

2009

# Mark Hess and Marilyn Hess v. Canberra Development Company, LC and David Allen : Reply Brief

Utah Supreme Court

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**IN THE SUPREME COURT OF UTAH**

MARK HESS and MARILYN HESS,

Plaintiffs/Appellees,

vs.

CANBERRA DEVELOPMENT  
COMPANY, LC and DAVID ALLEN,

Defendants/Appellants.

**REPLY BRIEF OF APPELLANTS**

Case No. 20090266

Appeal from the Fourth District Court, Utah County, Judge Fred D. Howard.

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## RELEVANT FACTS

Although the Appellees (the “Hesses”) argue that the Appellants (collectively “Allen and Canberra”) failed to marshal the evidence, the parties' recitations of the material facts are essentially consistent. The primary differences occur where the Hesses engage in hyperbole, speculation, and/or distortion of the testimony (such as incorrect quotations of testimony, or taking testimony out of context as more fully explained below). The following factual issues illustrate the differences.

### What the AGECE Report Actually Says

In an effort to show that Canberra and Allen had perfect knowledge and forewarning of the settlement of their house, the Hesses compress time and misquote both the testimony and the exhibits received at trial. For example, the Hesses frequently state that the AGECE Report reflected the presence of "collapsible soils" (or, even worse, “toxic soils”) on Lot 41. *See, e.g.*, Appellees' Brief at 6, 7, 8, 22-23. In fact, the AGECE Report was prepared in 1997. Tr. 521-22. Since the AGECE Report preceded the preparation of the subdivision plat map by several years, and the layout of the lots and streets was not known at the time of the AGECE Report, Tr. 613-15, the AGECE Report could not, and did not, make any references to specific lots upon which the test pits were dug. Hence, statements by the Hesses to the effect that the AGECE Report reflected the presence of collapsible soils on Lot 41 are simply not true. In retrospect, it is now known that test pit 12 was located in what is now the back yard of the Hesses' property, Tr. 188, but there was no testimony establishing that Canberra and Allen knew at the time of the sale of Lot

41 (in 2004, seven years after the AGECE Report) that test pit 12 was on Lot 41. Tr. 521-22.

The AGECE Report also does not expressly state that there were “collapsible soils” found in test pit 12. There are only two portions of the report that reflect data or analysis pertaining to test pit 12. Those portions consist of: (1) Figure 3, which sets forth the logs of all twelve test pits (showing a cross-sectional representation of the soils encountered) (Figure 4 provides the legend and notes for the test pit excavations), and (2) Figure 6, which sets forth the results of a “consolidation test” on a soil sample taken from test pit 12. Ex. 2, at Figure 2, Figure 4, and Figure 6, R. 4680. So that the Court can appreciate the highly technical nature of this data, Figures 3, 4 and 6 are reproduced in the Addendum to this Reply Brief. Applying the legend (Figure 4) to the log of test pit 12, a reader could derive that test pit 12 contained about one foot of topsoil, followed by eight feet of “silty gravel,” underlain by two feet of “lean clay and silt,” followed by one foot of “silty gravel,” with four feet of “lean clay and silt” extending to the bottom of test pit 12. Neither of the references to test pit 12 states that the soil is “collapsible,” much less “toxic.”

The Hesses also claim that the evidence established the presence of “serious soils problem in the development generally . . .,” and that the report “detailed soil problems throughout the development.” Appellees' Brief at 8, 22. Neither the AGECE Report nor any other evidence established that there were “serious soil problems in the development generally.” In fact, the report states:

Most of the soils present within the study area consist of coarse granular soils which are typically not moisture sensitive. However, there appears to be localized areas of collapsible soils. We were not able to identify specific areas of concern due to the erratic nature of the clay and silt soils at the site. With the known erratic occurrence, we suggest that the owners be aware of the potentially moisture sensitive soils in the area and that excavation observations and drainage precautions contained in the geotechnical recommendations of this report be carefully followed.

Ex. 2, at p. 10, R. 4680 (emphasis added).<sup>1</sup>

The Hesses' geotechnical expert witness, James Nordquist, testified, “There is nothing [in the AGEC Report] that states that the area is unsuitable for development.” Tr. 204. In fact, Mr. Nordquist testified that if the soils in test pit 12 made the property in the area unsuitable for construction of a home, AGEC would have noted that fact in the report. *Id.* The Hesses presented no evidence that there were other incidents of settlement at any other house, garage, road, sidewalk or other improvement built within the subdivision. In short, there was no basis in the evidence actually in the Record for the Hesses' assertions that there were serious problems in the subdivision generally, or even that the results of test pit 12 specifically gave notice that the area was unsuitable for development.

Allen's Knowledge of Toxic Soils on Lot 41.

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<sup>1</sup> This quotation also points out the proclivity of the Hesses' brief to add inaccurate and unsubstantiated commentary to the testimony. In the last sentence of this quote, the Hesses inserted bracketed material, so that the sentence read, in pertinent part: “With the known erratic occurrence [of bad soils at the site], . . .” Appellees' Brief at 5. As is apparent from the entire quotation, the bracketed insert should read [of clay and silt soils at the site].



Similarly, the Hesses' argument that Allen knew of “toxic soils” on Lot 41 is not supported by the record. As support for this contention, the Hesses' repeatedly quoted David Allen's testimony as supposedly establishing that he “read through that report [the AGECE Report] . . .” See, e.g., Appellees' Brief at 6, 7, 8, 22-23. In fact, the testimony, in context, was as follows:

Q. (Mr. Baird:) Why didn't you read it [the AGECE Report] in detail, Mr. Allen?

A. (The Witness:) It was similar to the others. None of the other homes we had any soils problems with them. The conclusions page [of the AGECE Report] was what I was very interested in. I'm not a geological expert. I read through that report and it really doesn't have much meaning or understanding for me.

