

2011

Michael and Lana Hone v. Advanced Shoring & Underpinning, Inc : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL AND LANA HONE, husband
and wife

Plaintiffs and Appellees,

vs.

ADVANCED SHORING &
UNDERPINNING, INC., a Utah
corporation; and DOES I-X,

Defendants and Appellants.

Case No. 20110256-CA

APPEAL FROM FINAL ORDERS OF
THE HON. JAMES L. SHUMATE
FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

BRIEF OF APPELLANT

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LIST OF PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption on appeal.

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JURISDICTION

Jurisdiction is proper in this Court under Utah Code Ann. § 78A-3-102(3)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in denying Advanced Shoring's pretrial motion for summary judgment seeking judgment as a matter of law that Plaintiffs cannot meet their burden to prove that Advanced Shoring breached its contract or warranty or that Advanced Shoring's breach caused Plaintiffs' damages without expert testimony, in a case involving complex allegations of improper geotechnical analysis and underpinning of residential construction, where Plaintiffs did not designate and would not present expert testimony at trial?

Standard of review: Review for correctness, granting no deference to the trial court's legal conclusions, and viewing the facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. See *Normandeau v. Hansen Equipment, Inc.*, 2009 UT 44, ¶9, 215 P.3d 152; *Prince Yeates and Geldzahler v. Young*, 2004 UT 26, ¶10, 94 P.3d 179.

Preservation: This issue was preserved in the parties' briefing and oral argument regarding Advanced Shoring's Motion for Summary Judgment. (R. 39 at pp. 4-9.)

2. Did the trial court err in denying motion for directed verdict made by Advanced Shoring at the close of Plaintiffs' case in chief on the basis that Plaintiffs failed to meet their burden to prove that Advanced Shoring caused Plaintiffs' damages without expert testimony, in a case involving complex allegations of improper geotechnical

analysis and underpinning of residential construction, where Plaintiffs did not present expert testimony at trial?

Standard of review: “When reviewing the denial of a motion for involuntary dismissal, an appellate court should defer to the trial court's findings and inferences under a clearly erroneous standard and review the trial court's conclusions of law for correctness.” *Markham v. Bradley*, 2007 UT App 379, ¶173 P.3d 865; *Southern Title Guar. Co. v. Bethers*, 761 P.2d 951, 954 (Utah Ct.App.1988).

Preservation: This issue was preserved in oral argument on Advanced Shoring’s motion for directed verdict at the close of Plaintiffs’ case in chief. (R. 79 at pp. 114-116.)

3. Did the trial court commit reversible error in denying Advanced Shoring’s pretrial motion for summary judgment seeking judgment as a matter of law because Plaintiffs cannot recover direct or consequential damages for loss in value of their residence because they surrendered the residence in bankruptcy prior to trial and therefore did not own any interest in the property damaged?

Standard of review: Review for correctness, granting no deference to the trial court’s legal conclusions, and viewing the facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. See *Normandeau v. Hansen Equipment, Inc.*, 2009 UT 44, ¶9, 215 P.3d 152; *Prince Yeates and Geldzahler v. Young*, 2004 UT 26, ¶10, 94 P.3d 179.

Preservation: This issue was preserved in the parties’ briefing and oral argument regarding Advanced Shoring’s Motion for Summary Judgment. (R. 39 at pp. 1-4.)

4. Did the trial court err in denying Advanced Shoring's pretrial motion for summary judgment seeking judgment as a matter of law on the basis that an enforceable warranty cannot be created by a single statement made by Advanced Shoring that "I won't guarantee it unless I get \$10,000.00 more", but that rather such a statement is too indefinite to form an enforceable contract?

Standard of review: Review for correctness, granting no deference to the trial court's legal conclusions, and viewing the facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. See *Prince Yeates and Geldzahler v. Young*, 2004 UT 26, 94 P.3d 179; *Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357 (Utah App. 1998).

Preservation: This issue was preserved in the parties' briefing and oral argument regarding Advanced Shoring's Motion for Summary Judgment. (R. 22 at pp. 1-5.)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

None.

STATEMENT OF THE CASE

Nature of case and course of proceedings below

This is a construction defect action filed by Plaintiffs as a result of foundation settling at the residence they formerly owned in LaVerkin, Utah. (R. 27 at pp. 1-2.) Plaintiffs filed this case on or about June 13, 2008, seeking recovery from Advanced Shoring for breach of contract, negligent misrepresentation, equitable estoppel, breach of warranty, and unjust enrichment/quantum meruit. (R. 1.)

After conducting discovery, Advanced Shoring first moved for summary judgment on or about November 30, 2009. (R. 21.) Advanced Shoring's motion was based (in part) on the fact on Plaintiffs' testimony that the sole basis for their breach of warranty claim is the statement "I won't guarantee it unless I get \$10,000 more", which Plaintiffs allege was made by an employee of Advanced Shoring. (R. 22 at pp. 1-5.) Advanced Shoring argued that this statement, standing alone, was much too indefinite to form the basis for an enforceable contract or warranty. (R. 22 at pp. 1-5.) In a brief order issued on May 11, 2010, the trial court indicated that "[a]s the Court finds that certain areas of material fact, particularly those relating to the alleged "warranty," remain in dispute, summary judgment is not appropriate at this juncture." (R. 33.)

After the expiration of expert discovery deadlines, Advanced Shoring filed a second motion for summary judgment, arguing that because Plaintiffs failed to designate an expert to testify on their behalf Plaintiffs could not meet their required burden of proof with respect to causation. (R. 39 at pp. 4-9.) Advanced Shoring also argued that Plaintiffs could not recover because they lost the Property as a result of their voluntary failure to make mortgage payments. (R. 39 at pp. 1-4.) Despite the agreement of the parties on the central facts applicable to these issues, the trial court again denied summary judgment on both arguments because of the existence of unspecified material disputes of fact. (See docket.)

This case was tried to the bench from January 24 – 28, 2011. (R. 62, 67.) Advanced Shoring raised the issues that form the basis of the instant appeal both in renewed dispositive motions and in closing argument. (R. 79 at pp. 114-140, 80 at 60-

89.) Specifically, at the close of Plaintiffs' case in chief, Advanced Shoring made a motion for a directed verdict based on Plaintiffs' failure to present expert testimony required to prove that any act or omission by Advanced Shoring caused Plaintiffs' damages. (R. 79 at pp. 114-116.) Advanced Shoring's motion was denied. (R. 79 at p. 140.) At the conclusion of trial the Court found for Plaintiffs on the breach of warranty and breach of contract causes of action and dismissed Plaintiffs' other causes of action. (R. 80 at 89-101.) Plaintiffs have not cross-appealed the dismissal of their remaining causes of action.

Facts

The following facts were either admitted on summary judgment or undisputed at trial:

Plaintiffs built a house on a lot located at 355 North 560 West in La Verkin, Utah (the "Property") in 2004. (R. 27 at pp. 1-2.) In 2006, Plaintiffs obtained a loan and executed a promissory note. (R. 39 at p. v; R. 44.) The promissory note was secured by the Property through a Deed of Trust. (R. 39 at p. v; R. 44.) Plaintiffs began to notice that the Property was settling two months after moving in. (R. 39 at p. v; R. 44.)

Plaintiffs filed suit in Fifth District Court against their general contractor and several subcontractors who performed work on the Property. (R. 39 at p. v; R. 44.) Plaintiffs brought claims seeking recovery for damage to the Property due to sinking of the foundation. (R. 39 at p. v; R. 44.) Plaintiffs ultimately settled the litigation against the general contractor who built their house. (R. 39 at p. v; R. 44.)

After settling that litigation, Plaintiffs' attorney obtained a bid from Advanced Shoring to perform certain repairs on the Property. (R. 39 at p. v; R. 44.) Plaintiffs directed their attorney to execute a written contract with Advanced Shoring on their behalf. (R. 39 at p. vi; R. 44.) Advanced Shoring began work on the Property in early 2006. (R. 39 at p. vi; R. 44.) After commencing work, Advanced Shoring learned that the condition of the Property was such that additional work and materials were needed to stabilize Plaintiffs' foundation. (R. 27 at p. 5.) Plaintiffs testified that Advanced Shoring's representative told Plaintiffs that "I won't guarantee it unless I get \$10,000 more." (R. 27 at pp. 5-6.) Plaintiffs authorized Advanced Shoring to perform the additional work, and paid approximately \$8,700.00. (R. 39 at p. vi; R. 44.)

Advanced Shoring performed work on the Property on more than one occasion, providing substantial work and materials in an attempt to stabilize the foundation. (R. 27 at p. 4.) Advanced Shoring completed its work, and then was notified that the Property continued to sink. (R. 39 at p. vii; R. 44.) Advanced Shoring returned to the Property and performed substantial additional work in attempt to prevent the Property from sinking further. (R. 39 at p. vii; R. 44.) Ultimately, Advanced Shoring's efforts to prevent further sinking of the Property were unsuccessful. (R. 39 at p. vii; R. 44.)

Beginning in June, 2009, Plaintiffs defaulted on the promissory note by failing to make required monthly payments. (R. 39 at p. vii; R. 44.) Notice of Default and Election to Sell the Property was filed by the holder of the deed of trust on or about August 25, 2009. (R. 39 at p. vii; R. 44.) On or about January 14, 2010, Plaintiffs filed a petition in the United States Bankruptcy Court in and for the District of Utah seeking protection

under chapter 7 of the United States Bankruptcy Code. (R. 39 at p. vii; R. 44.) Documents filed with the bankruptcy court indicate that Plaintiffs filed for bankruptcy protection because they were no longer able to satisfy their obligations to numerous creditors. (R. 39 at p. viii; R. 44.) Additionally, Plaintiffs represented to the United States Trustee that Mr. Hone's inability to continue working after suffering a blood clot in his leg reduced Plaintiffs income substantially. (R. 39 at p. viii; R. 44.) Plaintiffs filed a sworn statement of financial affairs with the bankruptcy Court indicating that Plaintiffs intended to surrender the Property to the holder of the trust deed. (R. 39 at p. viii; R. 44.) On or about January 15, 2010, the holder of the deed of trust moved the bankruptcy court to lift the automatic stay to allow the holder to foreclose the deed of trust, as Plaintiffs were in default and had no equity interest in the Property. (R. 39 at p. viii; R. 44.) The bankruptcy court granted the motion on or about February 10, 2010. (R. 39 at p. viii; R. 44.) Creditor then initiated a non-judicial foreclosure, which was completed by issuance of a trustee's deed on or about March 8, 2010. (R. 39 at p. viii; R. 44.) This trustee's deed transferred title to the Property to a buyer who purchased the Property at the trustee's sale. (R. 39 at p. viii-ix; R. 44.)

SUMMARY OF ARGUMENT

Appellant challenges the denial of two pretrial motions for summary judgments which presented arguments based on undisputed facts, and the denial of its motion for directed verdict made at the close of Plaintiffs' case in chief. Though the trial court denied these motions with largely cursory rulings indicating (in the case of the motions for summary judgment) that material issues of fact existed which precluded summary

judgment, these rulings were based entirely on undisputed facts – either testimony provided by Plaintiffs in deposition, the admitted failure of plaintiffs to retain an expert to testify in support of their claims, or the fact and effect of Plaintiffs’ bankruptcy. In every case, the undisputed facts presented in Advanced Shoring’s Motions did not materially change at trial. Therefore, the denial of these pretrial motions is properly challenged on appeal.

The evidence presented by Plaintiffs was insufficient, as a matter of law, to survive summary judgment because they failed to designate an expert to testify on their behalf as to the elements of causation and breach. Plaintiffs tried their case primarily on the theories of breach of contract and breach of warranty, and the trial court’s award was based on the breach of warranty theory only. However, each of these causes of action requires Plaintiffs to present evidence of breach and causation to recover. Determination of whether Advanced Shoring breached its contract with Plaintiffs or any warranty provided to Plaintiffs required analysis of the appropriateness of the geotechnical work performed by Advanced Shoring and whether any deficiency in Advanced Shoring’s work caused Plaintiffs’ damages. Due to the highly technical nature of Advanced Shoring’s work, and the multiplicity of potential causes for the sinking of the Property, Plaintiffs were required to submit expert testimony in order to meet their burden. In response, Plaintiffs firmly represented that they did not intend to present expert testimony. Therefore, the trial court erred in failing to grant Advanced Shoring’s Motion.

At trial, Advanced Shoring again moved for dismissal on the basis that, without expert testimony, the Plaintiffs were unable to meet their burden of proof. Plaintiffs did

not present any expert testimony in support of their claims. However, the trial court denied the motion without specifying a reason for doing so. The trial court erred in denying Advanced Shoring's motion because the technical and complicated nature of Advanced Shoring's work and the myriad of factors that could have caused the Property to sink required Plaintiffs to present expert testimony in order to prove, beyond mere speculation that Advanced Shoring caused or contributed to Plaintiffs' damages.

Advanced Shoring also sought summary judgment because Plaintiffs did not suffer any damages as a result of Advanced Shoring's conduct. The proper measure of contract or warranty damages is the amount necessary to "place the nonbreaching party in as good a position as if the contract had been performed." *Mahmood v. Ross*, 1999 UT 104, ¶ 31, 990 P.2d 933. In June of 2009, long after Advanced Shoring ceased working on the Property, Plaintiffs decided to stop making their mortgage payments, and predictably a secured creditor instituted foreclosure proceedings. Plaintiffs then filed for bankruptcy protection under chapter 7 of the United States Bankruptcy Code. Advanced Shoring indisputably had no involvement in Plaintiffs' bankruptcy or their decision to cease making mortgage payments. The combination of surrendering the Property to secured creditors and the bankruptcy discharge reduced Plaintiffs' interest in the Property to zero. Given that Plaintiffs no longer own the Property, they are in the same position they would be in regardless of any breach of warranty or breach of contract by Advanced Shoring.

Finally, the trial court erred in denying Advanced Shoring's motion for summary judgment on Plaintiffs' warranty claim because the language identified by Plaintiffs was insufficient to create a warranty as a matter of law. Plaintiffs repeatedly testified that the

sole basis for their belief that Advanced Shoring provided them with a warranty was the statement that “I won’t guarantee it unless I get \$10,000 more”. Plaintiffs claimed that Advanced Shoring made this statement in the context of requesting payment for additional piers necessary to support the foundation of the Property. However, Advanced Shoring’s statement does not actually promise or represent anything. Rather, it merely indicates that, if Plaintiffs would not pay for the additional work to be performed, no warranty could be provided. In contrast with the “direct and positive affirmation of fact” required by Utah law in order for a warranty to arise, Advanced Shoring’s statement is far too indefinite to give rise to an enforceable warranty. *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 21, 28 P.3d 669. It is, at best, either an offer to provide further construction services, or a hopelessly vague and indefinite agreement to agree, which lacks the basic requirements for enforcement as a matter of law.

ARGUMENT

I. ADVANCED SHORING HAS PROPERLY CHALLENGED THE TRIAL COURT'S DENIAL OF PRETRIAL MOTIONS FOR SUMMARY JUDGMENT.

- a. The denial of a pretrial motion for summary judgment can be challenged on appeal where the denial was on purely legal grounds

The Utah Supreme Court has explained that any time “that reasonable minds could not differ as to the conclusion to draw from the evidence or that the evidence adduced was simply insufficient to sustain the legal claim, then the trial court should rule on the issue as a matter of law.” *Normandeau v. Hanson Equipment, Inc.*, 2009 UT 44, ¶15, 215 P.3d 152. The Court then held that “when a court denies a motion for summary judgment on a purely legal basis, that is where the court denies the motion based on the undisputed facts, rather than because of the existence of a disputed material fact, the party denied summary judgment may challenge that denial on appeal.” *Id.*

In this case, Advanced Shoring filed two separate motions for summary judgment. (R. 21; R. 39 at pp. 4-9.) The trial court denied each motion with a cursory statement that material issues of fact existed which precluded summary judgment. However, the claims raised herein on appeal were based on undisputed facts, and involved purely legal determinations regarding whether the evidence presented could sustain a ruling in favor of Plaintiffs as a matter of law. These facts did not materially change at trial. Therefore, despite the trial court's cursory contention that material issues of fact existed, it is clear that Advanced Shoring's motions raised purely legal questions, and that Advanced

Shoring is therefore entitled to appeal the trial court's denial of its motions for summary judgment.

b. Advanced Shoring's challenge to the pretrial denial of its motions for summary judgment is proper because the motions were based on undisputed facts and turned on purely legal rulings

Appellants filed a motion for summary judgment in this case prior to trial on the basis that expert testimony was required to prove Plaintiffs' claims, and Plaintiffs failed to designate any expert witnesses to give testimony at trial. (R. 21; R. 39 at pp. 4-9.) The facts supporting Appellant's argument, namely the nature of Plaintiffs' defect claims and Plaintiffs' refusal to designate an expert to testify relative to said defects, were undisputed. (R. 44.) Specifically, Plaintiffs claimed that, due to Advanced Shoring's failure to properly perform its geotechnical and underpinning work, the Property continued to settle. (R. 44.) Moreover, the record undisputedly discloses that Plaintiffs never designated an expert to testify on their behalf, and Plaintiffs have repeatedly asserted that they had no intention of presenting expert testimony at trial. (R. 44.)

