

1981

# Taylor National, Inc. v. Jensen Brothers Construction Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

TAYLOR NATIONAL, INC.,

Plaintiff-Appellant,

vs.

JENSEN BROTHERS CONSTRUCTION  
COMPANY, a corporation,

Defendant and Third-Party  
Plaintiff-Respondent,

Case No. 17091

vs.

JESSE R. HARRISON and WILLIAM  
J. SOULE, d/b/a/ VALUE REALTY  
and LEON HARWARD,

Third Party Defendants,  
Third Party Plaintiffs,  
and Counterclaimants,

vs.

PAUL H. TAYLOR, JOHN DOES I through  
IV, whose true names are unknown,  
agents of Jensen Brothers Construc-  
tion Company, a corporation,

Third Party Defendants,

LEON HARWARD,

Third Party Defendant  
and Third Party Plaintiff,

vs.

TAYLOR NATIONAL, INC.,

Plaintiff and Third Party  
Defendant.

BRIEF OF RESPONDENT

FILE

MAY -4 1981

APPEAL FROM THE JUDGMENT OF THE DISTRICT  
COURT OF THE FOURTH JUDICIAL DISTRICT IN AND  
FOR UTAH COUNTY, STATE OF UTAH,  
HONORABLE J. ROBERT BULLOCK, JUDGE

- - - - -

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## PRELIMINARY STATEMENT

The procedural posture of the case before the court on appeal is as follows, Taylor National Inc. ("Taylor National"), the plaintiff real estate brokerage, sued defendant Jensen Brothers Construction Company ("JBC") seeking to recover a real estate commission in the amount of \$8,400.00, which Taylor National claimed to be due it as a commission on the sale of a house constructed and owned by JBC. The house was sold to third party defendant Leon Harward, also a real estate agent, in the employ of Continental Value Realty, a brokerage owned by third party defendants Harrison and Soule, to whom JBC claimed to have paid the real estate commission with the understanding that he would make suitable arrangements for splitting the commission with Taylor National, Inc., the listing realtor.

JBC made a third party claim against Harward, Harrison and Soule claiming that if JBC owed a commission to Taylor National, third party defendants owed the same amount to JBC. Subsequent to the commencement of suit, JBC gave notice of default to Leon Harward on a Trust Deed Note which secured part of the purchase price of the residence and sought to exercise the power of sale and the Trust Deed which secured the Note. Harward prevailed on the court to restrain exercise of the power of sale on the Trust Deed and subsequently counterclaimed against JBC seeking damages for claimed breaches of implied warranties in the construction of the house, for fraud

in allegedly failing to advise Harward that the subdivision in which the house was located had not been properly accepted by the city of Orem, and for reformation of the Trust Deed Note to reflect the alleged agreement by JBC that it would take only property in payment of the Note and not insist on payment in money.

After a trial to the court, the trial court entered Findings of Fact and Conclusions of Law and its Judgment awarding Taylor National recovery against JBC for the real estate commission and awarding JBC recovery over against Harward, Harrison and Soule for the amount of the real estate commission. The court found for JBC and against Harward, no cause of action, on his counterclaims. The court stayed execution of Taylor National's judgment against JBC on equitable grounds, but allowed Taylor National to execute over against Harward, Harrison and Soule on JBC's third party judgment against them.

On this appeal, the appellant Harward (and presumably Harrison and Soule), attack the court's ruling that Taylor National may execute over against Harward, et al., on JBC's third party judgment against them on the ground that Taylor National is not legally entitled to recover a commission from the buyer of a listed property, but must recover it from the seller. Brief of Appellant, Point II. In Point III of his brief, Harward apparently attacks the trial court's judgment

that Taylor National was entitled a commission from JBC. Harward, however, does not put at issue before this court the trial court's judgment over against Harward, Harrison and Soule on JBC's third party complaint. Therefore, JBC does not respond in this brief to the arguments and contentions contained in Points II and III of the Brief of Appellant, but responds only to Points IV, V, VI and VII, in which Harward directly attacks the court's judgment in favor of JBC and against Harward on JBC's Third Party Complaint and Harward's Third Party Counterclaim.

#### RESPONDENT'S STATEMENT OF FACTS

The respondent takes issue with many of the statements contained in the appellant's statement of facts, but because of the complexity of the factual context of this appeal, the respondent has chosen to avoid duplication by setting forth the facts it deems pertinent to this appeal as part of the argument section of its brief.

#### ARGUMENT

##### POINT I

THE TRIAL COURT'S JUDGMENT IN FAVOR OF JBC AND AGAINST HARWARD, NO CAUSE OF ACTION, ON HIS CLAIMS OF BREACH OF IMPLIED WARRANTIES OF HABITABILITY AND WORKMANSHIP IN CONSTRUCTION OF THE HOUSE MUST BE UPHELD ON APPEAL.

The trial court's judgment in favor of the Third Party Counterclaim defendants JBC on claims of breach of implied warranties in construction of the Barrington House should be

upheld by this court; first, because the judgment is properly supported by unchallenged findings of fact and second, because those findings of fact are supported by substantial evidence.

A. The Trial Court's Judgment in JBC's Favor is Properly Supported by Unchallenged Findings of Fact.

In Point IV of his Brief of Appellant, Harward attacks no specific Finding of Fact nor Conclusion of Law, but apparently only the judgment of the trial court in favor of JBC and against Harward, no cause of action, as to those portions of Harward's Counterclaim, Crossclaim and Third Party Complaint (as amended) claiming that JBC breached implied warranties of habitability and workmanship in construction of the Barrington house. See Brief of Appellant at 74; Amended Judgment, paragraph 4, R. 300; Third Party Counterclaim and Complaint, Count 5 "Warranty of Habitability," R. 38; Amendment to Third Party Complaint of Defendants Harrison, Soule and Harward, paragraph 19 b, R. 186-87.