Tr. 612.

In the same vein, the Hesses' brief asserts that although Mr. Tanner (the real estate agent for Canberra who had all of the actual discussions with Mr. Hess about the purchase and who filled in all of the relevant documents for Mr. Allen to sign on behalf of Canberra) initially testified that he did not understand the AGECE Report, he ultimately “conceded that 'it's not all that complicated' and that he could 'follow those [recommendations] . . .', and that '[the recommendations in the AGECE Report are] something that builders need to know about, I suppose.’” Appellees' Brief at 6. Placed in context, however, Mr. Tanner's testimony spoke only to one specific recommendation of the AGECE Report, that “down spouts and drains should discharge well beyond the limits of any back fill.” Tr. 98. Yet, the Hesses' cut, paste and insert job makes it sound like Mr.

Tanner conceded that interpreting and understanding the entire AGEC Report, including the *recherché* discussion of, was easy.

The Jury's Award of Economic Damages Exceeded the Competent Evidence.

At trial, the Hesses' counsel argued to the jury that its award of economic damages should be approximately \$330,000, noting that that amount was appropriate because it was less than the \$536,750 limit established by the court's Instruction No. 18. R. 3749, Tr. 718-20. In particular, counsel requested that the jury award the following specific sums:

1. \$865.40 paid to Earthtec for investigation. See also Tr. 314; Ex. 17, R. 4680.
2. \$9,752.28 paid to Terracon Consultants, Inc. for a soils study on the house. See also Tr. 330-31; Ex. 35, R. 4680.
3. \$24,483.00 and \$186,777.50, or a total of \$211,260.50, paid to Atlas Piers. See also Tr. 316; Ex. 20, R. 4680 (Atlas invoice dated July 25, 2005); Tr. 328-30; Ex. 22, and 23, R. 4680.
4. \$108,179.12 as the cost of future repairs, in accordance with an estimate provided by Zions Builders.

These sums totaled \$330,057.30.

Disregarding this argument and the evidence, the jury, getting only one number right, awarded \$10,617.68 as the costs of investigation and discovery, R. 3749, Tr. 775; \$330,057.30 as the costs of repair already made, R. 3749, Tr. 775; and an additional \$206,692.70 as the costs of repairs to be made, R. 3749, Tr. 776, for a total of \$536,750.00. While the Hesses concede that the jury made an error of \$10,617.68 (in

post-trial proceedings, the District Court reduced the damages by that amount), they argue that the rest of the damages were supported by the evidence.

The jury's award was not a “simple math error,” as asserted in the Hesses' brief (see Appellees' Brief, p. 4, fn. 3). Instead, it was the product of simply disregarding the evidence and the jury instructions. The only element of the award that was supported by the evidence was the cost of investigation and discovery, \$10,617.68. The Hesses claimed, and their evidence proved, the costs of repair already incurred were \$211,260.50, not the \$330,057.30 awarded by the jury. Similarly, the Hesses claimed, and their evidence proved, the future costs of repair were \$108,179.12, not the \$206,692.70 awarded by the jury.

On appeal, the Hesses argue that the jury's award for past and future costs is supported by the evidence. With respect to cost of repairs already incurred, the Hesses argue that the jury's award is based upon the invoices from Atlas Piers, which total \$211,260.50, plus “an estimate for repairs to the home from Zion's Builders for \$108,179.12.” Appellees' Brief at 45. Thus, the Hesses' argument is that an “estimate” (apparently made by the jury based on absolutely no actual proof) of the cost of future repairs is competent evidence of the cost of repairs already incurred.

Continuing this Alice in Wonderland approach to the evidence, the Hesses then argue that the jury's award of costs of future repairs was appropriate, because that was simply the difference between the amount already determined by the jury (for costs of repair already incurred, which, as the Hesses concede, included the costs of repair yet to

be incurred) and the stipulated fair market value of the house if all settlement-related damages have been repaired (which the court instructed was the maximum amount that could be awarded for economic damages). Appellees' Brief at 45, fn. 39. As further support, the Hesses argue that the jury could have reasonably come up with this amount because the house “does not include sidewalks, landscaping or any structures not attached to the home itself,” and that if the Hesses want to build anything else, “they will be required to pay significant amounts of money to install additional piers.” Appellees' Brief at 45. The Hesses do not cite to any evidence to support these assertions. There simply was no evidence presented at trial that any sidewalks or landscaping would have to be installed on piers, nor any evidence of the costs of such items. Additionally, the Hesses suggest that maybe the house could continue to settle, and, while they assert there was testimony to that effect, they do not cite where the record contains such testimony.<sup>2</sup> Appellees' Brief at 46, fn. 39. In fact, the Hesses' witnesses testified that the home was

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2 The Hesses assert that their house “sunk nearly five inches, which is approximately ten times the normal amount of settling for a new home.” Appellees' Brief at 22. The portion of the record cited as authority for this statement actually states that there is an elevation differential of five inches between different portions of the garage floor. When the Hesses' counsel tried to elicit the expert's opinion, “So it settled 5 inches from there?”, the witness stated, “Not necessarily because a garage floor slab typically slopes toward the front of the garage.” The cited portion of the transcript makes no reference as to the “normal amount of settling for a new home.” Tr. 180-81. While the “normal amount” that a house may settle may be known to the Hesses' counsel, as a result of his cottage-industry in suing developers for soil settlement, that fact is not supported at Tr. 180-81.

stronger now than a home built without piers, Tr. 398, and would be “as good as new” on those items that were repaired. Tr. 418.

In short, the jury's award of economic damages exceeded the amounts requested by the Hesses, and the outer limits of the competent evidence, by over \$215,000, or 65%, which also illustrates that the verdict was the product of passion and prejudice.

