

1992

Larry L. Mostrong and Jennifer Mostrong v. Lee Roy Jackson and Margaret R. Jackson : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 9205-78 IN THE COURT OF APPEALS
OF THE STATE OF UTAH

LARRY L. MOSTRONG and
JENNIFER G. MOSTRONG,

Plaintiffs
-Appellants,

vs.

LEE ROY JACKSON and MARGARET
R. JACKSON,

Defendants
-Appellees.

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Case No. 920089

Oral Argument
Priority 16

92-0578-CA

REPLY BRIEF OF APPELLANT

Appeal from a Judgment of the Fourth Judicial District Court
of Millard County, State of Utah
The Honorable Cullen Y. Christensen, District Judge, Presiding

D. DAVID LAMBERT (1872) and
LINDA J. BARCLAY (4967), for:
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FILED

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COURT OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

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Plaintiffs	:	Case No. 920089
-Appellants,	:	
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ARGUMENT

I. THE MOSTRONGS ARE ENTITLED TO RESCIND THE PARTIES' CONTRACT BECAUSE THE PROPERTY WAS AND IS UNMARKETABLE DUE TO LACK OF LEGAL ACCESS.

The Jacksons take the position throughout their brief that there was legal access to the north lane during at least some of the time relevant to this action, making the property marketable and the Mostrongs' action for rescission unjustified. Nothing could be farther from the true state of the record.

It is undisputed, when the Jacksons entered into the trust deed with the Mostrongs on September 1, 1987 and, two years later, on September 1, 1989, when the trust deed became due, that the Jacksons had not provided any legal, recorded means of access to the property. It is equally undisputed that, in January of 1990, Security Title Co. caused Geraldine Kessler, the original grantor of the property, to execute deeds purporting to grant an easement in the north lane to the Mostrongs. The language in this deed and the preceeding deeds is also undisputed.

. As the basis for their claim that an easement was actually conveyed, the Jacksons rely upon the following language in each original deed: "TOGETHER WITH AND SUBJECT TO a 33 foot easement over and across the East 33 feet of said property for road and utility purposes." (Appellee's Brief p. 6) Wayne M. Pinder, an expert witness, however, gave uncontroverted testimony that Ms. Kessler's deeds actually conveyed no easement interest to the Mostrongs because the language relied upon by the Jacksons only conveyed an easement to each purchaser over the east 33 feet of his own property for road purposes, but did not reserve any rights in the road in Geraldine Kessler, herself. (T. 347-48, ln 21-14; T.

351, ln 2-5) Without such a reservation, Geraldine Kessler had no rights in the road to convey to anyone, including the Mostrongs. These deeds, accordingly were only an illusory solution to the problem; they did not succeed in conveying a legal right of access to the Mostrongs.

The Jacksons rely upon Burton v. United States, 29 Utah 2d 226, 507 P.2d 710 (Utah 1973), to suggest that the quoted language of the deed created a reservation of rights in Ms. Kessler. Burton, however, does not support the Jacksons' point:

An exception excludes from the grant the property or estate therein described. If a conveyance contains a reservation, the entire property or estate described passes to the grantee subject to the right, estate, or easement reserved. The reservation creates a new right issuing out of the property granted, which did not exist as an independent right before the grant.

Id. at 712. There is no language in the relevant documents which explicitly create a reservation in Geraldine Kessler for an easement to the road in question. The quoted language does not create an exception either; it creates only a road easement to the east 33 feet of the particular parcel of property and nothing else.

The Jacksons further rely upon Stevens v. Bird-Jex Co., 81 Utah 355, 18 P.2d 292 (Utah 1933), to support their argument that the Kessler deeds should be interpreted according to the "circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the object to be attained." Id. at 294. (Appellee's Brief p. 29) Stevens refers to inapplicable facts and irrelevant law, so is not useful in interpreting the Kessler deeds. The factual setting of Stevens concerned the extent and purpose of an indisputably existing

easement, as opposed to the present attempt to create an easement about which the relevant documents are silent. Stevens also deals with the legal principle of parol evidence. Although parol evidence is relevant to interpret ambiguous contractual language, it is not admissible where there is no ambiguity on the face of the document. See Property Assistance Corp. v. Roberts, 768 P.2d 976, 977-78 (Utah Ct. App. 1989). Where there is no language reserving an easement in the present deeds, there is no ambiguity to interpret and Stevens is of no assistance.

