

2011

Hone v. Advanced Shoring & Underpinning, Inc : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Hone v. Advanced Shoring & Underpinning, Inc*, No. 20110256 (Utah Court of Appeals, 2011).
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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 HONORABLE JAMES L. SHUMATE
FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

BRIEF OF APPELLEES

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FILED
UTAH APPELLATE COURT

NOV 10 2011

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LIST OF PARTIES TO THE PROCEEDING

All of the parties to this proceeding are identified in the caption on the cover page.

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STATEMENT OF JURISDICTION

As argued below, this Court lacks jurisdiction over the subject matter of the bulk of the issues presented on appeal; however, if the Court accepts jurisdiction over some or all of the issues on appeal, the Court would have to rely on Utah Code Ann. § 78A-4-103(2)(j) for that jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Hones are dissatisfied with Advanced Shoring's statement as it concerns the appropriate standard of review for the first and second issues on appeal. These issues are styled as denials of summary judgment and directed verdict, and indeed they are; however, the first and second issues presented by Advanced Shoring have critical evidentiary components that necessarily influence the level of scrutiny to be applied by this Court. When a district court determines not to require expert testimony, the Court of Appeals should review for abuse of discretion, not, as Advanced Shoring contends, for correctness.

"It is within the discretion of the trial court to determine the suitability of expert testimony in a particular case, and we will not reverse that determination on appeal in the absence of a clear showing of abuse." *State v. Johnson*, 2009 UT App 382, ¶17, 224 P.3d 720, 725; *see also Walker v. Union Pacific R. Co.*, 844 P.2d 335, 343 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

None.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

This is an action for breach of warranty. (R. 1.) Advanced Shoring moved for summary judgment arguing that it did not give the Hones a warranty. (R. 22.) The Trial Court denied the motion inasmuch as it found “certain areas of material fact, particularly those relating to the alleged ‘warranty,’” in dispute. (R. 33.) Advanced Shoring filed a second motion for summary judgment, arguing (1) that the Hones could not meet their burden of proof without an expert, and (2) that the Hones could not recover damages where they no longer owned the home at issue. (R. 39.) “[T]he trial court again denied summary judgment on both arguments because of the existence of unspecified material disputes of fact.” (Brief of Appellant at p. 4.)

At trial, Advanced Shoring argued all three of the issues it previously lost on summary judgment in the form of a motion for directed verdict. Advanced Shoring’s motion for directed verdict was also denied. (R. 79 at pp. 114-140.) Advanced Shoring renewed these same positions in its closing argument. (R. 80 at pp. 60-89.) The Hones, after presenting substantial evidence, prevailed at trial on their breach of warranty and contract claims (R. 80 at pp. 89-101.)

The Trial Court found that Advanced Shoring breached its warranty and contract, stating, in part, as follows:

- [T]he court was stricken powerfully by what Mrs. Hone has described as the fateful call. I have been doing this – I have been in the trial courtrooms of the State of Utah for an excess of 36 years now. I was particularly struck after all the thousands of witnesses that I have listened to and examined myself and cross examined myself of the clarity with which Mrs. Hone testified. I note that clarity

in comparison to the failure to recall on the part of Mr. Garside. Mrs. Hone was absolutely crystal clear, “I cannot guarantee this project unless I receive another \$10,000.” (R. 80 at pp. 91:19 – 92:3.)

- Therefore, the recitation by Mr. Garside that he did not recall ever making a statement like that seems to be substantially outweighed by the actions and the testimony of Mrs. Hone and the subsequent actions of Mr. Boyack, and the payment of the check for \$8743. The Court specifically finds that upon payment of that check that a warranty was bought. There’s no question in my mind that a warranty was purchased. That is further supported by the behavior of the parties after that event. Additional work that was not billed by Advanced Shoring was conducted beyond the work of November of 2006. Advanced Shoring went back to the project in the summer of 2007 and began the additional work. No statements were sent for that additional work. (R. 80 at pp. 92:12-24.)
- It is clear to the Court that Advanced Shoring was operating under the assumption that there was a warranty (R. 80 at pp. 92:25 – 93:1.)
- My other findings are based upon a preponderance of this – of the evidence, but as to this warranty, again, I reemphasize the experience of this trial judge, my experience in the trial courtrooms of this state, and the absolute clarity and overpowering weight of the testimony of Mrs. Hone regarding this conversation. I am clearly convinced as to the extension of the offer for warranty and the acceptance thereby through payment of the additional check. (R. 80 at pp. 94:2-9.)
- [T]he departure of the defendant from the project is unexplained and must be laid squarely at the feet of Advanced Shoring. The Court can only find that they voluntarily left the project. (R. 95 at pp. 95:1-4.)
- Was the contract breached? Well, it was breached because the brackets were not installed and the work was stopped. (R. 80 at pp. 95:12-13.)

Statement of the Facts

The Hones built a home in LaVerkin, Utah in 2004. (R. 27 at pp. 1-2.) The home experienced substantial settling. (R. 27 at pp. 1-2.) The Hones hired Advanced Shoring to repair the home. (R. 27 at pp. 3-4.) Advanced Shoring was unable to repair the home. (R. 27 at p. 6.) Advanced Shoring informed the Hones that additional materials and work were

necessary for Advanced Shoring to guarantee its work. (R. 44 at p. 3.) Advanced Shoring stated “I won’t guarantee it unless I get \$10,000 more.” (R. 27 at p. 5.) Advanced Shoring proposed to perform additional work and offered a guarantee that no additional settling of the home would occur, in exchange for the additional \$10,000. (R. 44 at p. 3; R. 27 at pp. 5-6.) The Hones received, and paid, an invoice¹ from Advanced Shoring for the warranty and accompanying work in the amount of \$8,743². (R. 44 at p. 3.) Advanced Shoring acknowledges that Lana Hone’s intent in paying additional monies was that Advanced Shoring would “‘fix the house, we will never have any problems with it again, he can secure it. There won’t be any sinking. There won’t be any cracks. It will be good as new.’” (R. 22 at p. 5.) Advanced Shoring assured the Hones it could fix the house. (R. 44 at pp. 5-6.) Advanced Shoring guaranteed that the Hones’ home would no longer settle after it installed helical piers. (R. 44 at p. 4.)

The Hones’ home continued to settle after Advanced Shoring installed the helical piers. (R. 44 at p. 5.) Advanced Shoring was unable to stabilize the foundation of the home. (R. 27 at p. 6.) Advanced Shoring returned to the home to attempt to stabilize the home. (R. 27 at pp. 6-7.) When its additional attempts to stabilize the home failed, Advanced Shoring claims that the Hones refused to allow Advanced Shoring to return to the

¹ At some places in the summary judgment record the parties state that an additional \$8,000 was paid. The actual amount invoiced and paid was \$8,743 (R. 44 at p. 3) and any references in the summary judgment record to \$8,000 are best read as estimates.

² Though the \$8,743 payment is less than the amount of \$10,000, Advanced Shoring did not argue that the Hones did not pay full value for the warranty. After offering a warranty for \$10,000, Advanced Shoring sent an invoice in the amount of \$8,743, which the Hones paid. (R. 44 at p. 3.) There was no controversy at trial, or on summary judgment, about the amount paid.

home to perform further work. (R. 22 at p. vii; R. 27 at p. 6.) After Advanced Shoring stopped working on the house, the house continued to sink. (R. 44 at p. 6.) When Advanced Shoring started work on the house, just the Southwest corner of the home was sinking; after Advanced Shoring stopped working, the entire house was damaged, sinking, and caving in toward the middle of house. (R. 44 at p. 6.) Some of the piers installed inside the home came up through the floor. (R. 44 at p. 6.)

After Advanced Shoring had come out the third time to work on the Hones' house Per Danfors of Advanced Shoring came to the house; Mr. Danfors said to Michael Hone that he didn't realize the house was so bad, that he couldn't afford to fix it, and that he would turn it over to his insurance company. (R. 44 at p. 4.) Mr. Danfors told Michael Hone he had spoken to his attorney who told him he should not have guaranteed the work on the house. (R. 44 at p. 4.) Mr. Danfors let the Hones know that Advanced Shoring would not be able to come out to the house again and would not be able to fix the settling problem. (R. 44 at p. 4.)

Advanced Shoring came to work on the Hones' home three times; on each of these occasions, Advanced Shoring caused damage to the property; every time they came the damage to the home got worse – they damaged the inside and the outside of the home. (R. 44 at pp. 4-5.) While Advanced Shoring was working on the Hones' home, they caused damages, including but not limit to the following:

- a. Damage to decorative curbing
- b. Damage to lawn and sprinkling system
- c. Damage to front stamped concrete sidewalk
- d. Damage to patio
- e. Punched holes through stucco and exterior walls

- f. Damaged rain gutters
- g. Destroyed landscaping
- h. Punctured interior water line twice
- i. Damaged interior tile
- j. Damage to interior paint
- k. Left general debris and dirt in home
- l. Damage to carpet
- m. Damage to house foundation

(R. 44 at p. 5.) The Hones incurred tens-of-thousands of dollars in costs to fix the problems caused by Advanced Shoring's work. (R. 44 at p. 5.)