In failing to specifically challenge any particular finding of fact or conclusion of law, Harward is bound on appeal by those findings and conclusions made by the trial court, and the only question for review is whether they support the challenged judgment. State ex rel. New Mexico Water Quality Control Comm. v. City of Hobbs, 525 P.2d 371,

373-374 (N.M. 1974). An example of the application of this rule is found in Lakeside Pump & Equipment, Inc., v. Austin Construction Co., 576 P.2d 392 (Wash. 1978), where both plaintiff and defendant in a contract dispute cross-appealed portions of a judgment by challenging certain of the trial court's conclusions of law. The Supreme Court noted:

In making their respective contentions, both parties rely heavily on factual arguments, quoting frequently from the trial testimony as to the content of the bid. Our inquiry, however, is narrowly limited by the failure of either party to assign error to the trial court's findings of fact. Since no challenge was made to any finding of fact by either party, the trial court's findings became the established facts of the case. We must decide only whether the challenged conclusions of law are supported by the court's findings of fact. (Citation omitted).

Id. at 394. The Utah Supreme Court applied a similar rule in Coon v. Utah Construction Co., 228 P.2d 997, 998 (Utah 1951). The issue in the instant case, therefore, is whether the trial court's findings of fact and conclusions of law support its judgment. See City of Hobbs, supra.

An examination of the applicable findings shows that they are supportive of the court's judgment. Finding of Fact No. 18(e) of the Amended Findings of Fact and Conclusions of Law states that:

(e) The evidence was insufficient to find the Barrington House was not constructed in a workmanlike manner.

R. 291. The court also found that there was insufficient evidence to support Count V of Harward's Counterclaim, which alleged breach of an implied warranty of habitability. Finding of Fact 18(f), R. 291.

The New Mexico Supreme Court, in Horton v. Driver-Miller Plumbing, Inc., 414 P.2d 219 (N.M. 1966), held that a negative finding very similar to 18(e) and (f) in the instant case, when not challenged was conclusive on appeal. The case involved a claim by the plaintiff apartment-building owner that the defendant plumbing contractor had breached express and implied warranties of fitness for use, when pipes it had installed developed pinhole leaks after several months. In challenging the judgment in favor of the defendant, the plaintiff took exception to certain of the court's findings of fact but not others. The Supreme Court upheld the judgment, noting as to one important unchallenged finding:

The trial court expressly found that the appellants "failed to show a breach of warranty on the part of the defendant." This particular finding is not one of those which appellants specifically attacked as being unsupported by the evidence. A finding not specifically attacked and set aside by this Court is conclusive on appeal. (Citations omitted).

Id. at 222.

In the instant case, the trial court's unchallenged findings that there was insufficient evidence that JBC had breached either the warranty of habitability or of workmanship

in the construction of the house are binding on appeal. Those findings provide ample support for the trial court's judgment of no cause of action on Harward's claims of breach of the implied warranties set forth in his Third-Party Counterclaim as Amended.

Nevertheless, should the Court determine that the appropriate findings of fact have been put at issue in this appeal, the trial court's findings of fact denying any breach of implied warranties is properly supported by the evidence as will be demonstrated below.

B. The Trial Court's Findings of Fact are Adequately Supported by the Evidence.

Accepting, arguendo, that the doctrine of implied warranties of workmanship and habitability in new construction is applicable under Utah law, cf., Tibbits v. Openshaw, 18 Utah 2d 442, 425 P.2d 160, 161 (1967), the Findings of the Court that there is insufficient evidence in this case to support Harward's claims that such warranties were breached by Jensen Brothers should be upheld.

1. Findings That a Party has Failed to Meet Its Burden of Proof in an Issue Must be Upheld If Reasonable Minds Could Remain Unconvinced That the Burden Was Met.

The applicable standard or review of a Court's refusal to find that the moving party has met its burden of proof is set forth in Crane Co. v Dahle, 576 P.2d 870 (Utah, 1978),

where the Utah Supreme Court upheld the trial court's decision that the plaintiff had failed to prove its claim that defendants had conspired to injure its business, saying:

We apply the standard rule of review: that we survey the evidence in the light most favorable to the trial court's findings, in this instance more precisely stated, his refusal to find in accordance with plaintiff's contentions.<sup>5</sup>

<sup>5</sup>That where the burden of proof on an issue is on a party, and reasonable minds could remain unconvinced thereon, then the refusal of the court so to find must stand, see Walker Bank & Trust Co. vs. First Security Corp., 9 Utah 2d 215, 341 P.2d 944 [946 (1959)].

Id., at 873 and n. 5. In reviewing the trial court's findings that there was insufficient evidence to support Harward's burden of proving breach of the warranties of workmanship and habitability, it is necessary to briefly examine the elements of proof applicable to each and the evidence before the Court.

2. The Tests for Breach of the Warranty of Habitability and the Warranty of Workmanship are Distinctive and Require Different Elements of Proof.

In order to establish a breach of implied warranties in new construction, the plaintiff must prove either that the structure was deficient in workmanship or in habitability. The test for determining whether a breach has occurred is very different for each.

The Supreme Court of Maine has described the standard of "habitability" as follows:

Habitability is a term difficult of precise definition. Every minor defect in a new home does not necessarily make the structure uninhabitable. On the other hand, the warranty should not be defined in such strict terms as to require that the structure be deemed unlivable. . . . Whether or not a particular defect renders the dwelling "unsuitable" necessarily requires inquiry as to whether a reasonable person faced with such a defect would be warranted in concluding that a major impediment to habitation existed.

Banville v. Huckins, 407 A.2d 294, 297 (Me. 1979). The Court in Shiffers v. Cunningham Shepherd Builders Co., 470 P.2d 593, 598 (Colo. App. 1970), described the test for breach of the warranty of workmanlike construction as follows:

For construction to be done in a good and workmanlike manner, there is no requirement of perfection; the test is reasonableness in terms of what the workman of average skill and intelligence (the conscientious worker) would ordinarily do.

See Wimmer v. Down East Properties, Inc. 406 A.2d 88 (Me. 1979) (Implied warranty in construction of new home that work would be done in a reasonably skillful and workmanlike manner.)