The Jacksons allege that no one ever contested the right of the Jacksons or the Mostrongs to use the north lane for access to the property, and raise the related argument that the Mostrongs had an easement by implication to the road. In support of these arguments, the Jacksons refer to the testimony of the manager of Security Title, who "felt there was an implied easement due to the work he had done on the property and the intention that there was an implied easement to the north." (Appellee's Brief p. 10). While such facts would be useful evidence in establishing the existence of an access easement in an appropriate legal action, they, in and of themselves, do not create a legal, recorded easement. Such facts do not eliminate the necessity of bringing an action to obtain the legal, recorded access easement to which the Mostrongs were entitled, and which Lee Roy Jackson led Larry Mostrong to believe existed.

There is no dispute that the Jacksons obtained title insurance through Security Title, and that Security Title procured the Kessler deeds. The Jacksons go to great lengths to argue that

legal access was provided by means of this title insurance because the insurance specifically insured against unmarketability of title and because the Earnest Money Agreement stated that the Jacksons were to furnish good and marketable title "evidenced by a current policy of title insurance." (Appellant's Brief p. 20)

First, as pointed out in detail in appellant's brief, insurable title is not necessarily marketable title, and a purchaser of real property is entitled to rescind a contract if the title is unmarketable even if insurable. Brown v. Yacht Club of Coer D'Alene, Ltd, 111 Idaho 195, 722 P.2d 1062, 1065 (1986). Although a title insurance policy shows that the property is insurable, which is evidence probative of the conclusion that the property is probably marketable, the policy does not, in and of itself, make the property marketable. Title insurance is designed to indemnify a property holder should he or she become involved in litigation respecting the marketability of his title, but does not guarantee that there will be no such litigation. See Valley Bank & Trust Co. v. U. S. Life Title Ins. Co. of Dallas, 776 P.2d 933, 935-36 (Utah Ct. App. 1989). A purchaser of real property is not obliged to purchase a potential lawsuit. Brown, 722 P.2d at 1065. Notably, the Earnest Money Agreement did not provide that a policy of title insurance could be provided in lieu of conveying good and marketable title.

The Jacksons' reliance upon Holmby, Inc. v. Dino, 647 P.2d 392 (Nev. 1982), to show that a purchaser was not justified in rescinding a contract because he was fully protected by a policy of title insurance, (Appellee's Brief p. 22), is not justified here.

The factual situation in Holmby is distinguishable as follows: There was an unsatisfied trust deed encumbering the property at the time the buyer was to tender his down payment into an escrow account. There would have been, however, sufficient funds in the escrow account to pay off the trust deed, as well as a policy of title insurance, so there was no evidence that the seller would not have been able to deliver marketable title. Accordingly, the buyer's rescission was not justified. In contrast, even though there was a policy of title insurance available in the present situation, the Mostrongs never did receive a legal, deeded access easement to the property and the title continued, during all relevant times, to be unmarketable. Furtehr, there is no policy of title insurance in effect on the defective Kessler deeds. (A. 13, ln 16-21_)

Accordingly, the Jacksons' conclusion that "it [Security Title] effectively cured any question regarding the 'recorded easement' requested by FHA," (Appellee's Brief p. 29) not only begs the question but is false. In short, the Jacksons never delivered legal access to the property to the Mostrongs, in blatant breach of their covenant to convey marketable title. The Mostrongs should, accordingly, be entitled to rescind the contract.