## **ARGUMENT**

### **I. CANBERRA AND ALLEN HAVE PROPERLY MARSHALED THE EVIDENCE.**

The parties do not disagree as to the law applicable to the duty to marshal the evidence when challenging a factual determination. As noted by the Hesses, the obligation to marshal the evidence “is not intended to gratuitously oppress an appellant; rather it exists to facilitate a structured, realistic, and skeptical appraisal of facts without unduly compromising the adversarial process. At its core, the duty to marshal evidence contemplates that an appellant present ‘every scrap of competent evidence introduced at trial which supports the very findings the appellant resists’ and then ‘ferret out a fatal flaw in the evidence,’ becoming a ‘devil's advocate.’” *In re E.H.*, 2006 UT 36, ¶ 64 (citations omitted). Marshaling the evidence does not require that an appellant distort or misquote the exhibits or the testimony.

As illustrated by the foregoing discussion of the evidence and the facts, Canberra and Allen have met their duty to marshal the evidence. On the factual issues specifically challenged in the Hesses’ brief, Canberra and Allen have presented the competent

evidence actually introduced at trial, and have shown why it does not support the ultimate determination made by the jury. With respect to the jury's award of economic damages, the competent evidence (not to mention the Hesses' argument in closing) establishes that the award could not have exceeded \$330,057.30, which was the sum total of all the costs incurred and to be incurred by the Hesses in remedying the settlement of their home. The Hesses' argument on appeal is, in essence, that the jury's excessive award was justified by speculation.

The Hesses also assert that Canberra and Allen failed to marshal the evidence with respect to their knowledge of the contents of the AGECE Report. First, as set forth above, the Hesses make claims for the AGECE Report (e.g., that it showed "bad soils" on Lot 41) that are simply unsupported by the evidence, or any reasonable inference to be drawn from the report. The conscientious refusal of Canberra and Allen to concede that the AGECE Report states something that it simply does not state is not a failure to marshal. Second, the Hesses' repeated statement that Allen "read through that report [the AGECE Report] . . .," has been shown to be a misquotation. Finally, Canberra and Allen have accurately and completely stated for the Court what the report actually states. The jury could have concluded that Canberra and Allen read the report thoroughly; however, the AGECE Report simply does not identify the presence of "bad" or "toxic" soils on Lot 41.<sup>3</sup> To reiterate, the Hesses' own witness stated that if the soils in test pit 12 made the

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<sup>3</sup> As argued below at Point III, the jury should not, however, have been permitted to speculate about whether Canberra and/or Allen should have interpreted the AGECE Report as informing the reasonable developer of soils problems on what later became Lot 41.

property in the area unsuitable for construction of a home in the area, AGECE would have noted that fact in the report. Tr. 204.

Canberra and Allen have presented the material evidence and testimony, and have presented the Court with an evaluation of the evidence that concedes the reasonable inferences that could be drawn by the jury. What the Canberra and Allen have not done is engage in speculation and distortion of the testimony and exhibits.<sup>4</sup>

## **II. PROVING FRAUD REQUIRES ACTUAL KNOWLEDGE**

The Hesses failed, as a matter of law to produce sufficient evidence to support a claim for fraudulent misrepresentation or fraudulent nondisclosure because: 1) there is no evidence in the record that Canberra or, even more so, Allen, personally, knew or should have known that collapsible soils existed on the Hesses' lot; and 2) that Canberra or Allen withheld such knowledge about the soils on the lot from the Hesses.

As far as Canberra and Allen can tell, this is the first soil settlement case in Utah to make it through a trial and then an appeal on the record of that trial.<sup>5</sup> Of the applicable

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<sup>4</sup> To ensure that the marshaling was complete, Allen and Canberra hired a seasoned appellate lawyer to review the Record and the transcript to ensure that nothing was omitted.

<sup>5</sup> *Moore v. Smith*, 158 P.3d 562, 568 (Utah Ct. App. 2007), went to trial, but not on soil settlement (“The Moores pursued three of their remaining claims at trial: ... fraudulent nondisclosure regarding the footings and grading, and fraudulent nondisclosure regarding the windows.”).

precedents,<sup>6</sup> each of the cases went up on appeal before trial. Therefore this case presents the Court with its first opportunity to review the application of fraudulent nondisclosure and fraudulent misrepresentation law, in action. It is unlikely that the Court envisioned that such application would allow a developer to be held liable for two claims of fraud with no showing of intent or actual knowledge.

*Yazd* held “that a developer-builder may owe his buyer a duty to disclose information known to him about the composition or characteristics of any real property when that information is material to the suitability of the property purchased by the buyer.” 143 P.3d 283, 285 (Utah 2006) (emphasis added). Canberra and Allen are not builders. Moreover, the undisputed testimony at trial was that Canberra and Allen met the duty this Court promulgated in *Loveland v. Orem City*, 746 P.2d 763, 769 (Utah 1987) (emphasis added); namely that a “developer has a duty to exercise reasonable care to insure that the subdivided lots are suitable for construction of some type of ordinary, average dwelling house.”

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<sup>6</sup> *Yazd v. Woodside Homes Corp.*, 143 P.3d 283, 285 (Utah 2006) (“the district court granted Woodside’s motion for summary judgment”); *Mitchell v. Christensen*, 31 P.3d 572, 573 (Utah 2001) (“upholding the trial court’s dismissal of Mitchell’s claim against defendants”); *Hermansen v. Tasulis*, 48 P.3d 235, 237 (Utah 2002) (“plaintiffs, ... appeal from an order granting a motion for summary judgment to defendants”); *Smith v. Frandsen*, 94 P.3d 919, 921 (Utah 2004) (“the trial court granted Mary Mel’s motion for summary judgment”); *Loveland v. Orem City Corp.*, 746 P.2d 763, 764 (Utah 1987) (“plaintiffs seek reversal of three district court order granting defendants’ motions for summary judgment”); *Fennell v. Green*, 77 P.3d 339, 341 (Utah Ct. App. 2003) (“the trial court granted Defendants’ motions for summary judgment”).