"Whether expert testimony is required to prove an element of the plaintiff's prima facie case as a matter of law..." *Fox v. Brigham Young Univ.*, 2007 UT App 406, ¶¶ 14, 21-23, 176 P.3d 446; see also *Posner v. Equity Title Ins. Agency*, 2009 UT App 347, ¶20, 222 P.3d 775. Therefore, the trial court's decision as to whether Plaintiffs' claims required them to present expert testimony, and thus to deny Advanced Shoring's motion for summary judgment, was a purely legal ruling, and is appropriately challenged on appeal.

In the same motion for summary judgment, Advanced Shoring challenged Plaintiffs' ability to recover for damage to the Property given that Plaintiffs voluntarily surrendered the Property in bankruptcy after deciding to stop making payments on their mortgage. (R. 39 at pp. 1-4.) Advanced Shoring's motion argued that Plaintiffs suffered no recoverable damages because Plaintiffs' lost the Property through their own choices and not as a result of any act or omission of Advanced Shoring. (R. 39.) Plaintiffs are in exactly the same position as if there were no breach, and thus Plaintiffs have no damages.

The fact that Plaintiffs' voluntarily ceased making their mortgage payments and filed bankruptcy was clearly established by Plaintiffs bankruptcy filings, and was supported by testimony given by Plaintiffs at trial. (R. 39 at p. vii; R. 44; R. 78 at 108:10-19.) There is no dispute that Advanced Shoring had not worked on the Property for more than a year at the time Plaintiffs stopped making their mortgage payments. (R. 39 at p. vii; R. 44.) These facts were undisputed, and did not materially change at trial.

"Anytime 'that reasonable minds could not differ as to the conclusion to draw from the evidence or that the evidence adduced was simply insufficient to sustain the legal claim, then the trial court should rule on the issue as a matter of law.'" *Normandeau*, 2009 UT 44 at ¶15 (quoting *AMS Salt Indus., Inc. v. Magnesium Corp. of Am.*, 942 P.2d 315, 320 (Utah 1997)). The facts of Plaintiffs' bankruptcy are undisputed and therefore resolution of Advanced Shoring's motion turned on a pure question of law, namely, whether reasonable minds could differ as to the conclusion to draw from the evidence that Plaintiffs voluntarily surrendered all interest in the Property to secured

creditors. The trial court's denial of Advanced Shoring's pretrial motion on this basis is appropriately challenged on appeal.

Advanced Shoring's pretrial motion for summary judgment sought dismissal of Plaintiffs' breach of warranty claim because the statement on which this claim was based was too indefinite to constitute a warranty as a matter of law. (R. 22 at pp. 1-5.) Plaintiffs' alleged that Advanced Shoring told Lana Hone that "I won't guarantee it unless I get \$10,000 more." (R. 27 at pp. 5-6.) Plaintiffs admitted that this statement is the sole basis for their breach of warranty claim. (R. 27 at pp. 5-6.)

Advanced Shoring's motion argued that this statement could not, as a matter of law, constitute an enforceable warranty because it is not "a direct and positive affirmation of fact" and is so indefinite as to be unenforceable. See *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 21, 28 P.3d 669; *Brown's Shoe Fit Co. v. Olch*, 955 P. 2d 357, 363 (Utah Ct. App. 1998). Resolution of Advanced Shoring's argument that no enforceable warranty exists turned on a pure question of law because the facts on which this claim was based were undisputed for purposes of the motion. The trial court's denial of Advanced Shoring's pretrial motion on this basis is therefore appropriately challenged on appeal.

II. THE TRIAL COURT'S DENIAL OF ADVANCED SHORING'S PRETRIAL MOTION FOR SUMMARY JUDGMENT AND SUBSEQUENT MOTION TO DISMISS SHOULD BE REVERSED BECAUSE PLAINTIFFS COULD NOT PROVE THEIR CLAIMS WITHOUT EXPERT TESTIMONY, AND PLAINTIFFS NEVER DESIGNATED AN EXPERT.

a. Plaintiffs' claims require proof of causation and standard of care

Plaintiffs' Complaint alleges five causes of action: breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, unjust enrichment/quantum meruit, and breach of warranty. (R. 1.) Of those five causes of action, four—breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and breach of warranty—all require some showing of proximate cause. Advanced Shoring's pretrial motion sought dismissal of each of the claims based on Plaintiffs' inability to prove causation without an expert. (R. 22.)

Each of the Plaintiffs' claims required the trial court to determine the appropriateness of Advanced Shoring's geotechnical work in evaluating and underpinning the Property, and whether any deficiencies in that work caused Plaintiffs' damages. Under Utah law, there appears to be no distinction between causation in the context of contract-based versus negligence-based claims. For example, an essential element of an action for breach of contract is a showing that the breach caused the plaintiff's damages. *Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, ¶ 21, 83 P.3d 391. As the Utah Supreme Court recognized in *Thurston*, "[D]amages are not recoverable for losses suffered . . . unless the requirements of the law as to 'proximate' causation are satisfied. The form of this rule is the same whether it is being applied in the

field of contracts or in the field of torts.” *Id.* at ¶ 23 (quoting 5 Arthur L. Corbin, Corbin on Contracts § 997 (interim ed. 1964)) (alterations in original). The same rule applies to actions for breach of the implied covenant of good faith and fair dealing. See *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 793 (Utah 1991); *Thomas Am. Stone & Bldg., Inc. v. White*, 142 B.R. 449, 453 (D. Utah 1992). Similarly, a claim for negligent misrepresentation requires a showing that “the misrepresentation is the legal cause” of the damages suffered. *Forsberg v. Burningham & Kimball*, 892 P.2d 23, 27 (Utah Ct. App. 1995). “Proof of proximate cause is also required in breach of warranty actions” *Interwest Constr. v. Palmer*, 923 P.2d 1350, 1356 (Utah 1996).

As the *Thurston* court noted, evidence of causation is always necessary in order to avoid summary judgment, even in breach of contract actions. *Thurston*, 2003 Utah App 438 at ¶¶ 18, 23. *Thurston* involved a breach of contract action brought against a home health-care company by the family of a disabled man after he was found dead under suspicious circumstances. *Thurston*, 2003 UT App 438 at ¶ 6. The family alleged that the man had committed suicide as a result of the company’s failure to monitor his mental health and growing dependency on drugs and alcohol. *Id.* This Court upheld the trial court’s grant of summary judgment in favor of the company, noting that “due to the unusual circumstances and lack of direct evidence surrounding *Thurston*’s death, the jury would need some assistance in making the connection between the conduct of Defendants and the death of *Thurston*.” *Id.* at ¶ 18. Since the plaintiffs expert testimony was excluded, “[s]ummary judgment was appropriate due to the lack of evidence concerning the proximate cause of *Thurston*’s death.” *Id.* at ¶ 20. This was true even though some of

the plaintiffs' claims were for breach of contract, since "Defendants' acts, whether breaches of contract or torts, must be causally linked to Plaintiffs' damages." *Id.* at ¶ 23.

b. Plaintiffs' claims required expert testimony in order to prove breach and causation, and Plaintiffs did not designate any experts.

Expert testimony is often necessary to "establish the standard of care required in cases dealing with the duties owed by a particular profession, especially where the average person has little understanding of the duties owed by the particular profession at issue, or the case involves complex allegations." *Posner v. Equity Title Ins. Agency*, 2009 UT App 347, ¶21, 222 P.3d 775 (internal citations and quotations omitted). Engineering issues of a technical nature are considered beyond the scope of common knowledge and require expert testimony. See *Warenski*, 2011 UT App 197 at ¶11; cf. *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263 (Utah Ct. App. 1997) (noting the requirement of expert testimony regarding the standard of care for "cases involving medical doctors, architects, and engineers") (quoting *Wycalis v. Guardian Title*, 780 P.2d 821, 826 n. 8 (Utah. Ct. App. 1989)) (emphasis added).

Specifically, expert testimony is required to prove causation if the issues involved "are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding" *Beard v. K-Mart Corp.*, 2000 UT App 285, ¶16, 12 P.3d 1015 (quoting *Riggins v. Bechtel Power Corp.*, 722 P.2d 819, 824 (Wash. Ct. App. 1986)); see also *Warenski v. Advanced RV Supply*, 2011 UT App 197, ¶11, --- P.3d ----. For example, in the medical malpractice context, expert testimony is required unless causation of the

alleged injury is “obvious to a layperson.” *Florez v. Schindler Elevator Corp.*, 2010 UT App 254, ¶19, 240 P.3d 107.

As this Court recently made clear in *Warenski*, “when the circumstances and the probabilities as to the causative factors of an accident lie within the ken of experts, expert evidence is necessary to establish a foundation that gives rise to an inference of negligence.” *Warenski*, 2011 UT App 197 at ¶10 (quoting *King v. Searle Pharm., Inc.*, 832 P.2d 858, 862 (Utah 1992)).

Warenski involved a claim against a repair shop for an alleged failure to properly inspect and repair a tie rod on the plaintiff’s all-terrain vehicle. *Id.* at ¶ 2. In that case, the Court held that expert testimony was required to show both breach and causation, noting that “the average person would not be knowledgeable about how a tie rod is properly installed, what dangers may result if the tie rod is not properly installed, or how a tie rod could become disconnected.” *Id.* at ¶11. Since no admissible expert testimony was provided, this Court affirmed the trial court’s grant of summary judgment in favor of the defendant. *Id.* at ¶ 14; see also *Fox v. Brigham Young Univ.*, 2007 UT App 406, ¶ 22, 176 P.3d 446 (“It is only in ‘the most obvious cases’ that a plaintiff may be excepted from the requirement of using expert testimony to prove causation.”) (quoting *Beard*, 2000 UT App 285 at ¶16).

Plaintiffs bore the burden of proving that their damages were caused by Advanced Shoring’s acts or omissions. And like the plaintiffs in *Thurston*, Plaintiffs were required to produce expert testimony in order to establish that Advanced Shoring’s conduct, rather than any of the many other possible causes, caused their home to sink—which,

incidentally, it was already doing well before Advanced Shoring ever arrived on the site. (R. 39 at p. v; R. 44.) However, Plaintiffs did not present any expert testimony in response to Advanced Shoring's motion.

Plaintiffs cannot prove why this sinking occurred or what Advanced Shoring did that caused or contributed to its continued sinking. In fact, in response to Advanced Shoring's motion for summary judgment, Plaintiffs did not even present evidence of what work Advanced Shoring performed. (R. 44.) In fact, prior to filing the instant litigation, Plaintiffs filed and subsequently settled a lawsuit against other parties which they claimed were responsible for the sinking of the Property. (R. 39 at p. v; R. 44.) Plaintiffs were certainly aware that the sinking could have been caused by someone or something besides Advanced Shoring. (R. 39 at p. v; R. 44.) In the face of such uncertainty on causation, Plaintiffs were and are under the obligation to produce competent evidence linking Advanced Shoring's conduct to the sinking of the home. In a case involving complex questions about the soils underlying the home and other geotechnical factors, such testimony could only be provided by an expert.

Plaintiffs contend that Advanced Shoring improperly placed helical piers and ram or grouted piers under the Property, causing the Property to continue sinking and therefore lose value. (R. 1.) This theory surely requires expert testimony. An average lay person is not familiar with how helical piers work, the types of soil on which a helical pier can be successfully placed, the factors that can cause a house to sink despite proper placement of helical piers, or what factors could cause the Property to sink despite proper installation of pier systems. Geotechnical engineering is at least as complex as repairing

a tie rod on an ATV, which this Court held in *Warenski* required expert testimony to prove breach and causation. Accordingly, Plaintiffs were required to produce expert testimony on these issues here as well. Plaintiffs' failure to designate an expert is therefore fatal to their claims, and the trial court should have granted Advanced Shoring's pretrial motion for summary judgment.

c. The trial court erred in denying Advanced Shoring's motion to dismiss because Plaintiffs' failed to meet their burden to prove breach or causation in their case in chief.

At the close of Plaintiffs' case in chief, Advanced Shoring moved for a directed verdict on Plaintiffs' claims on the basis that Plaintiffs' had failed to meet their burden to prove breach or causation because Plaintiffs did not present expert testimony. (R. 79 at pp. 114-116.) "Under the Utah Rules of Civil Procedure, a motion for a directed verdict submitted during a bench trial is treated as a motion for involuntary dismissal." *Markham v. Bradley*, 2007 UT App 379, ¶13, 173 P.3d 865; *Grossen v. DeWitt*, 1999 UT App 167, ¶¶8-9, 982 P.2d 581.

As noted above, engineering issues of a technical nature are considered beyond the scope of common knowledge and require expert testimony. See *Warenski*, 2011 UT App 197 at ¶11; cf. *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263 (Utah Ct. App. 1997). Specifically, expert testimony is required to prove causation if the issues involved "are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding" *Beard v. K-Mart Corp.*, 2000 UT App 285, ¶16, 12 P.3d 1015 (quoting *Riggins v. Bechtel Power Corp.*, 722 P.2d 819, 824 (Wash. Ct. App. 1986)); see also *Warenski v. Advanced RV Supply*, 2011 UT App 197, ¶11, --- P.3d ----.

Plaintiffs did not designate any expert witnesses to give testimony at trial. This court has previously held that “[a] party shall disclose to other parties the identity of any person who may be used at trial to present evidence under [r]ules 702, 703, or 705 of the Utah Rules of Evidence.” *Pete v. Youngblood*, 2006 UT App 303, ¶12, 141 P.3d 629. Failure to comply with this rule bars the witness from giving expert opinions at trial. See *Id.* at ¶14.

While Plaintiffs attempted to elicit expert testimony from several witnesses at trial, for the most part such testimony was excluded. While the Court did allow Plaintiffs to ask Per Danfors, president of Advanced Shoring for his expert opinion regarding Advanced Shoring’s work on the Property, Mr. Danfors testified that Advanced Shoring did its job properly. (R. 77 at pp. 118:2-16.) Mr. Danfors also testified that he did not know why the Property continued to sink. (R. 77 at pp. 136:6-11.) He further testified that the Property could continue to sink for reasons unconnected with anything Advanced Shoring did or failed to do. (R. 77 at pp. 203:5-204:4.) Plaintiffs did not elicit (and the Court did not admit into evidence) any expert testimony supporting their claim that Advanced Shoring performed its work improperly or that an act or omission by Advanced Shoring caused or contributed to Plaintiffs’ damages.

Plaintiffs did not meet their burden to prove the elements of causation or breach by expert testimony. Plaintiffs’ claims should therefore have been dismissed. This court has noted that “[a] plaintiff who otherwise deserves to lose is simply not entitled to a shot at proving his case on cross-examination or at having the adverse party bumble into proving

it for him.” *Grossen*, 1999 UT App 167 at ¶9. Therefore, the trial court erred in denying Advanced Shoring’s motion, and the trial court’s ruling should be reversed.

III. THE TRIAL COURT’S DENIAL OF ADVANCED SHORING’S PRETRIAL MOTION FOR SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE PLAINTIFFS FAILED TO SUFFER ANY DAMAGES AS A RESULT OF ADVANCED SHORING’S CONDUCT.

The proper measure of damages in a breach of contract action is the amount necessary to “place the nonbreaching party in as good a position as if the contract had been performed.” *Mahmood v. Ross*, 1999 UT 104, ¶ 31, 990 P.2d 933 (quoting *Anesthesiologists Assoc. v. St. Benedict's Hosp.*, 884 P.2d 1236, 1238 (Utah 1994)). Thus, where the party is in the same position it would have been in absent the breach, it can recover no damages. *See Id.*; *Missouri Baptist Hosp. v. United States*, 555 F.2d 290, 296–97 (Ct. Cl. 1977). This principle is in harmony with the basic purpose of contract damages, which is to make the plaintiff whole; a measure of damages that punishes the defendant or provides the plaintiff with a windfall is inappropriate. *See TruGreen Cos., L.L.C. v. Mower Bros., Inc.*, 2008 UT 81, ¶ 23, 199 P.3d 929 (quoting *Am. Air Filter Co. v. McNichol*, 527 F.2d 1297, 1300 (3d Cir. 1975)).

