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Brighton Corporation v. Gregory M. Ward : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BRIGHTON CORPORATION, a Utah corporation, Plaintiff and Appellee, v. GREGORY M. WARD, Defendant and Appellant.	Case No. 20000171-CA Priority No. 15

REPLY BRIEF OF APPELLANT GREGORY M. WARD

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
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A. INTRODUCTION

This appeal arises out of a six-year legal battle in which the Appellant, Gregory M. Ward ("Ward"), has repeatedly attempted to obtain approval to build a small cabin on his property located in Brighton, Utah (the "Property"). The Property is subject to simple, basic restrictions contained in a Special Warranty deed. First, the Property "shall be limited to the construction of a single residential building containing not in excess of twelve hundred square feet on each floor, and not containing more than two floors." Special Warranty Deed (Trial Exhibit 44). Second, the Special Warranty Deed gives Brighton Corporation, a family corporation controlled by Ward's aunt, Mary Barton (sometimes referred to as "Brighton"), an adjoining landowner, the right to review and approve plans for the cabin and provides that Brighton will not unreasonably withhold such approval. Id.

For six years, Ward has been submitting detailed plans to Brighton attempting to obtain approval to build his cabin. Since the initial hearing on this matter in 1994, all of Ward's plans have undisputedly complied with the "1,200 square feet" and "two floors" requirements of the restrictive covenants.[1] See, e.g., Brighton's Opposition Brief at 61 (conceding that Ward's 1995 plans met "the two objective criteria stated in the Special

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[1] In 1994, the first plans submitted by Ward to Brighton were ruled by the district court to contain two floors, plus an attic and a basement that were "floors," equaling four floors in violation of the restrictive covenants. Brighton spends a great deal of time in its opposition brief referring to the 1994 decision of the trial court. However, Ward does not appeal the district court's ruling in 1994.

Warranty Deed.") These plans have been drawn by professional draftsmen and/or licensed architects. Salt Lake County has certified that these plans comply with all building and zoning requirements. Nevertheless, Brighton has refused to approve the plans and the district court has failed to compel Brighton to approve these plans. Ward has attached hereto as Exhibit A photographs of depictions of the various cabins that Ward has submitted for approval over the years, all of which have been unreasonably rejected by Brighton.

Although unnecessary to a determination of this dispute, it must be asked why this litigation has continued for six years over such a simple matter, at a cost of over $350,000 in fees and costs to the parties. Ward only wants to build a family cabin on his property. Brighton suggests that this litigation is a result of Ward's mother, Isabel Coats, being upset with the results of a family lottery in which she received the Property at issue in this case, rather than the larger parcel drawn by Mary Barton where the existing family cabin is located. See Opposition Brief at 11. This is not true and there is no evidence in the record to support such an allegation.

The underlying cause of this dispute is that Mary Barton, the owner of Brighton Corporation, does not want any cabin built on the adjoining property and has vowed to never let Mr. Ward build on his property. In the fall of 1990, Ward visited his Aunt Mary Barton at the family cabin. At that time, Mary Barton told Ward "Greg, I'll never allow you to build on the property up here so you might as well find another place to build."

September 7, 1994 Preliminary Injunction Hearing (R. 1744:310) (excerpt attached hereto as Exhibit B).

True to her word, Mary Barton and Brighton Corporation have consistently refused to approve building plans that met all restrictive covenants, county requirements, and that any reasonable person would have approved. The district court has repeatedly erred in failing to order that Ward may build his cabin on his property.

B. THE DISTRICT COURT RULED THAT THE RESTRICTIVE COVENANTS WERE UNAMBIGUOUS. CONSEQUENTLY, ANY REFERENCE TO PAROL EVIDENCE REGARDING THE INTENT OF THE PARTIES AS TO THE RESTRICTIVE COVENANTS IS NOT APPROPRIATE

After the initial preliminary injunction hearing in September, 1994, the district court found that "the restrictive covenants in the Special Warranty Deed are clear and unambiguous, and the terms of those covenants are to be construed according to their ordinary, popular usage." October 4, 1994 Order Granting Preliminary Injunction and Declaratory Judgment at ¶ 9 (R. 312). It is hornbook law that parol evidence is not admissible to interpret the terms of an unambiguous contract. As the Utah Supreme Court explained, "[d]eeds are to be construed like other written instruments, and where a deed is plain and unambiguous, parol evidence is not admissible to vary its terms." See, e.g., Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979). "It is also well known that the intention of the parties to a conveyance is open to interpretation only when the words used are ambiguous." Id.

Despite this clear law, Judge Young further found that the intent of the parties as to the restrictive covenants was that "the 'two floors' be similar to the original cabin on the property now owned by Brighton Corporation where the first floor was built into grade with the front door on the west side of the grade," and that "[t]he intent of the parties was that only a small cabin could be built on the Subject Property." October 4, 1994 Order Granting Preliminary Injunction and Declaratory Judgment at ¶¶ 14-15 (R. 314).

Thereafter, throughout the next six years of litigation, the trial court would, from time to time, refer to and rely on the intention of the parties that the cabin be small and look like the original family cabin on Brighton's property. See, e.g., Trial Transcript, Vol. II (R. 1751:238) (Judge Young stated that "[b]ut I have had a hearing, as you'll recall, several years ago, frankly before you were involved in this case, in which I had family members testify to what they thought the limitations of the new cabin would be. And Mr. Ward, I think he would have to acknowledge, is not happy with the confinement of that cabin"). Of course, based on the court's earlier ruling that the restrictive covenants were unambiguous, evidence of the intent of the parties as to what they intended the cabin to look like would be inadmissible parol evidence.

Throughout this litigation, Brighton has wrongfully refused to approve Ward's cabin plans because, even though the cabin plans complied with the objective requirements of the restrictive covenants (i.e., two floors and 1,200 square feet per floor), Brighton applied a totally subjective standard in reviewing the plans and rejected the plans because the cabin did not look like the original family cabin on the property.

Brighton's consistent reliance on the inadmissible intent of the parties, rather than the objective, unambiguous restrictive covenants, is illustrated by the following citations from Brighton's opposition brief:

- Ward submitted plans and "Brighton rejected them, at the same time suggesting an acceptable style, one that complied with the intent of the restrictions as construed by the district court." Opposition Brief at 6 (emphasis added).

- "Nevertheless, it was felt that a small cabin could be placed on the Subject Property . . . . The siblings believed that any cabin on the Subject Property should be small so it would not obstruct the view or value of the main cabin and to avoid large numbers of people on the property." Opposition Brief at 10-11 (emphasis added).

- "The two-floor limitation referred back to the design (though not the size) of the Family Cabin . . . ." Opposition Brief at 12-13 (emphasis added).

- "[T]he 'two floor' restriction was included with the intent that the 'two floors' be similar to the original cabin on the property now owned by Brighton Corporation where the first floor was built into grade with the front door on the west side on grade." Opposition Brief at 15.

- Alleging that in 1995, Ward failed to "submit plans for a 'small cabin,' 'built into grade with the front door on the west side on grade . . . ." Opposition Brief at 15.

- Alleging that in 1995, Ward's cabin did not show a door as in the original cabin. Opposition Brief at 15-16.

- Brighton would review plans that complied with intent of the parties regarding the restrictive covenants. Opposition Brief at 16.

- "While Ward's 1995 plans had been tweaked technically to meet the two objective criteria stated in the Special Warranty Deed . . . there were other problems giving rise to Brighton's rejection." Opposition Brief at 61.

- Alleging that Ward wants a judge who has not "already ruled . . . that the restrictive covenants of the Special Warranty Deed were intended to limit any structure to a 'small cabin'. . . ." Opposition Brief at 63.

Brighton has consistently rejected Ward's plans based on what it believes to be the intent of the parties regarding what a cabin was supposed to look like, rather than the objective, unambiguous terms of the restrictive covenants. The parties reduced their intent to have a "small cabin" to a writing by requiring that the cabin be two floors and 1,200 square feet per floor. Ward's cabin plans consistently met these objective requirements.

C. THE TRIAL COURT ERRED IN DENYING WARD'S 1995 APPLICATION FOR A DETERMINATION THAT CONSENT TO BUILD THE CABIN HAD BEEN UNREASONABLY WITHHELD

Standard of Review: The trial court's determination in 1995 that Brighton had not unreasonably withheld approval of Ward's cabin plans constitutes an interpretation of an unambiguous contract (the restrictive covenants) that should be reviewed for correctness giving no deference to the trial court' determination of the issues presented. Saunders v. Sharp, 806 P.2d 198, 199-200 (Utah 1991). Brighton erroneously argues that the appellate court should apply an "abuse of discretion" standard because "[t]he question before the court was whether the preliminary injunction should be vacated to allow Ward to build." Opposition Brief at 3. Ward did not file a motion to vacate a preliminary injunction. Rather, Ward filed a motion for an order that Brighton had unreasonably refused to approve new plans that had been submitted after the 1994 hearing. The review of those plans was based on the court's interpretation of the unambiguous restrictive covenants contained in the contract between the parties.