At trial, Derek Imlay, the Director of Operations and a former building inspector for the City of La Verkin, testified that he lifted the certificate of occupancy for the home because of safety issues relating the settling of the home. (R. 79 at pp. 31-33.) For illustrative purposes, the Hones have attached, as Addendum A, a sampling of trial exhibit photographs demonstrating the damage to the home. (R. 78 at p. 81, Ex. 8, 9, 17, 18, 22, 23, 24, 25, 26, 33, 36, 37, 41, 53, 61, and 84.)

When it became apparent that Advanced Shoring could not fix the house, the Hones realized they would lose their home; their lender started foreclosure proceedings. (R. 44 at p. 6.) The Hones could not afford to have a deficiency judgment against them, so they decided to file bankruptcy before their house was sold at foreclosure. (R. 44 at p. 6.) The Hones' home was sold at a trustee's sale on February 25, 2010. (R. 44 at p. 4.) The Hones filed bankruptcy because they had to pay tens-of-thousands of dollars to fix the damage caused to the property by Advanced Shoring, they had to vacate the home because it was not safe, and they could no longer afford to pay both the mortgage payment and rent required for a different place to live. (R. 44 at p. 5.) The Hones had

initially planned on filing for Chapter 13 bankruptcy, but around the time they were planning to file, Michael Hone was injured and lost his income; because of Michael Hone's lost income the Hones filed for Chapter 7 instead of Chapter 13. (R. 44 at p. 6.)

SUMMARY OF THE ARGUMENT

Advanced Shoring now seeks to appeal its losses on two motions for summary judgment. These motions were denied because the Trial Court determined that it could not render summary judgment in light of *material factual disputes*. Advanced Shoring later made its same summary judgment arguments at trial, and again lost. The Hones cannot definitively say why Advanced Shoring has chosen to appeal its losses on summary judgment instead of appealing the outcome at trial; but the obvious guess is that Advanced Shoring did not believe it could meet its heavy burden of attacking the Trial Court's factual record, which came out strongly in the Hones favor. To that end, Advanced Shoring now seeks to attempt an "end run" on the facts that were developed at trial by ignoring them, and asking this Court to review legal issues that were not outcome determinative. Regardless of whether the Hones' suspicions as to Advanced Shoring's motives are correct, the fact remains that the posture of Advanced Shoring's appeal is procedurally improper.

The Utah Supreme Court recently held that an appeal from the denial of a summary judgment motion is only appropriate if the motion were denied on a "*purely legal*" basis. *Normandeau v. Hanson Equipment, Inc.*, 2009 UT 44, ¶ 15, 215 P.3d 152, 157. In the instant case, the Trial Court denied Advanced Shoring's motions because of factual disputes, and Advanced Shoring's trial arguments were in no way prejudiced by the denials

of summary judgment; therefore, the Court of Appeals does not have jurisdiction over the subject matter of the denials of summary judgment at issue in the present appeal.

Advanced Shoring also appeals its lost motion for directed verdict. Advanced Shoring has failed to even make an attempt to marshal evidence, as is required for such an appeal, which would support the Trial Court's denial of directed verdict. Accordingly, Advanced Shoring's appeal should, and can, be dismissed on that basis alone. Additionally, this Court should note that while the failure to marshal evidence is fatal to Advanced Shoring's position, Advanced Shoring must also necessarily lose because Advanced Shoring cannot demonstrate the Hones failed to present evidence upon which a reasonable trier of fact could render a verdict in the Hones' favor.

Advanced Shoring argues that the Hones should have been required to present expert testimony at trial. Simply stated, expert testimony is unnecessary for a reasonable trier of fact to find breach of a warranty. Advanced Shoring guaranteed that it would fix the house and stop it from settling. Given the open and obvious devastation the home suffered any reasonable person, including the Hones, would be more than capable of testifying that the Hones' home was not fixed, did not stop settling, and was uninhabitable. No complex geotechnical analysis was necessary for the Hones to prove the breach. This is especially true where the City of LaVerkin deemed the home uninhabitable, and the Hones were forced to move out – the home was obviously not repaired as promised by the warranty.

Advanced Shoring seeks to escape responsibility by arguing that it cannot be responsible for the damages suffered by the Hones because they lost the home through foreclosure. This position is directly contrary to controlling Utah law. Specifically, the

Supreme Court of Utah has held that a property owner may recover damages for construction defects even if he or she no longer owns the home. *See Mitchell v. Stewart*, 581 P.2d 564 (Utah 1978). Furthermore, the Hones alleged at the time of summary judgment that Advanced Shoring was the direct cause of their loss of the home to foreclosure because of the extensive out-of-pocket expenses the Hones incurred while trying to repair the home after Advanced Shoring performed work and because the home was unlivable and the Hones could not afford to pay their mortgage in addition to a rental payment. Accordingly, Utah case law and issues of material fact both prevented summary judgment on this issue.

Finally, Advanced Shoring argues that the terms of the warranty at issue were too indefinite to be enforceable. The Trial Court expressly denied this argument because “certain areas of material fact, particularly those relating to the alleged ‘warranty,’ remain in dispute” (R. 33.) Advanced Shoring admits informing the Hones that additional work would be required to stop the home from settling and admits stating “I won’t guarantee it unless I get \$10,000 more.” The Supreme Court has held that whether a statement constitutes a warranty is a question for the trier of fact. *Groen v. Tri-O-Inc.*, 667 P.2d 598, 606 (Utah 1983). In this instance the meaning and intention behind the statement “I won’t guarantee it unless I get \$10,000 more” was precisely the factual question the Trial Court identified in denying the motion for summary judgment. Later, at trial, the Trial Court found the warranty was sufficiently definite. Specifically, the warranty required Advanced Shoring to repair the home and stop it from further settling. At a bare minimum, given the standard at summary judgment, this issue is one where its

ambiguous nature requires the trier of fact to review the facts and circumstances to appropriately interpret the warranty at issue.

ARGUMENT

I. ADVANCED SHORING DOES NOT HAVE A BASIS TO APPEAL THE DENIALS OF ITS MOTIONS FOR SUMMARY JUDGMENT AND DIRECTED VERDICT.

- a. This Court can only review denials of summary judgment rendered on purely legal grounds; Advanced Shoring's motions for summary judgment were not denied on purely legal grounds.**

The Supreme Court of Utah has 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.”

Normandeau v. Hanson Equipment, Inc., 2009 UT 44, ¶ 15, 215 P.3d 152, 157. “On appeal, we will review a district court's denial of a summary judgment motion when the district court makes a legal ruling based on undisputed facts that do not materially change at trial.” *Id.* at ¶ 9. The Supreme Court announced these holdings to clarify prior case law on the subject of the appellate review of denials of summary judgment. *Id.* at ¶ 8. The previous standard for reviewing the denial of a summary judgment motion was stated in *Wayment v. Howard*, 2006 UT 56, ¶ 20, 144 P.3d 1147, 1151-52 (emphasis in original):

In appealing a summary judgment ruling, only facts and legal theories that were *foreclosed* from being addressed at trial may be heard on appeal. Even if the motions had been granted, the interlocutory nature of a partial summary judgment leaves them subject to modification by the trial court

up until entry of final judgment. Appellant was accorded the opportunity to fully litigate his case. Consequently, the trial court's initial denials of partial summary judgment resulted in no prejudice, did not affect the final outcome, and are not reviewable.

The *Normandeau* Court considered implementing a bright line rule precluding any review of a denial of summary judgment, but ultimately determined that the courts may need to review summary judgment denials where, in light of a district court's denial of summary judgment on a legal basis, it would be futile for the moving party to continue to litigate the issue upon which it had lost at summary judgment. *Normandeau*, 2009 UT 44, ¶¶ 9-16. The Court cited to *Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co.*, 844 P.2d 322 (Utah 1992), in which the district court denied a summary judgment motion concerning accord and satisfaction as a matter of law. *Id.* at ¶ 12. "In that case, it would have been futile for the losing party to litigate accord and satisfaction at trial due to the earlier court ruling; no factual issue at trial would have affected the legal determination." *Id.* The *Normandeau* Court also cited to *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, 94 P.3d 179, in which Prince Yeates sought summary judgment, arguing that, as a matter of law, no contract existed between the parties to that case. *Id.* at ¶ 13. Prince Yeates was not foreclosed from arguing that there was no contract between the parties, but because the district court had already ruled that a contract existed, such an argument would have been futile and Prince Yeates was entitled to appellate review. *Id.* at ¶¶ 13-14.

In the instant matter however, Advanced Shoring's appeal is improper because its motions were not denied on a "purely legal" basis. Advanced Shoring sought relief

through summary judgment for each of the three issues it now appeals in the present matter. As to each of these issues, the Trial Court denied summary judgment on the basis that there existed material disputes of fact. Advanced Shoring can point to no legal ruling from the Trial Court which rendered any of its arguments futile at trial. In fact, all of those arguments were vigorously asserted at trial, and renewed as part of a motion for directed verdict and in the Advanced Shoring's case in chief.