Although Utah courts have held that a property owner may recover damages for construction defects even if he or she no longer owns the home at issue, the owner must still demonstrate that he or she actually suffered damages. *See Mitchell v. Stewart*, 581 P.2d 564 (Utah 1978). In *Mitchell*, the plaintiffs discovered several defects in a home they had purchased. *Id.* at 564. After selling the home for more than they had paid, they filed suit against the builder based on the defects. *Id.* The court held that the plaintiffs

were not barred from recovery simply because they no longer owned the home, noting that “[i]f they suffered compensable damage, it would make no difference whether or not they still owned the house.” *Id.* at 564–65. This was true, the court reasoned, because the house could have sold for even more if the defects had not been present. *See Id.*

Like the plaintiffs in *Mitchell*, Plaintiffs here are no longer the owners of the home at issue. But that is where the similarities end. Unlike the parties in *Mitchell*, Plaintiffs chose to abandon the mortgage on their home and allow it to fall into foreclosure. As Plaintiffs’ own documents show, this decision was based on factors unrelated to Advanced Shoring’s conduct. Thus, unlike the *Mitchell* plaintiffs, Plaintiffs in this case cannot show that the value of the home differs in any way as a result of any act or omission of Advanced Shoring. Plaintiffs made a conscious decision to cease making their mortgage payments due to financial difficulties they suffered because of Mr. Hone’s health. In doing so, Plaintiffs independently reduced their interest in the residence to zero. In other words, the value of the property to Plaintiffs now is the same as it would have been absent any alleged breach of contract or warranty. Plaintiffs are in precisely the same position they would have been in if there had been no breach. Therefore, Plaintiffs’ have no contract damages and cannot recover for any “lost value” in the property. Any loss they have suffered is due to their own actions, not Advanced Shoring’s. *Cf. Haymond v. Bonneville Billing & Collections, Inc.*, 2004 UT 27, ¶ 7, 89 P.3d 171 (no standing to sue where plaintiff’s alleged injuries were “largely self-inflicted”). The trial court erred in denying Advanced Shoring’s pretrial motion for summary judgment on this basis.

IV. THE TRIAL COURT'S DENIAL OF ADVANCED SHORING'S PRETRIAL MOTION FOR SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THE STATEMENT "I WON'T GUARANTEE IT UNLESS I GET \$10,000.00 MORE", STANDING ALONE, CANNOT CREATE AN ENFORCEABLE WARRANTY CONTRACT

a. Advanced Shoring's alleged statement to Plaintiffs is too indefinite to give rise to an express warranty or indeed any enforceable contract as a matter of law

Normal principles of contract interpretation apply to the interpretation of an express warranty. *See Orlob v. Wasatch Med. Mgmt.*, 2005 UT App 430, ¶ 32, 124 P.3d 269. As Utah courts have consistently held, "An agreement cannot be enforced if its terms are indefinite." *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 11, 78 P.3d 600 (quoting *Richard Barton Enters. v. Tsern*, 928 P.2d 368, 373 (Utah 1996)). In other words, "if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." *Id.* at ¶ 12 (quoting *Acad. Chicago Publishers v. Cheever*, 578 N.E.2d 981, 984 (Ill. 1991)); *see also Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, ¶ 17, 94 P.3d 179.

The Utah Supreme Court has previously held that a contract to purchase insurance cannot be enforced unless "the scope of the risk, the subject matter to be covered, the duration of the insurance, and other elements" can somehow be determined. *Harris v. Albrecht*, 2004 UT 13, ¶ 11, 86 P.3d 728 (quoting *Hamacher v. Tummy*, 352 P.2d 493, 497 (Or. 1960)). *Harris* involved a business owner who had called his insurance agent and asked him "to place business and fire coverage on [his] equipment and the contents [of his office]." *Id.* at ¶ 5 (alterations in original). Although the agent stated that "he would

take care of [it]" and "come out and look at [the] equipment," no insurance was ever obtained. *Id.* (alterations in original). In affirming the district court's grant of summary judgment in favor of the agent, the court stated that "negotiations will not ripen into a contract until the parties arrive at an agreement as to all of the elements which are essential to an insurance contract, including the subject matter to be covered, the risk insured against, the amount of the indemnity, the duration of the coverage and the premium." *Id.* at ¶ 10. Since the agent had no information regarding any of these critical issues, the court refused to imply even a contract to purchase insurance at a later date. *Id.* at ¶ 18.

Although the present case deals with an alleged express warranty rather than an insurance contract, the principles stated in *Harris* apply here also. For purposes of Advanced Shoring's motion for summary judgment, it was undisputed that an Advanced Shoring employee told Plaintiff Lana Hone that "I won't guarantee it unless I get \$10,000 more." (R. 27 at pp. 5-6.) "Express warranties presuppose that the parties have entered into some kind of contractual agreement, and arise out of promises by the warrantor guaranteeing or assuring a specific result. *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Associates, Inc.*, 2001 UT 54, 28 P.3d 669. Conversely, Advanced Shoring's statement does not assure a specific result. Neither does this statement constitute "an assurance by one party to a contract of the existence of a fact upon which the other party may rely." *Id.* at ¶18. In fact, it contains none of the defining terms of a warranty—what is being warranted or promised, what the warranty covers, how long it lasts, and so forth. The trial court's ruling essentially presupposes that Advanced Shoring

was providing an unlimited and indefinite warranty that the Property would never sink again, regardless of what the cause would be. Like the defective insurance contract in *Harris*, Advanced Shoring's alleged warranty simply has too many holes to be enforceable.

In response, Plaintiffs may argue that that Advanced Shoring's statement could be interpreted to give rise to a contract to provide a warranty in the future. However, this statement, and Plaintiffs' subsequent payment for additional materials, can at best constitute a hopelessly indefinite agreement to agree. That is, such an argument leads to the conclusion that perhaps Advanced Shoring and Plaintiffs agreed, because of additional work would be performed and paid for, Advanced Shoring would still be able to offer them a warranty in the future. Although an agreement to agree is not unenforceable per se, such an agreement must "contain[] provisions otherwise capable of enforcement" *Brown's Shoe Fit Co. v. Olch*, 955 P. 2d 357, 363 (Utah Ct. App. 1998). In other words, an agreement to agree, like any contract, "can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed." *Id.* (quoting *Bunnell v. Bills*, 368 P.2d 597, 600 (Utah 1962)).

Olch involved a dispute over the enforceability of a preliminary lease agreement that included general guidelines for determining the rent to be paid but omitted a critical term that was to be inserted into the agreed-upon formula. *Id.* at 360. There, this Court held that the agreement was unenforceable, noting that "an option to renew a lease is unenforceable unless the rent to be paid, or some mechanism for determining the amount of rent, is specified in the lease." *Id.* at 364. Accordingly, as the Court recognized,

“where the conditions of the deferred contract are not set out in the provisional one, or where material conditions are omitted, it is not a contract in praesenti because the minds of the parties have not met and may never meet.” *Id.* at 363 (quoting *Chu v. Ronstadt*, 498 P.2d 560, 563 (Ariz. Ct. App. 1972)) (emphasis added). Notably, the court was not swayed by the fact that the plaintiff, based on the preliminary lease agreement, had “moved ahead feeling that [he] had an agreement for a lease for a location.” *Id.* at 360.

The Utah Supreme Court has held that “[a] condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced.” *Valcarce v. Bitters*, 362 P.2d 427, 428-429 (Utah 1961). In *Valcarce*, the parties had engaged in substantial negotiations over the sale of some mink. *Id.* at 427. The buyer received a certain number of the mink, and exchange gave the seller a check. *Id.* The buyer later gave the seller a promissory note for a substantial sum. *Id.* The seller argued that the promissory note was merely additional payment for the mink already transferred. *Id.* The buyer argued that the promissory note was to pay for a side deal the parties had discussed. *Id.* The terms of this side deal were not spelled out with any specificity. *Id.* The Utah Supreme Court noted that “[u]nder the circumstances shown to exist here, where there was simply some nebulous notion in the air that a contract might be entered into in the future, the court cannot fabricate the kind of a contract the parties ought to have made and enforce it.” *Id.* at 428-429.

Under the rules stated in *Harris*, *Olch* and *Valcarce*, the Plaintiffs’ breach of warranty and breach of contract claims fail for the simple reason that Advanced

Shoring's statement was too indefinite to be enforceable. Even assuming there was an agreement to provide a warranty, Advanced Shoring's statement did not include critical terms—the content and scope of the warranty. Nothing in Advanced Shoring's alleged statement indicated which future events would be warranted against, which portions of the work would be covered, what Advanced Shoring's work would be or do for the Property, how long the warranty would last, or any other terms that would affect Advanced Shoring's ability to plan for and carry out the warranty. Just as the *Olch* court was unable to enforce the agreement absent a price term, the law does not allow the trial court to simply create a warranty out of whole cloth. Rather, a “warranty” which does not give any indication of what it consists of or what it covers is unenforceable as a matter of law. Just as the subjective feelings of the plaintiff in *Olch* could not, standing alone, give substance to a defective contract, in this case Plaintiffs' subjective belief regarding the scope of this warranty is irrelevant. (R.)

Similarly, *Nielsen v. Gold's Gym* involved a commercial lease agreement that went sour after the parties failed to agree on who should be responsible for necessary improvements to the leased building. *Nielsen*, 2003 UT 37 at ¶ 3. The initial contract signed by the parties referred only to the lessor's responsibility to develop the “premises”—a term that the lessor argued could not include post-construction improvements that had not been contemplated at the time the agreement was signed. *Id.* at ¶ 9. The Utah Supreme Court, holding that no agreement had been reached as to the improvements, noted that the lessor's argument “serve[d] only to reinforce the absence of mutual assent as to the one issue that eventually terminated this relationship.” *Id.* at ¶ 10.

As the court recognized, “The court must be able to enforce the contract according to the parties’ intentions; if those intentions are impenetrable, or never actually existed, there can be no contract to enforce.” *Id.* at ¶ 12.

The Utah Supreme Court reached a similar result in *Prince, Yeates & Geldzahler v. Young*, which involved an attorney hired by a law firm. *Young*, 2004 UT 26 at ¶ 2. In the course of joining the firm Young was told of the firm’s practice of awarding bonus compensation based on performance. *Id.* He was also told that attorneys with his level of experience could usually expect to become partners within two to three years. *Id.* Afterwards, when it became apparent that the attorney would be receiving a large fee on a contingent case, he began negotiating with the firm as to how the fee would be divided. *Id.* at ¶ 5. In the course of those negotiations, both parties repeatedly promised “to be ‘fair’ with each other in attempting to determine the amount of ‘fair and equitable’ compensation” that would be received. *Id.* However, after these negotiations broke down due to his insistence on being made a partner and given an increased salary, the attorney sued the firm for breach of contract. *Id.* at ¶¶ 6–7.

The court held that no contract had been entered into between the attorney and the firm, since there had been no representation “that the firm would pay him a specific amount of additional compensation in the future, or that [the attorney] was guaranteed to become a shareholder. Furthermore, [the firm] never provided, nor did [the attorney] ask for, clarification on what exactly constituted ‘performance’ sufficient to trigger increased compensation.” *Id.* at ¶ 13. This was true despite the fact that the firm had indicated its

intention to be “fair,” since “no agreement was ever reached on the integral feature of the alleged contract—[the attorney’s] compensation.” *Id.* at ¶ 17.

The indefinite nature of Advanced Shoring’s alleged statement is similarly fatal to Plaintiffs’ claims here. According to Lana Hone’s testimony presented at summary judgment, an Advanced Shoring employee told her, “I won’t guarantee it unless I get \$10,000 more.” Noticeably absent from that statement is any indication as to *what is being guaranteed*—that the work will be completed, that it will be completed according to the usual professional standards, that it will be free of defects, that it will fix the problems with the home, or any other even remotely specific statement. The only expert to testify in this matter indicated that such a warranty would be unreasonable. (R. 77 at pp. 203:5-204:4.) Thus, like the alleged contract in *Young*, this purported warranty is missing several essential terms, including most importantly, any fact or promise that is being warranted. Accordingly, it simply was not possible for any reasonable person, including Plaintiffs or the trial court, to tell what the alleged warranty was or whether it was breached. This “warranty” is therefore unenforceable as a matter of law, and summary judgment should have been granted.

b. Advanced Shoring’s alleged statement is, at best, a mere offer to provide services which cannot, as a matter of law, be a warranty of a specific result.

In order for an express warranty to be created, there must be “a ‘direct and positive affirmation of fact’ made by the warrantor with regard to the quality or condition of the goods or services provided, i.e., an affirmation of fact guaranteeing or assuring a specific result.” *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54,

¶ 21, 28 P.3d 669 (quoting *Groen v. Tri-O-Inc.*, 667 P.2d 598, 606 (Utah 1983)) (emphasis added). A mere agreement to provide services does not create a warranty, since it is not a “guarantee[] that the services provided [will] be free from defects or inaccuracies.” *Id.* In other words, an express warranty (as the term “express” makes obvious) cannot be implied merely from the fact that goods or services are being delivered.

The Utah Supreme Court made this point clear in *SME*, which involved a contract with an architectural firm to provide plans for a construction project. *SME*, 2001 UT 54 at ¶2. After construction was begun, the structural steel fabricator for the project encountered numerous difficulties and delays, which it claimed were due to faulty designs by the architects. *Id.* at ¶4. The fabricator sued on the basis of several provisions in the contract which the fabricator claimed constituted express warranties that the architects’ work would be free of defects; these included promises to act “in full compliance with the latest applicable codes,” to “set[] forth in detail the work to be accomplished,” to be responsible for “any necessary changes to . . . designs, drawings and specifications” as well as “all of its professional negligent acts,” and to do its work “accurately and timely in accordance with industry standards.” *Id.* at ¶19.

The Court disagreed and held that these promises did not “set[] forth express warranties guaranteeing that the services provided would be free from defects or inaccuracies.” *Id.* at ¶21. This was true, the court reasoned, because although the provisions included promises to follow building codes and industry standards, they did not “guarantee, assure, or warrant a specific result.” *Id.* (emphasis added). As the court

recognized, “[t]o hold otherwise would essentially turn every basic contractual promise, duty, or obligation . . . into a warranty under which [the party] would be strictly liable, despite the ‘exercise of all reasonable or even all possible care.’” *Id.* (quoting *Groen*, 667 P.2d at 604); see also *Boud v. SDNCO, Inc.*, 2002 UT 83, ¶ 13, 54 P.3d 1131 (“[T]o be relied upon as a promise, a statement [constituting a warranty] must be highly specific or definite.”).

The distinction that was made in *SME* is likewise applicable to this case. Plaintiffs allege that the statement made by Advanced Shoring constitutes a warranty that the Plaintiffs’ house will stop sinking. However, this statement is not a “direct affirmation of fact . . . guaranteeing or assuring a specific result” as required under *SME*. Plaintiffs do not allege that Advanced Shoring made a specific representation regarding the results of its work. Even when looked at in the light most favorable to Plaintiffs, this statement at most indicates that additional funds were necessary in order for the work to be completed. In other words, Advanced Shoring was merely agreeing to provide services, not a warranty.

Furthermore, under the *SME* standard, a statement creating a warranty must be a “direct and positive affirmation of fact . . .” *SME*, 2001 UT 54 at ¶ 21 (quoting *Groen*, 667 P.2d at 606) (emphasis added). Here, Advanced Shoring’s alleged statement is insufficient as a matter of law to create a warranty, for the simple reason that it is not a positive affirmation of a fact. Taking the facts in the light most favorable to Plaintiffs, Advanced Shoring stated that, unless additional funds were provided, a warranty would not be given. A statement that, unless a condition is met, an event definitely will not

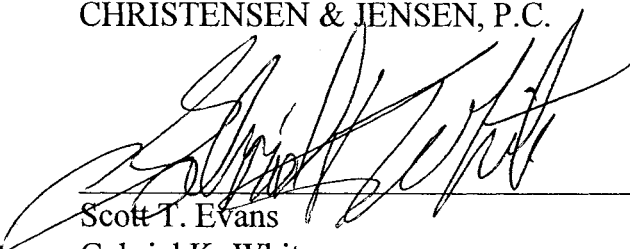
happen in the future is not equivalent to a statement that an event will happen upon the meeting of a condition. In other words, Advanced Shoring told Plaintiffs that they would have to expend additional funds if they wanted to keep alive the possibility of receiving a warranty at a later date. Plaintiffs' payment to Advanced Shoring was consideration for the promise that this possibility would remain in place, not that it would become definite. Accordingly, there is no enforceable express warranty, and summary judgment should have been granted on that issue.

CONCLUSION

For the reasons set forth above, Appellant Advanced Shoring respectfully requests the Court reverse the trial court's denial of summary judgment and remand this matter for entry of judgment in favor of Appellant.

DATED this 12th day of September, 2011.

CHRISTENSEN & JENSEN, P.C.

A large, stylized handwritten signature in black ink, likely belonging to Scott T. Evans, is written over a horizontal line.

Scott T. Evans

Gabriel K. White

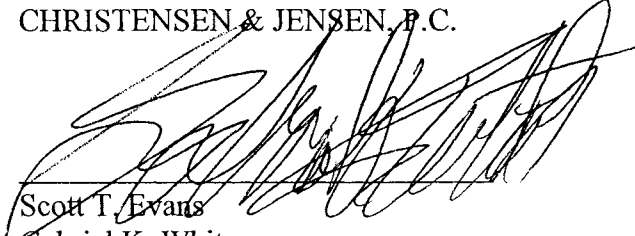
Attorneys for Appellants

CERTIFICATE OF SERVICE

This is to certify that on the 12th day of September, 2011, two true and correct copies of the foregoing BRIEF OF APPELLANT were mailed, first-class postage prepaid, to:

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ADDENDUM A

1 the contracts and given the Hones more than twice the value that
2 they originally bargained for. Plaintiffs have not met their
3 burden in this case, and we would ask the Court for a verdict of
4 no cause of action and for an award of taxable costs.