The District Court erred by allowing the jury to infer from the AGECE Report, alone, that Canberra and Allen “should have known,” prior to the sale, of problematic soils on what later was designed by a licensed civil engineer to become Lot 41. From this evidence, the jury returned a verdict of fraudulent misrepresentation, without any evidence that Canberra or, especially, Allen knowingly made a single false or misleading statement. There was no evidence that Canberra or Allen made any misrepresentation to Mr. Hess (or, especially Mrs. Hess). In fact, Mr. Hess testified that he never had any communication at all with Allen and did not even know that Allen was a principal at Canberra until well after the litigation commenced.

There was no evidence that Mr. Hess was misled into believing that the soils were good – in fact the Seller’s Disclosure states that Canberra does not know if collapsible soils exist. The Sellers Disclosure is the only evidence the Hesses produced relating to what Canberra represented about the soils at the time of the sale. In yet another example of how the Hesses conflate their case:

First, Canberra and Allen were sellers of real property. ... As established in *Mitchell* and reiterated in *Hermansen*, as sellers of real property, Canberra and Allen had a duty to disclose the AGECE Report to the Hesses, which they failed to do. A seller’s duty of disclosure could not be clearer. \*\*\* Therefore, Canberra and Allen – as *sellers* of real property – owed a duty *as a matter of law* to disclose to the Hesses material known defects that could not be discovered by a reasonable inspection; they had a duty as a matter of law to disclose the AGECE Report.

(Appellees' Brief at 18 (emphasis in original).)<sup>7</sup> There are two problems with this argument: 1) The *Mitchell* and *Hermansen* courts did not say that Canberra and Allen had a duty to disclose the AGECE Report;<sup>8</sup> and 2) the Hesses put on no evidence that Canberra

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7 The Hesses yet again attempt to place Canberra and Allen in the same liability boat and cite the Court to Addendum C, the Seller's Disclosures and Addendum D, the Warranty Deed. Neither of these documents support that Allen, personally, was a "seller." Instead, Allen signed both documents, prepared by Tanner, as the CEO of Canberra.

8 The *Mitchell* Court said that "what constitutes reasonable care in the discovery of defects, [is] whether the defect would be apparent to ordinary prudent persons." *Mitchell v. Christensen*, 31 P.3d 572, 575 (Utah 2001). The Court went on to say "although the proper standard for the discovery of a defect is that of an ordinary prudent person, this does not mean that inspection by an expert will never be required." *Id.* The Court concluded "that the Christensens had a legal duty to disclose the leaks in the swimming pool prior to the sale of their property to Mitchell, assuming it is determined on remand that the Christensens knew of the existence of the leaks." *Id.* at 576 (emphasis added).

The *Hermansen* Court stated the *Mitchell* holding as: "sellers of real property owe a duty to disclose material known defects that cannot be discovered by a reasonable inspection by an ordinary prudent buyer." *Hermansen v. Tasulis*, 48 P.3d 235, 242 (Utah 2002) (emphasis added). Here, Mr. Hess admitted that he did not hire any experts to do an inspection on the property before his purchase, and this of course begs the question, that went unanswered at trial, and has thus far gone unanswered in the appellate courts—was that prudent? *See Moore v. Smith*, 158 P.3d 562, 574, fn. 13 ("we also note that the *Yazd* decision did not address the possible relevance of not obtaining a home inspection or obviousness of defects.") More importantly, and crucially, there was no evidence put on that Canberra or Allen knew about the potential of the soils on the Hesses' lot to settle. And, Mr. Hess also failed to obtain a soils test by a geological engineer, as "strongly recommended" in the house construction plans. Tr. 451; Ex. 33, R. 4680; Tr. 500-01.

or Allen knew that the lot sold to the Hesses had any defects. Arguably, if the Hesses had put on evidence that Canberra or Allen actually knew that Lot 41 actually had a soils problem and actually failed to disclose that fact, liability might follow if the builder and the relevant subcontractors had later performed their work flawlessly.

Tellingly, there was no evidence that anything was said or not said, or written or not written, by Canberra or Allen that was relevant to Mark Hess' decision to enter into the transaction. "Fraudulent concealment ... requires the seller to have acted 'knowingly or recklessly'.<sup>9</sup>." *Moore v. Smith* at 574, fn. 12. The Hesses failed to put on any evidence that Canberra or Allen 1) willfully failed to disclose any information that Canberra or Allen had, and 2) that Canberra or Allen understood that the AGECE Report was material to the suitability of Lot 41 for construction; therefore, the Hesses failed to prove that Canberra or Allen had the requisite knowing or reckless state of mind to commit fraud.