Advanced Shoring's first motion for summary judgment, which sought relief on the basis that Advanced Shoring did not offer a warranty, was submitted on or about November 30, 2009. (R. 21.) The Trial Court found that "certain areas of material fact, particularly those relating to the alleged 'warranty,' remain in dispute." (R. 33.) Because of these material disputes of fact, the Trial Court held that summary judgment was not appropriate, and denied the motion on the basis of the factual disputes. (R. 33.) Advanced Shoring's motion for summary judgment as to the existence of the warranty was expressly denied on a factual basis.

As will be argued extensively below, numerous issues of fact prevented the Trial Court from granting Advanced Shoring's first motion for summary judgment. Specifically, the parties disputed the intent of Advanced Shoring in stating "I won't guarantee it unless I get \$10,000 more." The Hones contend that Advanced Shoring intended to offer a warranty, and Advanced Shoring contended it did not. (See R. 27 at p. 6.) Advanced Shoring, in its Memorandum in Support of Motion for Partial Summary Judgment (R. 22 at p. 5), acknowledges that Lana Hone's intent in paying additional monies was that Advanced Shoring would "fix the house, we will never have any problems with it again, he can secure

it. There won't be any sinking. There won't be any cracks. It will be good as new.' (Dep. of Lana Hone at 130:22-131:1; 107:18-108:15)."

Advanced Shoring's second summary judgment motion, filed on or about September 3, 2010, requested relief on the other two issues in its appeal: namely, that the Hones could not prevail on their case without expert testimony, and that the Hones could not recover because they no longer owned the home. This motion fared no better, and was denied by the Trial Court. Advanced Shoring admits that "the trial court again denied summary judgment on both arguments because of the existence of unspecified material disputes of fact." (Appellant's Brief, p. 4.)

Disputes of fact prevented summary judgment on the second motion as it concerns the necessity of expert testimony. The Hones presented facts on summary judgment that they bought a warranty from Advanced Shoring to keep their home from continued settlement, and that Advanced Shoring did not successfully stop the home from settling. (R. 44.) The primary factual dispute on this issue dealt with the intent of the parties and whether the Hones paid additional compensation just for work and labor, or whether they were purchasing a warranty. The Hones argue that because they purchased a warranty, this is primarily a case about breach of warranty and expert testimony is unnecessary.

As to the third issue on appeal, whether the Hones can recover damages for a home they no longer own, the record again demonstrates a factual dispute preventing summary judgment. The Hones would not have had to file bankruptcy and lose their home in foreclosure if Advanced Shoring had performed and honored its warranty. (See R. 44.) When it became apparent that Advanced Shoring could not fix the house, the Hones realized

they would lose their home. (R. 44 at p. 6.) The pending foreclosure on the Hones' home necessitated that the Hones file for bankruptcy protection to avoid a deficiency judgment being taken against them. (R. 44 at p. 6.) Advanced Shoring argued that the Hones' bankruptcy filings indicated that they had filed bankruptcy because they suffered a reduction in income after Mr. Hone became disabled and that they could not later claim they were filing bankruptcy because of anything Advanced Shoring did. (R. 51.) While true that the Hones' bankruptcy filing identified Mr. Hone's disability and loss of income as a reason for the bankruptcy filing, that does not change the fact that the Hones were forced into bankruptcy because Advanced Shoring did not honor its warranty. Because the facts concerning the reasons for the bankruptcy filing, and whether Advanced Shoring caused the Hones to file bankruptcy were in dispute, the Trial Court properly denied Advanced Shoring's motion for summary judgment on this issue as well.

Where the Trial Court denied Advanced Shoring's motions for factual disputes, it is hard to imagine that this Court can determine that the denials were on "purely legal" bases. Advanced Shoring is asking this Court to second guess the Trial Court's reasoning in denying these motions. Such is not the role of the Appellate Court. The Trial Court ruled that the motions were denied for factual reasons, but Advanced Shoring now argues that this Court should conclude that the Trial Court actually denied the motions on different grounds than those stated by the Trial Court. If the Court allows Advanced Shoring to appeal the denials of its motions, which were denied for factual reasons, and in light of the factual disputes set forth above, the Court is essentially saying that any denial of a summary

judgment motion is appealable. Such a proposition would be contradictory to the *Normandeau* directive that only denials on “purely legal” bases are appealable.

Advanced Shoring raised its summary judgment arguments at trial, on directed verdict, (R. 79 at pp. 114-125), and in its closing arguments, (R. 80 at pp. 57-89). Unlike the losing parties in *Estate Landscape* and *Prince, Yeates & Geldzahler*, it was not futile for Advanced Shoring to argue its summary judgment issues at trial. Where the Trial Court did not expressly deny the motions for a legal basis, Advanced Shoring was in no way impaired in bringing its summary judgment arguments again at trial. Where there is no specific pre-trial ruling which would render a trial argument futile, it is irrelevant if the motions were denied for factual reasons or for legal reasons. Therefore, Advanced Shoring is in a dissimilar position to the appellants in *Estate Landscape* and *Prince, Yeates & Geldzahler*. The Court should decline to take jurisdiction over the denials of summary judgment, or alternatively, if the Court does take jurisdiction, it should affirm the denials of Advanced Shoring’s summary judgment motions.

b. The Court should affirm the denials of summary judgment because Advanced Shoring failed to marshal evidence which would support the Trial Court’s findings of factual disputes.

A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. Utah Rules of Appellate Procedure 24(a)(9). Though Advanced Shoring attempts to evade this requirement by framing its entire argument in a way that the Court will only review the Trial Court’s decisions for legal correctness, its argument, in actuality, challenges the factual determinations of the Trial Court. The Trial Court expressly denied Advanced Shoring’s first motion for summary judgment in light of

factual disputes, stating that “certain areas of material fact, particularly those relating to the alleged ‘warranty,’ remain in dispute.” (R. 33.) As to its second motion for summary judgment, Advanced Shoring admits that “the trial court again denied summary judgment on both arguments because of the existence of unspecified material disputes of fact.” (Appellant’s Brief at p. 4.) A district court’s finding that material facts are in dispute, thus preventing summary judgment, is a “fact finding” within the scope of Utah Rules of Appellate Procedure 24(a)(9).

To marshal evidence, “[c]ounsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced ... which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.” *State v. Willey*, 2011 UT App 23, ¶ 11, 248 P.3d 1014, 1018 (emphasis in original) (quoting *Kimball v. Kimball*, 2009 UT App 233, ¶ 21, 217 P.3d 733 (citations and internal quotations omitted)). Appellants cannot shift the burden of marshaling by falsely claiming that there is no evidence in support of the trial court's findings. *Chen v. Stewart*, 2004 UT 82, ¶ 78, 100 P.3d 1177, 1195 (citing *Wilson Supply, Inc. v. Fraden Mfg.*, 2002 UT 94, ¶ 22, 54 P.3d 1177). Marshaling is required to promote efficiency and fairness. *Id.* at ¶ 79 (citing *Oneida/SLIC v. Oneida Cold Storage & Warehouse Inc.*, 872 P.2d 1051, 1054 (Utah App. 1994)). It would be unfair to require

the appellee to marshal evidence at considerable time and expense because appellants bear a greater burden on appeal. *Id.* (citing *Oneida*, 872 P.2d at 1053-1054). An appellant must marshal all evidence which would support the challenged decision in its opening brief. *Harding v. Bell*, 2002 UT 108, ¶ 21, n. 3, 57 P.3d 1093.

“If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone.” *Chen*, 2004 UT 82 at ¶ 80 (citing *Wilson Supply, Inc.*, 2002 UT 94 at ¶ 26). “If appellants have failed to properly marshal the evidence, we assume that the evidence supports the trial court's findings.” *Id.* (citing *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 233 (Utah 1998)). “In the face of an appellant's failure to properly marshal the evidence, our most likely action is summary affirmance of the challenged trial court decision.” *Neely v. Bennett*, 2002 UT App 189, ¶ 11, 51 P.3d 724 (citing *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991)).