5 THE COURT: Thank you, Counsel. Ladies and gentlemen, I
6 address my comments to the courtroom in general as well as to the
7 parties because you have seen each attorney approach the bench,
8 and in time honored fashion begin their remarks with, "May it
9 please the Court." That particular phrase probably goes back
10 into the midst of time in Anglo-American jurisprudence, somewhere
11 way across the pond in jolly old England it was probably first
12 said.

13 I have to take the time and the comment at this point
14 to note that indeed Counsel, it does please the Court. I am
15 particularly on this day proud to be a lawyer, because ladies and
16 gentlemen, what you've seen here today is the use in a highly
17 civilized, highly intellectual, very careful and very precise
18 work by two well prepared, well trained and experienced lawyers
19 to bring an important matter before the Court -- important to
20 both sides -- for a sensible and reasonable resolution, and this
21 resolution will be done under law.

22 Nobody is going to have to go to the streets. Tanks
23 won't roll. Nobody is going to have to go take the hunting rifle
24 off the wall. It's done in a civilized reasonable fashion, and
25 that frankly, is the reason we all give thanks to a jurisdiction

1 much above this Court's for living in this country in this day,
2 and why I have the particular joy of practicing before very
3 capable lawyers my profession.

4 What has come before the Court is the conclusion of a
5 very sad story. Apart from the facts and the numbers and the
6 pictures and the cracks and the trips back and forth between Salt
7 Lake and La Verkin and all the depositions and the discovery and
8 all the problems that these people have undergone, there is a
9 heartache here that I have to be honest with everybody involved,
10 I cannot cure. Only time will get you over this. No award of
11 compensation or lack of award of compensation will make it any
12 better.

13 The law does not provide a particularly good solution
14 for these types of life changing experiences. All I can tell
15 you -- and this is from personal experience, because I, too, have
16 been a litigant -- it will pass, and eventually it will be over,
17 and you'll go on enjoying your lives doing the things that you
18 like to do, and this will fade. I hope for everyone that that is
19 sooner rather than later.

20 It's my responsibility as a trial judge after the
21 conclusion of a case like this to find certain facts and to make
22 conclusions of law and a judgment according to the application of
23 the law as it see it and the facts before me.

24 This case is about a contract and a warranty. The key
25 issue to this case, as is in often many, many cases can easily be

1 written on a sticky pad like the one I have in front of me, and
2 the question is was this work by Advanced Shoring warranted under
3 all the facts and circumstances in this case. Well, the Court
4 specifically finds that there was a written contract entered
5 into between Advanced Shoring and the Hones by their attorney,
6 Mr. Boyack, who was the signatory of that contract in behalf of
7 the Hones. He was given that responsibility, and he fulfilled
8 that responsibility in retaining Advanced Shoring.

9 As the contract progressed in its execution payments
10 were made, invoices were sent and then an event occurred which
11 is pivotal in the resolution of this case. That event was that
12 telephone call testified to by Mrs. Hone. Up until that time the
13 Court specifically finds that the advertisement brochure left on
14 the counter at the home was probably not sufficient to establish
15 a warranty. It was interesting in the fact that warranties at
16 least were something that Advanced Shoring discussed in their
17 course of business and maybe have some impact according to the
18 findings that the Court's going to make later on.

19 The Court was stricken powerfully by what Mrs. Hone has
20 described as the fateful call. I have been doing this -- I have
21 been in the trial courtrooms of the State of Utah for an excess
22 of 36 years now. I was particularly struck after all the
23 thousands of witnesses that I have listened to and examined
24 myself and cross examined myself of the clarity with which
25 Mrs. Hones testified. I note that clarity in comparison to the

1 failure to recall on the part of Mr. Garside. Mrs. Hone was
2 absolutely crystal clear, "I cannot guarantee this project unless
3 I receive another \$10,000."

4 I find specifically that in result of that statement,
5 Mrs. Hone contacted Mr. Boyack, her attorney. It is the only
6 rational thing that anyone in Mrs. Hone's position would have
7 done. Her contacting Mr. Boyack makes perfectly good sense, and
8 regardless of which cape he was going around, Counsel, she did
9 make that contact through his office. Apparently it started out
10 by email, but it was not completed until Mr. Boyack came back to
11 the United States.

12 Therefore, the recitation by Mr. Garside that he did
13 not recall ever making a statement like that seems to be
14 substantially outweighed by the actions and the testimony of
15 Mrs. Hone and the subsequent actions of Mr. Boyack, and the
16 payment of the check for \$8743. The Court specifically finds
17 that upon payment of that check that a warranty was bought.
18 There's no question in my mind that a warranty was purchased.

19 That is further supported by the behavior of the parties
20 after that event. Additional work that was not billed by
21 Advanced Shoring was conducted beyond the work of November of
22 2006. Advanced Shoring went back to the project in the summer of
23 2007 and began the additional work. No statements were sent for
24 that additional work.

25 It is clear to the Court that Advanced Shoring was

1 operating under the assumption that there was a warranty, and
2 that the Hones, while they may have been unreasonable expectant
3 that there would be a warranty prior to the fateful call,
4 thereafter and following the payment of the additional
5 compensation above and beyond the signed contract that Mr. Boyack
6 had executed in their behalf, there was indeed a contract that
7 included a warranty.

8 Now the Court is going to pay some specific attention to
9 the very good arguments of Mr. White with respect to the statute
10 of frauds. As Counsel know, and people in the courtroom know,
11 I've got two flat screens up here in front of me. On this side
12 is the one that's connected to the courtroom. On this side is my
13 computer flat screen. During the course of these proceedings I
14 brought up Title 25 of the Utah Code and the statute of frauds.
15 I brought up also all the appurtenant cases decided under Title
16 25 and the statute of frauds.

17 I specifically find that this warranty probably is
18 outside the statute of frauds because it could have and should
19 have been accomplished within one year of the completion of the
20 work in November of 2006. A non-statute of frauds warranty, if
21 there is a requirement of warranty to be completed within one
22 year could have and should have been concluded by November of
23 2007.

24 In addition, I note that there is some case law that
25 would indicate the extension of a warranty like this must be by

1 clear and convincing evidence, not merely a preponderance of the
2 evidence. My other findings are based upon a preponderance of
3 this -- of the evidence, but as to this warranty, again, I
4 reemphasize the experience of this trial judge, my experience in
5 the trial courtrooms of this state, and the absolute clarity and
6 overpowering weight of the testimony of Mrs. Hone regarding this
7 conversation. I am clearly convinced as to the extension of the
8 offer for warranty and the acceptance thereby through the payment
9 of the additional check. It's not a full \$10,000. It's less
10 than that. The subsequent behavior of the parties as I've noted
11 is satisfactory to me.

12 This is a case that is about contract and warranty,
13 as I've earlier indicated. It doesn't have anything to do
14 with negligence. It doesn't have anything to do with negligent
15 misrepresentation, but it is the warranty and contract itself.
16 The Court finds specifically the contract was breached. The
17 contract was breached by the failure to place the brackets on
18 the 14 uncompleted piers on the exterior of the home.

19 There was evidence regarding the alleged source of the
20 direction to leave the project. The person making that statement
21 was never brought before the Court. That statement was hearsay,
22 was received by the Court not to prove the truth of the matter
23 asserted, but to explain the behavior of Mr. Danfors. Without
24 that testimony, from the witness who would bring that in in a
25 non-hearsay fashion, that's not part of the record. It has to be

1 excluded, and so basically the departure of the defendant from
2 the project is unexplained and must be laid squarely at the feet
3 of Advanced Shoring. The Court can only find that they
4 voluntarily left the project.

5 That is underscored by the equally convincing testimony
6 of Mr. Hone about the events on the inspection in the entry way
7 of the home. Mr. Hone was very clear that Mr. Danfors basically
8 said, "Wow, I didn't realize it was this bad. I'm going to have
9 to call my insurance company. I can't afford to do this." The
10 departure from the project after that makes more sense, and is
11 the only evidence that the Court has before it on that issue.

12 Was the contract breached? Well, it was breached
13 because the brackets were not installed and the work was stopped.
14 The contract also was breached because the apparent failure of
15 the bulbs on the interior piers or the absence entirely of the
16 bulbs on the interior piers, and I find that Mr. Stanforth's
17 testimony is compelling that when he drilled out the garage floor
18 around the pier that was placed in the garage next to the broken
19 pipe that there was no evidence of any grout material forming a
20 bulb there.

21 There was no picture evidence. Mr. Stanforth's
22 testimony was absolutely clear that he removed the concrete
23 floor, he didn't remove any bulb. So that wasn't there, and
24 there's other evidence in the photographs and the record before
25 the Court that the bulbs on the rest -- at least the eight that

1 came up through the floor failed or were not there in the first
2 place. We simply don't have any evidence other than the fact
3 that there was a breach in that circumstance.

4 I'm not sure that the Davencourt case applies to this
5 one. I am persuaded by Mr. White's arguments that Davencourt is
6 in fact a new home sale to a buyer and not a repair contract. So
7 the Court's simply falling back to prior law in the State of Utah
8 in order to establish what is appropriate in terms of damage.

9 Now some comment of the Court is necessary and some
10 findings of the Court are necessary to weigh upon the issue of
11 punitive damages, which have been prayed by the plaintiffs but
12 which the Court has indicated I'm not going to award. Punitive
13 damages are supported by the seven factors that Mr. Heideman so
14 ably demonstrated in his closing argument, a general overall
15 current of outrageous and totally unreasonable conduct before the
16 award of punitive damages.

17 The Court is most impressed by the punitives damages
18 case that frankly is now the law in the United States because it
19 was a Utah case that the United States Supreme Court ruled upon
20 where a State Farm insurance company was found to be behaving in
21 an outrageous fashion in their behavior and failure to settle
22 litigation, and while the Utah Supreme Court initially and a Utah
23 jury initially assessed punitive damages of \$144 million against
24 that company, the US Supreme Court cut it back substantially to
25 no more than 10 times the actual damage award, and the Utah

1 Supreme Court came back and said, "Okay, only 10 times, but
2 here's the limit. We're taking it right up the limit." The
3 final judgment of the Utah Supreme Court was to go to that limit.

4 When I compare the behavior of State Farm Insurance in
5 that case and the behavior of others who have received an award
6 of punitive damages brought against them with Mr. Danfors'
7 behavior, there is a world of difference between them.

8 As you have heard this Court's comments and as you don't
9 probably know as clearly as I'm going to place it on the record
10 now, I find Mr. Danfors' circumstances in this situation
11 incredibly difficult. He had a terrible problem that he was
12 facing. I'm not sure that he was ever told about the broken
13 water pipe, but even if he had been told, I'm not sure by then he
14 could have done anything about it, and that's just mere
15 speculation on my part because we don't have any evidence on it.

16 Everything I've seen Mr. Danfors do in this project by
17 coming back down, by responding reasonably to the letters in
18 Exhibits 3 through 7, in that correspondence back and forth,
19 everything that I have seen him do, while it supports my finding
20 of the warranty, it's a man making a good faith effort to do what
21 he can until he ran right up into something that he couldn't do
22 anymore, and apparently didn't get any insurance help after it,
23 and had to abandon the project. That will have an unfortunate
24 consequence for Mr. Danfors, but that does not rise to the level
25 of punitive damages, and I simply cannot find punitive damages

1 here, even though they were so ably and artfully argued by
2 Counsel for the plaintiff. I just don't find that behavior
3 (inaudible) preponderance of the evidence.

4 But I must calculate damages. I have a hard figure of
5 the value of the home in 2006 -- December of 2006 before the
6 problems came back again of \$320,000. I also know from the
7 testimony of Mrs. Hone that the Hones had borrowed 160,000 of
8 that value when they bought the home. They hadn't bought the
9 home that long in advance, only a couple of years before. So
10 their actual equity in the property was \$160,000.

11 Because we don't have the mortgage company here as a
12 party to the litigation, I'm going to have to reduce the value of
13 320 by the 160 -- cut that in half because that's the actual
14 worth of the home to the Hones. Counsel?

15 MR. HEIDEMAN: Your Honor, the only reason I'm standing
16 is because in the rebuttal or reply I was going to argue two
17 specific facts that I think the Court has testimony on just --
18 and I'll just call it to the Court's attention. There was
19 testimony that the payments on the mortgage were \$1800 per month,
20 and that those mortgage payments were made every single month.

21 THE COURT: I also had Mrs. Hone's testimony that she
22 put \$120,000 into the house.

23 MR. HEIDEMAN: Correct.

24 THE COURT: What I don't have, Counsel, is sufficient
25 evidence in the record to tell me how much of that was principal,

1 how much of that was interest, what the term of the mortgage was,
2 any of the math that I need to do. As a consequence, I'm just
3 going to have to leave it where it is.

4 MR. HEIDEMAN: Okay.

5 THE COURT: So \$160,000. Now to that I must add the
6 damage suffered by the Hones after the failure of the first
7 repair attempt. Counsel, your spreadsheet is extremely useful,
8 and I go directly to 89-A in the exhibits. Prior to 89-A the
9 entry on the second to the last page that is made on March the
10 30th of 2007, prior to that the Court finds that those damages
11 total up to that point are not recoverable.

12 The reason I say they are not recoverable is because of
13 the fact that there's nothing in the contract or the warranty
14 that would allow this Court to reasonably infer or find directly
15 that Advanced Shoring took upon themselves the obligation to put
16 the home back into the shape that it was in when they first came
17 on the property, absent the damage. So the 43,178.28 total
18 cannot be had up to November of 2006.

19 On the contrary, however, after that the line item
20 expenses shown on the spreadsheet after November are recoverable.
21 Counsel, I haven't done the math up here on the bench. You can
22 do that. You can highlight your exhibit. I'm not going to
23 highlight this one; it's the Court's record, but I've made enough
24 reference to it.

25 Then I have the other problem because the Hones fixed

1 the inside of this house twice. In order to put it back to the
2 inside of the house twice, Mrs. Hone has indicated that she had
3 the lost shoe box that showed those records, and in her best
4 estimation -- and again, she's a very persuasive witness -- she
5 had between 40 and \$50,000 of additional expenses. That's
6 persuasive to the Court.

7 When I look at the care and attention that she placed in
8 the preparation of Exhibit 89-A, I'm firmly convinced that the
9 second attempt at repairing the home came up to 43,178.28. So
10 Counsel, what you have is \$160,000 plus 43,178.28 plus the total
11 of the spreadsheet beginning line item entry second to the last
12 page, 3/30/2007.

13 Now prejudgment interest applies at the rate of 10
14 percent per annum. Counsel, prejudgment interest applies 10
15 percent per annum, and the Court's very comfortable with this
16 date, September 1st, 2007 to date of judgment. So total those
17 costs, 10 percent plus costs -- taxable costs under the law. Any
18 questions?

19 MR. HEIDEMAN: The only other question, your Honor, is
20 with regard -- we had made an argument that while they were out
21 of the home that they should be entitled to recover the rentals
22 that they had, that they were paying the mortgage and rent at the
23 same time. The testimony was --

24 THE COURT: Have that in --

25 MR. HEIDEMAN: The testimony was that it was \$1300 a

1 month, and the testimony from Mrs. Hone was that it was from
2 December of -- I wrote this down, just one moment. December of
3 '05 through December of '06, which --

4 THE COURT: That one I can't give her for, Counsel,
5 because that was prior to the contract.

6 MR. HEIDEMAN: I understand. Thank you.

7 THE COURT: All right. Nobody will walk out of here
8 happy, but the Court's done the best that I can. Thank you for
9 your good work, Counsel. The Court's adjourned.

10 MR. HEIDEMAN: Thank you, your Honor.

11 (Trial concluded)

ADDENDUM B

FILED

2010 MAY 11 AM 11:51

FIFTH DISTRICT COURT
WASHINGTON COUNTY

IN THE FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

BY

98

MICHAEL and LANA HONE,

Plaintiffs,

vs.

ADVANCED SHORING &
UNDERPINNING, INC., et al.,

Defendants.

ORDER DENYING MOTION FOR
SUMMARY JUDGMENT

Case No. 080501595

Judge James L. Shumate

Before the Court is Defendant Advanced Shoring & Underpinning Inc.'s Motion for Partial Summary Judgment. The Court heard oral argument on the motion on April 13, 2010. Having considered the motion, the memoranda, and the arguments of counsel, the Court denies the motion.

Summary judgment should be granted only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). As the Court finds that certain areas of material fact, particularly those relating to the alleged "warranty," remain in dispute, summary judgment is not appropriate at this juncture.

The motion is therefore DENIED.

DATED this 11 day of May, 2010.