After the 1994 hearing, Ward revised his cabin plans to eliminate the basement and the attic and resubmitted the plans to Brighton. Brighton still refused to approve the plans and on June 9, 1995, Ward filed an "Application for Determination that Approval Has Been Unreasonably Withheld." (R. 317-18). In its Opposition Brief, Brighton concedes that Ward's 1995 plans met the restrictive covenants, admitting that "Ward's 1995 plans had been tweaked technically to meet the two objective criteria in the Special Warranty Deed . . . ." Opposition Brief at 61.

Brighton fails to rebut Ward's argument that Brighton unreasonably withheld approval of the plans. As explained in Ward's opening brief, each of Brighton's objections to the plans were without merit--(1) the plans did not show a loft; (2) Brighton's expert admitted a roof pitch of 8/12 did not violate Wasatch Canyon Development Standards;[2] (3) Brighton did not show that the topography on the plans was wrong; and (4) Salt Lake County approved the plans. See Opposition Brief at 62. In fact, Brighton seems to concede that Ward is correct on these points, and argues only that "these are merely a selection of some facts purportedly favorable to Ward from among all that was before the trial judge." Id. However, tellingly, Brighton fails to cite from the

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[2]As pointed out in Ward's opening brief, Brighton's expert, Neil Richardson misrepresented to the trial court in the 1995 hearing that the preferred Alpine design in Utah is to retain snow on the roof with a 3/12 pitch. Mr. Richardson subsequently admitted that his testimony on that point was untrue by testifying that there is not a preferred alpine pitch design. See Testimony of Neil Richardson, Trial Transcript, Vol. I (R:1750:187).

record any evidence that Ward allegedly failed to include in his brief that was favorable to Brighton.

Brighton based its rejection of the plans primarily on the fact that it believed the intent of the parties was that the cabin look like the "original cabin," and Brighton did not like the look of Ward's cabin, even though it met the restrictive covenants. Opposition Brief at 60. As explained above, the restrictive covenants were unambiguous and any reliance on the intent of the parties is barred by the parol evidence rule.

D. THE TRIAL COURT ERRED IN GRANTING BRIGHTON'S SUMMARY JUDGMENT MOTION

Standard of Review: The parties agree that the standard of review in reviewing an order granting summary judgment is correctness. Opposition Brief at 2. Brighton argues that this Court should reject this well accepted standard of review and instead review the district court's summary judgment order using deference. Id. There is no legal basis for the Court to review the summary judgment order by any standard other than correctness, giving no deference to the trial court's determination. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993).

On December 22, 1998, Brighton moved for summary judgment, seeking to have the Court rule on three points as a matter of law: (1) that Ward must compensate Brighton for all further costs, including attorney's fees, associated with any review by Brighton of any new plans submitted by Ward as a condition of reviewing those plans; (2) that it was reasonable for Brighton to require a licensed architect to sign any plans for the cabin; and

(3) that it was reasonable for Brighton to apply the Foothills and Canyons Overlay Zone ordinance ("FCOZ") in reviewing plans submitted by Ward. (R. 802-04).

In his opening brief, Ward argued that the trial court erred in granting the motion for summary judgment for two reasons: (1) there were disputed facts regarding the factual basis for the motion; and (2) there is no legal basis for the court to award attorney's fees to Brighton, require the plans to be signed by a licensed architect, or allow Brighton to apply FCOZ in examining the plans. Brighton only briefly discusses the factual basis for its motion and does not even attempt to address the lack of legal authority for awarding attorney' fees in this case.

Brighton's motion was based on its argument that Ward had previously submitted "ambiguous" plans that made it harder for Brighton to determine whether the plans were adequate and created increased expense for Brighton. This assertion was controverted by, among other things, (1) the affidavit of Ward's architect, who testified that the plans were "clear and unambiguous (Affidavit of Kimble Shaw, R. 956); (2) a certified plan reviewer, who determined that Ward's plan were "clear and can be easily understood," (letter from John J. Saunders, July 13, 1995 Hearing Exhibit 15, p.6); and (3) Salt Lake County officials who repeatedly approved Ward's plans as meeting all applicable land use, zoning, and building requirements (Exhibits D and E to Ward's Opposition to Motion for Summary Judgment). The sole factual basis for Brighton's summary judgment motion--prior submission of ambiguous plans--was clearly contradicted by the evidence submitted by Ward, creating a disputed issue of fact that precluded summary judgment.

Further, Brighton fails to respond to Ward's argument that there was no legal basis for the trial court to award Brighton its attorney's fees as a condition of further review of Ward's plans. Brighton does not, and indeed cannot, dispute that such a ruling flies in the face of the well-accepted rule that each party must bear its own attorney's fees in the absence of a statute or contractual provision to the contrary. Cobabe v. Crawford, 780 P.2d 834, 835 (Utah Ct. App. 1989).

Of the three rulings by the district court--allowing attorney's fees, allowing the application of FCOZ, and requiring the plans to be signed by a licensed architect--the ruling of most concern to Ward is the order that he be required to pay Brighton's attorney's fees. Incredibly, Brighton argues that Ward was not prejudiced by this ruling because he "has never reimbursed Brighton for any costs." Opposition Brief at 50. Brighton attempts to lead this Court to believe that the payment of attorney's fees has not been an issue in this litigation. Prior to trial, Ward once again submitted revised plans to Brighton. On October 11, 1999, Brighton informed Ward that it refused to review the plans unless Ward paid $5,446.50 in attorney's fees associated with Brighton's review of the plans submitted earlier. See October 11, 1999 letter from Scott A. Hagen to Douglas J. Parry (attached hereto as Exhibit C). At trial, Brighton's counsel confirmed that it had refused to review the latest set of plans submitted by Ward because Ward had not paid Brighton's attorney's fees for prior review of plans. See Trial Transcript, Vol. II (R. 1751:285). Brighton relied on the summary judgment order awarding it attorney's fees to justify its refusal to review Ward' plans. It cannot now in good faith argue that Ward was

not prejudiced by the summary judgment order allowing Brighton to claim those attorney's fees.[3]

E. THE TRIAL COURT ERRED IN DETERMINING THAT A CONDITIONAL PROPOSED SETTLEMENT CONSTITUTED A BINDING CONTRACT

Standard of Review: Whether a contract exists between parties is a question of law and is therefore reviewed for correctness. See Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah Ct. App. 1992). Brighton argues that whether a contract exists in this case is a mixed question of fact and law. Opposition Brief at 1, 40. In the instant case, Ward is not challenging any findings of fact. Instead, Ward is challenging the trial court's determination that the parties, by their conduct, entered into a binding contract. The conduct of the parties is a matter of record. Whether that conduct created a binding contract is a question of law. Brighton relies on a concurring opinion in Kroupa v. Kroupa, 574 N.W. 2d 208 (S. Dak. 1997), in support of its position. However, the concurring opinion cited by Brighton recognizes that the majority of the court in that same case made a de novo examination of whether there was a binding settlement

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[3]Brighton argues that the summary judgment is "partially mooted" by the settlement agreement. The use of the word "partial" refers to the fact that Brighton still claims that Ward must pay its attorney's fees. This is the most critical issue in the summary judgment order that Ward is challenging. Also, Ward disputes that the purported settlement agreement mandates that a "retaining wall over six feet high violates FCOZ." Opposition Brief at 50. The Foothills and Canyons Overlay Zone ("FCOZ") ordinance speaks for itself. In fact, FCOZ allows for retaining walls in excess of six feet where the wall is terraced between two tiers of not more than four foot tiers. (See Trial Exhibit No. 15 (pertinent portions of FCOZ)). The evidence at trial established that the retaining wall satisfied FCOZ requirements and had been approved by Salt Lake County in this regard.

agreement between the parties in open court. See Kroupa, 574 N.W. 2d at 215. Whether there was a meeting of the minds and, therefore a binding contract, is a question of law and should be reviewed for correctness. See John Deere Co. v. A&H Equipment, Inc., 876 P.2d 880, 883 (Utah Ct. App. 1994).