In order to properly challenge the Trial Court's rulings on summary judgment, where the Trial Court found material facts in dispute as the basis for its denial of the motions, Advanced Shoring is required to marshal all evidence that might support the findings that factual issues were in dispute at the time of summary judgment. Advanced Shoring is required to set forth each possible fact that might have been considered by the Trial Court as being in dispute. After setting forth all possible factual disputes, the burden would then have been on Advanced Shoring to explain why no dispute actually existed. Advanced Shoring's failure to marshal evidence supporting the Trial Court's finding of factual disputes is fatal to its appellate effort; therefore, this Court should

summarily affirm the Trial Court's denial of the summary judgment motions. To emphasize this point, the Honors direct the Court to *Chen v. Stewart*:

“Even where the defendants purport to challenge only the legal ruling, ... if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the defendants also have a duty to marshal the evidence.” *Chen*, 2004 UT 82 at ¶ 20. In *Chen*, the former president, Chen, of a family corporation, E. Excel, brought a derivative suit against the corporation and its president, Stewart. *Id.* at ¶ 7. The district court entered a preliminary injunction against Stewart and other third-party defendants. *Id.* at ¶ 16. On appeal, the Supreme Court held that even though it was being asked to review the legal correctness of issues surrounding the preliminary injunction, these determinations were so fact-sensitive that the appellants were required to marshal evidence. *Id.* at ¶ 20. Specifically, the Court stated that the appellant should have marshaled evidence because it asked the Court to “call into question the factual findings of the trial court.” *Id.* at ¶ 81, n. 15. Rather than marshal the evidence, the appellants in *Chen* “merely ignored damaging findings and avoided confronting problematic facts by claiming that there is ‘no evidence.’” *Id.* at ¶ 83.

Advanced Shoring's appeal is nearly identical in its posture, and similar to the appeal in *Chen*, requires that the Appellate Court review factual findings of the Trial Court. Review of the denials of Advanced Shoring's motions necessarily requires this Court to decide whether the Trial Court's findings of factual dispute were proper. Advanced Shoring seeks to hide from the marshaling requirement by downplaying the

Trial Court's findings of factual dispute. Specifically, Advanced Shoring states that the Trial Court's rulings "were based entirely on undisputed facts" (Appellant's Brief at p. 8.) Advanced Shoring, like the appellant's in *Chen*, tries to avoid damaging factual issues and simply claims that, despite the Trial Court's rulings, no actual disputes of fact existed. Even if the Court construes the determination of whether there are disputed material facts to somehow be legal in nature, it is impossible to ignore that such a review would be highly fact sensitive, and hence under *Chen* Advanced Shoring is still required to marshal evidence.

In addition to the *Chen* analysis, is the Utah Court of Appeals decision that an appellant challenging a ruling on directed verdict is required to marshal evidence, and then show why the evidence was insufficient for the court to deny the motion. *Neely*, 2002 UT App 189 at ¶ 11. Advanced Shoring fails to meet this directive as well. Specifically, Advanced Shoring appeals the Trial Court's denial of its motion for directed verdict on the basis that the Hones should have presented expert testimony. The clear reasoning from *Neely* applies to Advanced Shoring's motion for directed verdict. Hence, because Advanced Shoring has failed to comply with controlling case law, has failed to marshal the evidence, and has failed to point out the "fatal flaw" in that evidence this Court should not consider Advanced Shoring's appeal of the denial of the directed verdict motion.

It is of course relevant that the denial of a directed verdict motion is highly analogous to the denial of a summary judgment motion on the basis that a factual dispute exists. A motion for directed verdict is denied if the evidence presented by the claimant is insufficient to support a verdict. *Id.* ¶ 14. Summary judgment is properly denied if there is a genuine

issue as to any material fact. U.R.C.P. 56(c). An appeal in each instance requires the Appellate Court to review the factual record in full. One of the reasons marshaling is required is to put the burden on the appellant to develop and analyze the full factual record at issue. *See e.g. Wilson Supply, Inc.*, 2002 UT 94 at ¶ 21. This Court should require an appellant to marshal evidence both when appealing a denial of a directed verdict motion, and when appealing the denial of a summary judgment motion where the Trial Court has based its denial on disputed facts.

II. EXPERT TESTIMONY IS NOT REQUIRED FOR THE HONES TO PROVE THEIR BREACH OF WARRANTY CLAIM.

Advanced Shoring argues the Trial Court erred in denying their summary judgment motion, and their motion for directed verdict, on the basis that the Hones could not prevail on their claims without an expert. Summary judgment is appropriate when “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 Rules of Civil Procedure 56(c). An appellate court, when reviewing a district court’s decision on summary judgment, views all facts and reasonable inferences therefrom in favor of the non-moving party. *Massey v. Griffiths*, 2007 UT 10, ¶ 8, 152 P.3d 312, 313 (internal quotations and citations omitted). The Court of Appeals will affirm the denial of a motion for summary judgment as long as it is possible that a fair-minded jury could return a verdict for the non-moving party. *Christiansen v. Union Pacific R.R. Co.*, 2006 UT App 180, ¶ 6, 136 P.3d 1266, 1269 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

Denial of a directed verdict is reversed “only if, viewing the evidence in the light most favorable to the prevailing party, we conclude that the evidence is insufficient to support the verdict.” *Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶ 33, 31 P.3d 557, 569 (internal quotations and citations omitted). “In other words, demonstrating insufficiency of the evidence requires an appealing party to show that *all* the evidence in favor of the verdict cannot support the verdict.” *Id.* (internal quotations and citations omitted). Furthermore, at the directed verdict stage, the court is not permitted to weigh the evidence, but must only determine whether there is a question of material fact for the jury to consider. *Young v. Fire Ins. Exch.*, 2008 UT App 114, ¶ 34, 182 P.3d 911, 919 (internal quotations and citations omitted). Thus, when there is at least some competent evidence that would support a denial of a verdict, then a directed verdict is inappropriate. *Id.* (internal quotations and citations omitted).

- a. The district court has discretion to determine if expert testimony is necessary, and a determination that expert testimony is unnecessary is reviewed for abuse of discretion.**

Advanced Shoring asks the Court to review for correctness the denial of its motions asserting that the Hones should be required to present expert testimony. Correctness is not the appropriate standard of review on this issue. Evidentiary rulings are reviewed under an abuse of discretion standard. *Weiser v. Union Pacific R.R. Co.*, 2010 UT 4, ¶ 22, 247 P.3d 357, 365. Trial courts enjoy broad discretion in determining whether expert scientific evidence is admissible. *Brewer*, 2001 UT 77 at ¶ 16 (internal citations omitted). Admission of expert testimony is within the discretion of the trial court. *State v. Span*, 819 P.2d 329, 332 (Utah 1991). The decision to exclude the

testimony of an expert witness is a matter uniquely within the province of the trial court, and will not be reversed absent a clear abuse of discretion. *Walker*, 844 P.2d at 343. “It is within the discretion of the trial court to determine the suitability of expert testimony in a particular case, and we will not reverse that determination on appeal in the absence of a clear showing of abuse.” *Johnson*, 2009 UT App 382 at ¶17 (citing *State v. Larsen*, 828 P.2d 487, 492 (Utah App. 1992)). “[I]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Utah Rules of Evidence 702(a).

The Trial Court denied Advanced Shoring’s requests that the Hones be required to present expert testimony in this case in order to prevail. The decision not to require expert testimony is an evidentiary ruling in the same way that rulings to allow or to exclude expert testimony are evidentiary. Such rulings are well within the discretion of the district courts.

Rule 702(a) provides that “if” scientific, technical, or other specialized knowledge will assist the trier of fact, expert testimony “may” be allowed. The district court is left to make the threshold decision of “if” such testimony will assist the trier of fact – a decision the court makes in its own discretion. Even if such testimony would assist the trier of fact, expert testimony is still not mandatory; it “may” be allowed – again, at the discretion of the court.

b. Expert testimony is only required in limited circumstances.

Expert testimony is unnecessary where the propriety of the defendant's conduct is within the common knowledge and experience of the layman. *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263-264 (Utah App. 1997) (internal quotations and citations omitted). In *Young v. Fire Insurance Exchange*, the Plaintiff's home and personal items were damaged by fire. 2008 UT App 114 at ¶ 3. The Plaintiff filed a claim against the insurance company for the loss. *Id.* As per the policy terms and conditions the company initiated compensation protocols and issued repeated payments. *Id.* However, after an investigation into the fire concluded, the fire was possibly the result of arson, the insurance payments ceased. *Id.* Subsequently, the plaintiff filed suit alleging breach of contract. *Id.* The defendant moved for, and was granted, a directed verdict at the trial level because the Plaintiff allegedly failed to satisfy the burden of proof with expert testimony that the loss was not the result of arson. *Id.* at ¶ 17. On appeal this Court reversed the trial court's directed verdict and held an expert was unnecessary to survive a directed verdict because the loss caused by fire is a topic within the grasps of ordinary people and a jury. *Id.* at ¶ 33.