JUDGE JAMES L. SHUMATE
FIFTH DISTRICT COURT

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 11 day of May, 2010, I provided a true and correct copy of the foregoing ORDER to each of the parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

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P Jordan
DEPUTY COURT CLERK

ADDENDUM C

1 A. Yeah.

2 Q. How long did it take you to move the stuff out of the
3 garage that was wet?

4 A. Well, I remember we moved a lot of it out on the carport
5 and into one other area of the garage, and they were sweeping the
6 water out, and it would --

7 Q. Now when you say we, who was helping you move the stuff
8 out?

9 A. The workers of Advanced Shoring.

10 Q. Okay. Did Mike help you move stuff out?

11 A. I can't remember if he did or not. I think -- he came
12 later. It was after work, because I made --

13 Q. He was at work?

14 A. I made a phone call to him, and I was not happy.

15 MR. HEIDEMAN: No further questions, your Honor.

16 THE COURT: Anything, Mr. White? Thank you, Ms. Hone.
17 You may step down.

18 MR. HEIDEMAN: Your Honor, the plaintiffs rest.

19 THE COURT: All right. Plaintiffs having rested,
20 Mr. White?

21 MR. WHITE: Your Honor, we would like to make a motion
22 for a directed verdict. If I may, your Honor, plaintiff's claims
23 arise in contract. That requires that plaintiffs prove the
24 existence of contractual obligations, breach of that contractual
25 obligation, that that breach causes damages.

1 Now plaintiffs have failed to prove specifically two --
2 well, really three of these allegations. First, they failed to
3 prove the existence of a contractual obligation that is breached,
4 okay. The testimony we've had so far has been that Advanced
5 Shoring promised to install certain piers on the property,
6 promised to put certain labor and materials into the property,
7 and the testimony has been that they did that, that they in fact
8 installed these piers. However, perhaps the most glaring
9 deficiency in plaintiff's case is the lack of any expert
10 testimony whatsoever as to the appropriateness of the work
11 performed by Advanced Shoring on the property.

12 Advanced Shoring was engaged in geotechnical analysis
13 and piling and underpinning work, which is extremely technical,
14 and is very complicated. I believe plaintiff's Counsel
15 recognized this when they asked Per, the only witness with any
16 technical training or expertise, as to whether or not even if all
17 the piers had been installed correctly, if the house could still
18 continue to sink. Mr. Danfors said that it could. So plaintiffs
19 lack fundamentally the required evidence to meet the threshold to
20 bear their burden of proof as to breach of the contract.

21 Even if we accept that there is some implied promise in
22 this list of work that was going to be done on the property, that
23 this together would cause the house to stop sinking, which I
24 don't know that we can do that. But even if we did, we can't
25 prove that Advanced Shoring actually breached the contract

1 because we can't prove that Advanced Shoring -- they can't prove
2 that Advanced Shoring actually did something improperly that
3 caused damages.

4 In fact, all of the evidence thus far has been that
5 Advanced Shoring installed the piers, that Advanced Shoring put
6 everything in place as per the contract, and that the house
7 continues to sink, and so far that's it. In order to meet their
8 burden of proof, plaintiffs have to prove breach and causation.
9 They have to prove that in fact Advanced Shoring did something
10 that breached the contractual obligations.

11 So we've been through the text of the contract and we
12 don't see anything there. So we have to prove that they breached
13 an implied contractual obligation. Now the Utah Supreme Court
14 very clearly has only recognized in a warranty of workmanlike
15 construction otherwise known as a warranty of habitability as
16 recently as -- I believe it was last fall in the Davencourt case.

17 In that case the Court went through and specifically
18 disclaimed recognizing some of the generalized duties, like a
19 duty to comply with building codes, a duty to, you know, perform
20 construction in a non-negligent manner, and instead settled on
21 duty of an implied covenant of a duty of habitability. However,
22 this duty doesn't apply either in this case because we're not
23 dealing with new residential construction. In fact, we're
24 dealing with a repair. The Supreme Court was very clear that the
25 warranty does not apply to repair situations.

1 So we have the contractual obligations. We can't really
2 say, you know, that there is any implied warranties that are
3 recognized in the law that apply here. We can't say exactly
4 where Advanced Shoring breached the contract because they
5 installed the piers. I mean they did everything that they said
6 they were going to do, and the only witness who's been allowed
7 to testify who has any expertise in this area has said that
8 everything was done properly. Plaintiffs also elicited similar
9 testimony from Mr. Bemis that he did everything that he
10 understood with his -- you know, his limited training that he
11 was supposed to do.

12 So plaintiffs have failed to meet their burden to prove
13 causation with expert testimony in a case that very clearly
14 involves analysis of soils, the insertion of large pieces of
15 equipment deep into the earth, analysis of the bearing capacity
16 of materials and metals, soils and engineering of piercing
17 systems. Plaintiffs have to meet their burden in order to
18 require defendants to put on our case.

19 Now there is -- there hasn't been shown the existence of
20 a contractual obligation that would apply or breach or causation,
21 but furthermore, we have a big problem with regard to damages
22 because plaintiffs admit that they no longer own the house that's
23 at issue. So we're talking about property damage to a house that
24 is owned by somebody else at this point.

25 So we believe that as a matter of law based on the

1 evidence that's been educed thus far, the Court can't find --
2 cannot find that plaintiffs have any damages in the loss of value
3 or a typical property damage type claims because the plaintiffs
4 lost the house.

5 Now in response plaintiffs have indicated that they --
6 that the bankruptcy was caused by Advanced Shoring, but there's
7 simply no -- that they lost the house as a result of conduct by
8 Advanced Shoring, but there's simply no evidence of that, other
9 than plaintiff's blanket statement that's that what caused it.

10 In fact, Advanced Shoring did their work. You know,
11 the testimony as to whether or not Advanced Shoring was asked
12 to leave or asked to finish their work is conflicting, but
13 regardless, even if we accept plaintiff's version of events that
14 they were told by Alan Boyack that Advanced Shoring wanted to
15 continue to do their work and plaintiffs testified -- Mr. Hone
16 testified that he knew that in order for that work to be done
17 inside the house they would have to vacate, for them to tell
18 Mr. Boyack that they were unwilling to vacate is tantamount to
19 saying you can't do this work, because it's impossible to do it
20 (inaudible) vacating.

21 So Advanced Shoring leaves the property. Is ordered
22 off, leaves, either way we look at it. Then a year passes, two
23 years pass, two-and-a-half years pass and plaintiffs decide --
24 they don't take any -- they don't make any estimate for what it
25 would cost to repair the property. They don't hire anyone else

1 to repair the property. They don't have anybody come out and
2 look at it to see what could be done. Then they make a conscious
3 decision at about the same time that Mr. Hone -- or Mr. Hone
4 suffered an injury -- suffered a medical problem that allowed him
5 to -- that caused him to stop working. They made a decision to
6 stop making the mortgage payments and to let the house go into
7 foreclosure. Then they filed the bankruptcy, according to their
8 own testimony, in order to avoid a deficiency judgment.

9 This -- there's no causal link between what happens
10 years after my clients leave the property and what happens -- and
11 what happened back when the shoring was performed. So there's
12 insufficient evidence to show that Advanced Shoring caused
13 plaintiff's bankruptcy.

14 When we take plaintiff's bankruptcy into account,
15 plaintiffs have no loss of value damages, and they haven't met
16 their burden to show loss value damages. Now your Honor
17 indicated in a previous hearing that perhaps another theory would
18 be rescission. Unfortunately that theory also is unavailable
19 because rescission requires that the parties be capable of being
20 put back in the status quo. At this point plaintiff's money was
21 given to Advanced Shoring, and Advanced Shoring put it right back
22 into the house. That money is not sitting in an account
23 somewhere. It was used to buy labor and materials to work on the
24 house. Now that the house is gone it's impossible to put the
25 parties back to the status quo.

1 So we would move the Court for a directed verdict at
2 this stage because plaintiffs have not met their burden required
3 by their causes of action as stated in their complaint, and we
4 would ask the Court to find no cause of action.

5 THE COURT: Counsel, the practice of the appellate
6 courts to require appellate Counsel to marshal evidence has
7 received much criticism from the bar, especially those who have
8 to do the marshaling, but concept find somewhat useful,
9 especially on a motion for a directed verdict, because there's
10 an area of the evidence that I'd like you to address that
11 Mr. Stanton just testified to.

12 The contract, as I understand it -- and this is
13 basically from Mr. Danfors' testimony, was that the piers that
14 would be installed in the interior of the home -- the ones that
15 are not affixed by brackets to the footings of the house on the
16 outside, that those would support the slab to which they were
17 adhering through the core, they would support the slab with a
18 bulb on top.

19 Mr. Stanton has just testified that when he excavated
20 with a jackhammer the garage floor that all he saw was the
21 column. Some people would say that that's breach. How do you
22 want to address that evidence that I have before me now, as it
23 implies your lack of the essential issue in any contract case,
24 and that's breach.

25 MR. WHITE: Well, I agree, your Honor, let's address

1 that. First of all, Mr. Stanton -- and I don't want to rehash
2 too much old ground, but is one of the witnesses that was
3 identified more than a year after the close of fact discovery,
4 and so this is the first we've heard of his testimony today.
5 However, Mr. Stanton testified that he went into this hole with a
6 jackhammer. It's very likely -- very possible -- in fact, I
7 imagine likely, and we'll hear some testimony later today if your
8 Honor decides not to grant the motion that he in fact removed the
9 bulb by jackhammering down through the soil.

10 However, we won't ever know for sure because no
11 photographs were taken, no record was made other than his
12 testimony. We weren't notified that inspection was going to be
13 made and that we weren't given an opportunity to inspect that
14 evidence, and thus that evidence has been completely spoliated.

15 THE COURT: Let's look at the other --

16 MR. WHITE: However --

17 THE COURT: -- situation, and that's Exhibit No. 84 and
18 the testimony of Mrs. Hone about the piers -- I'll just use the
19 non-technical term -- popping through the floor on the interior
20 of the home.

21 Mr. Bemis has opined that it's possible that the
22 grouting could have left a void underneath the slab so that as
23 the rest of the house settled the grout in the coring could have
24 been pushed up as the slab -- or would appear to be pushed up.
25 Actually, the slab is moving down and leaving the core in

1 place -- the pier in place. But he's opined that it might be
2 from a void formed as that particular pier was grouted.

3 It is logically difficult for the Court to make that
4 stretch that you could get the grout to fill the slab -- the
5 coring in the slab but not because it's liquid -- it's not water.
6 It certainly isn't chocolate pudding, but it might flow a little
7 bit more like chocolate pudding, but I don't know.

8 MR. WHITE: That's my understanding.

9 THE COURT: Well --

10 MR. WHITE: It's roughly, but --

11 THE COURT: My father-in-law always said you had to make
12 it like soft butter, but that's what grout does. My logic that
13 would follow with it is that it's very difficult to imagine that
14 you could top off that core in the slab without having a bulb
15 formed directly underneath the slab.

16 At this juncture on your motion for a directed verdict,
17 don't I have to draw inferences in favor of the plaintiff's
18 position?

19 MR. WHITE: I believe that your Honor does have to.
20 However, with regard to this particular issue, your Honor has
21 just said a couple of things that I think are important to focus
22 on. First of all, your Honor said it's difficult to imagine that
23 it wouldn't fill up the void.

24 Additionally, your Honor -- I mean what we're talking
25 about is on breach, it has to be a material breach, okay.

1 If there are a few of these where they had slight puddling on
2 the inside, even if we accept that, which it sounded to me like
3 talk -- like listening to Mr. Bemis and on redirect that in fact
4 he's just speculating, because he also said it's possible that
5 these piers come up through the floor. The important thing to
6 remember is that Mr. Bemis is not an engineer. He's not been
7 qualified to provide expert testimony in this case, and he has
8 not been qualified by his experience to determine what causes
9 piers to come up through the floor. He's qualified to install
10 piers.

11 THE COURT: Not to worry about why they fail.

12 MR. WHITE: Not to worry about why they fail, not to
13 analyze the bearing capacity, not to do that. He's -- all Earl's
14 testimony was, "Hey, this is how I install the pier. This is
15 what I did."

16 THE COURT: Okay.

17 MR. WHITE: Okay. Now the plaintiff's fundamental
18 problem here is this lack of expert testimony on the issue of
19 breach and causation. Plaintiffs cannot prove what's going on
20 underneath this house. They can't prove -- they can't tell the
21 Court why the house is still settling with that required expert
22 testimony. They can't meet that threshold, and that is the crux
23 of the problem.

24 Even if we don't draw every inference in favor of
25 plaintiffs based on the evidence that's been presented thus far,

1 there is no expert testimony proving that my client breached.
2 There's no witness that said to a reasonable degree of
3 engineering certainty or to a reasonable degree of geotechnical
4 certainty this -- I could say that this work was performed
5 deficiently and that but for this deficient performance, damages
6 would not have been caused. So we just don't have -- plaintiffs
7 don't have the expert testimony that they in fact need.

8 They can't -- I mean they have no idea why the property
9 is sinking. Mrs. Hone testified that she still to this day has
10 no idea why that property sunk. That is a question that has to
11 be answered before a verdict could be entered by plaintiffs. It
12 has to be this is why the property sunk.

13 There are two options. This is why the property sunk,
14 or had you done everything correctly, the property wouldn't sink,
15 therefore it is -- and it is sinking; therefore, you didn't do
16 everything correctly. Those are the two possible syllogisms that
17 plaintiffs have to prove, and they need expert testimony to
18 provide them, because when they asked Mr. Danfors, he said,
19 "Well, yeah," and it makes empirical sense because all these
20 piers are doing is going down and securing to hard layers of
21 earth and rock. There are things underneath the hard layers of
22 earth and rock, and there are things that change.

23 Plaintiffs themselves have provided testimony that the
24 house at some times one part was sinking, at some times another
25 part was sinking, and just no idea why. Without that expert

1 testimony I think we're entitled to a directed verdict.

2 THE COURT: Thank you, Counsel, for your careful
3 analysis. Mr. Heideman, let me give you a chance to respond.
4 Or Mr. Larsen, whoever wants to jump up.

5 MR. HEIDEMAN: Well, even though I realize that most
6 people like him better -- he's better looking -- I'll take the
7 opportunity. Your Honor, the response is really simple. For a
8 directed verdict to be granted, this Court would have to find
9 that a prima facie case has not been made, and frankly, we can
10 do -- I can refute that with just one witness.

11 At the point in time that Derek Imlay indicates that
12 there's a violation of law, according to the controlling case
13 law in the State of Utah, that is per se a prima facie case
14 sufficient to survive a motion for directed verdict, at a bare
15 minimum.

16 THE COURT: Counsel, none of the contractual parties
17 ever mentioned as a term of the contract that a building permit
18 would be obtained.

19 MR. HEIDEMAN: Uh-huh.

20 THE COURT: That was not a part of the contract. Now I
21 can see that the contract without a building permit, according to
22 Mr. Imlay -- and he certainly wouldn't use the Latin -- but it
23 would be malum in se, but as to breach, you're fairly certain and
24 you can rest on breach simply because there was not a permit?

25 MR. HEIDEMAN: I could -- for purposes of directed

1 verdict, I certainly can, but of course the Court needs to
2 recognize that we have pled this case in multiple causes of
3 action -- contract, misrepresentation, negligence, and frankly,
4 based on the evidence, I think it almost becomes a res ipsa
5 issue. That's one of the things we're going to focus on with
6 regard to our closing argument to the Court.

7 We're going to evaluate the law and identify how the
8 evidence fits that, and particularly under Rule 14 -- or 15, I
9 think the Court has a very simple method of bringing that claim
10 in based on the other claims that are already there.

11 That having been said, again, we have a prima facie
12 case based on that alone, whether you apply it to the negligence
13 cause of action or the contract cause of action. You cannot
14 contract for an illegal thing. Although you do not have an
15 element of the contract that says we will get a building permit,
16 just as I cannot contract to commit murder because it is illegal,
17 it is implied within the contract that the contract will be
18 performed in a workmanlike and more specifically a legal manner,
19 which requires the duties and obligations associated with a
20 general contractor to be complied with.

21 Furthermore, your Honor -- and this is where I think the
22 analysis really comes down. The Yaz case makes this case a prima
23 facie case for multiple reasons, but the one that I'll focus on
24 at this time so that I don't give my entire closing argument is
25 that of duty.

1 Yaz and Moore v. Smith, and frankly -- although it's
2 not a controlling opinion because it's not an appellate opinion,
3 but the decision rendered by Judge Ludlow in the case of Moser v.
4 Cottam, which follows that, and then the Davencourt opinion that
5 follows that is an appellate opinion, all of those cases identify
6 one very specific thing, that the requisite levels of knowledge
7 held by the parties is what this Court analyzes in determining
8 the duties that are outlined, and where there is a disparate
9 level of knowledge, where there is a large distance in the
10 contractual abilities to understand what's going on in the
11 process, the Court protects the parties by inferring -- actually,
12 by requiring that there be a duty and obligation met by the
13 contractor.

14 It's -- frankly, it's not that much different from a
15 malpractice action from a doctor or a lawyer. When you have that
16 level of particular specialized knowledge, you are in fact deemed
17 to have that obligation to appropriately disclose what is
18 relevant and to do your work in an appropriate manner.