II. THE MOSTRONGS ARE ENTITLED TO RESCIND THE CONTRACT BECAUSE THE JACKSONS DELIVERED UNFINANCEABLE PROPERTY TO THEM.

As discussed at length in the Mostrongs' main brief, the Jacksons failed to deliver financeable property in two ways: First, the property not only did not have a legal, deeded access, but did not have access by means of a dedicated county road within

three hundred feet of the house; and second, the construction of the house was substandard. These reasons for denial are well attested by the loan application records. (T.220, Ex. 2S; T. 39, 41, Ex. 7; T. 52, Ap. 41-42, Ex. 17)

A. The Preponderance of the Evidence Indicates That The Property Was Unfinanceable Because Of Lack Of Approved Access.

The Jacksons make the incredible argument that the property was not denied financing because of "lack of access." (Appellee's brief p. 24) This is simply not true. Kent Dalton, the manager of Security Title, testified that he had a telephone conversation with Linda Whiteman in which he learned that the appraiser had rejected the property "because of lack of recorded access." (A. 10, ln 7-13; A. 22, ln 16-19) It is patently obvious from the record that the property was rejected for financing by First Security Bank because it was not located within three hundred feet of a publicly maintained road. This is clearly a problem for which "lack of access" was the term used throughout the trial.

. The Jacksons attempt to evade the access issue by asserting that Judy Hardinger of Valley Central Bank did not seem to think that access was an issue. (Appellee's Brief p. 24) The Jacksons' assertion is misleading because the access issue had, at least initially, been resolved at the time Judy Hardinger considered the property because she was aware of the Millard County Commission's letter indicating that the county was willing to accept the Tuckfield road. (A. 42-43, ln 25-11) Further, Joseph Stott's testimony indicates that the access was, indeed, a concern for Valley Central Bank. He testified that he imposed a requirement,

namely, that "documentation needs to be provided showing that the subject has access by a county road or deeded easement," (T. 119, ln. 19-21), because of this concern.

The Jacksons make the remarkable claim that the Mostrongs' obtaining an easement over the south road was inconsistent with their position that the south road was the bargained-for access. (Appellee's Brief p. 34) First, this claim makes no sense on its face. Second, it is indisputable that the south road was the major access in that: (1) It was the shortest distance to a county road, being three times shorter than the north lane; (2) it was improved while the north lane was nothing but a poorly maintained, rutted, dirt lane; and (3) it was the primary means of access used by all, including the Jacksons. In fact, the Jacksons were responsible for creating and improving the south road in the first place. (T. 237, ln 14-23) If the north lane was the primary means of access, the Jacksons presumably would have improved the north road instead. Third, because of the above factors, the south road was the only access that was a reasonable candidate for county dedication; it would have been prohibitively expensive to improve the north lane to the point where it would qualify for county dedication. When the Mostrongs discovered there was no easement to the south road, they busied themselves in obtaining one. If this was not the major access to the property, it is inconceivable that they would have spent time and money to obtain this easement. Their behavior, contrary to the Jacksons' assertion, was entirely consistent with their belief that the south road was the bargained-for access.

As to the Jacksons' assertion that the Mostrongs "voluntarily" obtained the easement to the south road, (Appellee's Brief p. 32), the Mostrongs took what effort they could to obtain a qualifying access because the Jacksons were apparently unwilling to do so, as shown by their letter refusing to be liable for any expenses of obtaining an access easement or improving it. (T. 43, Ex. 15)

The Jacksons assert that the Mostrongs obtained the Tuckfield easement "at no cost to themselves," (Appellee's Brief p. 32), apparently in an attempt to show that there was really not an access problem. This assertion is not true. First, there is no evidence on the record as to whether Ralph Tuckfield charged the Mostrongs for the easement. Even if he did not, however, obtaining the easement was not without cost to the Mostrongs. The Mostrongs hired attorney Brent Bullock to obtain this easement. Mr. Bullock charged the Mostrongs for his services. Even had the Mostrongs obtained the easement at no cost, however, the Jacksons' duty to provide both legal and financeable access to the property is not diminished.