Expert testimony is most commonly required in medical malpractice cases. *See Nguyen v. IHC Health Servs. Inc.*, 2010 UT App 85, ¶ 15, 232 P.3d 529, 536 (finding that the standard of care could not be proved in a medical malpractice claim without expert testimony); *Young*, 2008 UT App 114 at ¶ 32 (explaining that expert testimony is usually required to establish proximate cause in medical malpractice cases, but the common knowledge principle creates an exception to the general requirement (internal

quotations and citations omitted)); *Sohm v. Dixie Eye Center*, 2007 UT App 235, ¶ 15, 166 P.3d 614, 619 (“Because of the complex issues involved in a ... medical malpractice case, the plaintiff is required to prove the standard of care and proximate cause through expert testimony” (internal quotations and citations omitted)). In the majority of medical malpractice cases the plaintiff must introduce expert testimony to establish standard of care. *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980). However, even in the ultra-complicated medical malpractice arena, expert testimony is not required where a layman can conclude the impropriety of the treatment at issue. *Id.* (internal citations omitted). “Whether a surgical operation was unskillfully or skillfully performed is a scientific question. If, however, a surgeon should lose the instrument with which he operates in the incision . . . , it would seem as a matter of common sense that scientific opinion could throw little light on the subject.” *Id.* (quoting *Fredrickson v. Maw*, 119 Utah 385 (1951)). The Hones’ claims are obviously simpler to sort out than medical malpractice claims, and much like leaving a surgical instrument in an incision, scientific opinion would shed little light on the question of whether Advanced Shoring breached its warranty by failing to repair a home that was so ruined, the certificate of occupancy was removed by LaVerkin City. Unlike medical malpractice and other cases involving highly complex issues of causation, a breach of warranty case does not require expert testimony.

c. Expert testimony was not necessary to prove the Hones’ breach of warranty claim.

Pointedly expressed, expert testimony is not necessary for the Hones to know that their house was cracking, sinking into the earth, and collapsing around them. Advanced

Shoring's argument wrongly assumes that the Hones had to prove that Advanced Shoring's geotechnical work was deficient. There is no complex geotechnical analysis involved in determining (1) that the Hones bought a warranty from Advanced Shoring, (2) that the warranty required Advanced Shoring to repair the home and stop it from settling, and (3) that Advanced Shoring did not repair the home and did not stop it from settling. Whether the house was repaired and whether it continued to settle are simple observations that can be made by a homeowner.

Additionally on the summary judgment record, the Hones set forth the following factual statements, which must be viewed in the light most favorable to them (R. 44 at pp. 3-6.):

- Plaintiffs affirmatively state that Advanced Shoring informed Plaintiffs that the additional materials and work were necessary in order for Advanced Shoring to guarantee its work.
- After Advanced Shoring had come out the third time to work on Plaintiffs' house Per Danfors came to the house. Mr. Danforth said to Michael Hone that he didn't realize the house was so bad, that he couldn't afford to fix it, and that he would turn it over to his insurance company.
- Mr. Danforth let Plaintiffs know that Advanced Shoring would not be able to come out to the house again and would not be able to fix the settling problem.
- Subsequently, Mr. Danfors told Michael Hone he had spoken to his attorney who told him he should not have guaranteed the work on the house.
- Advanced Shoring guaranteed that Plaintiffs' home would no longer settle after they installed helical piers.
- Plaintiffs' home continued to settle after Advanced Shoring installed the helical piers.
- Advanced Shoring assured Plaintiffs they could fix the house.

- After Advanced Shoring stopped working on the house, the house continued to sink.
- When Advanced Shoring started work on the house, just the Southwest corner of the home was sinking; after Advanced Shoring stopped working, the entire house was damaged, sinking, and caving in toward the middle of house.

The factual record on summary judgment demonstrates that the Hones purchased a warranty from Advanced Shoring to keep their home from continued settlement. The Hones paid substantial consideration for this warranty. When Advanced Shoring did not successfully stop the home from settling, and did not compensate the Hones for its failure, Advanced Shoring was in breach of the warranty. The reasons why Advanced Shoring's work was unsuccessful are irrelevant to this conclusion. Where the Hones were able to give testimony that their home continued to settle after they bought the warranty, no expert testimony was needed.

The practical result of adopting Advanced Shoring's argument is that obvious and readily apparent injuries will be withheld from the trier of fact unless a claimant can bear the expense, time, and delay of engaging an expert witness. Advanced Shoring's position would require expert testimony in all kinds of cases where such testimony has not previously been required. This is hardly helpful to the economy of judicial process and is wholly unnecessary. Further, and contrary to Advanced Shoring's position, the notion that Advanced Shoring's work may have been technical in nature is not the basis of the Hones' breach of warranty claim – the basis of the claim is that a certain result was promised and paid for, and Advanced Shoring did not achieve that result. Simply put, a result was guaranteed and not achieved; hence the breach.

d. The Hones established a prima facie case, and the Trial Court properly denied summary judgment.

On a motion for summary judgment, or a motion for directed verdict, where the moving party requests dismissal of a claim on the basis that expert testimony is required to prove causation, the court evaluates whether the non-moving party can establish a prima facie case without an expert. See e.g. *Young*, 2008 UT App 114 at ¶¶ 29-24; *Thurston v. Workers Compensation Fund of Utah*, 2003 UT App 438, ¶ 6, 83 P.3d 391, 392. In *Young*, the Court of Appeals reversed the grant of directed verdict where the plaintiff had established a prima facie case for liability. *Young*, 2008 UT App 114 at ¶ 34. Young sued Fire Insurance Exchange (“FIE”) when it did not pay on a claim that Young’s home was destroyed by fire; FIE asserted that the fire was a result of arson and would not pay. *Id.* at ¶¶ 3-4. At trial, Young’s expert testimony was excluded. *Id.* at ¶¶ 15-17. The district court held that Young had not established a basis upon which to submit the matter to the jury, and granted a motion for directed verdict. *Id.* at ¶ 17. The Court of Appeals reversed, stating that Young was not required to present expert testimony to establish a prima facie case. *Id.* at ¶ 29. Because Young had established a prima facie case, she should have survived summary judgment, because she presented some competent evidence that would support a verdict in her favor. *Id.* at ¶ 34.

Like *Young*, the Hones presented a prima facie case of breach of warranty. Advanced Shoring warranted that it would fix the Hones’ home and keep it from settling. Advanced Shoring did not fix the home and it continued to settle. The Hones therefore meet the necessary elements for a breach of warranty claim, and did not need expert

testimony to survive summary judgment or directed verdict. The Trial Court properly denied the motions and referred the issue of causation to the trier of fact.

In *Thurston*, the parents of a disabled man claimed the man's medical staff was negligent and proximately caused their son's death. 2003 UT App 438, ¶ 6. The Court held that summary judgment for the defendants was appropriate because the plaintiffs were unable to offer evidence linking the suicide of their Son with the negligence of the care givers. *Id.* at ¶ 20. It was not the lack of an expert which made summary judgment appropriate; rather, it was the lack of any evidence to support the proximate cause of the man's death. *Id.* at ¶¶ 12-22. Proximate cause was left to conjecture. *Id.* at ¶ 13. The trial court does not ordinarily determine proximate cause as a matter of law, unless there is no evidence to support causation. *Id.* at ¶ 15-16. Had the *Thurston* plaintiffs been able to demonstrate a prima facie case of causation, they would have survived summary judgment. Unlike the *Thurston* plaintiffs, the Hones have submitted prima facie evidence that Advanced Shoring offered a warranty and failed to live up to that warranty, and it would be error for the Trial Court to have determined that the Hones could not prove causation at trial in light of its evidence.

The notion that causation is not determined as a matter of law is especially true in a breach of warranty action. "[U]nlike a cause of action in negligence, which is premised on fault, a cause of action for breach of express warranty sounds in strict liability." *SME Indus., Inc. v. Thompson, Ventulett, Stainback and Assocs., Inc.*, 2001 UT 54, ¶ 18, 28 P.3d 669, 676 (internal citations omitted). A plaintiff is not required to prove causation in strict

liability. *See e.g. Decius v. Action Collection Serv., Inc.*, 2004 UT App 484, ¶ 16, 105 P.3d 956, 960 (“[S]trict liability permits a plaintiff to forgo proving causation”).

III. THE TRIAL COURT PROPERLY DENIED ADVANCED SHORING’S MOTION FOR SUMMARY JUDGMENT AS TO THE HONES’ DAMAGES EVEN THOUGH THE HONES NO LONGER OWNED THE HOME.

a. A property owner may recover damages for injury to property even though he or she no longer owns the property.

The Supreme Court of Utah has held that a property owner may recover damages for construction defects even if he or she no longer owns the home. *See Mitchell v. Stewart*, 581 P.2d 564 (Utah 1978). In *Mitchell*, the plaintiffs bought a home which was built by the defendants. *Id.* at 564. After they sold the home, the plaintiffs brought an action against the defendants for damages from defective construction. *Id.* at 564-565. Similar to Advanced Shoring, the defendants in that case moved to dismiss on the basis that the plaintiffs no longer owned the home. *Id.* at 564. The Supreme Court reasoned that the defendants’ motion to dismiss was not well taken, because “If they suffered compensable damage, it would make no difference whether or not they still owned the house.” *Id.* at 564-565.

Though not the focus of its decision, the Court of Appeals supported the *Mitchell* holding in a footnote in 2006, stating, “It should be noted that if Plaintiffs had suffered any compensable damage, their lack of a present ownership interest in the [property] would not preclude recovery.” *Eleopulos v. McFarland and Hullinger, LLC*, 2006 UT App 352, ¶ 16 n. 5, 145 P.3d 1157, 1160. Thus, the only criterion for the Hones to meet under the *Mitchell* standard is to have “suffered compensable damage” – an inquiry which has nothing to do with present ownership of the home.