Contrary to the case at bar, in *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570, 578 (Utah Ct. App. 1995) (another case decided on summary judgment), where a seller had actual doubts about the integrity of the stucco on the home and did not disclose anything related to such doubts, the Court determined that the seller could not be held liable, since the buyer did not hire any inspectors to conduct inspections. Likewise, a

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<sup>9</sup> "[N]egligent misrepresentation 'carries a lesser mental state, requiring only that the seller act *carelessly* or *negligently*.' Fraudulent concealment, on the other hand, requires the seller to have acted 'knowingly or recklessly.'" *Moore v. Smith*, 158 P.3d 562, 574, fn. 12 (emphasis in original) (internal citations omitted). The Hesses did not plead "negligent representation" against Canberra or Allen.

seller was held not liable in *Fennell v. Green*, 77 P.3d 339 (Utah Ct. App. 2003), where the developers had two soils reports<sup>10</sup> prepared, including one report that was specific to the lot relating to the dispute, and both reports were on file with the City. After a home was built there was a landslide that caused damage and the Court “determine[d] that Fennell’s fraudulent nondisclosure claim fails because there were no facts presented to show that Wall or Green knew of a possible landslide condition on lot 31.” *Id.* at 343. Here, Canberra did not have a soils report specific to Lot 41 (a lot that had, again, been designed by a licensed professional engineer and approved by another engineer for Lindon City) and there is no evidence that Canberra or Allen were aware of potential soils problems, yet a jury held each liable on claims of fraud for such problems. Comparing the outcomes of *Maack* and *Fennell*, to the case at bar, illustrates the problems with the application of fraudulent nondisclosure and fraudulent misrepresentation law in Utah - at least the law as interpreted by the Hesses.

In this case, the party that had a legal responsibility under Utah law to the Hesses was their builder. “Where a developer [Canberra] conveys property to a residential contractor [the builder that constructed the Hesses’ home], the knowledge and expertise of the builder [not Canberra or Allen], and the independent duties owed thereby, interrupt

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<sup>10</sup> In fact, there was a subdivision-wide soils report, prepared for the developers, and thereafter a lot specific soils report was prepared, for the developers, which showed a scarp existed on the lot. *Fennell* at 340. Here, the AGECE report was a subdivision wide report prepared for Canberra before the subdivision was platted, and at no time did Canberra have a report specific to Lot 41. The Hesses, of course, were repeatedly advised to have their own such report, which they repeatedly failed to do.

certain obligations running from the initial developer [Canberra] to subsequent purchasers [the Hesses].” *Smith v. Frandsen* at 925. Here, the soils report was on file with the City for the builder to review. The builder,<sup>11</sup> not Canberra (or Allen), had the duty to determine design parameters to build an average ordinary home on the lot purchased by the Hesses.

Although the Hesses claim that they know the law and can apply it better than the Utah Court of Appeals, the *Anderson* Court correctly interpreted *Smith* when it found that

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<sup>11</sup> Appellees claim that the Appellants’ block quote on p. 44 of its Brief relating to a builders duty is “not found in *Smith* or any other Utah case.” (Appellees’ Brief at 34.) Appellants apologize for citing only *Smith* instead of also recognizing that part of the quote was from Jury Instruction Number 20. The first part of the block quote is, in fact, from *Smith*: “[T]he duties owed by ... developers are not without limitation. Even where a duty is found to exist, it does not continue indefinitely. Absent intentional fraud, it continues only until the buyer has adequate time and opportunity, through occupation of the land or otherwise, to discover the existence of the condition, to take effective precautions against it by repair or other means.” *Smith* ¶17. The second portion was the agreed upon jury instruction and that language was also taken from *Smith*, albeit from a different paragraph of the opinion. “In particular, builder-contractors are expected to be familiar with conditions in the subsurface of the ground.” *Smith* at ¶19. “[T]he court relied on the knowledge and judgment of the builder in finding that the developer had satisfied his duty and was not liable to homeowners. Likewise, our decision today requires contractors to be accountable, either directly or through explicit warranties from their predecessors in title, for the suitability of the land upon which they build.” *Smith* at ¶23.

a developer who did not build the home, which settled, had its liability under *Yazd* severed. *Anderson v. Kriser*, 2009 UT App 319 at ¶6.

In *Smith*, this Court cited three cases where a developer was found liable. *Id.* at ¶24. None of these three cases is similar to the case at bar. The first case cited is *Barnhouse v. City of Pinole*, 133 Cal.App.3d 171 (1982). There, the developer was aware that the land had “springs and slides on the proposed subdivision site.” *Id.* at 177. The developer did not advise prospective purchasers of “preexisting slides and springs.” *Id.* at 178. Thereafter, a slide damaged the property and the developer misrepresented that he had actually fixed the problem and did not inform the purchasers that damage could happen again in the future. *Id.* at 179. Finally, the property owners had expert testimony at trial supporting their theory that the developer’s actions caused the damage. *Id.* at 189. Unlike *Barnhouse*, Canberra and Allen 1) were not aware of any soils problems, 2) did not attempt to fix such problem and then misrepresent that the problem would not occur in the future, and 3) the Hesses did not provide expert testimony that Canberra’s or Allen’s actions caused their damages.

The second case cited is *Washington Rd. Developers, LLC v. Weeks*, 249 Ga.App. 582, 549 S.E.2d 416 (2001), where the developer hired the builder and sold the completed home to the buyer. *Id.* at 582. The *Washington Rd.* Court specifically addressed the situation at bar, where the developer is not the builder, and stated that the developer is not liable for problems relating to the duties of the builder. *Id.* at 585. The third case cited is *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979). The

*Moxley* holding is quite similar to the decision in *Washington Rd.*, as the Court discusses the duties of builders.

We can see no difference between a builder or contractor who undertakes construction of a home and a builder-developer. To the buyer of a home the same considerations are present, no matter whether a builder constructs a residence on the land of the owner or whether the builder constructs a habitation on land he is developing and selling the residential structures as part of a package including the land.

*Id.* at 735. It is undisputed that neither Canberra nor Allen was the builder of the Hesses home and therefore this Court should adopt the *Anderson* decision, which correctly applies applicable precedent, as the law.