The Jacksons claim that Millard County accepted the south road unconditionally, and that no improvements were required. Whether Millard County was going to require the Mostrongs to bring the south road up to county specifications is equivocal on the record. According to the county attorney, who physically held the Tuckfield deed pending the upgrading of the road to county standards, upgrading was required, although the County Commission letter tentatively agreeing to accept the road did not state any conditions. (T. 248-50) It is clear, however, that the dedication

was never formally completed. Regardless of whether a requirement to upgrade was or would have ultimately been imposed is not important; what is important is that, from the Mostrongs' perspective in the spring of 1990, such a requirement could be imposed, and it might be expensive. That the Mostrongs and, in fact, the Jacksons, had such a concern is unequivocally illustrated by the record: Jennifer Mostrong testified that, because of this concern, she contacted the county about road specifications and then requested a bid for upgrading the road from Reed Penney, (T. 56-57), who obtained specifications from the county. (T. 204, ln. 9-12). The Jacksons pointed out that Lee Roper, the county official in charge of road maintenance, did not remember this conversation with Jennifer Mostrong. This testimony is not dispositive of the issue, but may show only that Ms. Mostrong spoke with someone else or that Mr. Roper did not remember a brief conversation that had occurred over two years before. Finally, the Jacksons' concern, as set forth in their letter, that "[w]e (Jackson's) [sic] will not be liable for any cost of the Mostrong's [sic] obtaining . . . upgrading of road," belies their argument that the parties believed that no upgrading was or ever could be required.

Because the two major briefs have set forth in detail the evidence supporting the trial court's finding that the county did not require the road to be upgraded, it is not necessary to reiterate it here. This evidence does not, however, negate the very real concern that the parties had in the spring of 1990 that such a requirement might be imposed. Had the Mostrongs reasonably

believed that they might be responsible for bringing the road up to county standards, which reasonable belief the record supports, they could also reasonably feel that this was more of an expense than they had bargained for in purchasing the property and, accordingly, be justified in rescinding the contract.

The Jacksons point out that Reed Penney did not inspect the road prior to entering his bid. (Appellee's Brief p. 33 n. 5) What the Jacksons failed to point out was that Reed Penney was intimately familiar with the condition of the road because the Jacksons had hired him to do the initial grading and improvements only a few years before. (T. 237)

In summary, despite their misleading and erroneous factual assertions, the Jacksons have failed to demonstrate that the preponderance of the evidence does not indicate that the property was not financeable because of problems with access.

B. The Preponderance Of The Evidence Shows That The Property Was Unfinanceable Because Of Substandard House Construction.

The second reason that financing was not available was because of the substandard construction of the house.

The Jacksons make the outrageous and totally unsupportable assertion that "nowhere in the record is it established that the Mostroms were denied financing because of the home construction." It is obvious from the record that the reason Valley Central Bank denied financing on the house was because of the construction of the house. (A. p. 41, ln. 2-18; T. 52; Ex. 17) It is equally unreasonable for the Jacksons to assert that the UBC standards are irrelevant; Joseph Stott, appraiser for Valley Central Bank,

testified that the primary construction standard used by both FHA and conventional underwriters, including himself, is the UBC. (T. 120-121, ln. 17-5).

The Jacksons argue that the house construction was not deficient because the Mostrongs lived in the house for over two years without complaining about it. (Appellee's Brief pp. 47-48) What the Jacksons do not point out is that the construction of the house only became an issue in June of 1990, when the house was turned down for financing because of these defects. Experience should indicate that a house may be habitable but not up to code.

To summarize, the Jacksons failed to deliver property which was reasonably financeable. That the court concluded otherwise, in the face of almost overwhelming evidence to the contrary, is not evidence that the Jacksons delivered financeable property. The record indicates that the parties believed that the property would be financeable and that the only obstacle to financing was the necessity that the Mostrongs establish a two-year income history in Utah. This is a reasonable precondition and assumption underlying the parties' contract. When the Jacksons failed and refused to deliver such property, they breached their contractual obligations. The Mostrongs, therefore, should be entitled to rescind the contract.