Advanced Shoring admits in its Brief that the trial court denied Advanced Shoring's second motion for summary judgment "because of the existence of unspecified material disputes of fact." (Brief of Appellant, p. 4.) Advanced Shoring now appeals that decision, alleging that the parties agreed as to the central facts applicable to the issues. (Brief of Appellant, p. 4.) Clearly, this is not the case. In response to Advanced Shoring's motion for summary judgment, the Hones disputed many of Advanced Shoring's statements of allegedly undisputed facts and asserted the following damages in their Additional Statements of Fact (R. 44 at pp. 4-6):

- Advanced Shoring guaranteed that Plaintiffs' home would no longer settle after they installed helical piers.
- Plaintiffs' home continued to settle after Advanced Shoring installed the helical piers.
- After Advanced Shoring stopped working on the house, the house continued to sink.
- When Advanced Shoring started work on the house, just the Southwest corner of the home was sinking; after Advanced Shoring stopped working, the entire house was damaged, sinking, and caving in toward the middle of house.
- Advanced Shoring came to work on Plaintiffs' home three times. On each of these occasions, Advanced Shoring caused damage to the property. Every time they came the damage to the home got worse – they damaged the inside and the outside of the home.
- While Advanced Shoring was working on Plaintiffs' home, they caused damages, including but not limit to the following:
 - a. Damage to decorative curbing
 - b. Damage to lawn and sprinkling system
 - c. Damage to front stamped concrete sidewalk
 - d. Damage to patio
 - e. Punched holes through stucco and exterior walls
 - f. Damaged rain gutters
 - g. Destroyed landscaping

- h. Punctured interior water line twice
 - i. Damaged interior tile
 - j. Damage to interior paint
 - k. Left general debris and dirt in home
 - l. Damage to carpet
 - m. Damage to house foundation
- Plaintiffs incurred tens-of-thousands of dollars in costs to fix the problems caused by Advanced Shoring's work.
 - Some of the piers installed inside the home came up through the floor.

The Hones quite obviously asserted that they suffered damages. In a reply memorandum, Advanced Shoring objected to each statement of additional fact stated above and moved to strike them from the record (R. 51); the motion was denied (see Minute Entry of 12-14-10, Addendum D to Appellant's Brief). It is clear that the parties did not agree as to the central facts as Advanced Shoring now claims. In light of the parties' dispute as to the material facts of the case, the Trial Court properly denied Advanced Shoring's motion for summary judgment. Inasmuch as they properly asserted claims for compensable damages, the fact that the Hones no longer owned the home during the time of trial is irrelevant to the denial of summary judgment.

Advanced Shoring attempts to differentiate the case at hand from *Mitchell* on the basis that the *Mitchell* home was sold by the homeowners and the Hones' home was sold at a trustee's sale. Nothing in the *Mitchell* decision limits the Court's holding to apply only to property owners who personally sell their property or makes an exception if there is a cessation of ownership due to foreclosure. Rather, *Mitchell* makes an unqualified statement that if a plaintiff "suffered compensable damage, it would make no difference whether or not they still owned the house." 581 P.2d at 564.

As an additional matter, it would be bad public policy to allow a wrongdoer to avoid liability merely because a victim of wrongdoing is no longer in possession of the injured property. Wrongdoing parties should not be allowed to serendipitously escape responsibility for their bad acts.

b. Whether Advanced Shoring caused the Hones' bankruptcy and the foreclosure is a question of fact reserved for trial.

When reviewing a motion for summary judgment, “[a] trial court is not authorized to weigh facts...but is only to determine whether a dispute of material fact exists.” *Barenbrugge v. State*, 2007 UT App 263, ¶ 7, 167 P.3d 549 (quoting *Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, ¶ 24, 42 P.3d 379). Causation, however, is a question of fact that must be determined by an examination of the facts. *See Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1292 (Utah App. 1996) (finding that “[c]ausation is a highly fact-sensitive element of any cause of action” and that summary judgment is appropriate “only if there is no evidence upon which a reasonable jury could infer causation” (internal quotations omitted)). Because causation is a fact-sensitive issue, it is not easily disposed of on summary judgment. *See Kilpatrick*, 909 P.2d at 1292.

As Advanced Shoring stated in the Brief of Appellant, the Trial Court denied Advanced Shoring’s second motion for summary judgment “because of the existence of unspecified material disputes of fact.” (Brief of Appellant, p. 4.) Regarding the foreclosure of the home and the Hones’ bankruptcy proceeding, Advanced Shoring asserted, among others, the following allegations of fact in its motion for summary judgment:

- Beginning in June, 2009, Plaintiffs defaulted on the Promissory Note by failing to make required monthly payments. Notice of Default and Election to Sell the Property was filed by the holder of the Deed of Trust (hereinafter, "Creditor") on or about August 25, 2009.
- 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. 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 [sic] income substantially.
- Creditor then initiated a non-judicial foreclosure, which was completed by issuance of a trustee's deed on or about March 8, 2010. This trustee's deed transferred title to the Property to a buyer who purchased the Property at a trustee's sale. Any interest Plaintiffs had in the Property was extinguished by foreclosure.

(R. 39 at pp. vii-ix.)

In response, the Hones disputed many of the allegedly undisputed facts as stated by Advanced Shoring. The Hones also made the following assertions from which a reasonable jury could infer that Advanced Shoring's actions caused the Hones to file for bankruptcy and caused their home to be lost to foreclosure:

- Plaintiffs home was sold at a trustee's sale for \$151,900 on February 25, 2010.
- Plaintiffs paid tens-of-thousands of dollars in costs to fix the problems caused by Advanced Shoring's work.
- Plaintiffs filed bankruptcy because they had to pay tens-of-thousands of dollars to fix the damage caused to the property by Advanced Shoring, they had to vacate the home because it was not safe, and they could no longer afford to pay both the mortgage payment and rent.
- When it became apparent that Advanced Shoring could not fix the house, Plaintiffs realized they would lose their home.
- Plaintiffs could not afford to have a deficiency judgment against them, so they decided to file for Chapter 13 bankruptcy, but around the time they were planning to file, Michael Hone was injured and lost his income.

- Because of Michael Hone's lost income Plaintiffs filed for Chapter 7 instead of Chapter 13.

(R. 44 at pp. 4-6, Additional Statements of Fact.)

Advanced Shoring argues that the Hones' bankruptcy and foreclosure were "based on decisions unrelated to Advanced Shoring's conduct." (Brief of Appellant, p. 23.) The Hones, however, have asserted that they had no choice but to file for bankruptcy because they had paid tens-of-thousands of dollars to fix the damage caused to the property by Advanced Shoring, because they were required to vacate the home because it was uninhabitable, and because they could no longer afford to pay both the mortgage payment and rent. From the facts alleged by the Hones, a reasonable jury could infer that Advanced Shoring caused the Hones to file for bankruptcy and to lose their home to foreclosure. Summary judgment is appropriate only if there is no evidence upon which a reasonable jury could infer causation. Because a reasonable jury could infer causation in this matter, denial of summary judgment was proper.

c. The Hones damages were not limited to being dispossessed of the home.

Advanced Shoring's appeal incorrectly casts the Hones' damages as being related to only the loss of the home.

Under Utah law it is well established that the injured party in a breach of contract action has a right to damages based upon his expectation interest as measured by (a) the loss in value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or loss that he has avoided by not having to perform.

TruGreen Cos., L.L.C. v. Mower Bros., Inc., 2008 UT 81, ¶ 10, 199 P.3d 929, 931.

Advanced Shoring's motion for summary judgment did not take into account damages for reimbursement of the Hones' out-of-pocket costs incurred in repairing the injury Advanced Shoring caused to the house. Upon summary judgment, the Hones asserted that their damages were related not only to the loss of their home but also extended to their out-of-pocket costs of repairing the injury caused by Advanced Shoring. (R. 44 at pp. 4-6.) The Hones prevailed at trial on both categories of damages: (1) loss of value to the home, and (2) reimbursement of expenses incurred by the Hones to repair injury to the home caused by Advanced Shoring. (R. 80 at pp. 98-100.) On summary judgment, the Trial Court was asked to rule that the Hones could not recover any damages because they no longer owned the home. (R. 39.) Based on the Hones claimed damages for out-of-pocket expenses, the Trial Court, even if it had been compelled by Advanced Shoring's argument as concerning the loss of the home, properly denied the motion as it could not ascertain, as a matter of law, that no damages were appropriate.

IV. THE TRIAL COURT PROPERLY DENIED ADVANCED SHORING'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF WARRANTY.

Advanced Shoring challenges the Trial Court's denial of its summary judgment motion arguing that the Hones' warranty was unenforceable. The Trial Court ruled on summary judgment that "certain areas of material fact, particularly those relating to the alleged 'warranty,' remain in dispute" (R. 33.)