There is a distinct difference in the nature of the liability concept applicable to each warranty. Breach of the warranty of habitability is based on strict liability, i.e., "[n]egligence, knowledge, or fault of the vendor [of the house] need not be shown" (Matalunas v Baker 569 S.W.2d 791, 794 (Mo. App. 1978)),. but only that the house has some major impediment to habitation. A breach of the warranty

of workmanship, however, requires, by its very nature, some default on the part of the builder. This warranty is closely analogous to, if not identical with, the warranty implied in a personal services contract that the services will be performed in a workmanlike manner. The Idaho Supreme Court held in Hoffman v. Simplot Aviation, Inc., 539 P.2d 584 (Id. 1975), that breach of such an implied warranty could not be based on strict liability, but that fault must be shown:

The more vexing problem of theory is the distinction, if any, between the doctrines of implied warranty and negligence in circumstances involving the rendering of personal services. Although such causes of action are generally thought to be independent of each other in the instant circumstances they merge into one cause of action. A fundamental component in a negligence action is the existence of a duty. . . toward another and a breach thereof. In circumstances involving the rendition of personal services the duty upon the actor is to perform the services in a workmanlike manner.

\* \* \*

"Whether the tort standard of care is considered or the duty of care imposed by an implied warranty of workmanlike performance is taken as the applicable standard, in our view the resultant standard of care required. . . is identical. . . ." (Citations omitted.)

Id. at 589. The Court concluded that:

Since the case involved the rendition of personal service, a cause of action does not exist for breach of an implied warranty in the absence of fault on the part of the actor.

Id. at 590. See, In Re Talbott's Estate, 337 P.2d 986, 989 (Kan. 1959) ("A breach of an implied warranty. . . to do a

workmanlike job usually results from negligence or failure to use due care and skill in performing the particular work.")

The evidence presented at trial, viewed in the light most favorable to the trial court's findings (as it must be) supports the conclusion that reasonable minds could remain unconvinced that JBC breached implied warranties in construction of the house. A discussion of the evidence follows.

3. The Trial Court was Justified in Its Refusal to Find that JBC Breached the Warranty of Habitability Because Harward Presented No Evidence of a Major Impediment to Habitation.

Unlike the instant case, in cases relied on by Harward as examples of breaches of the warranty of habitability, there was evidence in the record of major impediments to habitability and findings by the respective courts that the dwellings were in some way unfit for habitation due to defects. For example, in House v. Thornton, 457 P.2d 199 (Wash. 1969), there was evidence that settling of the soil had resulted in cracks in the foundation and other parts of the house so severe that daylight showed through. In spite of efforts by both owner and builder to remedy the situation, both parties evidently agreed that "the house was untenable and unfit for further occupancy as a dwelling." Id., at 201. The Washington Supreme Court held that such evidence supported the trial court's finding that the house was "unusable

as a dwelling" and upheld judgment in favor of plaintiffs.  
Id. at 203.

In Mulhern v. Hederich, 430 P.2d 470 (Colo. 1967), the trial court had entered specific findings to the effect that "heaving" of the foundation had made the basement of the house "uninhabitable" in that it "could not be used for the purposes for which it had been designed, namely the division thereof into rooms for use by members of the family." When combined with other construction defects the total damage award was \$3,500, fully 15 percent of the total cost of the house, \$25,000. The Colorado Supreme Court upheld the judgment noting that it would not disturb a judgment predicated on findings of the trial court on disputed questions of fact. Id. at 470. The evidence before the trial court in the instant case did not rise to this level.

At trial, Mr. Harward produced two witnesses who testified as to problems which had developed in the house and introduced photographs illustrating those problems. Exhibits 44(A)-(K). The first, Jim Loveland, a contractor of one year's experience, testified that the foundation was settling at a rate faster than normal, resulting in the following problems:

1. Cracks in the garage floor which appear to be merely cosmetic. R. at 581; Ex. 44(A).
2. A horizontal crack in a sheetrock wall, of which there was evidence that it could have

been caused by a large rack affixed to the wall by Harward and holding a number of bridles and other horse tack. R. at 581-82, 587-88, 655; Ex. 44(B).

3. A slight shift (apparently about 5/8") in a wall in the family room which contains the fireplace. R. 582-83, 595; Ex. 44(C) and (D). "This is the room that shows the most movement." R. 582.
4. Some damage to a concrete frame surrounding a grate-covered opening in the rear of the house. R. 583; Ex. 44(F).
5. A doorframe which shifted out of square. R. 583; Ex. 44(G) and (H).
6. Slight separation at the juncture of two walls in one corner of the family room. R. 584; Ex. 44(I). (Cracks are barely visible in photograph.).
7. A crack, approximately 1/2" by 2', in the exterior brick above a door. R. 584; Ex. 44(J) and (K).

All the problems described apparently occurred in one section of the ground floor of the two-story structure containing the garage and family room. R. 587. Harward's second witness, Jack Potter, also a contractor, merely reviewed the photographs and stated he had seen the areas of the house they depicted. R. 590-95.

Mr. Loveland estimated the cost of repair to be \$5,602.31. R. 776. There was no testimony that this estimate was reasonable or that the items comprising the estimate were reasonably necessary repairs. Mr. Leon Jensen, vice-president of JBC and an experienced builder with 12 years of cost estimating experience, took exception to Mr. Loveland's estimate both

as to the necessity for certain repairs and the reasonableness of the cost. He testified that \$2,000 would be a reasonable charge to correct the problems in the house. R. 407-12. Cf. Hellbaum v. Burwell and Morford, 463 P.2d 225, 231, (Wash. App. 1969). ("Proof of mere expenditure does not establish that the expenditure was reasonably necessary or reasonable in amount.")

The purchase price of the house was \$140,000. Accepting the \$2,000 figure as the reasonable cost of repair (which the trial court was entitled to do and obviously did in this case [see Conclusion of Law No. 9 R. 296]), then the cost of repairing the problems complained of was only 1.5 percent of the total value of the house--a far cry from the 15 percent figure in Mulhern v. Hederich, supra, relied on by Mr. Harward.

Mr. Jensen further testified on cross examination that the damage which occurred from settling of the foundation was not significant. R. 763-64. There was no testimony from which it could be inferred that the problems complained of in the house made the house unfit for the purpose for which it was purchased, nor that such problems were a major impediment to habitability.

Certainly on this facts there was room for reasonable men to doubt that the house contained major impediments to habitability and the trial court's conclusion that Mr. Harward had not met his burden of proof on his claim of breach

of the warranty of habitability must therefore be sustained.