1. The proposed agreement constituted preliminary negotiations to which further manifestations of assent were required.

On March 3, 1999, the parties informed the trial court of a proposed settlement. In explaining the nature of the proposed settlement to the trial court, Brighton's own counsel referred to the agreement as a "conditional settlement." "It's conditional because certain actions remain to be taken." March 3, 1999 Transcript (R. 1745:3, lines 17-19). As set forth in Ward's opening brief, thereafter, Brighton's counsel makes an additional seven references to the proposed, conditional nature of the settlement:

> MR. JARDINE: We propose to state the agreement on the record and then to formalize it later in an order for the Court to sign, if the remaining issues and actions are satisfactorily resolved. And we would ask the Court to continue the trial date, and I think Mr. Parry will speak to that Id. at 3-4 (emphasis added).
>
> MR. JARDINE: There remains an issue outstanding that the future plans submitted to us will address, which is the location and design of the porch or front entrance proposed on the north side. Id. at 5, lines 15-16 (emphasis added).
>
> MR. JARDINE: . . . if the issues raised in the letters of October 28, 1998, and February 22, 1999, and the noted ambiguities are addressed and resolved, Brighton is not presently aware of other grounds on which it would disapprove plans." Id. at 6, lines 11-15 (emphasis added).
>
> MR. JARDINE: There are other issues to address in terms of the proposed settlement. A term of the proposed settlement is that Mr. Ward will withdraw all plans filed to date with the county . . . . Id. at 6, lines 16-19 (emphasis added).

MR. JARDINE: Next, with regard to Brighton Corporation's waterline easement, which comes across the property, the proposed resolution is that the claim of trespass and relocation would be dismissed, if everything else is resolved . . . Id. at 10, lines 20-23 (emphasis added).

MR. JARDINE: I understand that if all of this is achieved and accomplished and finally resolved, that all other claims between the parties would be dismissed and that a final order would be entered with the Court, setting forth all of the terms of the settlement, attaching the plans, ... Id. at 13, lines 6-10 (emphasis added).

MR. JARDINE: One of the issues is whether the road would be paved. It's our understanding that if this goes through, we would pave the road, at Brighton Corporation's expense. Id. at 15, lines 16-19 (emphasis added).[4]

In its brief, Brighton states that this was not an "agreement to agree . . . in light of the parties' statements during the March 3, 1999 hearing . . . ." Yet, Brighton does not even address the specific statements of the parties set forth by Ward in his brief. Those statements speak for themselves and clearly establish the preliminary nature of the settlement discussions.

This was not the first time the parties had proposed a settlement and continued a trial date in hopes that a settlement could be reached. The parties were previously set to try this case on February 26, 1998. As set forth in the minutes of a February 18, 1998 pretrial conference and the corresponding order, a "possible resolution" of the case was discussed at that time. Under that proposal, Ward would again submit plans to Brighton, Brighton would review the plans, there would need to be "final attached plans," and the trial setting was "vacated pursuant to possible resolution." February 18, 1998 Minutes of Pretrial Conference (R. 746) and March 4, 1998 Order (R. 747-749) (attached hereto as

[4]The March 3, 1999 Transcript is attached as Exhibit C to Ward's opening brief.

Exhibit D). Ward subsequently submitted revised plans, but Brighton again rejected them. Brighton never argued that the 1998 proposal constituted a binding contract.

This is exactly what happened one year later, in March 1999. A possible settlement was presented the trial court; Ward agreed that he would resubmit plans that would attempt to satisfy Brighton's concerns; a settlement could only be reached if Brighton approved Ward's plans in time for the 1999 building season; "a final order would be entered with the Court, setting forth all of the terms of the settlement, attaching the plans, ..." (R:1745:13, lines 6-10); and the court continued the trial date in the hope that this matter would be settled. However, no settlement was reached and trial was necessary.

There is no substantial difference between the way the proposed settlements in 1998 and 1999 were presented to the trial court, other than the parties stated the nature of the proposal on the record in 1999. The parties presented a conditional, proposed agreement that was never consummated, i.e., never resulted in "final plans" and a "final order . . . entered with the Court, setting forth all of the terms of the settlement [and] attaching the plans . . . ." March 3, 1999 Transcript at 13 (R. 1745:13).

2. There were never any plans approved, which was an essential condition of the proposed settlement.

A crucial question is "Where is the "final order [that] would be entered with Court, setting forth all of the terms of the settlement, attaching the plans . . . ." March 3, 1999 Transcript (R. 1745:13, lines 6-10. There is no such order. There are no "attached

plans." By agreement of the parties, there would be no settlement without final approved plans. Brighton cites Brown's Shoe Fit Co. v. Olch, 955 P.2d 357 (Utah Ct. App. 1998), in support of its argument that just because the parties intended to document their agreement at a later time, the failure to do so does not mean that the parties do not have an enforceable agreement. However, Brown's Shoe presupposes that an agreement has been reached, with the intention of later memorializing the agreement. In this case, as shown in the March 3, 1999 transcript, the parties repeatedly stated that there would be an agreement only "if all of this is achieved and accomplished and finally resolved," (R. 1745:13, lines 6-10) and "if this goes through." (R. 1745:15, lines 16-19). No agreement was reached and consequently no memorialization could have or did take place.

3. Brighton never agreed to approve the plans, and there was no mutuality of consideration.

A contract must be supported by mutual consideration. "A promisor, by reserving an arbitrary right to terminate the contract, can unilaterally negate his promises. Thus, a negatable promise does not constitute consideration for a return promise for an executory contract." Resource Management Co. v. Ranch and Livestock Co., Inc., 706 P.2d 1028, 1037 (Utah 1985). Consideration that does not bind a party is referred to as "illusory consideration" or a failure of "mutuality of obligation." Id.

In reality, Brighton was not agreeing to do anything in the proposed agreement. Brighton never agreed that it would approve Ward's plans. Rather, Brighton hedged and was careful to reserve the right to disapprove plans, stating that "it was not presently

aware of other grounds on which it would disapprove the plans." March 3, 1999 Hearing Transcript (R. 1745:6, lines 13-15) (emphasis added). This is illusory consideration. Brighton could (and in fact did) subsequently assert "other grounds" to disapprove the plans. There was no mutuality of obligation in the proposed conditional settlement.

4. The proposed agreement was too ambiguous to be enforced and the parties failed to have a meeting of the minds.

In the Brown's Shoe case, cited by Brighton, the Court made clear that "a contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness." Id. at 363. In his opening brief, Ward argued that the proposed resolution of this matter incorporated by reference two letters that could contain between 50 and 70 requirements depending on how the letters are interpreted. Brighton replies that "the mere fact of numerous requirements does not indicate ambiguity, but demonstrates the extent of detail and clarity required by Brighton and agreed to by Mr. Ward." Opposition Brief at 42. Brighton misses the point. It is the fact that there is a dispute as to whether there are fifty requirements or seventy requirements or some number in between that illustrates the ambiguity of the proposed agreement. Brighton cannot tell the Court (or Ward for that matter) exactly how many terms there are in the proposed agreement.

The most glaring and important example of this ambiguity is perhaps the dispute over whether Ward was, as a part of the proposed conditional agreement, required to pay Brighton's attorney's fees incurred as a part of any review. Brighton concedes that "[t]he

settlement did not address the issue of legal fees." Opposition Brief at 44. Nevertheless, Brighton has consistently maintained that after the proposed settlement it still has the right to legal fees from Ward. See, e.g., Trial Transcript, Vol. II (R. 1751:285). Ward, on the other hand, believed that to the extent Brighton had the right to require him to pay its fees as a condition of review, it compromised that right in the settlement that the trial court ruled to exist. Trial Transcript, Vol. II (R. 1751:477-78). The parties have a fundamental disagreement on this and other essential terms of the agreement.

For example, Ward understood that Brighton would agree to approve the south patio as long as the patio complied with FCOZ. FCOZ allows retaining walls in excess of six feet when terracing is employed. Ward's plans employed terracing on the patio that satisfied the requirements of FCOZ. Brighton argues that the settlement prohibits any retaining wall in excess of six feet, despite the clear provisions of the ordinance itself.

Also in dispute is whether Ward conditioned his agreement to participate in any settlement on his receiving approval to build during the 1999 building season. Affidavit of Greg Ward (R. 1365); March 3, 1999 Transcript (R. 1745:17-18). Brighton disagrees with Ward that it was required to approve the plans in time for Ward to build in 1999.