III. FINANCING WAS NOT REASONABLY AVAILABLE TO THE MOSTRONGS.

The Jacksons rely upon the trial court's finding No. 13 as evidence that financing was reasonably available to the Mostrongs. Because the trial court's findings are precisely what are at issue

here, such reliance is totally improper. Further there is inadequate factual basis for the trial court's finding.

The trial court apparently relies upon the alleged representation of the Zions Bank loan officer to the Mostrongs that Zions would be "willing to loan the Mostrongs money to purchase the property after they established a stable income over a two-year period." (Appellee's Brief pp. 8-9 ¶ 13) This alleged statement does not, however, indicate that financing was reasonably available on the property.

At the time this representation was allegedly made, the Mostrongs had not yet qualified for a loan and could not have qualified for a loan because they had not met the two-year residency requirement. The statement was not set forth on a contractual basis, and no consideration was given for it. The reality is that this representation was in the nature of a condolence by the loan officer -- "I am sorry that you did not qualify for a loan this time, but come back and try again in two years." It was not a guarantee and did not mean that Zions would unequivocally and unconditionally offer financing at a later date.

Had the Mostrongs reapplied at Zions, they would have applied for an FHA loan. The property had been rejected for FHA financing when the Mostrongs applied through First Security Bank. Linda Whiteman, the First Security Loan Officer, testified that she felt they "had exhausted all possibilities of approving an FHA insured mortgage." (A. 33, ln 8-9) Because the underwriter's requirements will not vary regardless of the financial institution applied

through, the property would have also been rejected by the FHA had the Mostrongs applied through Zions' Bank.

The trial court and the Jacksons rely upon the fact that the Mostrongs did not apply for financing between September 1, 1987 and September 1, 1989 to support their conclusion that the Mostrongs did not diligently attempt to obtain financing. They not only ignore the fact that the Mostrongs inquired as to the possibility of obtaining financing in August of 1988, but conveniently overlook the fact that the reason for the two-year trust deed was to allow the Mostrongs to establish a two-year income history in Utah as a prerequisite for obtaining financing, which period was to begin on September 1, 1987 and end on September 1, 1989.

The trial court's and the Jacksons' apparent reliance upon the inference that the problems with the property were ultimately resolved as of June 1990, making financing easily available, distorts the record. They rely upon the facts that the Mostrongs had obtained a letter of acceptance from Millard County and had the Tuckfield deed for the south road, and that the Jacksons had offered to pay the cost of repairs on the house. The record, however, shows that the problems were not, in fact, resolved as of June 1990.

Although the problem of the south road easement and acceptance appeared to be substantially resolved as of June 1990, there was a substantial probability, as discussed in detail above, that the road dedication could cost the Mostrongs several thousand dollars, if dedication was made conditional upon bringing the road up to county standards. The issue, therefore, was not resolved as far as

the Mostrongs were concerned. Further, Joseph Stott's testimony, in which he stated that he required some proof of dedication or easement before financing could be offered, indicates that the issue was not fully resolved, in view of the fact that the dedication was not complete at that time.

It is undisputed that the Jacksons apparently wrote a letter offering to pay the expense of correcting some of the structural defects of the house. Notably, there were more than three or four defects according to Joseph Stott's testimony:

The only heat in the kitchen, living room and family room are wood, are the wood stoves. One bath is not vented. Hot water heater wired as needs to be placed in a conduct. [sic] The supports underneath the home are wood and on grade level. I could not determine if they are set on a concrete footing because black vinyl had been laid on the ground. The footings for the supports should be stand up [sic] eight inches for termite protection.

(T. 119, ln 9-16) This letter was apparently never communicated to the Mostrongs, so the Mostrongs did not respond to it. For the issue to have been resolved, however, the Jacksons would have had to have actually performed the repairs by June of 1990 for the house to qualify for financing.