4. The Trial Court's Finding That There Was Insufficient Evidence That The House Was Not Constructed in a Workmanlike Manner Is Also Supported by the Evidence.

As noted earlier, in order to prove breach of the warranty of workmanship, there must be some evidence of fault or negligence on the part of the builder. Cases in which courts have found breaches of an implied warranty of workmanlike construction, including those cited in the Harward Brief, rely on evidence that defects were the result of improper or faulty construction techniques. See, e.g., Pollard v. Saxe & Yolles Development Co., 525 P.2d 88, 90 (Cal. 1974) (floor damage caused by use of undersized beams inadequate for support, improper materials increased stress on floors); Belt v. Spencer, 585 P.2d 972 (Colo. App. 1978) (cracked foundation and walls due to improper installation of drainage system, improper grade, and improper installation of floor and driveway slab); Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964) (walls cracked to the point of cave-in due to construction which violated county building codes).

The testimony of Mr. Loveland, Harward's contractor, was that there was some greater than normal subsidence in the foundation of the house. R. 580-81. There was absolutely no evidence presented that this subsidence was due to any substandard workmanship or negligent construction on the part of the builder, JBC. In fact, Mr. Potter, a builder testifying

for Mr. Harward admitted on cross examination that in his experience foundation cracks do appear without any negligence on the part of the builder. R. 596.

Mr. Clarence Perry, an experienced excavator, testified for JBC that he was employed to excavate the foundation of the Harward house, that the soil was excavated with a hydro-unit, the best method for problem soil, and that the excavation was done without mistakes and in original soil, which would normally does not require compaction. R. 639-642.

Mr. Leon Jensen, an officer of JBC who had previously supervised the pouring of over 100 foundations, testified that JBC nevertheless did compact the soil after excavation, an unusual extra step taken to ensure that the house would be well constructed. R. 754-56.

Further, it is clear that the Court had some doubts after the testimony of Harward's witnesses, Loveland and Potter, whether the problems in the house were defects or due to defective workmanship. R. 597, lines 21-24. These doubts could well have resulted from the fact that Harward presented no testimony of any accepted standard from which workmanship or lack thereof could be judged. Even if there were some defects:

The builder-vendor is not required to construct a perfect house. The test is one of reasonableness of quality.

Matalunas v. Baker, supra at 794.

Certainly on the record before the trial court, reasonable minds could remain unconvinced that Mr. Harward had carried his burden of proof that JBC had breached a warranty of workmanship in the construction of the house and the Court's findings and judgment in that regard must therefore be sustained.

## POINT II

THE TRIAL COURT'S JUDGMENT THAT HARWARD HAD NO CAUSE OF ACTION IN FRAUD AGAINST JBC FOR ITS ALLEGED FAILURE TO DISCLOSE CERTAIN FACTS ABOUT THE STATUS OF SUBDIVISION IMPROVEMENTS MUST BE UPHeld BECAUSE IT IS SUPPORTED BY A PROPER FINDING OF FACT WHICH IS ITSELF SUPPORTED BY SUBSTANTIAL EVIDENCE.

- A. The Trial Court's Unchallenged Finding That JBC Committed No Actionable Fraud Fully Supports The Court's Judgment that Harward had no Cause Of Action in Fraud Against JBC.

In Point V of his brief, Harward again does not attack any specific finding of the trial court, but argues generally that the trial court's judgment that Harward had no cause of action in fraud against JBC is in error because JBC was guilty of fraud in failing to notify Harward prior to his purchase of the house that the subdivision improvements had not been physically accepted by the City of Orem. Harward Brief at 84. As discussed earlier, where the Court's findings are not specifically attacked, they are conclusive on appeal and the only question is whether they support the judgment.

In Finding of Fact 18(a), the trial court specifically found:

(a) There was no actionable fraud by JBC . . . as alleged in Count I.

R. 290.

As the gravamen of count I of the Third Party Counterclaim against JBC sounds in fraud, the court's finding that there was no fraud amply supports paragraph 4 of the Amended Judgment in which the court ruled against Harward and in favor of JBC, no cause of action, on all issues in the Counterclaim, Crossclaim and Third Party Complaint. R. 300.

In any event, it is clear that there was substantial evidence on which the court could have based its finding that no fraud had occurred and the necessary inference to be drawn from that finding that Harward failed to meet his burden of producing "clear and convincing" evidence on each essential element of fraud. Beckendorf v. Beckendorf, 457 P.2d 603, 607-07 (Wash. 1969).

B. There is Substantial Evidence in the Record Which Supports the Trial Court's Finding That JBC Committed no Actionable by Fraud.

In reviewing attacks on specific findings of the trial court:

[T]his court is constrained to look at the whole of the evidence in the light favorable to the trial court's findings, including any fair inferences to be drawn from the evidence and all of the circumstances shown. The trial court's findings shall not be disturbed unless the evidence is such that all reasonable minds would be persuaded to the contrary. (Footnotes omitted.)

Hanover Ltd. v. Fields, 568 .2d 751, 753 (Utah 1977). The

burden for overturning a trial court's findings should be even more stringent where the appellant's burden at trial was to produce clear and convincing evidence of fraud. It is clear in the instant case that Harward did not meet that burden at trial.

The allegations set forth in his Third Party Counterclaim show the nature of the fraud that Harward sought to prove. In Count I, Harward alleged that at the time that he purchased the house, the subdivision in which the house was built had not been approved by the city of Orem as required by law. He further alleged that JBC knew that the subdivision had not been approved and knowingly failed to disclose this information to Harward, who justifiably relied on such nondisclosure in purchasing the property. Harward alleges that he was injured by such nondisclosure because failure to obtain municipal approval of a subdivision results in the property being left without public services such as fire protection, snow removal, street repair and police protection, leaving Harward with a house of diminished value which could not be sold until the subdivision was approved. He seeks damages in the amount of \$250,000.00. Third party counterclaim and Complaint, paragraphs 10 through 17, R. 35-36.

It should be noted that JBC was not the subdividor but had merely built the Barrington House on a lot owned by Taylor National, Inc., the plaintiff in this case. R. 7-8; 12-13.

At trial the official plat of the subject subdivision, Executive Estates, plat C, was introduced in evidence as Exhibit 26. The plat map shows that it was accepted by the legislative body, the City Council of Orem, on January 4, 1977:

The City Council of Orem, County of Utah, approves this subdivision and hereby accepts the dedication of all streets. . . .