Yet another ambiguous point revolves around the survey of the property. Brighton requested that the parties agree on the accuracy of what is referred to as the "Sneidman survey." Brighton represented that the survey was accurate and that "Brighton Corporation's waterline has never been moved." See October 28, 1998 letter at 2. Ward was also required to have an updated survey of the property. After the updated survey

was conducted, it was discovered that Brighton had misrepresented the accuracy of the Sneidman survey and that contrary to Brighton's representations, its waterline had indeed been moved by some 14 feet from its prior location and extended an additional 18 feet on Ward's property without an easement or authorization from Ward. In addition, Brighton's access roadway is shown in the wrong place on the Sneidman survey, the circular drive is misrepresented, and the area protected by the Property Use Agreement on Ward's property referred to as the "buffer zone" is incorrect. (Cf. Sneidman survey (Trial Exhibit No. 56) with updated survey (Trial Exhibit No. 46). The parties cannot agree on the accuracy of the Sneidman survey. Brighton believes it to be accurate and Ward has proven that it is inaccurate. There simply is no meeting of the minds on this point and the other points discussed above and in Ward's opening brief.

F. THE TRIAL COURT ERRED IN ALLOWING BRIGHTON TO PAVE THE PRIVATE ROADWAY ACROSS WARD'S PROPERTY

Standard of Review: Brighton does not dispute that the constitutionality of a trial court's actions are considered conclusions of law reviewed for correctness. Brighton argues that the standard of review is abuse of discretion because the decision of a trial court to summarily enforce a settlement agreement is reviewed under that standard. Opposition Brief at 1. However, Brighton ignores the fact that when the trial court issued its order allowing pavement of the roadway, it had not yet made a determination that a settlement even existed. In addition, in John Deere Co. v. A&H Equipment, Inc., 876 P.2d 880 (Utah Ct. App. 1994), cited by Brighton, the court held that although it is

generally true that a trial court's summary enforcement of a settlement agreement will only be reversed for abuse of discretion, the court had to first determine that there was a binding settlement agreement, and this issue "is a question of law which we review for correctness." Id. at 883.

Brighton argues that Ward's due process rights were not violated when Judge Young granted Brighton's motion to pave a roadway across Ward's property before Ward's counsel had been served with the motion or had any fair opportunity to be heard on the issue because (1) the trial court briefly questioned Ward's counsel about the surprise motion to pave the roadway at the scheduling conference and (2) because Ward's counsel filed an objection to the order that was entered without due process. Opposition Brief at 47-48. Due process requires a legitimate inquiry into the merits of the question presented, notice of the inquiry, and a fair opportunity to be heard. See, e.g. In re: L.G.W., 638 P.2d 527, 528 (Utah 1981). "'Where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him . . . a party is deprived of due process.'" In re: Richard Worthen, 926 P.2d 853, 877 (Utah 1996). Due process cannot be satisfied by reducing a person's right to be heard to nothing more than an opportunity to make a few comments at the spur of the moment and to file an objection to an order granted without due process of law in the first instance. Kinkella v. Baugh, 660 P.2d 233 (Utah 1983), cited by Brighton, does not hold otherwise. In Kinkella, the trial court entered findings of fact and conclusions of law after a trial on the merits before opposing counsel could file objections to the proposed findings and conclusions. The trial court

subsequently reviewed the objections and allowed the findings and conclusions to stand. The Utah Supreme Court held that there had been "substantial compliance" with the local rules of practice that required that counsel have an opportunity to submit objections to proposed findings and conclusions. Id. at 235. Kinkella was not a due process case and in fact, unlike this case, in Kinkella, all parties had notice and a fair opportunity to be heard on the merits in the first instance.

G. THE TRIAL COURT ERRED IN REFUSING TO CONSIDER THE LATEST SET OF PLANS AT TRIAL IN 1999

Standard of Review: The trial court ordered that the issue to be decided at trial was "whether the plans submitted by Ward after the hearing on March 3, 1999 complied with the criteria stated in the March 3, 1999 stipulation and incorporated letters." November 3, 1999 Order at ¶ 3 (R. 1417-18). Nevertheless, the trial court refused to consider plans that were submitted by Ward to Brighton in October 1999. Brighton cites two federal cases, neither of which constitute binding authority, in asserting that the trial court's refusal to consider the latest set of plans should be reviewed under an abuse of discretion standard. However, this Court has ruled that "Court orders are subject to the same rules of construction that apply to other written instruments." In re Estate of Leone, 860 P.2d 973, 975 (Utah Ct. App. 1993) (citing Park City Utah Corp. v. Ensign Co., 586 P.2d 446, 450 (Utah 1978)). Therefore, "[w]hen a trial court interprets the unambiguous language of an order, [the appellate court] review[s] the court's interpretation for correctness." Id. The trial court's refusal to consider the latest set of plans should be

reviewed in light of the court's earlier order ruling that the plans submitted by Ward to Brighton, without reference to any deadline for submission, would be considered at trial.

In an attempt to resolve this matter, Ward made revisions to his plans to attempt to satisfy Brighton's concerns. Ward submitted these plans to Brighton for review on October 6, 1999. On October 11, 1999, Brighton informed Ward that it refused to review the plans submitted on October 6, 1999, because it wanted to wait until the trial court decided its pending Motion to Enforce Settlement Agreement and also because it would not review any additional plans unless Ward paid the costs and expenses, including attorney's fees, associated with Brighton's review of the plans submitted in April and June. See October 11, 1999 letter (attached hereto as Exhibit C).

On October 26, 1999, the trial court granted Brighton's Motion to Enforce Settlement Agreement and ruled that the issue at trial would be whether the plans submitted to Brighton by Ward complied with the settlement. There were no deadlines for submitting plans in the order. On that same day, Brighton sent Ward a letter stating:

> . . . we believe that the plans that will be litigated at trial are those Mr. Ward submitted on April 9, 1999 and resubmitted, with corrections, on or about June 16, 1999. Due to the upcoming trial date, we need clarification of this issue immediately. Please let us know before the end of the week if you are going to contend that any other set of plans will be litigated at trial.

October 26, 1999 letter from Scott A. Hagen to Douglas J. Parry (Trial Exhibit No. 30) (emphasis added) (attached hereto as Exhibit E).

On November 1, 1999, Ward's counsel informed Brighton that the latest set of plans submitted to Brighton on October 6, 1999 would be at issue in the trial.

> With regard to Scott's October 26, 1999 letter requesting clarification of which plans will be litigated at trial, it seems clear that the plans will be the latest plans submitted to you. Mr. Ward submitted plans to Brighton Corporation in accordance with the terms of the proposed settlement agreement. Mr. Ward made revisions to those plans in response to your objections and concerns. These revisions are contained in the plans that we delivered to you on October 6, 1999. If you eventually decide to review those plans and notify us of any items that you believe are still deficient, Mr. Ward reserves the right to try to correct these deficiencies prior to trial.

Nov. 1, 1999 letter from James K. Tracy to James S. Jardine (Trial Exhibit No. 39) (attached hereto as Exhibit F).

Ward repeatedly pleaded with Brighton to review the latest set of plans, which had been delivered to Brighton two weeks before the trial court had even ruled that there was a binding settlement agreement in this case. Brighton insisted on trying this case on plans that were moot, based primarily on its insistence that Ward pay Brighton's attorney's fees. See, e.g. October 6, 1999, November 10, 1999, November 11, 1999, and November 12, 1999 letters (attached hereto as Exhibit G). The trial court erred in refusing to consider the latest set of plans submitted by Ward, in direct contravention of its own order that the trial would be held on the plans submitted by Ward to Brighton.

H. THE TRIAL COURT ERRED IN RULING AT TRIAL THAT BRIGHTON PROPERLY REJECTED WARD'S PLANS

Standard of Review: The trial court's review of Ward's plans constitutes the interpretation of a contract (the settlement) reviewed for correctness giving no deference to the trial court's determination of the issues presented. Saunders, 806 P.2d at 199-200. Factual determinations are reviewed under a clearly erroneous standard.

1. The "finality" of Ward's plans. Brighton argues that the district court's "oral finding that Ward's plans were not final must be upheld because it was not clearly erroneous." Opposition Brief at 55. As set forth in Ward's opening brief, the plans were "not final" only in the sense that Ward was willing to make changes if necessary and no plans would be "final" until approved by Brighton. Nevertheless, even if the plans were not "final," that fact would not justify rejection of the plans as long as Ward had met all of the requirements of the settlement agreement that the trial court ruled existed between the parties. Brighton does not rebut Ward's assertion that he substantially complied with all reasonable requirements of the settlement agreement.

2. The north porch. As set forth in Ward's opening brief, additional drawings of the north porch were provided to Brighton. Brighton objected to the use of a "heavy black line" on the drawings. Would a "dashed line" or a "dotted line" have been acceptable? What matters is that detailed drawings of the porch were provided.