Financing may have been more available to the Mostrongs had the Jacksons not been so anxious to foreclose on the property. The Jacksons noticed up no less than three trustee's sales between March and June of 1990, during which time the Mostrongs were attempting to resolve the problems with the property created by the Jacksons and apply for financing. Although these sales were continued by the Jacksons at the insistence of Mr. Bullock, the Mostrongs could not have felt, in June of 1990, even if the

problems with the property had been resolved, that there was sufficient time to apply again for financing.

The Jacksons argue that the Mostrongs should have gone back to First Security Bank, after obtaining the acceptance letter from the Millard County Commission in June of 1990, because they would have then qualified for the FHA loan. By June of 1990, the application had lapsed and a new application and appraisal would have had to be done. This would have cost the Mostrongs another \$300 and taken at least another month before an initial determination as to the availability of financing could have been available. (A. 28-29, ln. 25-8; A. 48, ln. 5-8) The Mostrongs reasonably felt that they did not have this much time.

The Jacksons argue that the Mostrongs did not qualify for financing because of a collection action against them. Not only was there no trial court finding on this issue, but such an argument directly contradicts the Jacksons' position that financing was reasonably available to the Mostrongs. Nevertheless, while there were several questions as to Mostrongs' credit, including several tax liens and a \$39.00 collection action, none of these were sufficient to prevent the Mostrongs from obtaining financing. Judy Hardinger, the loan officer at Valley Central Bank who dealt with these issues, testified that if the Mostrongs paid and resolved these issues that would have resolved the problem, and that there were a number of good items in their credit history. (A. 43-44, ln. 14-13) Ms. Hardinger testified that the tax liens were, in fact, cured. (A. 46, ln. 22-25). In short, these were not

substantial issues and would not have resulted in the denial of financing absent the structural defects of the house.

The Jacksons raise the specious argument that the Mostromgs could never have satisfied the two-year verification of income requirement because Larry Mostromg worked in California for part of the time. Larry Mostromg had Utah as his official residence, however, and paid income taxes in Utah. The location of his work was not relevant.

The Mostromgs had already expended substantial resources in the attempt to correct the defects in the property and obtain financing despite the defects. The Jacksons, simultaneously, were making continual demands for additional money and constantly noticing trustee's sales. Under such adverse circumstances, all of which were created by the Jacksons, it is unreasonable for the Jacksons to say, on the one hand, that the Mostromgs could have gotten financing if they had only worked harder and spent more money curing problems created by the Jacksons, and then argue that they should not be entitled to rescind the contract because financing was reasonably available.

IV. THE MOSTROMGS ARE ENTITLED TO RESCIND THE CONTRACT BACause THE JACKSONS MADE MATERIAL FRAUDULENT OR NEGLIGENT MISREPRESENTATIONS REGARDING THE PROPERTY TO THEM.

The Jacksons assert that the Mostromgs did not marshal the evidence supporting the trial court's findings relating to this issue. In fact, the Mostromgs did so in their principal brief, albeit not as thoroughly as should have been done because of the brief length limitation. To resolve all doubts, however, a reiteration of the evidence supporting the trial court's findings,

following the elements set forth in Wright v. Westside Nursery, 787 P.2d 508, 512 (Utah Ct. App. 1990) (for elements, see Appellant's Brief p. 37), follows: The representations at issue were made to the Mostrongs by Lee Roy Jackson, according to own testimony, and dealt with three facts: (1) The north lane, at the time of sale, was the legal access to the property; (2) the south road, at the time of sale, was a private lane which was permissively used; and (3) the house, at the time of sale, was either FHA approvable or approved. The only evidence on the record which would indicate that these representations were not false, at the time they were made and at the time of sale are the facts relating to constructive and adverse easements over both the north lane and the south road, that there was no building code in effect at the time the house was built, and Lee Roy Jackson's testimony that he made no representations regarding the construction of the house. The court made no findings as to inducement, the Mostrongs' reasonable reliance upon Lee Roy Jackson's representations, or the Mostrongs' damages. (The evidence relied upon and the citations to the record supporting them are laid out in detail in both parties' major briefs.)