It was filed with the Utah County Recorder on February 22, 1977. This acceptance and recordation of the plat occurred several months before the house was sold to Harward. Ex. 24, Earnest Money Receipt and Offer to Purchase, dated October 27, 1977.

There was testimony by John W. Jones, Director of Public Works of the City of Orem that after a subdivision has been accepted and properly recorded the lots may built upon, subject only to the building permit process. R. 576. There was no claim that JBC failed to obtain a proper building permit. Mr. Jones, subject to JBC's objection as to materiality (R573, lines 18-23), also described the official approval process necessary to accomplish the subdivision of land within the city of Provo. He noted that one of the conditions precedent to recording the plat is that the subdivider file a performance bond ensuring the proper installation of off-site improvements, including streets, sewer, curb, gutter sidewalk, etc. R. 574-75. Although the plat can be approved and filed at that time, he testified that

the street improvements "are not accepted until such time as they are installed properly and the final inspections are made." R. 575. Mr. Jones testified that this final acceptance occurred on October 15, 1979. There was no testimony from any witness that because the improvements were not accepted, the subdivision was not provided with police and fire protection, sewer and other services as alleged in the Third Party Counterclaim. Clearly the subdivision approval discussed in the Harward counterclaim relates to approval of the plat and not to approval of the physical improvements as installed in the subdivision. On that basis JBC's objection on grounds of relevance and materiality was well taken and further testimony in that regard was probably not considered by the trial court and should not be considered by this court.

In any event, Harward simply did not present sufficient evidence on the elements required for proof of fraud. Accepting the elements of fraud as set forth in Stuck v Delta Land and Water Company 227 P. 791, 795 (Utah 1924) as quoted at page 75 of the Harward Brief, Harward failed in his proof as follows:

(1) There was no representation made about the improvements by JBC. There is no evidence in the record that any representative of JBC made any representation or statement

about subdivision improvements; in fact, there is no evidence these improvements were even discussed before the sale of the house. In his brief Harward apparently recognizes this problem and attempts to develop a concept of fraudulent non-disclosure. Harward Brief at 75-77. According to Harward's own authorities, however, silence only becomes actionable where there is a duty to disclose material facts on the part of one of the parties. Such a duty simply did not exist in the instant case. There was no confidential or fiduciary relationship between the parties. There was no inequality in condition or knowledge between the parties: Although JBC was an experienced homebuilder, Leon Harward was himself an experienced professional real estate salesman (R. 629) with undoubtedly equal knowledge as to laws, customs and practices relating to the approval of subdivisions and subdivision improvements. Nor was there any evidence that JBC had knowledge that Harward was acting under the mistaken belief that the subdivision improvements had not been physically approved by the city, or that Harward was relying on JBC for such information. The sale of the house was an arm's length transaction between an equally sophisticated buyer and seller.

(2) There was no knowledge on the part of JBC of the falsity of any representation. Even if the court could have

found that there was a representation or an actionable non-disclosure, there is no evidence of any kind in the record which indicates that JBC or anyone associated with JBC knew that the subdivision improvements had not been finally physically accepted by the city of Orem.

(3) There is no evidence that any alleged false representation was material. It is apparent that the subdivision improvements were at least visually acceptable to Harward at the time that he bought the house because he in fact did go through with the deal; there is no evidence in the record that there was anything wrong with those improvements at the time of the transaction. Given that fact and the further fact that there was a performance bond ensuring that the improvements to be properly installed it is difficult to see how a buyer would be materially affected in his decision whether to make a deal by knowledge that the subdivision improvements had not been physically accepted by the city. In fact the performance bond evidently did insure that the problems which subsequently occurred with the improvements were satisfactorily taken care of by October 1979. R. 576-77, 604.

(4) Harward did not prove he was damaged by an alleged misrepresentation. The testimony relating to Harward's inability to sell the house is at best equivocal and was

met with some doubt by the judge at the time it was given. R. 656-57. It consists almost entirely of testimony that the subdivision improvements were in visibly bad condition, that at the time of trial there were seven houses on the block for sale (there is no evidence of how many houses had been for sale prior to the time of trial), and that during the past year or two only one house had been sold on the block. R 656-58. Harward testified that he believed he could not get \$140,000 for the house, but on cross-examination it was shown tht he had listed the house for sale at \$150,000 and had never tried to sell it for \$140,000. R. 714-16. The court was certainly justified in assuming that there were other equally possible causes for the failure of houses in the subdivision to sell besides the street conditions.

In summary, Harward failed to present evidence necessary to sustain several important elements which he was required to prove by clear and convincing evidence in order to establish fraud on the part of JBC. There was substantial evidence to support the trial court's finding that there was no fraud, and its judgment of no cause of action based on that finding should be sustained by this court.

C. Harward's Assertion on Appeal that there was Negligent Misrepresentation as to the Status of the Subdivision Improvements is not Properly Before this Court as it was Never a Part of His Claim Below.

It should be mentioned that Harward also apparently claims in his brief that the trial court should have found that there was at least a negligent misrepresentation as to the status of the improvements vis a vis Orem City. However, Harward never made any claims of negligent misrepresentation in his original Third Party Counterclaim, nor was there any amendment made or requested to that effect. In Ellis v Hale, 373 P.2d 382 (Utah 1962), this Court held, in upholding the lower court's dismissal of a complaint alleging fraud, that:

In plaintiff's complaint it is specifically alleged that the defendants had knowledge of the falsity of the supposed representation that induced the belief that the lots were part of an approved subdivision. We conclude that this knowledge forecloses an action for negligent misrepresentation. . .

Id. at 385. In other words, Howard cannot claim in his counterclaim that JBC knew the subdivision had not been properly approved, and then, in his brief attacking the court's finding that there was no fraud, allege that if JBC didn't know, it should have known. The claims are mutually exclusive and an allegation of negligent misrepresentation should not be allowed to be made for the first time at trial or

on this appeal. Moreover, the evidence presented to the trial court, as discussed above, simply does not support a claim of negligent misrepresentation on the part of JBC, as JBC made no representation at all regarding the status of the improvements.