### **III. WHAT CANBERRA OR ALLEN “SHOULD HAVE KNOWN” ABOUT COLLAPSIBLE SOILS ON LOT 41 REQUIRES EXPERT TESTIMONY**

This Court determined in *Smith*, “like developers, the law imputes to builders and contractors a high degree of specialized knowledge and expertise with regard to residential construction.” *Id.* at ¶18 (emphasis added). “Expert testimony is especially considered unnecessary, although helpful, in cases involving trades or professions that do not require a high degree of specialized knowledge ....” *Ortiz v. Geneva Rock Products*, 939 P.2d 1213, 1217 (Utah Ct. App. 1997). Because the *Smith* Court found that being a developer requires a high degree of skill, the standard of care and any alleged breach of such standard, by Canberra, a developer (or Allen as the owner of a development company) requires expert testimony, as discussed in *Ortiz*. The Hesses should have named an expert to testify that a development company, and the owner of a development

company, would have read the AGECE Report and, from it, should have known that it said that there was the potential for soil settlement to occur on the Hesses' lot (even though the lot was approved by a licensed professional engineer for Lindon City, who was in possession of the AGECE Report but who made no such warning). Instead, the jury was allowed to speculate that by reading a scientific report<sup>12</sup> that Canberra and Allen knew that the Hesses' lot had soils problems, and withheld such knowledge from the Hesses.

In a similar case, where settling damage occurred, the Supreme Court of Wyoming held that a developer could not be held liable for the damage because the plaintiffs failed to show that the developer breached the standard of care, because the lots that it sold "were suitable for the construction of ordinary dwelling houses" and that the developer "had no control over the type of house to be constructed on each lot." *Reoh v. Suchor Investments, Inc.*, 699 P.2d 284, 287 (Wyo. 1985). Likewise, here: 1) the Hesses' witness testified that an ordinary average home could have been built on this lot, satisfying the developers' duty created in *Loveland*; and 2) neither Canberra nor Allen had anything to do with the actual building of the house.

This dispute is not analogous to *Schreiter v. Wasatch Manor, Inc.*, 871 P.2d 570, 574 (Utah Ct. App. 1994), as the Hesses claim, because in that case there was no legal

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<sup>12</sup> The parties in a position to understand the potential for soils problems on the Hesses' lot - AGECE, the preparer of the report; the civil engineer hired by Canberra to plat the subdivision; the Lindon City engineer who recommended that the subdivision be approved - are not parties to this suit. Instead, Canberra and Allen were held liable when the jury was allowed to presume Canberra and Allen understood from the AGECE report that the soils on the Hesses' lot were "toxic."



authority that retirement home operators were in a field requiring a high degree of skill “where the average person has little understanding of the duties owed.” Here the Hesses claim that “Canberra and Allen not only received the AGECE Report, but they also read it and knew about the potential for soils problems in the development,” (Appellees’ Brief at 24), and the Hesses claim this should make *Schreiter* applicable.

Without any expert testimony about what a reasonable development company (Canberra) or a reasonable owner of a development company (Allen) could reasonably understand from the AGECE Report, the jury was allowed to speculate from the mere existence of the report itself that Canberra and Allen “should have known” about the settlement problems experienced by the Hesses. Expert testimony was needed so the jury had parameters to make the determination that Canberra and Allen’s actions toward the Hesses breached their standard of care, *Downing v. Hyland Pharmacy*, 194 P.3d 944, 948 (Utah 2008), “in the locality.” *Nauman v. Harold K. Beecher & Assoc.*, 24 Utah 2d 172, 476 P.2d 610, 615 (Utah 1970).

#### **IV. THE DAMAGES AWARDED IN THIS CASE WERE EXCESSIVE**

Although the standard for overturning a jury verdict is high, the appellate courts job is to review the evidence and determine if evidence “was presented at trial upon which a reasonable, fair jury” could make the decision that was made. *Ortiz v. Geneva Rock Products, Inc.*, 939 P.2d 1213, 1218 (Utah Ct. App. 1997). Pursuant to Rule 59(a)(5), *Utah R. Civ. P.*, the damages found by the jury in this case, both the economic and the noneconomic damages, were “excessive,” as the total damages returned,

approximately \$3.1 million, were nearly ten times the specific hard costs, of approximately \$330,000, presented to the jury.

As noted in the Facts above, the damages awarded for costs of investigation, repairs to date, and future repairs, ignored the District Court's instructions and were directly against the evidence. Since the costs of repairs, past and future, awarded by the jury exceeded the evidence that the Hesses presented at trial, it is apparent that the damages awarded were given under the "influence of passion or prejudice."

We do not doubt that when a verdict is so grossly disproportionate to any amount of damages which could have been fairly awarded as to make manifest that the verdict was so suffused with passion and prejudice that the defendant could not have had a fair trial on the issues, the trial court should grant a new trial. \*\*\*

Notwithstanding what was said therein, we regard the true role to be that if the verdict is so excessive as to show that it must have been motivated by prejudice or ill will toward the litigant, or that passion such as anger, resentment, indignation or some kindred emotion has so overcome or distorted the jury's reason that the verdict is vindictive, vengeful or punitive, it should be unconditionally set aside.

*M. Stamp v. Union Pac. R. Co.*, 5 Utah 2d397, 303 P.2d 279, 281 (Utah 1956) (emphasis added), quoting *Wheat v. Denver R. G. W. R. Co.*, 250 P.2d 932, 935 (Utah 1951).

In reviewing the award of noneconomic, or pain and suffering damages, this Court should reverse a verdict where the amount is so excessive that it appears to have been the product of "passion or prejudice." *Duffy v. Union Pac. R. Co.*, 118 Utah 82, 89, 218 P.2d 1080, 1083 (Utah 1950). Canberra and Allen have properly marshaled and presented to

this Court the claims and testimony of the Hesses that bear on their pain and suffering. While monetizing those claims is admittedly an imprecise task, and within broad parameters left to the discretion of the jury, Canberra and Allen are not reticent in asserting that an award of \$2.625 million substantially exceeds the limits of a reasonable award, and thus appears to be the result of passion and prejudice, rather than a consideration of the evidence.