3. The "new" and "proposed" easements. It was undisputed that Ward showed the proposed easements on the plans as Brighton requested. Brighton simply didn't like the description of the easements as "new" and "proposed." This description was accurate and the trial court stated that he was not concerned about semantics on this issue. Trial Transcript, Vol. I (R. 1750:86, 143, 148).

4. Placement of the sewer line. Brighton argues that Judge Young's few findings of fact should be upheld, yet ignores the fact that Judge Young stated that "if the

only problem here was the sewer line there wouldn't be any problem." Trial Transcript Vol. II (R. 1751:257, lines 17-18).

5. South side patio. As discussed previously, Ward's plans called for a retaining wall that employed a terraced planter box in compliance with FCOZ. Brighton incorrectly argues that the settlement agreement provided that any wall in excess of six feet violated FCOZ, eliminating the terracing exception allowed by law. The parties did not agree to change existing law.

6. Updated survey. It was undisputed that Ward gave Brighton an updated survey prior to the trial of this matter. There was no deadline for submitting the survey.

7. Colorboard and transparency. At trial, and in its brief, Brighton admits that Ward had already given Brighton both the colorboard and a transparency. Brighton never told Ward that the failure to provide duplicate copies of these items was a deficiency and therefore waived any objection on this point.

8. Support documents. Mary Barton admitted at trial that the prior plans submitted by Ward (which included the so-called "support documents") were not to be withdrawn until Brighton approved Ward's latest plans, which it never did. Testimony of Mary Barton (R. 1751:117). Further, the County will not allow public records (i.e. filed plans) to be physically removed.

Although Ward disagrees that the parties entered into any binding settlement, to the extent an agreement existed, Ward substantially complied with that agreement and the trial court erred in ruling that Ward's plans did not comply with the settlement agreement.

I. THE TRIAL COURT ERRED IN REFUSING TO ALLOW WARD'S EXPERT, CARL ERIKSSON, TO TESTIFY AT TRIAL

Standard of Review: The parties agree that the admissibility of expert testimony is reviewed under an abuse of discretion standard. Brighton concedes that the trial court ruled that Eriksson was excluded from testifying because he had not fully read the settlement agreement between the parties. Neither the trial court nor Brighton has explained why Eriksson would have had to have read the settlement agreement in order to testify as an expert on the issues for which he was presented. With regard to his factual testimony, his testimony that Salt Lake County, the governmental entity who applies the ordinance, had approved Ward's plans with regard to FCOZ was certainly relevant to whether the plans complied with FCOZ.[5]

CONCLUSION

Based on the foregoing and the arguments previously set forth in Ward's opening brief, the Court should reverse the trial court in this matter on each of the points outlined above and specifically requested in the Conclusion of Ward's opening brief.

RESPECTFULLY SUBMITTED this 6th day of December, 2000.

LeBOEUF, LAMB, GREENE & MacRAE, L.L.P.

By: _____
James K. Tracy
Attorneys for Appellant Gregory M. Ward

[5]The issue concerning the recusal of Judge Young from this action has been adequately briefed.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2000, I caused two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT GREGORY M. WARD to be served by hand-delivery on the following:

James S. Jardine
Scott A. Hagen
RAY, QUINNEY & NEBEKER
79 South Main, #500
P.O. Box 45385
Salt Lake City, Utah 84145-0385

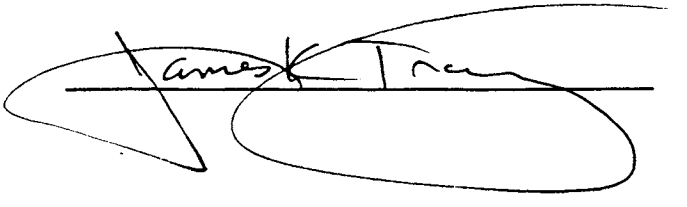
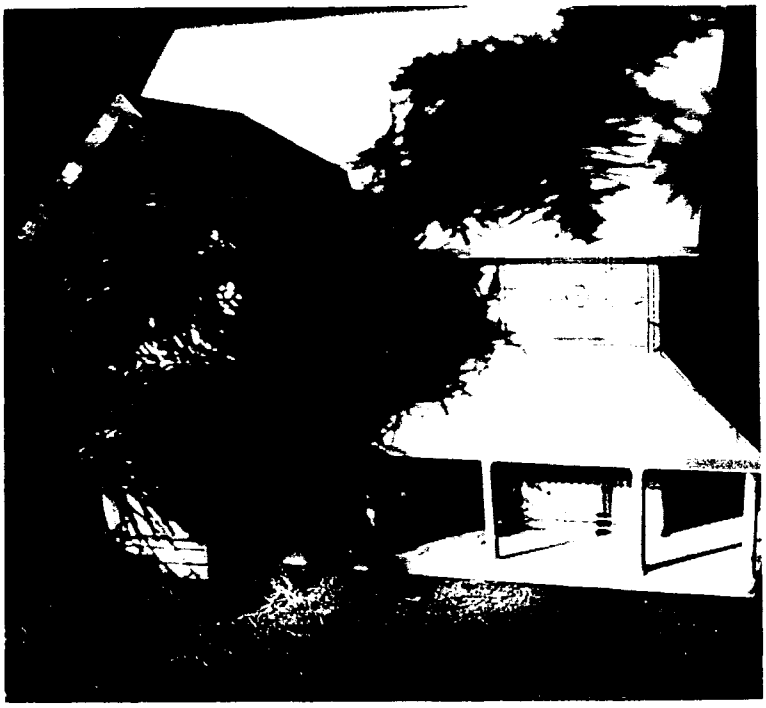
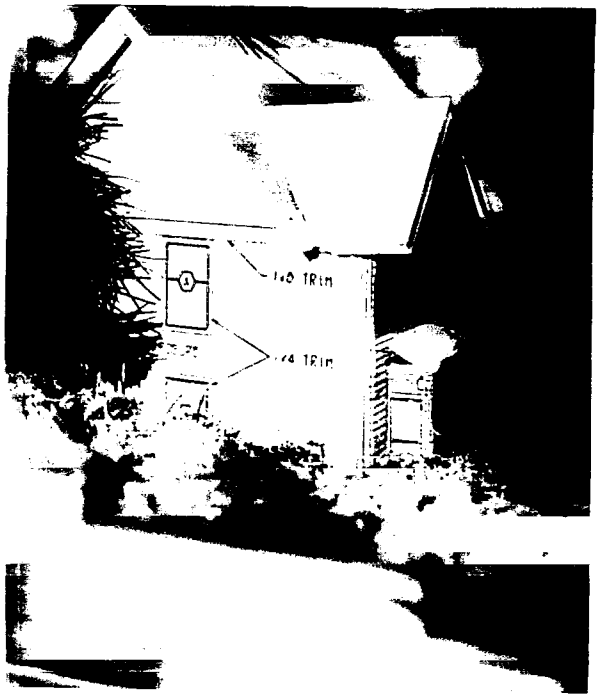


Exhibit A

"CLASSIC PLAN" PROPOSED AUGUST 1995-96 AND REJECTED BY BRIGHTON. PLAN HAS NOT BEEN SUBMITTED TO SLCo FOR BUILDING PERMIT APPROVAL NOR TO THE COURT FOR APPROVAL. PLANS COMPLY WITH ALL RESTRICTIONS OF BOTH SLCo AND BRIGHTON. APPROVAL UNREASONABLY WITH HELD.



NORTH WEST
BUILT ON GRADE

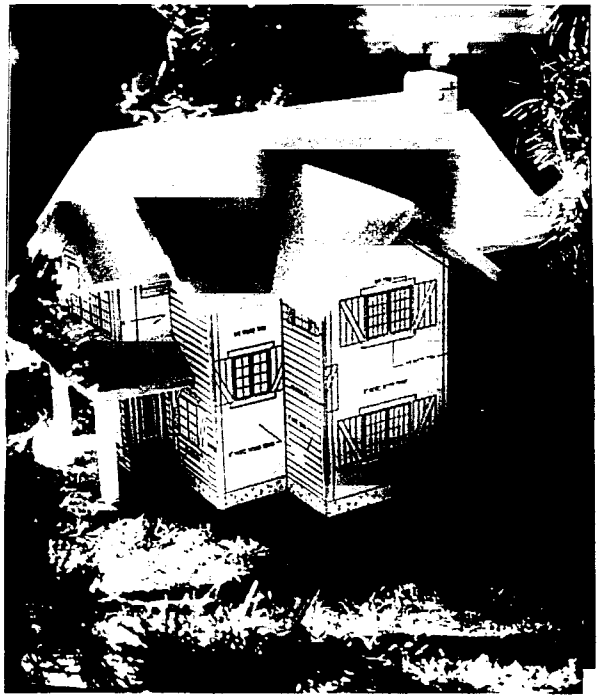


NORTH EAST
SET INTO MOUNTAIN

SOUTH WEST
SLCo COMPLIANCE

DEFENDANT HAS PROPOSED <u>FOUR DIFFERENT</u> CABIN PLANS TO BRIGHTON CORPORATION. ALL HAVE BEEN UNREASONABLY REJECTED. CLASSIC PLAN NOT SUBMITTED TO SLCo FOR PERMIT

