented by their counsel of record, Dale E. Andersen, Esq. of Spencer & Andersen. The Plaintiffs were represented by their counsel of record, Russell S. Fericks, Esq. of Richards. Brandt, Miller and Nelson, P.C. The Court, having heard arguments of counsel, and having reviewed the memoranda, affidavits and other submissions of the parties, and having rendered its ruling from the bench at the conclusion of the hearing, and being duly advised in the premises, and good cause appearing therefore,

ORDERS AS FOLLOWS:

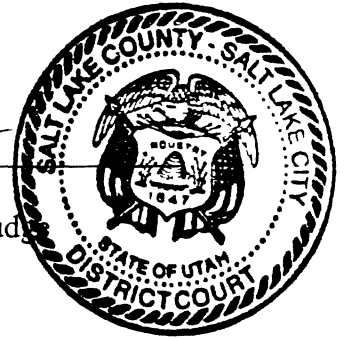
1. The Motion for Summary Judgment of Pentad Defendants is GRANTED.
2. The Motion for Summary Judgment of Soffe Defendants, by joinder, is GRANTED.
3. Based upon the foregoing rulings, the Plaintiffs’ Amended Complaint, and each and every cause of action thereof, is dismissed with prejudice and on the merits.
4. Application for award of attorneys’ fees and costs shall be submitted by separate application in accordance with Utah Code of Judicial Administration Rule 4-505.

5. The Lis Pendens recorded on the title to the property subject of this action by Plaintiff shall be immediately removed of record.

DATED this 17th day of Sept, 2002

BY THE COURT

J. Dennis Frederick
Third Judicial District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of ~~August~~, 2002, I caused to be served a true and correct copy of the foregoing **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS PENTAD, GOODMAN AND THE SOFFE, DEFENDANTS, AND DISMISSING PLAINTIFFS' AMENDED COMPLAINT** upon the following addressees by first-class mail, postage prepaid:

Russell C. Fericks
Richards, Brandt, Miller & Nelson
Key Bank Tower, Seventh Floor
50 South Main Street
PO Box 2465
Salt Lake City, Utah 84110-2465

Dale E. Anderson, Esq.
Spencer & Anderson
635- 18th Avenue
Salt Lake City, Utah 84103

Jeffrey Weston Shields, Esq.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN FERICKS, et al, : MINUTE ENTRY RULING
Plaintiff(s), : CASE NO. 020903870 MI
vs. : Judge J. Dennis Frederick
LUCY ANN SOFFE TRUST, et al, : Date: November 26, 2002
Defendant(s), :

After review of the pleadings and upon receipt of the Notice to Submit for Decision (Motion of Pentad Defendants for Award of Attorney's Fees and Costs) filed November 22, 2002, the Court rules as follows:

1. Moving defendants' Motion for Award of Fees, etc. is granted for the reasons specified in the supporting memoranda excepting point V of the Reply Memorandum.

2. This Court is persuaded the fees requests are reasonable and necessary for the successful pursuit of the moving defendants' claims.

3. Counsel for movants to prepare the order and judgment.

Case No. 020903870 MI

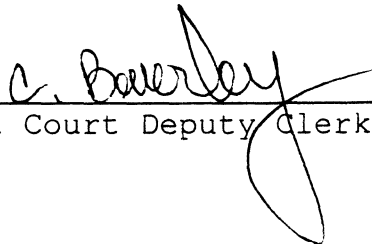
CERTIFICATE OF MAILING

I certify that on the 26th day of November, 2002, I sent by first class mail, a true and correct copy of the attached document to the following:

Jeffrey Weston Shields
201 South Main Street
Suite 600, One Utah Center
Salt Lake City, UT 84111-2215

Dale E. Anderson
635 - 18th Avenue
Salt Lake City, UT 84103

Russell C. Fericks
50 South Main Street
Key Bank Tower, 7th Floor
P.O. Box 2465
Salt Lake City, UT 84110-2465



District Court Deputy Clerk

IMAGED

FILED DISTRICT COURT
Third Judicial District

DEC 11 2002

By SALT LAKE COUNTY
Deputy Clerk

JEFFREY WESTON SHIELDS, ESQ. (USB #2948)
Ballard Spahr Andrews & Ingersoll, LLP
Attorneys for Defendants Pentad Properties, Inc. and
Joe Goodman
One Utah Center - Suite 600
201 South Main Street
Salt Lake City, UT 84111-2215
Telephone: (801) 531-3000

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 12/12/02

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JOHN FERICKS; and KURT HOFFMAN,

Plaintiffs,

vs.

LUCY ANN SOFFE TRUST; CHARLES R.
SOFFE, as Trustee of the Lucy Ann Soffe Trust
and individually; PENTAD PROPERTIES, INC;
JOE GOODMAN individually, and JOHN DOE
BUYER,

Defendants.