Summary judgment is appropriate when "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

Rules of Civil Procedure 56(c). An appellate court, when reviewing a district court's decision on summary judgment, views all facts and reasonable inferences therefrom in favor of the non-moving party. *Massey*, 2007 UT 10 at ¶ 8. The Court of Appeals will affirm the denial of a motion for summary judgment as long as it is possible that a fair-minded jury could return a verdict for the non-moving party. *Christiansen*, 2006 UT App 180 at ¶ 6 (citing *Anderson*, 477 U.S. 242).

a. Where there are disputed facts, an oral warranty cannot be interpreted on summary judgment.

Summary judgment cannot be granted where there exist genuine issues of material fact. *Lovendahl v. Jordan School Dist.*, 2002 UT 130, ¶ 13, 63 P.3d 705, 709. Only the trier of fact can ascertain the intent of the parties to an oral agreement. *See e.g. Rex T. Fuhrman, Inc. v. Jarrell*, 445 P.2d 136, 137 (Utah 1968) (stating, "It was the duty of the trial court in its interpretation of this oral agreement to ascertain the meaning to be given to the words and manifestations of the parties and thus determine their intention") (citing *Restatement of the Law of Contracts*, §226, p. 305, and comment b). Where there is conflicting evidence, whether a statement constitutes a warranty is a question for the trier of fact. *Groen v. Tri-O-Inc.*, 667 P.2d 598, 606 (Utah 1983); *Park v. Moorman Manufacturing Co.*, 241 P.2d 914, 918 (Utah 1952); *Nielson v. Hermansen*, 166 P.2d 536, 538 (Utah 1946). The *Groen* Court additionally went to the effort to distinguish the interpretation of an oral warranty, which is a factual interpretation, from the interpretation of an unambiguous written contract, which interpretation can be made as a matter of law. 667 P.2d at 606.

Advanced Shoring concedes that it made the statement “I won’t guarantee it unless I get \$10,000 more.” The parties further agree that the Hones paid additional compensation after this statement was made. The major factual dispute hinges on the intent of the parties. The Hones intended to buy a warranty. Advanced Shoring claims it did not intend to give a warranty.

Specifically, the Hones, in their Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment (R. 27 at p. 6) set forth their dispute to Advanced Shoring’s eighteenth factual statement as follows:

18. Plaintiffs authorized Advanced Shoring to perform additional work, and paid \$8,000.00 to cover the additional cost. (Dep. of Lana Hone at 97:2-16.)

Plaintiffs do not dispute that they paid an additional \$8,000.00, but this additional cost was not only for the additional work, but also to secure a guarantee of the work performed insuring that no additional settling of the home would occur. (Dep. of Lana Hone 96:12-97:18, Dep. of Michael Hone 97:1-14.)

This dispute, which speaks to the intent of the Hones in paying additional monies, is enough to defeat Advanced Shoring’s motion. The Hones paid additional monies to secure Advanced Shoring’s guarantee that it could stop any additional settling of the home from occurring.

Advanced Shoring, in its Memorandum in Support of Motion for Partial Summary Judgment (R. 22 at p. 5), acknowledges that Lana Hone’s intent in paying additional monies was that Advanced Shoring would “‘fix the house, we will never have any problems with it again, he can secure it. There won’t be any sinking. There won’t be any cracks. It will be good as new.’ (Dep. of Lana Hone at 130:22-131:1; 107:18-108:15).” This is clearly a

dispute as to what was meant by Advanced Shoring's statement, "I won't guarantee it unless I get \$10,000 more", which dispute should have been, and in fact was, resolved at trial.

b. The statement "I won't guarantee it unless I get \$10,000 more" is not the sole basis for the warranty.

The Court should note that Advanced Shoring's framing of this argument is based on a faulty premise. Advanced Shoring asks the Court to determine that the statement "I won't guarantee it unless I get \$10,000 more", standing alone, cannot create an enforceable warranty. This statement, however, is not the sole basis for the warranty. In addition to this statement, the summary judgment record contains other facts – facts which Advanced Shoring failed to marshal – which are critical in determining whether a reasonable trier of fact could conclude Advanced Shoring gave the Hones a warranty.

The parties agree that Advanced Shoring stated "I won't guarantee it unless I get \$10,000 more." The parties agree that additional monies were paid. (R. 27 at p. 6.) The parties further agree that, after payment of the additional monies, Advanced Shoring returned to the home to perform additional work, but was unable to stabilize the home. (R. 27 at p. 6.) Advanced Shoring returned to the home to perform work, not once, but at least twice (R. 27 at pp. 6-7), and claims to have wanted to come back to perform more work, but states that "Plaintiffs have refused to allow Advanced Shoring to return to the Property." (R. 22 at p. vii.)

Advanced Shoring offered a warranty, and the Hones bought it. After money changed hands, the course of conduct of the parties is further evidence of the warranty. Acting in all consistency with the idea that it had given the Hones a warranty, Advanced

Shoring came to the home for further work, and when the Hones still had problems, Advanced Shoring came back for an additional attempt to fix the home. When the home continued to settled thereafter, Advanced Shoring claims to have wanted to come back to make another attempt, but claims it was prevented by the Hones from so doing.

Advanced Shoring might contend that it came back to the home merely because the Hones paid for additional labor, but this ignores the fact that Advanced Shoring came back to the home on multiple occasions, and it claims to have wanted to come back to do even more work, but was prevented by the Hones. Advanced Shoring acted as though it thought it had warranted a particular result on the project.

c. The warranty was sufficiently definite for the Trial Court to deny summary judgment.

“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.*, 2001 UT 54 at ¶ 18. A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. *Groen*, 667 P.2d at 604. It is intended to relieve the promisee of any duty to ascertain the fact for himself, and it amounts to a promise to answer in damages for any injury proximately caused if the fact warranted proves untrue. *See Quagliana v. Exquisite Home Builders, Inc.*, 538 P.2d 301, 309 (Utah 1975); *Welchman v. Wood*, 353 P.2d 165, 167 (Utah 1960).

Utah case law also establishes that an express warranty does not require any particular words to be effective. *See Welchman*, 353 P.2d at 328; *Nielson*, 166 P.2d at

537; *Rockhill v. Creer*, 189 P. 668, 671 (Utah 1920). “[T]he representation of fact which would naturally tend to and does induce a bargain is a warranty.” *Nielson*, 166 P.2d at 537. A warranty only requires a direct and positive affirmation of fact made by the warrantor guaranteeing a result. *SME Indus., Inc.*, 2001 UT 54 at ¶ 21. Where there is indefiniteness, there is no contract. *Candland v. Oldroyd*, 248 P. 1101, 1102 (Utah 1926). “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 (Utah 1961).

Advanced Shoring guaranteed that the Hone’s home would not settle any further, on the condition that the Hones pay additional monies. This representation by Advanced Shoring induced the Hones to pay the additional monies. Advanced Shoring, therefore, assured that if it was unable to secure the home, it would answer in damages. Advanced Shoring’s representation was an affirmation that, for additional consideration, it could guarantee the security of the home. Advanced Shoring gave the Hones a warranty.

In *Groen*, the Supreme Court found that there was enough evidence that the question of whether the defendant gave the plaintiff a warranty should have been submitted to the trier of fact. 667 P.2d at 606. Plaintiff was to perform complicated helicopter work, known as “flying wire.” *Id.* at 600. Defendant gave plaintiff certain rope to “fly wire” and when the plaintiff expressed concerns about the rope, the defendant assured him that the rope was strong enough. *Id.* at 600-601. The defendant’s statements were sufficient to raise issues of fact and should have been submitted to the

jury for determination of whether the statements constituted a warranty. *Id.* at 606.

Similarly, the Hones argue that Advanced Shoring offered them a warranty. Whether the parties intended to exchange a warranty for additional consideration is not a question that can be resolved on summary judgment, and was properly submitted to the trier of fact.

Welchman is a warranty case in which the district court dismissed the plaintiffs' case before evidence was submitted to the jury. 353 P.2d at 166. On appeal the plaintiffs asked the Supreme Court to reverse the district court ruling in light of the plaintiffs' evidence of the existence of a warranty. *Id.* at 167. The plaintiffs had listed their home for sale with the defendant acting as its agent at an asking price of \$21,000. *Id.* at 166. A couple named Granger offered to exchange their home, valued at \$10,000, for the plaintiffs' home and to pay the balance of the purchase price over time. *Id.* at 166-167. The plaintiffs needed cash and could not accept this offer. *Id.* at 167. In order to push the transaction through, the defendant represented that it would assist the plaintiff in securing an FHA loan and in selling the Granger installment contract, so the plaintiffs could get cash out of the transaction. *Id.* The defendant stated, "I will see that you get that loan", and "I will sell your contract for no less than \$4,000, whereby you can attain your money." *Id.* Defendant did not obtain the loan and did not sell the contract. *Id.* The Court found that the statements made by the defendant were enough to submit to the trier of fact and reversed the district court's ruling. *Id.* at 168. The representations made by Advanced Shoring are similar to those in *Welchman*. Advanced Shoring's offer to guarantee its work induced reliance by the Hones in the same way that the defendant's statements induced the reliance of the plaintiffs in *Welchman*.