#### POINT IV

HARWARD PROVED NONE OF HIS CLAIMED DEFENSES TO ENFORCEMENT OF THE TRUST DEED, AND THE TRIAL COURT'S JUDGMENT THAT THE TRUST DEED NOTE WAS IN DEFAULT AND THAT THE TRUST DEED BE FORECLOSED MUST THEREFORE BE SUSTAINED.

- A. The Trial Court's Finding that there was no Meeting of the Minds Between Harward and JBC Requiring JBC to Accept Solely Property in Payment of the Trust Deed Note Supports its Judgment Enforcing the Trust Deed Note by Allowing Sale of the Trust Deed Property.

In Points VI and VII of his Brief, Harward evidently contests the judgment of the trial court that the Harwards are in default in payment of the Trust Deed Note and that JBC may cause the trustee to sell the property secured by the Trust Deed (Amended Judgment, paragraph 5, R. 300-301) and its judgment denying reformation of the Trust Deed as requested in Harward's Amendment to Third Party Complaint. Amendment, paragraph 18, R. 186; Amended Judgment, paragraph 4, R. 300. Harward's arguments as to both points revolve around the related claims that JBC agreed to take land in trade for the amount owing on the Trust Deed Note, that JBC

is estopped from denying that it agreed to take land in trade, and that the Trust Deed Note should be reformed to reflect this agreement.

Again, Harward has attacked the judgment of the trial court without attacking its specific findings of fact. Thus, the court's findings are conclusive on appeal, and, if they support the judgment, it must be upheld. The finding of fact applicable to this issue is Finding of Fact 18(d):

(d) The evidence was insufficient to compel or justify any reformation of the Trust Deed or Trust Deed Note (Exhibit 59) acknowledged by Leon Harward as executed and delivered to JBC with respect to the Bartington House, and the court specifically finds that no meeting of the minds occurred between Leon Harward or Judith Harward, his wife, with JBC pertaining to acceptance of property or sales of real estate in lieu of the cash required pursuant to terms of the Trust Deed Note.

The remedy of reformation is available to a party who proves that due to mutual mistake or fraud or inequitable conduct on the part of another party, the written contract between them fails to reflect their agreement. Ingram v. Forrer, 563 P.2d 181, 182 (Utah 1977); George v. Fritsch Loan & Trust Co., 256 P. 400, 403 (Utah 1924). The threshold question is whether there was an initial agreement to which the writing may be conformed. The trial court's finding that there was no meeting of the minds between the various parties as to acceptance of property in lieu of cash, together with its finding that the Harwards had no defense

to enforcement of the Trust Deed and Trust Deed Note (Finding of Fact 19(g) R. 293) fully support those parts of the trial court's Amended Judgment which relate to enforcement of those instruments.

Should this court decide that the trial court's findings are properly attacked on review it must still uphold those findings and the resulting judgment on the ground that they are amply supported by the evidence, as will be demonstrated below.

- B. The Trial Court's Finding that there was no Agreement by JBC to Accept only Property in Payment of the Trust Deed Note is Fully Supported by the Evidence and Harward Failed to Adequately Prove his Defenses to Enforcement of the Note and the Trust Deed.

Although it is the duty of this court to review the facts as well as the law in reviewing an equity proceeding, such as the instant, involving application of the equitable remedies of estoppel and reformation of an instrument, the court has imposed some bounds on its scope of review. As the court stated in Del Porta v. Nicolo, 495 P.2d 811, 812 (Utah 1972):

It is true, as plaintiff asserts, that this action to avoid deeds is one in equity upon which this court has both the prerogative and the duty to review and weigh the evidence, and to determine the facts. However, in the practical application of that rule it is well established in our decisional law that due to the advantaged position of the trial court, in close proximity to the parties and the witnesses, there is indulged a presumption of cor-

rectness of his findings and judgment, with the burden upon the appellant to show they were in error; and where the evidence is in conflict, we do not upset his findings merely because we may have reviewed the matter differently, but do so only if the evidence preponderates against them. (Footnotes omitted.)

See Foster v. Blake Heights Corp., 530 P.2d 815, 816 (Utah 1974). This must be particularly true where the evidence required to sustain plaintiff's burden of persuasion is required to be both clear and convincing, as in the instant case where the doctrines of equitable estoppel and reformation of instruments are invoked. Tribble v. Reely, 557 P.2d 813, 818 (Mont. 1976) ("[E]stopppel is not favored and will only be sustained upon clear and convincing evidence."); Weight v. Bailey, 147 P. 899, 903 (Utah 1915) ("[T]he presumption that the instrument correctly evidences the agreement of the parties, where reformation is resisted, must be overcome by proof which is clear and convincing.")

Harward's assertion that there was mutual mistake justifying reformation of the Trust Deed Note to reflect JBC's alleged agreement to take land in lieu of cash in payment and that JBC is estopped from denying that there was such an agreement will be discussed in turn below.

1. There was Insufficient Evidence of Mutual Mistake to Justify Reformation of the Trust Deed Note.

Reformation of a written contract on grounds of mistake requires that the mistake "be mutual, and that both parties

understood the contract as the complaint or petition alleges it ought to have been, and as in fact it was except for the mistake. . . ." Ingram, supra at 182 (Emphasis by the court).

Evidence of mutual mistake must be "clear and convincing":

An honest difference of understanding as to what the contract was is fatal to reformation, for in such case there is no meeting of the minds of the parties and no preexisting agreement to which the written instrument can be conformed.

It is often stated that reformation will not be granted on [internally] contradictory evidence. (Footnote omitted.)

Id. See 66 Am Jur 2d, "Reformation of Instruments", §125.

The evidence before the court on Harward's claim that JBC agreed to accept property, and not money, in payment of the Trust Deed Note was at best contradictory and simply did not reach the level of "clear and convincing".

Harward prepared two Earnest Money Receipts offering to purchase the Barrington House from JBC. The first (Exhibit 60) contains a provision that \$56,600 of the price of the house will be "equity in ground". That Earnest Money was signed by Harward, but was not accepted by JBC. R. 732-33, 746. Leon Jensen, an officer of JBC, testified that the unsigned Earnest Money was rejected by JBC because the provision for trading of equity in ground for a portion of the purchase price was not acceptable. R. 732-35. The Earnest Money Receipt subsequently signed by both parties

(Exhibit 24) contained no provision that land or equity in land would be accepted as a portion of the purchase price. That Earnest Money bears the date of October 27, 1977.