"CLASSIC PLAN"
BETTER HOMES & GARDEN
***READY TO BUILD PLAN.* NOT SUBMITTED TO SLCo. 1995-66**



"DESIGNER PLAN"
PROPOSED 1994 & APRIL 1995
APPROVED FOR BUILDING PERMIT SLCo JUNE 1995

"COTTAGE PLAN"
PROPOSED JULY 1995
APPROVED FOR BUILDING

"CHALET PLAN"
PROPOSED FEBRUARY 1996
APPROVED FOR BUILDING

"DESIGNER PLAN" PROPOSED APRIL 1994 AND REJECTED BY BRIGHTON. SUBJECT OF (SEPT 1994 HEARING). REVISED TO MEASURE SQUARE FOOTAGE BY SURFACE OF EXTERIOR WALLS INSTEAD OF INSIDE SURFACE OF EXTERIOR WALLS (AREA FOOT PRINT vs. LIVEABLE AREA; ROOF PITCH 8/12; NO BASEMENT; AND NO STORAGE IN ATTIC). PLANS RESUBMITTED OCTOBER 1994 AND APRIL 1995. PLANS REJECTED BY BRIGHTON AND DISTRICT COURT AT JULY 1995 HEARING. COURT'S ACTIONS AND RULING INCLUDED IN APPEAL.

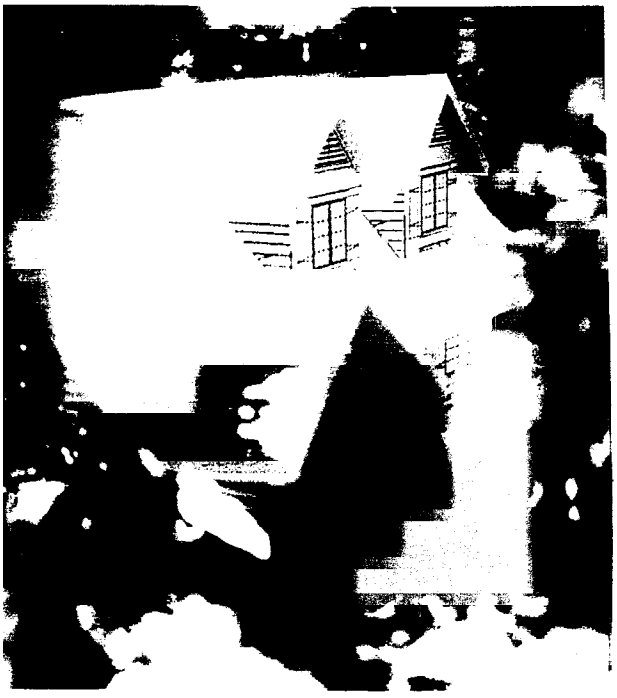
NORTH WEST
BUILT ON GRADE

NORTH EAST
SET INTO MOUNTAIN

SOUTH WEST
SLCo COMPLIANCE

"COTTAGE PLAN" PROPOSED JULY 1995 AND REJECTED BY BRIGHTON. REJECTED BY BRIGHTON AND NOT PRESENTED TO THE COURT FOR RULING. APPROVED FOR BUILDING PERMIT MAY 1996 SLCo. COMPLIED WITH ALL BRIGHTON REQUIREMENTS. APPROVAL UNREASONABLY WITHHELD 1995-96.

NORTH WEST
BUILT ON GRADE



NORTH EAST
SET INTO MOUNTAIN

SOUTH WEST
SLCo COMPLIANCE

"CHALET PLAN" PROPOSED MARCH 1996 AND REJECTED BY BRIGHTON. COMPLIES WITH ALL REQUIREMENTS AND APPROVED BY SLCo. FOR BUILDING PERMIT MAY 1996. UNREASONABLY REJECTED DISTRICT COURT NOVEMBER 1999. COURT'S ACTIONS AND RULING INCLUDED IN APPEAL.

NORTH WEST
BUILT ON GRADE

NORTH EAST
SET INTO MOUNTAIN

SOUTH WEST
SLCo COMPLIANCE

Exhibit B

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BRIGHTON CORPORATION, A UTAH CORPORATION, PLAINTIFF, VS. ISABEL M. COATS AND WALTER M. COATS, INDIVIDUALLY AND AS TRUSTEES, GREGORY M. WARD, ET AL, DEFENDANTS.	Original CASE NO. C-94-090-5453 PRELIMINARY INJUNCTION HEARING

BEFORE THE HONORABLE DAVID S. YOUNG

SALT LAKE CITY, UTAH 84111

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME II

SEPTEMBER 7, 1994

REPORTED BY: EILEEN M. AMBROSE, C.S.R.

A WHAT I SAID IN MY TESTIMONY WAS, AGAIN, NOT TO BE ARGUMENTATIVE, THAT IT WAS MY BELIEF THAT SHE DIDN'T WANT TO EVER BUILD ON THE PROPERTY. AND THAT WAS MY IMPRESSION.

Q ARE YOU AWARE THAT A BRIEF YOUR LAWYER'S FILED WITH THIS COURT EXPRESSLY SAYS THAT SHE TOLD YOU SHE WOULD NEVER ALLOW YOU TO BUILD ON THE PROPERTY?

A THAT'S CORRECT.

Q OKAY. DO YOU NOW REPRESENT THAT THAT ISN'T A CORRECT STATEMENT OF YOUR MEMORY?

A THE CORRECT STATEMENT OF MY MEMORY IS IN THE FALL OF 1990 I VISITED MY AUNT MARY AT THE CABIN IN BRIGHTON. AND I WAS UP THERE, IT WAS A BEAUTIFUL AUTUMN DAY, AND MISSING THE PROPERTY I THOUGHT I'D DRIVE UP AND JUST SEE HOW IT WAS GOING, BECAUSE I CLOSE IT ALMOST EVERY YEAR, FOR THE LAST 15 YEARS. AND MY AUNT MARY WAS UP THERE CLEANING AND STRAIGHTENING UP THE CABIN. AND I HEARD THAT SHE BOUGHT NEW CURTAINS AND THAT SHE HAD BEEN WORKING ON THE CABIN. I WAS NOT INVITED IN, BUT THAT'S OKAY, BECAUSE SHE WAS BUSY CLEANING. AND MY AUNT MARY SAYS, GREG, I'LL NEVER ALLOW YOU TO BUILD ON THE PROPERTY UP HERE SO YOU MIGHT AS WELL FIND ANOTHER PLACE TO BUILD.

Exhibit C

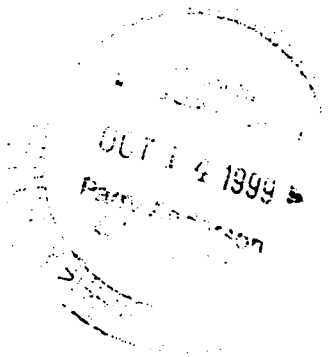
RAY, QUINNEY & NEBEKER
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

79 SOUTH MAIN STREET
SUITE 400
P. O. BOX 45385
SALT LAKE CITY, UTAH 84145-0385
TELEPHONE (801) 532-1500
FACSIMILE NO. (801) 532-7543

PROVO OFFICE
92 NORTH UNIVERSITY AVENUE
SUITE 210
PROVO, UTAH 84601-4420
TELEPHONE (801) 342-2400
FACSIMILE NO. (801) 375-8379

OF COUNSEL
M. JOHN ASHTON
VALERIE A. LONGMIRE

October 11, 1999



Douglas J. Parry, Esq.
James K. Tracy, Esq.
PARRY, ANDERSON & MANSFIELD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Re: Brighton Corporation v. Coats, et al.

Dear Doug and James:

I received last week your letter of October 6, 1999 and the enclosed plans. I am writing in response to the letter's statement that the modified plans are "submitted for final review and approval by Brighton Corporation in hopes that this matter can finally be resolved." First, there is a procedural impediment to the review of these plans that precludes their present review. As you know, the parties are in disagreement over whether the settlement agreement is enforceable. Because review of the October 6, 1999 plans would differ depending on whether they were reviewed consistent with the settlement agreement or under the general review which existed prior to the settlement agreement, the plans have not and cannot be reviewed until the Court rules on our motion to enforce the settlement agreement. Therefore, Brighton Corporation will not undertake to review the plans until that matter is determined.