The Mostrongs presented evidence sufficient to satisfy all of the prongs of the Wright test, as is shown by the discussion in Appellant's Brief on pp. 37-42. Nevertheless, in response to the Jacksons' query (Appellee's Brief p. 35), the following evidence supports elements 2, 3, 7, and 8:

Elements (2) and (3) are shown as follows: Among other things, in December, 1990, more than two years after the

representations had been made, Jennifer Mostrong discovered that there was no recorded access easement to the property, either to the north or to the south, and that there never had been. (T. 41-42) Lee Roy Jackson, himself, testified that he knew he did not have a recorded easement to the south road, knew the property had been sold, and had not requested permission from the new owner to use the road. (T. 133-134) (Please refer to appellant's Brief pp. 38-39 for full discussion.)

Elements (7) and (8) are shown by Larry Mostrong's testimony that he sought information regarding the access issue from Lee Roy Jackson and then relied upon the information provided, and the fact that he purchased the property in the face of his testimony that he would not have done so had he known that it was landlocked. (Please see Appellant's Brief pp. 39-41)

The preponderance of the evidence favors the position of the Mostrongs and works against the trial court's findings on many of the elements of fraudulent or negligent misrepresentation. The only evidence on the record for several elements, however, are the conflicting testimonies of the Mostrongs and Lee Roy Jackson. For a finding to be proper, it must be based upon credible evidence. For evidence to be credible, it must be clear and convincing. Nordstrom v. Miller, 227 Kan. 59, 605 P.2d 545, 552 (1980).

The term "clear and convincing evidence" means: [t]he witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct, and weighty; and the witnesses must be lacking in confusion as to the facts at issue."

Id. (quoting Modern Air Conditioning, Inc. v. Cinderella Homes, Inc., 226 Kan. 70, 596 P.2d 816, 824 (1979)).

While the Mostrongs' testimonies have these characteristics, Lee Roy Jackson's does not. Lee Roy Jackson's testimony is totally untrustworthy because he explicitly contradicted himself on several material facts and did not clearly remember significant details. Please refer to Appellant's Brief pp. 34-37 for a full discussion of this issue. (Please note that there was a typographical error on p. 36, lines 21-25 of Appellant's Brief. These lines should read: (4) Last but not least, Lee Roy Jackson testified that he told the Mostrongs he had a legal easement to the south road, (T. 245), and then turned around and flatly denied that he had ever told them that he had an easement to the south road. (T. 281))

The Jacksons attempt to discredit Larry Mostrong's testimony by stating that "Larry Mostrong testified that Lee Roy Jackson stated that the construction of the home was 'FHA approvable' and then contradicted himself by stating that Lee Roy Jackson represented construction of the house was "FHA approved." (Appellee's Brief p. 36) While there is a difference in the word "approvable" as opposed to "approved," there is little, if any, difference in the import of the testimony, given the issue of whether the property was ultimately financeable. This is hardly a discrepancy which should reflect adversely on Larry Mostrong's credibility.

As discussed at length in the Mostrongs' previous brief, the Mostrongs had an affirmative right to rely upon Lee Roy Jackson's representations about the property. The Jacksons' brief argues

that Larry Mostrong read the legal description in the Warranty Deed at closing and knew, or should have known, that there was no deeded easement to the property. While it is true that Larry Mostrong did have access to the legal description, it must be reiterated that Larry Mostrong was not a sophisticated purchaser, that he did not have any expertise in reading and understanding property descriptions, and, given the language relating to easements in the Warranty Deed, he would not necessarily have understood that there was no access easement included in the document. That Larry Mostrong had access to this legal description does not negate the Jacksons' responsibility of knowledge, honesty and candor about access to the property. Furthermore, if the Jacksons are holding Larry Mostrong to the level of technical expertise necessary to understand the existence (or lack thereof) of an easement from a legal description, the Jacksons should be required to perform to the same standard. Because they had access to the warranty deeds by which they initially obtained the property and to the Kessler deeds, they should be found to have unequivocal and definite knowledge that they did not ever have any legal right of access by means of the north lane.