A comparison of the instruction given to the jury on this issue (Inst. No. 17, R. 3742) to the evidence and the outcome demonstrates that the verdict was far beyond the bounds of a reasonable award. Instruction No. 17 advised the jury that its award should be “the amount of money that will fairly and adequately compensate the Hesses for losses other than economic losses.” The instruction outlines the following matters that the jury could consider in determining the amount of the noneconomic losses:

1. **“The nature and extent of damages.”** To the extent this instruction advises the jury to consider the amount of its award of economic damages, the jury’s blatant disregard of the evidence and the court’s instruction on economic damages<sup>13</sup> justifies a reversal of the noneconomic damages award. To the extent the instruction directs the jury to consider the “nature and extent” of the Hesses’ noneconomic damages,

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13 Presumably, if economic damages are incorrectly awarded by a jury the non-economic damages are likewise incorrect. “Economic damages ... are not restricted, presumably because they are less likely to be exaggerated by a jury, and also because they are “hard” amounts, subject to careful calculation.” *Judd v. Drezga*, 103 P.3d 135, 138 (Utah 2004) (emphasis added).

the evidence put on by the Hesses was nothing like that put on in *Andreason v. Aetna Casualty & Surety Co.*, 848 P.2d 171, 176, where the plaintiff “meticulously testified from his personal written records of expenses.” Here the only specifically identified economic hard costs relating to the Hesses’ pain and suffering claim are: the garage sale of the air hockey table, the ping pong table, and video equipment; the sale of Mrs. Hess’ wedding ring; and, bottles of Pepto Bismol. Further, there was no evidence that the Hesses experienced “large wages losses, considerable medical costs, permanent disability, loss of bodily function, gross disfigurement ....” *Duffy* at 90, 1084. This case illustrates the problem with the blanket claim of “pain and suffering;” namely that a jury can return an absurdly large verdict that has no connection to the injury itself and without the legal parameters that are in place to protect a defendant against an unusually large punitive damages<sup>14</sup> verdict.

2. **“The Hesses’ mental pain and suffering,” “The extent to which the Hesses have been prevented from pursuing their ordinary affairs,” and “The extent to which the Hesses have been limited in the enjoyment of life.”** Substantially all of the direct testimony from the Hesses on these considerations is found at two points in the transcript, Ms. Hess’ testimony at Tr. 559-62, and Mr. Hess’ testimony at Tr. 334-35.

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14 It bears repeating that the trial court did not allow the jury to consider punitive damages, even though the only claims against Canberra and Allen were for fraud. Somehow the District Court determined that even though Canberra and Allen were found liable for intentional torts, there was no evidence of Canberra’s and Allen’s intent to commit the intentional torts to support punitive damages.

The evidence establishes that the situation was traumatic and frightening to the Hesses, it affected their family life and marriage, and occupied their lives; however, it was not so traumatic and frightening that the Hesses left the house. In essence, the evidence was that the situation was bad, but not so unbearable that the Hesses fled the home. Canberra and Allen do not contend that the Hesses did not have pain and suffering, but instead that the award is simply not commensurate with the evidence.

3. **“Whether the consequences of these injuries are likely to continue and for how long.”** There was no testimony that once the home was repaired that the Hesses were going to suffer “diminished enjoyment of life,” *Judd v. Rowley’s Cherry Hill Orchards, Inc.*, 611 P.2d 1216, 1221 (Utah 1980). In fact, the testimony was that the settlement issues had been repaired, and that only the cosmetic repairs to the house remained to be completed.

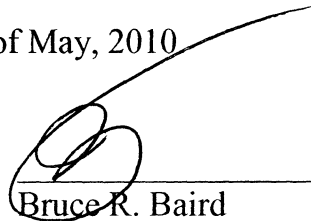
Even though there is no set formula for determining pain and suffering damages, the damages still must be proved with certainty and with a “preponderance of the evidence and the amount of damages by approximations and projections that rise above mere speculation.” *Richards v. Brown*, 222 P.3d 69, 83 (Utah Ct. App. 2009), quoting *Andreason*, 848 P.2d at 176. The Hesses give a nod to the speculative nature of their damages in their Brief by mentioning that the jury probably determined that it was okay to give them money to build “sidewalks, a swimming pool, a fence, a shed, a rock wall, a patio.” (Appellees’ Brief at 45.) Due to the lack of evidence, and the apparent passion and prejudice of the jury relating to the damages awarded, the Court should vacate the pain


and suffering damages, or remand this matter for a new trial.

### CONCLUSION

The verdict of the jury on the Hesses' fraud claims cannot be sustained, as a matter of law. Thus, the jury's verdict should be vacated, or at a minimum the Court should remand this matter for a new trial. Finally, the damages awarded by the jury simply were not supported by the evidence at trial and these should be vacated, or the Court should remand this matter for further proceedings with the trial court.