Second, there is an order in place providing that Brighton Corporation may require, as a condition of reviewing additional plans, reimbursement of its professional expenses and other

out-of-pocket costs. Heretofore, Brighton Corporation has submitted bills for costs to your client in the total amount of $5,446.50, which have not been paid. Brighton Corporation is unwilling to incur further professional expense in costs necessary to its review of the October 6, 1999 plans unless it is compensated for its expenses since the date of the Order.

Third, your letter of October 6, 1999 states that "the proposed cabin is on grade on the west side and the new main floor elevation is 119 feet." Since we have not reviewed the plans, we do not fully understand the reference to the main floor elevation at 119 feet. However, with respect to previously submitted plans, we note that no final survey of the actual elevations of the property has been obtained by your client, as contemplated in the settlement agreement, and Brighton Corporation regards such final determination ~~of~~ relevant elevations as essential to any review.

Fourth, in light of the foregoing, we do not believe that the plans submitted to us on October 6, 1999 can fairly be the plans considered by the Court at the trial on November 17, 1999. Therefore, we assume that trial will focus on Brighton Corporation's review of the plans submitted to us on June 11, 1999.

Please call if you have any questions.

Very truly yours,

RAY, QUINNEY & NEBEKER

James S. Jardine
Scott A. Hagen

cc: Brighton Corporation
498197

Exhibit D

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

BRIGHTON CORPORATION, Plaintiff,	:	MINUTES PRETRIAL CONFERENCE
vs.	:	Case No: 940905453 PR
ISABEL M COATS Et al, Defendant.	:	Judge: DAVID S. YOUNG Date: February 18, 1998

PRESENT

Plaintiff's Attorney(s): JAMES S. JARDINE
Defendant's Attorney(s): DAVID M CONNORS
Clerk: taunah
Reporter: GAYLE CAMPBELL

HEARING

This matter comes before the Court for a pre-trial conference. Counsel state a possible resolution may be reached. Issues discussed: 1) location of porch on north side & retaining wall. Mr. Jardine states he will respond within 3 business days after receiving needed informaion. 2) Need for final attached plans. Mr. Jardine will respond within 5 business days after receiving plans, will clarify any questions re plans, reserves right to reject if any deviations made on plans. 3) Rights re water lines and upkeep. Mr. Jardine is to prepare and submit order re posible resolution. The trial setting on 2-26-98 is vacaed pursuant to possible resolution.

James S. Jardine (A1647)
Robert P. Hill (A1492)
Scott A. Hagen (A4840)
RAY, QUINNEY & NEBEKER
79 South Main, #500
P. O. Box 45385
Salt Lake City, Utah 84145-0385
(801) 532-1500
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, UTAH

----ooOoo----

BRIGHTON CORPORATION, a Utah corporation,	:	ORDER
Plaintiff,	:	
v.	:	
ISABEL M. COATS and WALTER M. COATS, individually and as Trustees of the Isabel M. Coats Trust dated December 10, 1985, GREGORY M. WARD, an individual, DOUG'S TREE SERVICE, INC., a Utah corporation, and UNKNOWN PERSONS designated as JOHN DOE NO. 1 through 10,	:	Civil No. 940905453
	:	Judge David S. Young
Defendants.	:	

----ooOoo----

The above-entitled action came on for a final pre-trial conference on February 18, 1998. Plaintiff Brighton Corporation was represented by James S. Jardine and defendants

were represented by David M. Connors. Based on the discussions with the Court and the stipulation of the parties,

IT IS HEREBY ORDERED as follows:

1. The trial date beginning February 26, 1998 is stricken.

2. As a first step, defendants will provide to plaintiff specific and detailed plans showing the location of the proposed porch on the north side of the proposed cabin, including any proposed retaining walls and required footings. Such plans shall also include all relevant elevations. The purpose of the review is to determine whether the porch, the retaining walls and the graded slopes will interfere with plaintiff's waterline. Plaintiff shall respond with its approval, disapproval or questions within three business days of receipt of the plans.

3. If plaintiff approves the proposed porch design, defendants shall proceed to prepare a complete set of final plans of the proposed cabin, with all relevant elevations clearly noted. These plans will be reviewed by Brighton Corporation including to determine, where applicable, whether they are consistent with prior discussions between the parties. It is the objective of the parties that these plans be sufficiently detailed and specific that, to the fullest extent possible, no ambiguity and uncertainty remain. Plaintiff shall respond with its approval, disapproval or questions with respect to the detailed plans or deviations from prior discussions within five business days of its receipt.

4. With respect to plaintiff's waterline easement, the parties will attempt to negotiate a resolution of issues, including but not limited to access, maintenance, repair, the status of the 1991 adjustment of the waterline location, and defendants' alleged future right to seek relocation of the waterline. If those negotiations are not successful, the parties have agreed to proceed to resolve any remaining issues by written submission to the Court. The negotiations and possible submissions to the Court regarding the waterline issues shall proceed independent of, and shall not delay, the review of defendants' proposed cabin plans.

DATED this 4th day of ~~February~~ March, 1998.

BY THE COURT:

Hon. David S. Young
District Judge

Approved As To Form:

LEBOEUF, LAMB, GREENE
& MACRAE, L.L.P.

David M. Connors
Attorneys for Defendants

402534

Exhibit E

RAY, QUINNEY & NEBEKER
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

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PROVO OFFICE
92 NORTH UNIVERSITY AVENUE
SUITE 210
PROVO, UTAH 84601-4420
TELEPHONE (801) 342-2400
FACSIMILE NO. (801) 375-8379

October 26, 1999

Douglas J. Parry, Esq.
PARRY, ANDERSON & MANSFIELD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Re: Brighton Corporation v. Greg Ward, et al.

Dear Doug:

Attached is a proposed order reflecting Judge Young's ruling at the hearing on Brighton's motion to enforce settlement agreement. Please review it and advise me as soon as possible whether you are able to approve it as to form.

Based on the denial of your petition for extraordinary writ and the grant of the motion to enforce the settlement agreement, we believe the plans that will be litigated at trial are those Mr. Ward submitted on April 9, 1999 and resubmitted, with corrections, on or about June 16, 1999. Due to the upcoming trial date, we need clarification of this issue immediately. Please let us know before the end of the week if you are going to contend that any other set of plans will be litigated at trial.

Very truly yours,

RAY, QUINNEY & NEBEKER

Scott A. Hagen

EXH
NO. 30

cc: Brighton Corporation

Ex 30

Exhibit F

LAW OFFICES OF
PARRY ANDERSON & MANSFIELD
A PROFESSIONAL CORPORATION

JAMES K. TRACY

1270 EAGLE GATE TOWER
60 EAST SOUTH TEMPLE
SALT LAKE CITY, UTAH 84111
TELEPHONE: (801) 521-3434
FAX: (801) 521-3484

E-MAIL:
parry-law@utah-inter.net

November 1, 1999

VIA FACSIMILE NO. 532-7543 and REGULAR MAIL

James S. Jardine
Scott A. Hagen
Ray, Quinney & Nebeker
79 South Main Street, Suite 400
P.O. Box 45385
Salt Lake City, Utah 84145

Re: Brighton Corporation v. Coats, et al.: Case No. 940905453

Dear Jim and Scott:

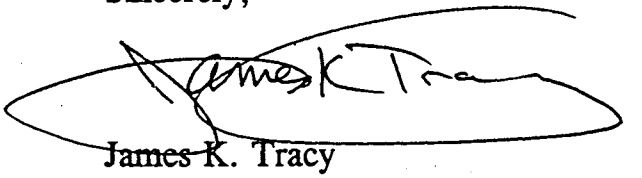
As you know, the Court ruled on October 22, 1999, that there is a binding settlement agreement in this case. You have argued that all of the terms of the proposed settlement agreement are contained in the stipulation that was read into the record on March 3, 1999, as reflected in your proposed order that we approved as to form and filed with the Court. Of course, we do not agree that the Court's order is correct and we wonder how this case can be resolved on the basis of that order, but be that as it may, there is no requirement that Mr. Ward pay for your review of the plans anywhere in the terms of what the Court ruled to be an enforceable settlement agreement. To the extent that you were entitled to such payment, you compromised that right as a part of the settlement you claim exists.