In *Valcarce*, the parties, mink ranchers, negotiated the sale of 180 mink. 362 P.2d at 428. The buyer gave \$1,500 cash and a promissory note for \$2,700. *Id.* The buyer attempted to argue that the sale price of the mink was \$1,500 and that he gave the promissory note for some other side deal. *Id.* The buyer argued that the note was given for one of three possible deals: (a) for the seller to give an unspecified number of additional mink; (b) to be applied on a transaction where the seller would ranch some of his mink on the buyer's ranch; or (c) to return the note to the buyer. *Id.* The Court concluded that because the "plaintiff himself could not delineate with any definiteness" which of the three deals the parties had agreed to, it could not enforce a contract. *Id.* The warranty in the case at hand is nothing like the contract in *Valcarce*. Where in *Valcarce*, the plaintiff could not even articulate what his promissory note was for, naturally, the Court could not find a contract. The Hones, quite specifically, state that they bought a warranty from Advanced Shoring so that their home would stop sinking. Even Advanced Shoring admits that it stated "I won't guarantee it unless I get \$10,000 more." Advanced Shoring's representations induced the Hones to pay additional consideration. When Advanced Shoring gave the Hones this warranty it promised to answer in damages if it was unable to secure the home.

To reverse the Trial Court's ruling on summary judgment, this Court, while making all inferences in favor of the Hones, would have to find that a reasonable trier of fact could not have found that the parties agreed to a warranty. This is an especially difficult standard where an experienced trial judge, a more-than-competent trier of fact, has reviewed the evidence and found that such a warranty did in fact exist. A reasonable trier of fact could

find that Advanced Shoring meant to give the Hones a warranty when it stated “I won’t guarantee it unless I get \$10,000 more.”

Advanced Shoring acknowledges making the statement “I won’t guarantee it unless I get \$10,000 more.” The reasonable inference of this statement is that Advanced Shoring actually intended to guarantee its work in exchange for \$10,000. The summary judgment record also contains Lana Hone’s deposition testimony concerning her intent in paying additional consideration, namely that Advanced Shoring would “fix the house, we will never have any problems with it again, he can secure it. There won’t be any sinking. There won’t be any cracks. It will be good as new.” (R. 22 at p. 5.) A trier of fact could reasonably conclude that Lana Hone’s interpretation of the warranty is correct.

Advanced Shoring cites the Court to *Harris v. Albrecht*, 2004 UT 13, 86 P.3d 728. In *Harris*, a business owner filed suit after his building burned down. *Id.* at ¶ 6. The business owner alleged that he had called his insurance agent and asked him to place fire coverage on his equipment and the content of his office. *Id.* at ¶ 5. The agent allegedly said “he would take care of [it]” and “he would come out and look at [the] equipment,” but the agent did not obtain any insurance. *Id.* at ¶¶ 5-6. The Court found no contract between the parties. *Id.* at ¶ 10. *Harris* is very different from the present case. After the business owner and the agent discussed potential fire coverage, neither party took any further action toward obtaining fire insurance. *Id.* at ¶ 14. After Advanced Shoring offered the Hones a warranty, the Hones paid consideration for the warranty. No evidence is cited in *Harris* that the business owner paid for fire coverage. After the Hones paid consideration, Advanced

Shoring came to the Hones' home to attempt to secure it; when its attempt failed, Advanced Shoring came back for another attempt; when that attempt failed, Advanced Shoring claims it wanted to return again, but was prevented by the Hones. There was no evidence in *Harris* that the conduct of the parties to that case indicated insurance had been purchased. The Hones and Advanced Shoring both acted as if the offered-and-paid-for warranty was in effect.

Brown's Shoe Fit Co. v. Olch, 955 P.2d 357 (Utah App. 1998) is also set forth by Advanced Shoring as similar to the present case. A critical distinction between *Olch* and the present case is that the parties in *Olch* could not identify the amount to be paid under the contract at issue. *Id.* at 364. No such problem exists for the Hones, where the price of the warranty is not contested by the parties – only whether the price paid was for the purchase of a warranty.

d. Where contract terms are missing, the contract is ambiguous, not indefinite.

Much of Advanced Shoring's argument focuses on terms that it considers absent or unclear from the warranty. The Hones contend that the warranty is completely developed, but even if that were not true, the warranty is, at worst, ambiguous. While a lack of definiteness is demonstrated when there is no "meeting of the minds," *see Valcarce*, 362 P.2d at 428, ambiguity is a condition where the parties have had a meeting of the minds sufficient to demonstrate that some agreement exists, or may exist, but the terms are missing or have uncertain meaning, *see WebBank v. American General Annuity Service Corp.*, 2002 UT 88, ¶¶ 19-20, 54 P.3d 1139, 1145. If there is any lack of clarity

to the terms of the warranty, the warranty should be construed as ambiguous, not indefinite.

An appellate court reviews the trial court's legal conclusion that the contract is ambiguous for correctness. *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 6, 78 P.3d 600, 601 (citing *Parduhn v. Bennett*, 2002 UT 93, ¶ 5, 61 P.3d 982). If a contract is deemed ambiguous, and the trial court allows extrinsic evidence of intent, interpretation of the contract becomes a factual matter and the court's review is strictly limited. *Id.* (citing *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985)). "An ambiguity exists in a contract term or provision if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies."

WebBank, 2002 UT 88 at ¶ 20 (internal quotations and citations omitted). When ambiguity exists, the intent of the parties becomes a question of fact. *Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990). "Failure to resolve an ambiguity by determining the parties' intent from parol evidence is error." *Id.* "[A] motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended." *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983). Because an ambiguous contract must be referred to the trier of fact for interpretation, the Trial Court, to the extent the warranty is ambiguous, properly denied summary judgment.

Advanced Shoring relies on *Gold's Gym* to make its argument that the warranty at issue is indefinite, but *Gold's Gym* is really a case about ambiguity and "more a case about missing terms than indefinite terms." *Gold's Gym*, 2003 UT 37 at ¶ 10. This case

highlights the distinction and relationship between ambiguity and indefiniteness. *Gold's Gym* was a dispute between a commercial landlord and tenant. *Id.* at ¶ 1. The parties disagreed about which of them was responsible for improvements to the building. *Id.* at ¶ 4. The parties had entered into a lease agreement, but the agreement was silent as to who was responsible for the improvements. *Id.* at ¶ 3. The district court made the threshold conclusion that the contract was ambiguous and allowed extrinsic evidence of the parties' intent. *Id.* at ¶ 8. After considering extrinsic evidence the trial court found that there was no meeting of the minds and dismissed the complaint for indefiniteness. *Id.* at ¶ 5. Nielsen appealed the trial court's conclusion that the lease agreement was ambiguous. *Id.* at ¶ 11. The Supreme Court affirmed the determination of ambiguity in light of the missing terms. *Id.* at ¶ 14. The contract at issue was not indefinite as a matter of law, but was only determined to be indefinite after the district court made a finding of ambiguity and conducted a trial. See generally *Id.* Thus, summary judgment that a contract is indefinite is only appropriate when no reasonable trier of fact could make a finding of ambiguity. To the extent that this Court finds any ambiguity in the terms of the warranty, it must affirm the denial of summary judgment.

Advanced Shoring's warranty is not indefinite as was the lease agreement in *Gold's Gym*, where the Court first found ambiguity, and then determined indefiniteness after full trial. The record on summary judgment demonstrates that the Hones bought a warranty from Advanced Shoring and that Advanced Shoring agreed to take responsibility if it could not fix the home and keep it from sinking. The record further reflects that Advanced

Shoring failed to fix the home. To the extent that any terms are missing to complete the warranty it is, at worst, ambiguous rather than indefinite, and subject to interpretation by the trier of fact. It would be particularly difficult for the Court to hold that the warranty is indefinite as a matter of law, and that no reasonable trier of fact could find that the warranty is ambiguous, when Advanced Shoring admits to making the statement, "I won't guarantee it unless I get \$10,000 more."

CONCLUSION

For the reasons set forth above, the Hones request the Court to affirm the Trial Court's denial of each of Advanced Shoring's summary judgment motions and the denial of Advanced Shoring's motion for directed verdict.

DATED and SIGNED this 10th day of November, 2011.

HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.




JUSTIN D. HEIDEMAN
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify, pursuant to Utah Rules of Appellate Procedure 24(f)(1)(C), that the Appellees' principle brief complies with the type-volume limitation set forth in Utah Rules of Appellate Procedure 24(f)(1)(A). Appellees' brief contains 13,973 words.

DATED and SIGNED this 10th day of November, 2011.

HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.



TRAVIS LARSEN

CERTIFICATE OF SERVICE

I hereby certify, that on the 10th day of November, 2011, I caused to be served upon the below-named party two true and correct copies of the Brief of Appellees, via US mail, postage prepaid.

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ADDENDUM “A”

Illustrative photographs of damage to the Hones’ home.