DATED this 24<sup>th</sup> day of May, 2010

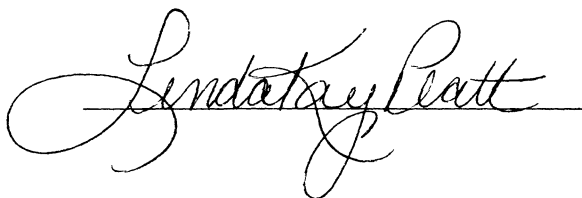
  
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Bruce R. Baird

  
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Dallis A. Nordstrom

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 24<sup>th</sup> of May, 2010, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were served by mail, postage prepaid, upon the following:

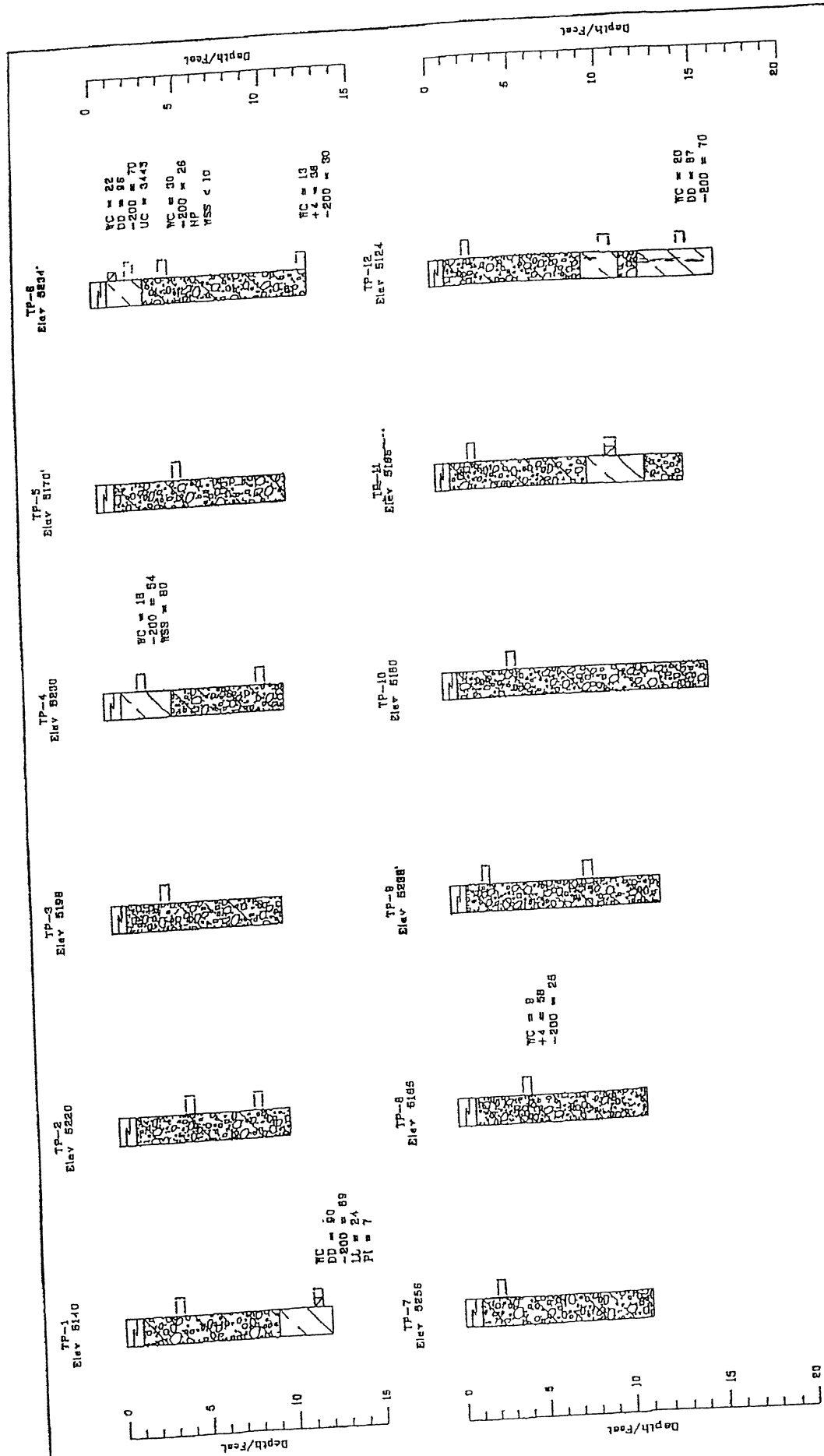
Stephen Quesenberry  
Charles L. Perschon  
HILL, JOHNSON & SCHMUTZ  
4844 North 300 West, Suite 300  
Provo, Utah 84604-5663

A handwritten signature in cursive script, reading "Linda Kay Pratt", written over a horizontal line.

## **ADDENDUM**

Figures 3, 4 and 6 of the AGECE Report.





See Figure 3 for Legend and Notes

Approximate Vertical Scale 1" = 8'



Loga of Test Pits

Figure 3

# LEGEND



Topsoil silty and clayey gravel to sandy lean clay with gravel, moist, dark brown, roots and organics.



Lean Clay and Silt (CL/ML); interlayered, sandy, medium stiff, moist, light brown to brownish gray



Silty Gravel (GM); with clayey gravel layers, with cobbles and boulders up to approximately 2 feet in size, occasional boulders up to 8 feet in size, medium dense to dense, moist, brownish gray to light brown.



Indicates relatively undisturbed hand drive sample taken.



Indicates disturbed sample taken.

## NOTES.

1. Test pits were excavated on March 7, 1997 with a track excavator.
2. Locations of test pits were measured approximately by pacing from features shown on the site plan.
3. Elevations of test pits were determined by interpolating between contours shown on the site plan.
4. The test pit locations and elevations should be considered accurate only to the degree implied by the method used.
5. The lines between the materials shown on the test pit logs represent the approximate boundaries between material types and the transitions may be gradual.
6. No free water was encountered in test pits at the time of excavation.
7.
  - WC = Water Content (%);
  - DD = Dry Density (pcf);
  - +4 = Percent Retained on the No. 4 Sieve;
  - 200 = Percent Passing No. 200 Sieve;
  - LL = Liquid Limit (%);
  - PI = Plasticity Index (%);
  - NP = Non-Plastic;
  - UC = Unconfined Compressive Strength (pcf);
  - WSS = Water Soluble Sulfates (ppm).

# Applied Geotechnical Engineering Consultants, Inc.