)
) **FINDINGS AND ORDER ON**
) **MOTION OF PENTAD**
) **PROPERTIES, INC. AND JOE**
) **GOODMAN FOR AWARD OF**
) **ATTORNEYS FEES AND COSTS**
) **and**
) **JUDGMENT IN FAVOR OF**
) **PENTAD PROPERTIES, INC. AND**
) **JOE GOODMAN FOR**
) **ATTORNEY'S FEES AND COSTS**
) **AGAINST PLAINTIFFS**
)
) Civil No. 020903870
)
) Judge Frederick

The Motion of Defendants Pentad Properties, Inc. and Joe Goodman for Award of Attorney's Fees and Costs came before the Court, the Honorable J. Dennis Frederick, for decision without hearing pursuant to Utah Code of Judicial Administration Rule 4-501(1)(D).

The Court reviewed the respective memoranda and affidavits of the parties and rendered its Minute Entry Ruling on November 26, 2002. Based thereupon, the Court

ENTERS ITS FINDINGS AS FOLLOWS:

1. Pentad Properties, Inc. and Joe Goodman are “prevailing parties” against the Plaintiffs in this action having prevailed on all issues and causes of action by summary judgment.
2. The Real Estate Purchase Contract subject of this action provides for award of attorneys fees and costs as a matter of contract.
3. Pentad Properties, Inc. and Joe Goodman are entitled to an award of attorneys fees and costs under the Real Estate Purchase Contract by virtue of the allegations of the Amended Complaint alleging that Pentad Properties, Inc. and Joe Goodman were the agents of Soffe, one of the principal parties to the Real Estate Purchase Contract. Pentad Properties, Inc. and Joe Goodman were not the agents of Plaintiffs and were not required to have a separate written agreement with Plaintiffs to recover their attorneys fees in this action.
4. The legal work on behalf of Pentad Properties, Inc. and Joe Goodman shown in the Affidavit of Jeffrey W. Shields was actually performed.
5. All of the legal work performed on behalf of Pentad Properties, Inc. and Joe Goodman as shown in the Affidavit of Jeffrey W. Shields was reasonably necessary to adequately prosecute their case.

6. The attorney's billing rates shown in the Affidavit of Jeffrey W. Shields are consistent with rates customarily charged in this locality for similar services.

7. There are no additional circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility.

8. Paralegal fees billed by Defendants' law firms may be awarded as attorney's fees in Utah and are awarded.

9. Pentad Properties, Inc. and Joe Goodman may have all of their attorney's fees awarded without allocation because the entire case was resolved in their favor with a common defense such that all fees are necessarily allocated to the result.

10. Pentad Properties, Inc. and Joe Goodman are the real and necessary parties in interest with respect to the application for award of attorneys fees despite the fact that counsel was engaged by an insurer and Pentad Properties, Inc.'s and Joe Goodman's counsel is authorized to pursue reimbursement of attorney's fees on the insurer's behalf.

12. Plaintiffs did not bring this action in bad faith, and Pentad Properties, Inc. and Joe Goodman do not, consequently, allege sufficient grounds for an award of attorney's fees pursuant to Section 78-27-56, Utah Code Ann.

BASED UPON THE FOREGOING, JUDGMENT IS ENTERED IN FAVOR OF PENTAD PROPERTIES, INC. AND JOE GOODMAN AND AGAINST PLAINTIFFS JOHN FERICKS AND KURT HOFFMAN, JOINTLY AND SEVERALLY, AS FOLLOWS:

1. For the principal sum of Twenty Seven Thousand Six Hundred Ninety-Nine Dollars and ~~50~~52/100 cents (\$27,699.52);

2. For interest on this sum from date of entry of this judgment until paid at the maximum statutory post-judgment interest rate;

3. Additional attorney's fees claimed by Pentad Properties, Inc. and Joe Goodman, if any, incurred in further proceedings in this action shall be requested in accordance with Rule 4-505, Utah Code of Judicial Administration.

DATED AND ENTERED this 11th day of December, 2002.

BY THE COURT



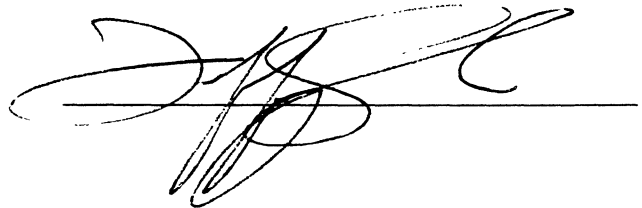
J. DENNIS FREDERICK,
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of December, 2002, I caused to be served a true and correct copy of the foregoing **FINDINGS AND ORDER ON MOTION OF PENTAD PROPERTIES, INC. AND JOE GOODMAN FOR AWARD OF ATTORNEYS FEES AND COSTS AND JUDGMENT IN FAVOR OF PENTAD PROPERTIES, INC. AND JOE GOODMAN FOR AWARD OF ATTORNEY'S FEES AND COSTS AGAINST PLANTIFFS** upon the following addressees by first-class mail, postage prepaid:

Russell C. Fericks
Richards, Brandt, Miller & Nelson
Key Bank Tower, Seventh Floor
50 South Main Street
PO Box 2465
Salt Lake City, Utah 84110-2465

Dale E. Anderson, Esq.
Spencer & Anderson
635- 18th Avenue
Salt Lake City, Utah 84103

A handwritten signature in black ink, appearing to be "DALE E. ANDERSON", written over a horizontal line.