The next day, on October 28, 1977, the Harwards signed a Trust Deed Note to JBC for \$45,600 (Exhibit 59) representing a portion of the down payment on the property, and to secure the Trust Deed Note a Trust Deed of the same date was executed (Exhibit 45). The Trust Deed Note provides that the principal amount will be paid "in full on or before May 1, 1978" and shows no indication that any provision is made for payment in other than money.<sup>1</sup>

Harward testified that when he first spoke with Leon Jensen about acquiring the Barrington House with Leon Jensen, they discussed the nature of the consideration to be paid:

A. I asked Leon if they would be interested in taking ground as a down payment.

Q. Were you given an answer to that question?

A. They would entertain it, they would talk about it.

Q. Are you telling us what Mr. Leon Jensen said?

A. Yes. He said that they would consider it and take a look at it.

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<sup>1</sup> "Unless the parties agree otherwise, or an obligee consents to receive some other medium, payment of an obligation may be made only in money." 60 Am Jur 2d "Payment," §22.

R. 613. Mr. Harward testified that subsequently, from early October or November until the next spring (both before and after signing the Earnest Money, according to him) he took Leon and Marvin Jensen of JBC to look at several parcels of property. R. 614-621. Leon Jensen contradicts Harward's claim that there was any discussion of accepting property in lieu of cash until after the Earnest Money and the Trust Deed Note were signed. R. 736. Only three of the approximately twelve parcels which Harward testifies he showed to Jensen were shown to them prior to the due date of the Note, May 1, 1978. R. 718-719. It is apparent from Harward's testimony that he did not own any of the property (see R. 614-621), but was attempting to interest the Jensens in buying property belonging to others on which he would receive a real estate commission. R. 673, 737-739. It is also clear that during the entire period in which Leon Harward was showing property to the Jensens, the Jensens were also looking at other property with other realtors because they needed a project to develop at that time. R. 742.

The Jensens' testimony was very specific that they expected the Note to be paid in money, but were willing to take land if suitable land could be produced for them by Mr. Harward:

A. [Leon Jensen] Yes. We discussed the possibility of taking property in exchange for this Trust Deed

and Notes. If there were some presented that were acceptable and it was feasible. . . .

\* \* \*

Q. Okay. And who was present?

A. Leon Harward and myself.

Q. And what was said?

A. He asked me if we would consider taking the property that he had in exchange for all or part of the down payment for that home.

Q. And what did you say?

A. I said we'd consider it.

Q. . . . Were you required to do so in your understanding?

A. No.

R. 736.

Q. (By Mr. Norton) . . . From the time the Trust Deed Note was signed, Exhibit 45, to this time, have you or to your knowledge any other agent of Jensen Brothers Construction agreed to accept land and not to require cash in payment of the Trust Deed Note?

A. [Marvin Jensen] Absolutely not.

R. 748. Leon Jensen testified that at the signing of the Trust Deed Note and again at the closing on the house Harward told him that when the Note was due "if he had to he would take out a second mortgage on his home or some other property he had and pay us in cash." R. 735.

Further, at least twice before the May 1, 1978, due date on the Trust Deed Note, Marvin Jensen, president of

JBC, called Harward to advise him that JBC expected to be paid on the Note. R. 400-403.

The Jensens continued to consider accepting equity in property or some sort of property deal for the amount of the Note after the May 1, 1978, due date because of their feeling that it would be difficult to otherwise collect from Harward. As Leon Jensen testified:

A. You are asking me what attempts I know of to collect the money?

Q. Yes.

A. Leon Harward and I had several conversations in which I, this was at or around the time of the Trust Deed and Note being due, I had several conversations about that; and I informed him of our desire to collect on that, it was becoming due and we didn't want the thing to drag on, that we wanted to collect.

Q. What was his response?

A. He assured me that there would be no problem.

Q. After May of 1978, there was a reason why you--were there reasons why you allowed him to show you property?

A. Yes. It was obvious to us and he, I think, very well, I think it was very soon after the Note became due he told me that he just did not have the funds to pay the Note off. And the reason why we still considered property in exchange is to collect somehow on the Note.

R. 741-743.

In an attempt to consummate some sort of deal by which they could be paid out of the now over-due Note, the Jensens

ultimately, in November of 1978, entered into an Earnest Money Agreement with parties known as Memmott and Johnson on a 25-acre parcel (the Williamson property) shown to them by Harward. As part of the deal, Memmott and Johnson were to accept the Trust Deed Note as a portion of the purchase price. Exhibit 38. In his Brief at pages 90-92 Harward argues that this proves that JBC had agreed to accept land in trade for equity. It does prove that JBC had agreed, in the context of that deal, to accept land, but not that JBC was obligating itself to accept only land and not money. In fact a letter quoted by Harward at page 91 of his Brief indicated that this was merely an accommodation to Harward and not an indication of some binding agreement:

The arrangements to include your Note in this deal on Williamson's property should be a benefit to both of us. It is, as you know, because of these negotiations that we have held off on our foreclosure of your home.

Exhibit 55. The "Williamsen deal" was never closed for reasons not before the court in this matter. R. 762.

The only evidence presented by Harward which appears to support his contention that JBC agreed to accept only property in satisfaction of the Trust Deed Note besides his own rather ambiguous testimony was a pre-closing letter to Scott Harrison of American Home Mortgage, Inc., the institution financing the bulk of Harward's purchase of the Barrington House, and signed by Leon Jensen, indicating that JBC

had taken equity in property which Mr. Harward owned as a down payment on the house. Exhibit 37. This evidently resulted in the Settlement Statement (Exhibit 36), indicating that part of the consideration for the sale was a "Land Trade" in the amount of \$56,600. It is clear, however, that this letter was written by JBC at the specific request of Leon Harward. Mr. Harward, in fact, so testified:

Q. (By Mr. Norton) I show you what's previously been marked and offered as Exhibit 37, purporting to be a letter from Leon Jensen to Scott Harrison. Do you remember seeing that letter?