19 Because the duty exists, because it was not performed,
20 and because there was a violation of law, again, I need -- I
21 don't need to spend a lot of time, although I certainly can,
22 going through each and every element. The directed verdict
23 simply cannot at this point in time -- particularly where this
24 Court is required to grant all reasonable inferences in favor of
25 the non-moving party, it just simply can't be granted.

1 I would point out one thing, though, that I think the
2 Court will want to take a look at before we get to closing
3 arguments, so I'll give the Court a case cite. The case is
4 Price-Orem vs. Rollins, and it's 784 P.2d 475. It's a 1989 Utah
5 Court of Appeals opinion, and it is going to be enormously
6 important in this case, which is why I bring it up at this stage.

7 Counsel's argument regarding the bankruptcy means less
8 than nothing. That bankruptcy in and of itself is not going to
9 be something that this Court even can consider, and the reason
10 for that is because anything that happens after the point in
11 time that damage occurs with regard to damage calculations is
12 irrelevant. The damage is what it is at the time of injury, and
13 subsequent actions just like subsequent remedial measures just
14 simply don't cut it.

15 That case is very, very clear, and that's why I give the
16 Court that citation, because I hope the Court will review it
17 before we get to closing arguments; I'll be discussing it in
18 detail.

19 THE COURT: Did you bring a copy, Counsel?

20 MR. HEIDEMAN: Your Honor, we actually pulled a copy and
21 we were trying to grab it, and we didn't, but we will have one
22 for you after lunch.

23 THE COURT: If you could find me one, that would be
24 useful because I sometimes have to multitask up here, and keeping
25 it up on the screen means that I can't do other things, so a

1 paper copy would help.

2 MR. HEIDEMAN: I will absolutely make sure that you have
3 a copy after lunch, your Honor. The other comment or element
4 that I think -- or conversation that needs to be had is this.
5 Not only do we survive a motion for directed verdict on every one
6 of our theories, but more specifically I notice that the argument
7 is not made with regard to warranty.

8 Your Honor, we have a conflicting element of evidence.
9 We have a party whom I think the Court is going to agree with me
10 is incredibly succinct and specific and will find to be a very
11 persuasive and credible witness in Mrs. Hone, who with grave
12 detail identified the fateful phone call wherein the warranty --
13 if it didn't exist to begin with -- was certainly confirmed. Was
14 there an offer? She testifies yes. Was there acceptance? The
15 check proves it. That was what it was for.

16 Now we have conflicting testimony on the other side, but
17 that's conflicting testimony. The fact that it's conflicting in
18 and of itself kills the directed verdict. This Court is going to
19 have to weigh that evidence and make a determination.

20 As a result, if the warranty is found to exist, and the
21 fact that there was no repair effected, the only thing that could
22 possibly help the Counsel or the defendant at this point in time
23 again is a conflicting evidence statement, and that is whether or
24 not the Hones somehow precluded the performance of the warranty.
25 It's going to be very, very difficult for that -- for the Court

1 to be able to find that such preclusion ever existed in light of
2 the fact that there is absolutely no direct testimony offered
3 whatsoever from anyone saying they spoke to Mrs. Hone or Mr. Hone
4 telling them that you couldn't come back to this property.

5 It would seem to me that if Counsel is going to indicate
6 that expert testimony is necessary to make some of these
7 conclusions, that it would be readily identifiable that if in
8 fact the secretary is the person who received this supposed
9 instruction, that she would be the one testifying, but she's not
10 here. Any testimony that might be given as to what she said
11 would be inadmissible hearsay.

12 So all we have is Per Danfors' comment that, "No, I
13 heard it from my secretary." He can't tell us exactly what she
14 said. He can't tell us exactly what he heard, but we certainly
15 know this. The Hones with again specificity and directness have
16 indicated to this Court that no such instruction was ever issued.

17 Frankly, but for the way the rule reads, I would move
18 the Court for a directed verdict in favor of the plaintiff,
19 because no evidence exists or can exist that would go to the
20 contrary of that element in and of itself, and hence the Court
21 will be bound to find that a warranty at a bare minimum exists.
22 Then it really is only all about damages, which of course is what
23 our closing arguments are for.

24 That of course not being a procedural option, and I
25 certainly understand why, it's not something that this Court is

1 likely to grant. However, it certainly survives a motion for
2 directed verdict. If the Court has questions, I would love to
3 answer them, but I have no desire to answer questions that the
4 Court's not asking.

5 THE COURT: Counsel, walk through your res ipsa
6 analysis --

7 MR. HEIDEMAN: Sure.

8 THE COURT: -- because there is no testimony before the
9 Court establishing a reasonable standard of care to support your
10 negligence claim other than what might be inferred from if it's
11 going to hold it up it ought to have something to connect it to
12 hold it up, i.e., a bulb. Walk through it how we get a res ipsa
13 argument without testimony on the standard of care.

14 MR. HEIDEMAN: Your Honor, I'm happy to do that. I hope
15 the Court will understand that I will fully develop this with the
16 case law to support it as part of my closing, but I mention it
17 here because I want the Court to be aware of it, and I want
18 Counsel to make sure he understands.

19 One of the key elements of res ipsa -- and I'll go
20 through each one of them in turn. One of the key elements is
21 that the issue -- the problem be in the sole control of the
22 defendant. In this particular instance there is no argument
23 about that. My clients didn't even live at the house during much
24 of the major repairs, and during the repairs that they did live
25 at the house, they didn't do anything. They certainly didn't

1 have any technical expertise. I honest to goodness can tell that
2 this Court would believe me if I said that Lana Hone has never
3 operated an air ram. She has never screwed a helical pier into
4 the ground, and she is not likely to do so.

5 I also believe that the Court recognizes that
6 particularly given the medical conditions that were suffered by
7 Michael Hone, he also did not, and there's not even been an
8 allegation as to such. As a result, it's obvious that the
9 repairs associated with the property are solely and specifically
10 within the control of ASU.

11 The testimony of Mr. -- Earl -- and I'm forgetting.
12 It's not Mr. Earl, it's --

13 THE COURT: Bemis.

14 MR. HEIDEMAN: Thank you, Mr. Bemis. The testimony of
15 Mr. Bemis is incredibly persuasive in this regard, because what I
16 asked Mr. Bemis is, "All the jobs you've ever done -- all of
17 them -- have you ever seen a pier come back up through the
18 floor?" "No, I haven't." Mr. Stanton comes out. "When you went
19 and dug down through the cement, did you see a bulb?" "No. In
20 fact, it appeared as though it had been washed clear around that
21 area." Well, the installation of those bulbs as required to make
22 the piers functional can only be in the control of ASU. The
23 thing speaks for itself in that regard.

24 The Court asked a question, and I would offer this very
25 simple explanation. I don't have any problem whatsoever

1 believing that it would be very simple to create a gap because
2 anytime you fill up a hole rapidly with a slurry type material,
3 if it happens to go in fast enough, it will actually create an
4 air bubble. That's why when you pour cement you stick it with
5 your pole to make sure that you get all of the air out of it so
6 there's not pockets of air formed therein.

7 It's quite probable in light of what we've heard that
8 just didn't -- simply didn't happen if -- and this is the other
9 real specific statement, if there was even a shallow area dug out
10 to fill the bulb with. Again, specifically within the control of
11 ASU.

12 Because it's within the control of ASU, because it
13 failed, and because ASU's own testimony is they've never seen
14 that happen, and the guy that's in charge of doing this is the
15 guy that poured the slabs, and because he acknowledges that it
16 looks to be that there was a -- there's a failure. If that's a
17 pier, that's a failure. In and of itself, that indicates that
18 there was a breach in the duty because the standard of care,
19 i.e., that the pier never ever comes up through the floor if it's
20 done right, was breached.

21 Furthermore, when you have Mr. Stanton's very direct
22 testimony that there's no bulb here, and the standard of care has
23 been established that the bulb is required to bear the weight,
24 that's a breach. I think it's quite clear that res ipsa is going
25 to establish this, and particularly as I go through a very

1 detailed analysis, vis-a-vis Utah case law during closing
2 argument.

3 The other thing I wish to point out, your Honor, before
4 I sit down, and I think that this goes to the warranty issue, and
5 I almost forgot it, but just to make sure that we clear these
6 hurdles directly, is the testimony of Mr. Garside. Mr. Garside
7 just said something very, very interesting to me.

8 I asked Mr. Garside -- and I was -- I went through this
9 multiple times to make sure that there was no misunderstanding
10 whatsoever. I said, "Did ASU in your experience ever do work for
11 free?" "No." "If they went out and did work, did they send a
12 bill?" "Yes." "If there was a warranty situation where they did
13 work, did they send a bill?" "No." In this particular instance
14 the evidence is quite clear that a ton of work was done -- 40 to
15 50 to \$60,000 worth of work as done, and more work was
16 anticipated, the likes of which Ms. Hone indicates are basically
17 the equivalent of starting over. We projected that with
18 Mr. Danfors on the stand at around \$150,000 for which roughly
19 58 had been paid.

20 I asked Mr. Garside, "Is that -- would that be
21 consistent with a warranty situation," and his answer was yes.
22 Now your Honor, this Court made a comment that I have enjoyed
23 many times repeating to other associates, but I will quote it
24 back to the Court. I can make some remarkable inferences from
25 that statement. In this particular instance, I hope the Court

1 can as well.

2 The testimony it has received, in particular from Lana
3 Hone, in particular from Dave Christensen, in particular from
4 Larry Stanton, in particular from the city official, Mr. Imlay,
5 this is not a hard case, and I look forward to closing.

6 THE COURT: Thank you, Counsel. Moving party,
7 Mr. White, so you get the last say.

8 MR. WHITE: Yes, your Honor. I hope to be brief. The
9 first problem that plaintiffs will have for the res ipsa claim is
10 that they don't have a negligence claim. They have a negligent
11 misrepresentation claim. However, they fail to identify any
12 information or any alleged misrepresentations that my clients
13 made which were negligently made, so they don't have a straight
14 negligence claim, and so they can't make a res ipsa argument,
15 first of all.

16 Second of all, res ipsa only applies where the
17 instrumentalities that cause the loss are within the exclusive
18 control of the defendant.

19 THE COURT: Now I don't want to put words in your mouth,
20 Counsel, but what you're telling me is Advanced Shoring had no
21 control over what the material was underneath this house, what
22 the fill was, what was put there, what the subsurface below even
23 the fill may have been. The only thing they had was whatever the
24 single core drilling, apparently, that AGECE gave them.

25 MR. WHITE: Well, there's not even direct evidence that

1 that's how many cores there were on the report. But even if
2 there were, I mean opposing Counsel -- so this is one of the
3 major reasons why res ipsa doesn't apply. I mean we see res ipsa
4 cases, we see flower pots falling off a window ledge.

5 THE COURT: Well, Counsel, you find patients on the
6 floor of the operating room.

7 MR. WHITE: Yeah, exactly.

8 THE COURT: That's my favorite one. People on gurneys
9 don't fall on the floor unless somebody messed up.

10 MR. WHITE: Exactly. Exactly. It's within the sole
11 control of the hospital, and the people -- the doctors and the
12 nurses that are there. There's nobody else. There's no other
13 factors, nothing else that could have happened. Okay. In this
14 case there are literally miles and miles and miles and miles and
15 miles of earth underneath this house that could be affecting why
16 it's sinking, and Advanced Shoring has control over none of that.

17 Now opposing Counsel also made an interesting point when
18 he referenced the Yaz case and said that in construction it's
19 almost beginning like being a doctor or a lawyer, which is
20 particularly interesting because if we are dealing with a case of
21 breach of contract or breach of duty with a doctor or a lawyer,
22 the law is very clear that we must have expert testimony to prove
23 breach, which we don't have here.

24 We do not have -- plaintiffs don't have expert testimony
25 that says that Advanced Shoring should have done X and they

1 didn't. Why? Or that if everything was done properly, the
2 house would never sink, and the house is sinking; therefore,
3 Advanced Shoring did something wrong. I mean if this were a case
4 involving a doctor or a lawyer, there would be no question, okay,
5 because expert testimony is required to prove that standard of
6 care.

7 Now we're using the term standard of care somewhat
8 loosely here because again, this is a breach of contract case, a
9 breach of a warranty case. However, even though standard of care
10 perhaps isn't the proper term, plaintiffs still have to prove
11 that we did something wrong which caused the house to sink which
12 caused plaintiff's damages, and they can't do that in this case
13 without an expert, and they have none, and they've disclaimed
14 having one. They haven't been able to point to anything glaring
15 that Advanced Shoring has done.

16 We've got a pier that popped up, looks like almost like
17 a quarter of an inch out of the floor. We've got -- I mean we've
18 got little tiny minor things that we have no idea what they mean.
19 Maybe the popping up of the pier is because there's no bulb.
20 Maybe the bulb sheared off. Maybe when Mr. Stanton drilled in
21 there he -- you know, there was no bulb on that particular pier.
22 Maybe he knocked it off. Maybe there was one pier that there was
23 no bulb on that was missed, but even is that a material breach
24 out of 60 some-odd piers, is it reasonable to suppose that one
25 pier that they have evidence -- they have any evidence, albeit

1 disputed, that there was no bulb on this pier, that it's one pier
2 out of 60 or 70.

3 Mr. Danfors' testified that yeah, if you've got one pier
4 or even a few piers that are trying to hold up this whole house,
5 and they're the only ones that are staying where they're supposed
6 to, they're going to fail. It's going to shear off because you
7 don't -- because they're not designed to hold the entire house.

8 So we always -- at the end of the day we all come back
9 to the fact that they have no expert testimony, and they need it,
10 because this is a very complicated case. Breach of warranty does
11 not mean strict liability.

12 Now Counsel mentioned the breach of a building code as
13 being the basis for avoiding a dismissal by directed verdict.
14 However, there still has to be some connection between the breach
15 and the damages. Even if we can imply that it was an implied
16 term that they get a building permit, although I guess it's
17 possible the parties could have understood that the Hones would
18 get the building permit, because it's just not in the contract,
19 so there's just no evidence.

20 Even if we did that, we would still -- plaintiffs
21 would still have to present some form of expert testimony that
22 the act of having the building permit would have prevented the
23 plaintiff's damages, and there just isn't any. I mean there's no
24 expert who can say, "Gosh, if you had had this building permit,
25 somehow that would have prevented the house from sinking, that

1 would have prevented their damages."

2 There simply just is no -- plaintiffs can't meet their
3 burden as far as whether or not damages -- Counsel's argument
4 that what happens after the fact can't affect what the damages
5 are, I struggle with that because we have so many doctrines in
6 the law where something that happens after again a negligent act,
7 which is not at issue here, is affected -- affects because --
8 especially in contract law because the object of contract law is
9 to put the parties back to where they were when they started.

10 THE COURT: Consequential damages, the 38th domino in the
11 line, is still recoverable.

12 MR. WHITE: Well, theoretically out to some limit, but
13 yes. I mean your Honor, we've got -- you've got all sorts of
14 doctrines that affect damages. You've got consequential damages.
15 There's interest statutes. There's a requirement which is
16 particularly at issue in this case of mitigation, which again
17 happens after the fact. The reality is, the Hones had a house,
18 it was sinking before Advanced Shoring got there, it was sinking
19 after Advanced Shoring left, and then the Hones don't have the
20 house anymore for reasons that are unconnected with Advanced
21 Shoring completely.

22 So where are their damages? They're in exactly the same
23 position they were before the contract was made. They didn't --
24 they don't have a house. There's no way to put them back in the
25 position they were before the house -- before the contract was

1 formed. So your Honor, again, we would ask that your Honor grant
2 our motion for directed verdict.

3 THE COURT: Thank you, Counsel. Gentlemen, I appreciate
4 very much your careful and professional advocacy. Only the
5 lawyers in here have really understood everything that's going
6 on, but it was well done and I appreciate that very much.
7 However, my job is to rule. The motion for directed verdict is
8 overruled and denied, and we'll hear the defendant's case, come
9 back into session at 1:45.

10 Counsel, something has come up that I want you to
11 consider planning on. I'm going to have to take a protective
12 order and stalking injunction calendar tomorrow morning.
13 Tomorrow afternoon is free. Monday morning I have prelims set
14 now, but those almost never go. Even if they did, I would still
15 be free for Monday afternoon. Let's look at the housekeeping
16 matter. How long do you think you're going to be on your defense
17 case, Mr. White?