With regard to Scott's October 26, 1999 letter requesting clarification of which plans will be litigated at trial, it seems clear that the plans will be the latest plans submitted to you. Mr. Ward submitted plans to Brighton Corporation in accordance with the terms of the proposed settlement agreement. Mr. Ward made revisions to those plans in response to your objections and concerns. These revisions are contained in the plans that we delivered to you on October 6, 1999. If you eventually decide to review those plans and notify us of any items that you believe are still deficient, Mr. Ward reserves the right to try to correct those deficiencies prior to trial.

There is no legitimate basis for you to refuse to consider plans that contain revisions addressing concerns that you have raised. There is also no legitimate basis for you to demand payment of fees for your review of the plans when such payment was not a term of the settlement you claim exists.

We would ask that you promptly review the plans submitted to you on October 6, 1999, and advise us whether your client will approve these plans, and if not, provide us with an explanation of what deficiencies you claim still exist.

Sincerely,



James K. Tracy

Enclosure
cc: Gregory M. Ward

Exhibit G

LAW OFFICES OF
PARRY ANDERSON & MANSFIELD
A PROFESSIONAL CORPORATION

JAMES K. TRACY

1270 EAGLE GATE TOWER
60 EAST SOUTH TEMPLE
SALT LAKE CITY, UTAH 84111
TELEPHONE: (801) 521-3434
FAX: (801) 521-3484

E-MAIL:
parry-law@utah-inter.net

October 6, 1999

VIA HAND DELIVERY

James S. Jardine
Scott A. Hagen
Ray, Quinney & Nebeker
79 South Main Street, Suite 400
P.O. Box 45385
Salt Lake City, Utah 84145

Re: Brighton Corporation v. Coats, et al.: Case No. 940905453

Dear Jim and Scott:

Please find enclosed another copy of the plans previously submitted to you by Greg Ward. These plans are the same as prior plans, with the exception that the cabin has been slightly rotated to reduce your client's concern regarding cuts into the mountain, to provide a more reasonable placement of the cabin on the lot, and to address your client's concern the cabin was too close to their water line. The proposed cabin is on-grade on the west side and the new main floor elevation is 119 feet. Additionally, I believe that most of your objections to the General Site Notes and General Information have been addressed. The attached plans are submitted for final review and approval by Brighton Corporation in hopes that this matter can finally be resolved.

Please call if you have any questions.

Sincerely,

James K. Tracy

JKT/sb

Enclosure

cc: Gregory M. Ward

EXH. NO. 29

EX29

RAY, QUINNEY & NEBEKER

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

79 SOUTH MAIN STREET
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92 NORTH UNIVERSITY AVENUE
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TELEPHONE (801) 342-2400
FACSIMILE NO. (801) 375-8379

OF COUNSEL
M. JOHN ASHTON
VALERIE A. LONGMIRE

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November 10, 1999

James K. Tracy, Esq.
PARRY, ANDERSON & MANSFIELD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Re: Brighton Corporation v. Greg Ward, et al.

Dear James:

We received your letter of November 9 and respond on behalf of Brighton Corporation. We regard your position on which plans to litigate as wrong for two reasons.

First, as we explained in our November 5 letter (and earlier), Brighton Corporation has declined to review the latest set of plans because Ward ignored Brighton's invoices for costs. Although you claim there is nothing in the settlement agreement requiring such payment, you do not address the rationale stated in our November 5 letter. Specifically, you fail to address or show how the settlement abrogated the Order of Partial Summary Judgment. Indeed, as we have noted before, the February 1999 order (that it was reasonable for Brighton to condition review of further plan on payment of professional costs) has continuing legal and logical effect, i.e. that it was and still is reasonable for Brighton to require reimbursement before further review of new plans, and the settlement agreement does not make it now unreasonable.

Second, the settlement contemplates a specific set of plans with specific changes. Indeed, the settlement was very specific and precise to make it clear and easy for your client to comply. You now have given us new plans (as shown by the raised main floor elevation), not corrected plans, as required by the settlement.

As you will recall, the Court has stated it will try this case once. We agreed to a specific program of review regarding a specific set of plans. Brighton's intent was to achieve clarity. Ward's "rotation" concept confuses and frustrates the specific program set out in the settlement agreement.

Thus, if Ward truly wants review of cabin plans, he needs to pay the invoices and correct the chalet plans (rejected by our letter dated June 23, 1999) as stated in the October 28, 1998 and February 22, 1999 letters, as modified in the March 3, 1999 hearing. Brighton will not review plans not submitted pursuant to the settlement agreement.

Very truly yours,

RAY, QUINNEY & NEBEKER

James S. Jardine
Scott A. Hagen

cc: Brighton Corporation
503193

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PARRY ANDERSON & MANSFIELD
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November 11, 1999

VIA HAND DELIVERY

James S. Jardine
Scott A. Hagen
Ray, Quinney & Nebeker
79 South Main Street, Suite 400
P.O. Box 45385
Salt Lake City, Utah 84145

Re: Brighton Corporation v. Coats, et al.: Case No. 940905453

Dear Jim and Scott:

Please find enclosed a revised Site Plan that contains a few more changes that you have requested. You should be able to review these changes in five minutes or less. The changes are as follows:

1. Mr. Ward's proposed sewer line has been moved to the west side of the property as you requested in your October 28, 1998 letter.

2. The words "disputed" in connection with Brighton Corporation's water line and sewer line have been removed as you requested in your October 28, 1998 letter.

3. Kimble Shaw has written the exact elevations of each outside corner of the cabin as you requested in your February 22, 1999 letter.

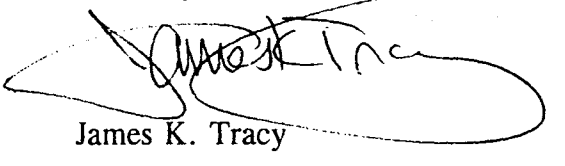
4. General Information Note 18 has been deleted in accordance with your request in your June 23, 1999 letter.

With regard to the issue of payment of your attorney's fees, you are incorrect when you state that we failed to address that issue in our November 9, 1999 letter. We clearly stated that pursuant to the Court's Order Granting Motion for Partial Summary Judgment you could have required the reimbursement of legal and professional fees and costs as a part of Brighton Corporation's review of plans. However, YOU DID NOT STATE THAT REQUIREMENT AS A PART OF THE SETTLEMENT. In other words, the partial summary judgment Order stated that it would be reasonable for you to require payment of

fees as a condition of review. BUT YOU DID NOT DO SO. If you had, Mr. Ward would not have agreed to the conditional settlement. It is not a matter of abrogating the order as you put it. Rather, it is a matter of your failing to state the payment of fees as a term of our settlement agreement that you claim exists. I requested you to point out exactly where in the October 28, 1998 letter, the February 22, 1999 letter, or the March 3, 1999 transcript that you list the payment of fees for review as a condition of the settlement agreement. You have failed to do so for the obvious reason that it does not exist.

Second, these are not new plans. The basic plan has remained the same for years. We have made modifications to the basic plan in an attempt to meet your concerns, even though we believed your concerns to be without merit and raised in bad faith. In my last letter I stated that the main floor elevation was raised as a result of rotating the cabin. Upon further review, I do not believe that statement was correct. In fact, the cabin was rotated to address your concern listed in Item VII(c) of your June 23, 1999 letter that the location of the front porch might encroach on the waterline easement. The rotation of the cabin resolves this concern. Raising the cabin approximately two feet addresses your concern listed in Item II(e) of your June 23, 1999 letter that the retaining wall was too high. Raising the cabin slightly reduces the height of the retaining wall. Mr. Shaw will testify that it would not be prudent to build the cabin at 116'10" and that the putting the main level at 119' is more appropriate for drainage and other reasons. If you disagree, please let us know why.

Sincerely,



James K. Tracy

Enclosure
cc: Gregory M. Ward

RAY, QUINNEY & NEBEKER

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November 12, 1999

James K. Tracy
PARRY ANDERSON & MANSFIELD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Re: Brighton Corporation v. Coats, et al.

Dear James:

We have received your letter of November 11, 1999, and the site plan that you sent with the letter.

We will submit it to our client, of course, but we view this not as a submission pursuant to the settlement agreement, but as revisions to the new plan your client submitted in October 1999 after the plan submitted pursuant to the settlement agreement was rejected.

For the reasons stated in our letter of November 10, 1999, Ward's failure to pay Brighton's invoices excused Brighton's duty to review the plans. Moreover, as explained in the same letter, the rotated design first submitted in October 1999 is not the cabin contemplated in the settlement agreement. While rotating the cabin on the site may avoid the FCOZ violation that your client has never properly addressed, it does so not by stepping down the patio, as promised in the settlement agreement, but by suggesting an entirely different placement on the property.

Very truly yours,

RAY, QUINNEY & NEBEKER

Scott A. Hagen

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