A. Yes, I do.

Q. And that letter was written at your request, wasn't it?

A. Yes.

Q. You knew at the time that property had not been transferred to Jensen Brothers?

A. I knew that they had not received property yet, yes.

Q. But you requested Leon Jensen to write that letter?

A. I asked him if he would.

Q. And the reason for that is so that you could obtain that first mortgage?

A. That's true.

R. 708.

Thus, it is clear from the evidence that the trial court was justified in concluding that there was never a binding agreement that JBC would accept only property in satisfaction

of the Trust Deed Note. In fact, the evidence which Harward cites in Point VI of his Brief as supportive of his position that there was such an agreement is equally persuasive evidence of JBC's agreement to merely accommodate him by accepting property because of his lack of funds to pay the Trust Deed Note in cash. To the extent other testimony appears to contradict this, the court may "assume that [the trial court] believed those aspects of the evidence which are in accord with his findings and judgment." Foster v. Blake Heights Corporation, supra at 816.

Even if the evidence were sufficiently clear and convincing to demonstrate that the parties had agreed as a general proposition to exchange land for the payment due under the Trust Deed Note, it still cannot be concluded that the necessary meeting of the minds occurred, because the agreement would still be too indefinite to enforce. Valcare v. Bitters, 362 P.2d 427, 428 (Utah 1961). Such an "agreement" leaves many material questions unanswered such as what property JBC was to accept in payment for the amount of the Note or the standard by which an appropriate property would be designated.

Further, as Harward apparently did not own property he proposed to trade, what form was the "trade" to take--a commission to be deducted from the sales price or a purchase

of property by Harward with resale to JBC at a higher price to cover the amount of the Note? None of these significant questions is answerable from the testimony and other evidence before the court, and for that reason alone it must conclude that no meeting of the minds took place and no reformation of the Trust Deed Note is appropriate or possible.

2. There Was Insufficient Evidence of Inequitable Conduct on the Part of JBC to Justify Reformation of the Trust Deed Note.

The courts of Utah require "clear and convincing" evidence to justify reformation of a written instrument on the grounds of fraud or inequitable conduct as well as on grounds of mutual mistake. Weight v. Bailey, supra at 903.

Harward argues in his Brief at Point VII that if there was no mutual mistake justifying reformation, then there was inequitable conduct by JBC in encouraging Harward to spend time and effort in locating land for JBC under the false impression that he need not pay money in satisfaction of the Trust Deed Note when JBC secretly intended not to perform if such land was located. Harward cites no portion of the record for this proposition because there is no support for it in the record.

The facts previously discussed clearly contradict any claim of inequitable conduct on the part of JBC and there is thus no justification for reformation on that ground.

3.     There Was Insufficient Evidence to Estop  
JBC from Denying an Agreement to Accept  
Property in Sole Payment of the Trust  
Deed Note.

Accepting the elements of equitable estoppel set forth in Celebrity Club, Inc. v. Utah Liquor Control Comm., 602 P.2d 689 (Utah 1979), as stated in the Harward Brief at 86, there is simply insufficient clear and convincing evidence in the record to support Harward's claim that JBC is estopped to deny it agreed to accept a property trade in lieu of cash payment of the Trust Deed Note:

(a)     JBC made no statement nor took any action inconsistent with the requirements that the Note be satisfied in money. The evidence before the court shows that JBC agreed to make some sort of property exchange as an accommodation to Harward but not that it was required to do so.

(b)     Harward's actions were not taken in reliance on any representation by JBC that it would take only property in satisfaction of the Note. Harward claims that in reliance on JBC's statements and acts he failed to pay money on the Trust Deed Note, thus allowing it to go into default. There is no evidence in the record that Harward had the money to pay the Note when due. In fact, JBC's agreement to take a property exchange after the Note's due date was shown to

be an accommodation to Harward because he did not have the money to pay the Note.

Harward further claims that in reliance on JBC he spent time and effort in seeking property for JBC he would not otherwise have expended. This claim is unsupportable. Harward was a realtor who dealt in such properties for a living. In dealing ith JBC he was pursuing his normal line of work and expected to get a commission on any deal he made for them. The fact that his commission on such a deal would go to pay the Note was a benefit to Harward and is really not relevant in any event.

(c) Any injury to Harward is a result of his failure to abide by the terms of the Trust Deed Note and is not due to any action of JBC. Rather than foreclose the Trust Deed when the due date had passed without payment, JBC continued to accommodate Harward by seeking a property deal which would allow satisfaction of the Note. There was no evidence that they acted in bad faith in any potential land deal; on the contrary, they spent much fruitless time and effort in seeking a deal which would involve Harward.

Harward never paid the Note and now asks the court to rule that JBC's forbearance and cooperation with him throughout their business relationship should bar JBC from seeking the money which is due it by a remedy which it bargained

for in good faith, foreclosure of the trust deed. Harward's position itself is inequitable and this court should uphold the judgment of the trial court and allow the trustee's sale to go forward as ordered.

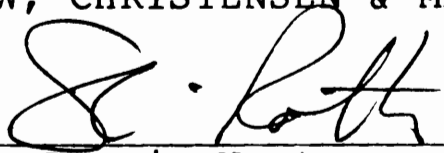
### CONCLUSION

Harward has attacked those portions of the judgment of the court against him and in favor of JBC on his claims that JBC breached implied warranties of habitability and workmanship, that JBC committed fraud in allegedly failing to disclose to Harward that subdivision improvements had not been approved by Orem City, and that the Trust Deed Note between Harward and JBC should be reformed to reflect an agreement that JBC take only property in payment of the Note, and be estopped from denying that agreement. However, the judgment of the trial court is adequately supported by findings of fact and those findings of fact have substantial support in the record. Therefore, Harward's contentions on this appeal must be denied, and the judgment of the trial court upheld.

Dated this 15<sup>th</sup> day of May, 1981.

SNOW, CHRISTENSEN & MARTINEAU

By

  
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Attorneys for Respondent  
Jensen Bros. Construction Co.

I hereby certify that I delivered two copies of the foregoing document to William Bradford, attorney for Taylor National, Inc. this 1<sup>ST</sup> day of May, 1981.

Stephen Rath