18 MR. WHITE: We have a substantial amount to get from
19 these witnesses. You know, if I could be completely honest with
20 the Court, this is my first trial of this size, and so estimating
21 how long we're going to take is --

22 THE COURT: How many witnesses do you think you're going
23 to have?

24 MR. WHITE: Three.

25 THE COURT: Okay. Each of those witnesses may be two

ADDENDUM D

FIFTH DISTRICT COURT-ST GEORGE
WASHINGTON COUNTY, STATE OF UTAH
APPEALED: CASE #20110256
MICHAEL HONE vs. ADVANCED SHORING & UNDERPINNIN

CASE NUMBER 080501595 Property Damage

CURRENT ASSIGNED JUDGE
JAMES L SHUMATE

PARTIES

Plaintiff - MICHAEL HONE
Represented by: JUSTIN D HEIDEMAN
Represented by: TRAVIS LARSEN

Plaintiff - LANA HONE
Represented by: JUSTIN D HEIDEMAN
Represented by: TRAVIS LARSEN

Defendant - ADVANCED SHORING & UNDERPINNIN
Represented by: GABRIEL K WHITE

ACCOUNT SUMMARY

TOTAL REVENUE Amount Due: 391.75
Amount Paid: 391.75
Credit: 0.00
Balance: 0.00

BAIL/CASH BONDS Posted: 300.00
Forfeited: 0.00
Refunded: 0.00
Balance: 300.00

PAPER BOND TOTALS Posted: 310,000.00
Forfeited: 0.00
Exonerated: 0.00
Balance: 310,000.00

REVENUE DETAIL - TYPE: COMPLAINT 10K-MORE
Amount Due: 155.00
Amount Paid: 155.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES
Amount Due: 3.00

Amount Paid: 3.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due: 0.75
Amount Paid: 0.75
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due: 8.00
Amount Paid: 8.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: APPEAL

Amount Due: 225.00
Amount Paid: 225.00
Amount Credit: 0.00
Balance: 0.00

BAIL/CASH BOND DETAIL - TYPE: CASH BOND: Appeals

Posted By: CONNIE LOVERIDGE
Posted: 300.00
Forfeited: 0.00
Refunded: 0.00
Balance: 300.00

NONMONETARY BOND DETAIL - TYPE: Surety

Posted By: AMERICAN SAFETY INSURANCE SER (#ASB-523243)
Posted: 310,000.00
Forfeited: 0.00
Exonerated: 0.00
Balance: 310,000.00

CASE NOTE

PROCEEDINGS

06-13-08 Case filed
06-13-08 Filed: Complaint
06-17-08 Judge JAMES L SHUMATE assigned.
06-17-08 Fee Account created Total Due: 155.00
06-17-08 COMPLAINT 10K-MORE Payment Received: 155.00
Note: Code Description: COMPLAINT 10K-MORE
06-23-08 Filed return: Summons and Return of Service
Party Served: ADVANCED SHORING & UNDERPINNING

Service Type: Personal
Service Date: June 19, 2008
08-25-08 Filed: Default Certificate
09-09-08 Filed: Answer
ADVANCED SHORING & UNDERPINNIN

10-28-08 Filed: Motion to Set Aside Judgment
Filed by: WHITE, GABRIEL K
10-28-08 Filed: Memorandum in Support of Motion to Set Aside Default
10-28-08 Filed: Affidavit of Scott T. Evans
11-12-08 Filed: Memorandum in Opposition to Defendant's Motion to Set
Aside Default and Request for Hearing
11-12-08 Filed: Affidavit of Benjamin D Gordon
11-19-08 Filed: Reply Memorandum in Support of Motion to Set Aside
Default
11-19-08 Filed: Notice to Submit for Decision
12-09-08 Filed order: Court's Ruling (Motion to set aside default, set
1/2 hr hearing)
Judge JAMES L SHUMATE
Signed December 09, 2008
12-10-08 Notice - NOTICE for Case 080501595 ID 11777735
MOTION TO SET ASIDE is scheduled.
Date: 03/17/2009
Time: 01:30 p.m.
Location: Courtroom TBD
Fifth District Court
220 North 200 East
St. George, UT 84770
Before Judge: JAMES L SHUMATE

Defendant's Motion to Set Aside Default
12-10-08 MOTION TO SET ASIDE scheduled on March 17, 2009 at 01:30 PM in
Courtroom TBD with Judge SHUMATE.
03-17-09 Minute Entry - Minutes for MOTION TO SET ASIDE
Judge: JAMES L SHUMATE
Clerk: diannem
PRESENT
Plaintiff(s): MICHAEL HONE
LANA HONE
Plaintiff's Attorney(s): BENJAMIN D GORDON
Defendant's Attorney(s): GABRIEL K WHITE
Video
Tape Number: FTR-D Tape Count: 2:17/2:25

HEARING

Arguments are heard.

Court grants Motion to Set Aside the Judgment but that Judgment may enter regarding attorney fees. Order to be submitted.

Counsel stipulates to the Court that they will submit a scheduling order.

04-03-09 Filed order: Case Management Order

Judge JAMES L SHUMATE

Signed April 03, 2009

04-10-09 Filed: Certificate of Service Re Defendant Advanced Shoring & Underpinning Inc's Rule 26 Initial Disclosures

04-20-09 Filed: Notice of Depositions of Per Danfors and Earl Bemis

04-27-09 Filed: Certificate of Service of Plaintiff's Initial Disclosures

06-08-09 Filed: Noticew of Firm Name Change

07-06-09 Filed: Notice of Deposition of Alan Boyack

12-02-09 Filed: Defendant's Motion for Partial Summary Judgment

Filed by: WHITE, GABRIEL K

12-02-09 Filed: Memorandum in Support of Defendant's Motion for Partial Summary Judgment

12-02-09 Filed: Defendants' Ex Parte Motion for Leave to File Over Length Memorandum

Filed by: WHITE, GABRIEL K

12-07-09 Filed order: Order Granting Defendants' Ex Parte Motion for Leave to File Overlength Memorandum

Judge JAMES L SHUMATE

Signed December 07, 2009

12-31-09 Filed: Fax to Judge Shumate from Lisa Ross (Copies to counsel and file per JLS 1/4/10)

01-08-10 Filed order: Order Granting Motion to Set Aside Default Judgment

Judge JAMES L SHUMATE

Signed January 08, 2010

01-15-10 Filed: Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment

02-10-10 Filed: Reply Memorandum in Support of Defendant's Motion for Partial Summary Judgment

02-10-10 Filed: Request to Submit for Decision Re Defendant's Motion for Partial Summary Judgment

02-22-10 Filed order: Court's Ruling on Motion for Summary Judgment: Set 1 hour hearing. Courtesy copies 1 week before trial.

Judge JAMES L SHUMATE

Signed February 22, 2010

03-01-10 Notice - NOTICE for Case 080501595 ID 12796452

MOTION FOR SUMMARY JUDGMENT is scheduled.

Date: 04/13/2010

Time: 01:30 p.m.

Location: Courtroom 3D

St. George Courthouse

206 West Tabernacle

St. George, UT 84770

Before Judge: JAMES L SHUMATE
03-01-10 MOTION FOR SUMMARY JUDGMENT scheduled on April 13, 2010 at
01:30 PM in Courtroom 3D with Judge SHUMATE.
04-13-10 Minute Entry - Minutes for MOTION FOR SUMMARY JDMT
Judge: JAMES L SHUMATE
Clerk: janaj
PRESENT
Plaintiff(s): LANA HONE
MICHAEL HONE
Plaintiff's Attorney(s): BENJAMIN D GORDON
Defendant's Attorney(s): GABRIEL K WHITE
Video
Tape Number: FYT/3D Tape Count: 1:43-2:31

HEARING

TAPE: FYT/3D Mr. White addresses the court stating his reasons for
summary judgment request.

COUNT: 2:07

Mr. Gordon addresses court stating Plaintiff's position.

COUNT: 2:21

Mr. White again addresses the court.

COUNT: 2:30

The court takes the matter under advisement. He will issue a
decision within 60 days.

05-11-10 Filed order: Order Denying Motion for Summary Judgment

Judge JAMES L SHUMATE

Signed May 11, 2010

05-25-10 Filed: Certificate of Readiness for Trial and Request for
Pre-Trial Conference

06-25-10 Filed: Notice of Initial Pre-Trial Conference

07-01-10 PRETRIAL CONFERENCE scheduled on July 27, 2010 at 09:30 AM in
Courtroom 3D with Judge SHUMATE.

07-27-10 Minute Entry - Minutes for Pretrial Conference

Judge: JAMES L SHUMATE

Clerk: diannem

PRESENT

Plaintiff's Attorney(s): BENJAMIN D GORDON

Defendant's Attorney(s): GABRIEL K WHITE

Video

Tape Number: 3D Tape Count: 1035/10:47

HEARING

Counsel informs the court that they are ready to proceed to trial.

Discussions are held regarding exhibits, depositions, final orders and discovery.

Case has not been mediated yet but may be attempted.

Deadlines are given.

this matter to be set for a 5 day bench trial in January, 2011.

Notice to be given.

07-28-10 Notice - NOTICE for Case 080501595 ID 13139913

PRETRIAL CONFERENCE is scheduled.

Date: 12/15/2010

Time: 10:00 a.m.

Location: Courtroom 3D

St. George Courthouse

206 West Tabernacle

St. George, UT 84770

Before Judge: JAMES L SHUMATE

BENCH TRIAL.

Date: 01/24/2011

Time: 09:00 a.m.

Location: Courtroom 3D

St. George Courthouse

206 West Tabernacle

St. George, UT 84770

Before Judge: JAMES L SHUMATE

BENCH TRIAL.

Date: 01/25/2011

Time: 09:00 a.m.

Location: Courtroom 3D

St. George Courthouse

206 West Tabernacle

St. George, UT 84770

Before Judge: JAMES L SHUMATE

BENCH TRIAL.

Date: 01/27/2011

Time: 09:00 a.m.

Location: Courtroom 3D

St. George Courthouse

206 West Tabernacle

St. George, UT 84770

Before Judge: JAMES L SHUMATE

BENCH TRIAL.

Date: 01/28/2011

Time: 09:00 a.m.

Location: Courtroom 3D

St. George Courthouse

206 West Tabernacle

St. George, UT 84770
Before Judge: JAMES L SHUMATE

BENCH TRIAL.

Date: 01/31/2011

Time: 09:00 a.m.

Location: Courtroom 3D

St. George Courthouse

206 West Tabernacle

St. George, UT 84770

Before Judge: JAMES L SHUMATE

07-28-10 PRETRIAL CONFERENCE scheduled on December 15, 2010 at 10:00 AM
in Courtroom 3D with Judge SHUMATE.

07-28-10 BENCH TRIAL scheduled on January 24, 2011 at 09:00 AM in
Courtroom 3D with Judge SHUMATE.

07-28-10 BENCH TRIAL scheduled on January 25, 2011 at 09:00 AM in
Courtroom 3D with Judge SHUMATE.

07-28-10 BENCH TRIAL scheduled on January 27, 2011 at 09:00 AM in
Courtroom 3D with Judge SHUMATE.

07-28-10 BENCH TRIAL scheduled on January 28, 2011 at 09:00 AM in
Courtroom 3D with Judge SHUMATE.

07-28-10 BENCH TRIAL scheduled on January 31, 2011 at 09:00 AM in
Courtroom 3D with Judge SHUMATE.

09-03-10 Filed: Motion for summary Judgment

09-03-10 Filed: Memorandum in Support of Motion for Summary Judgment

09-17-10 Filed return: Certificate of Service re: Defendant's

Supplemental Rule 26 Disclosures

Party Served: ASCIONE, HEIDEMAN & MCKAY, LLC

Service Type: Mail

09-17-10 Filed: Defendant's Rule 26(a)(4) Pretrial Disclosures

09-24-10 Filed: Pretrial Disclosures

09-24-10 Note: *****END OF VOL I *****

09-28-10 Filed: Memorandum in Opposition to Motion for Summary Judgment

09-29-10 Filed: Amended Memorandum in Opposition to Motion for Summary
Judgment

10-04-10 Filed: Motion to Exclude Evidence Produced After the Expiration
of Fact Discovery

Filed by: WHITE, GABRIEL K

10-04-10 Filed: Memorandum in Support of Motion to Exclude Evidence
Produced After the Expiration of Fact Discovery

10-06-10 Filed: Supplemental pretrial disclosures

10-12-10 Filed: Certificate of Service Supplemental Rule 26 Disclosures

10-25-10 Filed: Rule 37 Motion to Strike 1]the Declaration of Michael
Hone; 2]the Amended Declaration of Lana Hone; 3]Portions of
Plaintiffs' Supplemental Pretrial Disclosures and 4]Portions of
Plaintiff's Supplemental Rule 26 Disclosures

Filed by: WHITE, GABRIEL K

10-25-10 Filed: Request to Submit Motion for Summary Judgment

10-25-10 Filed: Advanced Shoring's Joint Reply Memorandum in Support of

COUNT: 3:09

Court recommends resolving this matter; counsel have stipulated to Mediation and state that they have submitted a Stipulation to Submit to Judicial Stipulation.

Mediation Judge's Scheduling Clerk to schedule Mediation Hearing for 1/2 day, and send notice before trial on 1/24/10. Counsel to prepare and submit Mediation Brief to Mediating Judge.

12-21-10 Notice - NOTICE for Case 080501595 ID 13470000

MEDIATION is scheduled.

Date: 01/07/2011

Time: 09:00 a.m.

Location: Courtroom 2A

St. George Courthouse

206 West Tabernacle

St. George UT, UT 84770

Before Judge: ERIC A LUDLOW

Judge Ludlow will conduct mediation in this matter. The 5 day bench trial is scheduled to begin 1-24-11 with Judge Shumate

12-21-10 MEDIATION scheduled on January 07, 2011 at 09:00 AM in Courtroom 2A with Judge LUDLOW.

12-21-10 Filed: Notice of Mediation

01-07-11 Note: **Medation: Off record. Settlement/ agreement not reached.

01-13-11 Filed: Certificate of Service of Subpoenas

01-19-11 Filed: Trial Brief

01-21-11 Filed: Acceptance of Service (Boyack subpoena)

01-24-11 Minute Entry - Minutes for BENCH TRIAL (DAY 1)

Judge: JAMES L SHUMATE

Clerk: michellh

PRESENT

Plaintiff(s): MICHAEL HONE

LANA HONE

Defendant(s): PIER DANSFORS

Plaintiff's Attorney(s): TRAVIS LARSEN

JUSTIN D HEIDEMAN

Defendant's Attorney(s): GABRIEL K WHITE

Tape Number: 3D Tape Count: 9:03/5:00

HEARING

COUNT: 9:03

Opening Statements are made. Exclusionary rule is requested and ordered.

COUNT: 9:19

Eric Michael Campbell is sworn and testifies. Plaintiff's exhibit 266 is submitted.

COUNT: 10:01

Plaintiff's exhibit 266 is recieved.

COUNT: 10:02

Witness is excused.

COUNT: 10:03

Court is in recess.

COUNT: 10:12

Court is back on the record. All parties are present with counsel.

Piers Dansfors is sworn as a hostile witness for the plaintiffs and testifies.

COUNT: 10:35

Plaintiff's exhibit 263 is offered.

COUNT: 10:36

Plaintiff's exhibit 263 received.

COUNT: 10:39

Exhibit 264 offered.

COUNT: 10:46

Plaintiff's Exhibit 264 is received. Plaintiff's Exhibit 1 is offered.

COUNT: 10:53

Plaintiff's exhibit 1 is received. Plaintiff's Exhibit 2 is offered.

COUNT: 11:03

Plaintiff's Exhibit 6 and 7 are offered.

COUNT: 11:12

Court is in recess.

COUNT: 11:24

Court is back on the record. All parties are present with counsel. Mr. Dansfors re-takes the stand and testimony continues.

COUNT: 11:55

Plaintiff's Exhibit 3 is submitted. Plaintiff's Exhibit 2 and Exhibit 3 is received.

COUNT: 12:00

Plaintiff's Exhibit 4 is submitted.

COUNT: 12:01

Plaintiff's Exhibit 4 is received.

COUNT: 12:06

Plaintiff's exhibit 5 is submitted.

COUNT: 12:18

Plaintiff's exhibit 5 received. Plaintiff's exhibit 6 is submitted.

COUNT: 12:30

Court is in recess.

COUNT: 1:45

Court is back on the record. All parties are present with counsel. Mr. Danfors retakes the stand and continues testimony.

COUNT: 1:53

Plaintiff's Exhibit 7 is offered and received.

COUNT: 2:08

Plaintiff's Exhibit 262 is offered.

COUNT: 2:09
Plaintiff's Exhibit 84 and Plaintiff's Exhibit 86 is offered.
COUNT: 2:26
Defense Exhibit 267 is offered.
COUNT: 2:29
Defendant's exhibit 267 is offered but entered.
COUNT: 2:32
Defendant's Exhibit 268 is offered.
COUNT: 2:55
Court is in recess.
COUNT: 3:07
Court is back on the record. All parties are present with counsel
and Mr. Danfors testimony continues.
COUNT: 3:15
Defense Exhibit 269 is offered.
COUNT: 3:23
Defense Exhibit 269 is received.
COUNT: 3:46
Mr. Danfors is excused. Mr. Alan Boyack is sworn and testifies.
COUNT: 3:51
Defense Exhibit 268 is received.
COUNT: 4:51
Mr. Boyack leaves the stand.
COUNT: 4:59
Court is adjourned for the day.
01-24-11 Filed: Acceptance of Service
01-25-11 Minute Entry - Minutes for BENCH TRIAL (DAY 2)
Judge: JAMES L SHUMATE
Clerk: michellh
PRESENT
Plaintiff(s): MICHAEL HONE
 LANA HONE
Defendant(s): PERS DANFORS
Plaintiff's Attorney(s): JUSTIN D HEIDEMAN
 TRAVIS LARSEN
Defendant's Attorney(s): GABRIEL K WHITE
Tape Number: 3D Tape Count: 9:03/5:15

HEARING

2nd Day:
COUNT: 9:01
All parties are present with counsel. Lana Sue Hone is sworn and
testifies.
COUNT: 9:32
Exhibit 262 if offered.
COUNT: 9:58

Exhibit 8 is offered. Court is in recess.

COUNT: 10:01

Exhibit 9 is offered. Court is in recess.

COUNT: 10:14

Court is back on the record. All parties are present with the counsel.

COUNT: 10:15

Plaintiff's Exhibit 89A "Overview Spreadsheet of Receipts" and Exhibits 89 through 260 "Receipts" are offered and accepted.

COUNT: 10:39

Plaintiff's exhibit 10 is offered

COUNT: 10:40

Plaintiff's exhibit #10 and Plaintiff's exhibit #9 are received.

Plaintiff's exhibit #15 is offered.

COUNT: 10:41

Plaintiff's exhibit # 15 is received. Plaintiff's exhibit 16 is offered and received. Plaintiff's exhibit 17 is offered.

COUNT: 10:42

Plaintiff's exhibit 17 is received.

COUNT: 10:43

Plaintiff's exhibit #21 and 22 are offered and received.

Plaintiff's exhibit #23 and 18 are offered and received.

COUNT: 10:45

Plaintiff's Exhibit 23 and 18 are received.

COUNT: 10:47

Plaintiff's exhibit #29 and 24 are offered and received.

Plaintiff's exhibit #25 is offered and received.

COUNT: 10:50

Plaintiff's Exhibit 8 through 88 is received.

COUNT: 11:09

Court is in recess.

COUNT: 11:20

Court is back on the record. All parties are present with counsel. Mrs. Hone retakes the stand.

COUNT: 11:36

Plaintiff's Exhibit #261 is received.

COUNT: 11:44

Defense Exhibit 270 is offered. Court is in recess.

COUNT: 11:55

The court is back on the record. All parties are present with counsel. Mrs. Hone retakes the stand and continues testimony.

COUNT: 11:56

Defendant's Exhibit 270 is received.

COUNT: 12:30

Court is in recess.

COUNT: 1:50

The court is back on the record. Parties are present with counsel. Mrs. Hone retakes the stand.

COUNT: 2:21

Witness is excused. Michael J. HOne is sworn and testifies.

COUNT: 2:55

Court is in recess.

COUNT: 3:07

The court is back on the record. All parties are present with counsel. Mr. Hone retakes the stand and testifies.

COUNT: 3:55

Mr. Hone is excused.

COUNT: 3:56

The court is in recess.

COUNT: 4:25

The court is back on the record. All parties are present with counsel. David K. Christensen is sworn and testifies.

COUNT: 5:00

Objection to Mr. Christensen as witness remains on the table.

Court is adjourned until Thursday 1/27/11 at 9:00 a.m.

01-26-11 Minute Entry - Minutes for BENCH TRIAL (DAY 3)

Judge: JAMES L SHUMATE

Clerk: michellh

PRESENT

Plaintiff(s): MICHAEL HONE

LANA HONE

Plaintiff's Attorney(s): TRAVIS LARSEN

JUSTIN D HEIDEMAN

Defendant's Attorney(s): GABRIEL K WHITE

Video

Tape Number: 3D Tape Count: 9:05/3:55

HEARING

COUNT: 9:06

Mr. David K. Christensen retakes the stand. Arguments are presented regarding the motion on allowing expert testimony.

COUNT: 9:28

The court ruling stands on accepting Mr. Danfors testimony as a non-expert witness.

COUNT: 9:29

The court rules that any questions to Mr. Christensen regarding his experience will be stricken as expert testimony. Other testimony given stands.

COUNT: 9:42

Mr. Christensen is excused.

COUNT: 9:43

Court is in recess.

COUNT: 10:05

Court is back on the record. All parties are present with counsel. Derek Inlay is sworn and testifies.

COUNT: 10:24
Mr. Inlay is excused from the stand.
COUNT: 10:26
Mr. Earl Bemis is sworn and testifies.
COUNT: 11:07
Mr. Bemis is allowed to step-down.
COUNT: 11:08
Larry Leroy Stanton is called, sworn and testifies.
COUNT: 11:24
Mr. Stanton is excused. Kevin Gurside is sworn and testifies.
COUNT: 11:40
Lana Hone is recalled.
COUNT: 11:43
The Plaintiff's rest.
COUNT: 11:44
Defense requests a directed verdict for no cause of action.
Arguments are presented.
COUNT: 12:23
Motion for direct verdict is denied by the court.
COUNT: 12:25
Court is in recess.
COUNT: 1:36
Court is back on the record. All parties are present with counsel.
COUNT: 1:47
Mr. Gurside is recalled.
COUNT: 2:19
Mr. Gurside is excused.
COUNT: 2:45
Court is in recess.
COUNT: 2:54
Court is back on the record. All parties are present with counsel.
Plaintiff's Exhibit 271 is offered and received with no objection from defense. Mr. Earl Bemis retakes the stand and testifies.
COUNT: 3:29
Mr. Bemis is excused. Defense rests. The court is in recess.
COUNT: 3:49
Court is back on the record. All parties are present with counsel.
Mrs. Hone is recalled to the stand.
COUNT: 3:54
Court is adjourned.

01-26-11 Filed: Acceptance of Service (Earl Bemis)
01-26-11 Filed: Acceptance of Service (Alan Boyack)
01-26-11 Filed: Acceptance of Service (Kevin Garside)
01-27-11 Minute Entry - Minutes for BENCH TRIAL (DAY 4)
Judge: JAMES L SHUMATE
Clerk: michellh
PRESENT

Plaintiff(s): MICHAEL HONE
LANA HONE
Defendant(s): ADVANCED SHORING & UNDERPINNING
Plaintiff's Attorney(s): JUSTIN D HEIDEMAN
TRAVIS LARSEN
Defendant's Attorney(s): GABRIEL K WHITE
Video
Tape Number: 3D Tape Count: 2:08/5:16

HEARING

COUNT: 2:08
Closing Arguments begin.
COUNT: 3:56
The court is in recess.
COUNT: 3:51
Court is back on the record. All parties are present with
counsel. Closing Arguments continue.
COUNT: 4:16
The court finds the contract was executed in behalf of the Hones
by Mr. Boyack with Advanced Shoring & Underpinning.
The court finds the brochure from Advanced Shoring & Underpinning
is not sufficient to prove warranty.
However, with the sworn testimony of Mrs Hone regarding a phone
call from Advanced Shoring and Underpinning and the additional
payment made, the existence of a warrant is viable.
The court does not find negligence against the defendant.
The court finds the contract was breached by the defendant when
they voluntarily left the project. There is no proof or testimony
that the Hones ordered the defendant from the property.
The court does not award punitive damages.
The court awards any line items on Exhibit 89A after 11/16/2006
are recoverable. The court also grants an amount of \$43, 178.28 to
the plaintiff's for receipts lost during the flooding of the home
and moving.
The court awards the difference between what the home sold on the
market at bankruptcy auction and the amount the home was valued in
the appraisal.
The court finds a 10% prejudgment interest applicable from 9/1/07
to the date of judgment. Mr. Heideman to prepare the paperwork.
COUNT: 5:14
Court is adjourned.

01-27-11 Filed: Advanced Shoring's Motion to Strike and Exclude
Undesignated or Improperly Designated Expert Testimony
Filed by: WHITE, GABRIEL K
01-27-11 Filed: Advanced Shoring's Memorandum in Support of Motion to
Strike and Exclude Undesignated or Improperly Designated Expert

Testimony

01-28-11 Filed return: Subpoena and Certificate of Service (Alan Boyack)

Party Served: 0

Service Type: Personal

Service Date: January 14, 2011

01-28-11 Filed return: Subpoena and Certificate of Service (David Christensen)

Party Served: 0

Service Type: Personal

Service Date: January 14, 2011

01-28-11 Filed return: Subpoena and Certificate of Service (Thomas Tadd)

Party Served: 0

Service Type: Personal

Service Date: January 14, 2011

02-09-11 Filed: Affidavit of Costs

02-15-11 **** PRIVATE **** Filed: Motion for Bill of Costs to be Taxed by the Court

**** PRIVATE **** Filed by: WHITE, GABRIEL K

02-15-11 **** PRIVATE **** Filed: Memorandum in Support of Motion for Bill of Costs to be taxed by the Court.

02-16-11 Filed order: Judgment and Order

Judge JAMES L SHUMATE

Signed February 16, 2011

02-16-11 Judgment #1 Entered \$ 289065.54

Debtor: ADVANCED SHORING & UNDERPINNIN

Creditor: LANA HONE

Creditor: MICHAEL HONE

289,065.54 Total Judgment

289,065.54 Judgment Grand Total

02-16-11 Filed judgment: Judgment

Judge JAMES L SHUMATE

Signed February 16, 2011

02-16-11 Case Disposition is Judgment

Disposition Judge is JAMES L SHUMATE

02-16-11 Filed: TRANSCRIPT for Hearing of 01-24-2011

02-17-11 Fee Account created Total Due: 3.00

02-17-11 Fee Account created Total Due: 0.75

02-17-11 Fee Account created Total Due: 8.00

02-17-11 CERTIFIED COPIES Payment Received: 3.00

Note: 20.00 cash tendered. 8.25 change given.

02-17-11 COPY FEE Payment Received: 0.75

02-17-11 CERTIFICATION Payment Received: 8.00

02-20-11 Filed: TRANSCRIPT for Hearing of 01-25-2011

02-22-11 Filed: TRANSCRIPT for Hearing of 01-27-2011

02-24-11 Filed: TRANSCRIPT for Hearing of 01-28-2011

02-25-11 Filed: Notice of Appeal

02-25-11 Fee Account created Total Due: 225.00

02-25-11 APPEAL Payment Received: 225.00

Note: Code Description: APPEAL

02-25-11 Bond Account created Total Due: 300.00
02-25-11 Bond Posted Payment Received: 300.00
02-25-11 Filed: Notice of Appeal
02-25-11 Filed: Motion to Stay Execution of Judgment Pending Appeal and
to Set Bond
Filed by: WHITE, GABRIEL K
02-25-11 Filed: Memorandum in Support of Motion to Stay Execution of
Judgment Pending Appeal and to Set Bond
02-25-11 Filed: Motion to Strike Plaintiffs' Motion and Order for
supplemental Proceeding
Filed by: WHITE, GABRIEL K
02-25-11 Filed: Memorandum in Support of Motion to Strike Plaintiffs'
motion and Order for Supplemental Proceeding
02-28-11 Filed: Memorandum in Opposition to Motion for Bill of Costs to
be Taxed by the Court.
03-02-11 Filed: Memorandum in Opposition to Motion to Stay Execution of
Judgment Pending Appeal and to Set Bond
03-07-11 Filed: Transcript of Bench Trial Electronically Recorded on
01/24/2011
03-07-11 Filed: Transcript Bench Trial Electronically Recorded on January
25, 2011 (Volume II)
03-07-11 Filed: Transcript of Bench Trial Electronically Recorded on
January 27, 2011 (Volume III)
03-07-11 Filed: Transcript - Bench Trial Electronically Recorded on
January 28, 2011 (Volume IV)
03-08-11 MOTION HEARING scheduled on March 15, 2011 at 04:00 PM in
Courtroom 3D with Judge SHUMATE.
03-14-11 Filed: NOTICE OF HEARING ON PENDING MOTIONS
03-14-11 Filed: Joint Reply Memorandum in Support of 1) Advanced
Shoring's Motion to Stay Execution of Judgment Pending Appeal
and to Set Bond; 2) Advanced Shoring's Motion to Strike
Plaintiffs' Motion and Order for Supplemental Proceedings; and
3) Advance
03-15-11 Note: **Certified Copy of Notice of Appeal sent to Ut Court of
Appeals**
03-15-11 Minute Entry - Minutes for HEARING MOTION
Judge: JAMES L SHUMATE
Clerk: michellh
PRESENT
Plaintiff(s): MICHAEL HONE
LANA HONE
Plaintiff's Attorney(s): JUSTIN D HEIDEMAN
Defendant's Attorney(s): GABRIEL K WHITE
Video
Tape Number: 3D Tape Count: 4:02/4:05

HEARING

Motion to require the defendant's to file a supersedeas bond before
filing an appeal.
Arguments are presented.
Motion is overruled and denied.
Mr. Heideman to prepare the order.

03-18-11 Issued: Motion and Order for Supplemental Proceeding
Judge JAMES L SHUMATE
Hearing Date: April 25, 2011 Time: 08:30

03-25-11 Filed: Motion to Approve Bond Pursuant to Utah Rules of Civil
Procedure Rule 62
Filed by: WHITE, GABRIEL K

03-25-11 Filed: Memorandum to Approve Bond Pursuant to Utah Rules of
Civil Procedure Rule 62

03-28-11 Filed: Letter from Supreme Court of Utah

04-04-11 Filed: Objection to Sufficiency and Amount of Supersedeas Bond
and Memorandum in Opposition to motion to Approve Bond
(Expedited Rule 62 Hearing Requested)

04-04-11 BOND MOTION scheduled on April 11, 2011 at 04:30 PM in
Courtroom 3D with Judge SHUMATE.

04-04-11 Notice - NOTICE for Case 080501595 ID 13691432
BOND MOTION is scheduled.
Date: 04/11/2011
Time: 04:30 p.m.
Location: Courtroom 3D
St. George Courthouse
206 West Tabernacle
St. George, UT 84770
Before Judge: JAMES L SHUMATE

04-04-11 Filed: Notice of Bond Motion Hearing

04-06-11 Filed: Certificate Pursuant to Utah Rules of Appellate
Procedure Rule 11(e)(1)

04-08-11 Filed: MEMORANDUM REPLY MEMORANDUM IN SUPPORT OF MOTION TO
APPROVE BOND AND MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
OBJECTION TO AMOUNT AND SUFFICIENCY OF SUPERSEDEAS BOND

04-11-11 Filed: Reply Memorandum in Support of Motion to Approve Bond
and Memorandum in Opposition to Plaintiff's Objection to Amount
and Sufficiency of Supersedeas Bond

04-11-11 Minute Entry - Minutes for BOND MOTION
Judge: JAMES L SHUMATE
Clerk: michellh
PRESENT
Plaintiff(s): MICHAEL HONE
LANA HONE
Plaintiff's Attorney(s): JUSTIN D HEIDEMAN
TRAVIS LARSEN
Defendant's Attorney(s): GABRIEL K WHITE
Video
Tape Number: 3D Tape Count: 4:29/4:46

HEARING

Matter before the court is the plaintiff's objection to the amount of supercedias bond and the form.

Arguments are made.

COUNT: 4:45

Motion is overruled and denied. Order for stay is approved. Mr.

White to prepare the paperwork.

04-21-11 Filed: Supersedeas Bond

04-22-11 Filed: AMERICAN SAFETY INSURANCE SER 310000.00

04-22-11 Bond Account created Total Due: 310000.00

04-22-11 Bond Posted Non-Monetary Bond: 310,000.00

05-09-11 Filed order: ORder Approving Supersedeas Bond Pursuant to Rule 62 and Staying Execution of Judgment Pending Appeal

Judge JAMES L SHUMATE

Signed May 04, 2011

05-09-11 Filed: Utah Court of Appeals Notice

06-08-11 Filed: Letter from Court of Appeals

06-23-11 Note: Appealed: Case #20110256

FIFTH DISTRICT COURT-ST GEORGE
WASHINGTON COUNTY, STATE OF UTAH

MICHAEL HONE Et al,	:	MINUTES
Plaintiff,	:	PRETRIAL CONF/PENDING MOTIONS
	:	
vs.	:	Case No: 080501595 PD
ADVANCED SHORING & UNDERPINNIN,	:	Judge: JAMES L SHUMATE
Defendant.	:	Date: December 14, 2010

Clerk: trudyg

PRESENT

Plaintiff's Attorney(s): JUSTIN D HEIDEMAN
TRAVIS LARSEN

Defendant's Attorney(s): GABRIEL K WHITE

Audio

Tape Number: 3D Tape Count: 2:09-3:15

HEARING

This matter comes before the Court re: Motion in Limine, Motion to Strike, and Motion for Summary Judgment.

COUNT: 2:12

Opening briefs are made. The Court overrules and denies the Motion in Limine and Motion to Strike without prejudice.

COUNT: 2:19

Arguments are made; and Motion for Summary Judgment is over-ruled and denied.

COUNT: 3:09

Court recommends resolving this matter; counsel have stipulated to Mediation and state that they have submitted a Stipulation to Submit to Judicial Stipulation.

Mediation Judge's Scheduling Clerk to schedule Mediation Hearing for 1/2 day, and send notice before trial on 1/24/10. Counsel to prepare and submit Mediation Brief to Mediating Judge.