In conclusion, the Mostrongs have marshalled the evidence and shown, despite this evidence, that the trial court's findings to the effect that Lee Roy Jackson did not make fraudulent or negligent misrepresentations of material fact to the Mostrongs are not supported by the preponderance of credible evidence on the records. The trial court's findings, accordingly, should be reversed.

V. THE MOSTRONGS ARE ENTITLED TO RESCIND THE CONTRACT BECAUSE OF THE PARTIES' MUTUAL OR UNILATERAL MISTAKES OF FACT.

The trial court relied upon essentially the same evidence to find that there were no mutual or unilateral mistakes of fact as it did to find that there were no fraudulent or negligent misrepresentations, except for evidence relating to the issue of the Jacksons' knowledge of the falsity of the misrepresentations. Accordingly, the same arguments set forth in section IV of this reply brief apply to this issue.

VI. THE MOSTRONGS ARE ENTITLED TO RESCISSION OF THE CONTRACT.

The Jacksons argue that the Mostronics waited too long after discovering the problems with the property to rescind the contract. They rely upon Perry v. Woodall, 20 Utah 2d 399, 438 P.2d 813 (1968) as precedent for this argument. In Perry, Woodall arranged to purchase a pharmacy from Perry. Woodall was operating the business when he discovered, on July 18, 1964, that a substantial portion of the debt he had purchased was Perry's personal debt. Rather than immediately rescinding the contract, he continued to operate the business until September 7, 1964, at which time he was appointed receiver in an action commenced by one of the creditors of the business. He continued to act as a receiver for nearly a year and one half more, until January, 1966, at which time he resigned and a successor receiver was appointed. Woodall continued to operate the business for the successor receiver for nearly another two years, until March of 1966, at which time he purchased the assets of the business at the receiver's sale. The court found

that Woodall's actions were not consistent with an intent to rescind.

In contrast, the Mostrongs did not discover that there was any problem with access until December, 1989. They did not discover that there were problems with the construction of the house until June, 1990. They attempted to rectify the access problem for several months, but elected to abandon the property and rescind the contract in July of 1998, within a month of discovering the construction defects. They brought suit demanding rescission on September 17, 1990, only two months after manifesting their intent to rescind by abandoning the property. These facts are easily distinguishable from those in Perry, making Perry a poor precedent for deciding this case.

The Jacksons argue that the Mostrongs should not be entitled to rescind because they did not leave the property for seven months after discovering that there was no legal access to it, while, at the same time, the Jacksons loudly proclaim that financing was reasonably available to the Mostrongs if only they would have worked harder to resolve the problems left to them by the Jacksons. The Mostrongs acted in good faith in attempting to mitigate the damages created by the Jacksons' failure to perform their obligation of providing marketable and financeable property. The Mostrongs should not be penalized for attempting to work out the problems with the property in an attempt to fulfill the contract. Public policy dictates that parties should be entitled to work out contractual problems for a reasonable period of time after discovering a defect, rather than having to immediately rescind at

the first possible sign of trouble. Such policy encourages parties to work out their problems between themselves rather than resorting to litigation. Following the result urged by the Jacksons, in contrast, encourages parties to litigate at the slightest provocation.

The Jacksons claim that the Mostrongs should not be entitled to rescind the contract because they have lost rent because of the Mostrongs' extended occupation of the premises. This is a specious assertion. Under Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 731 (Utah Ct. App. 1990), rescission damages include the amount paid for the property less a reasonable rental value of the property for the time the rescinding party was in possession of it. Thus, the Jacksons would retain the full rental value of the property for the entire length of the Mostrongs' occupation of it, unless this court finds that the Jacksons defrauded the Mostrongs, in which case the Mostrongs would be entitled to the full amount which they paid for the property. Lee v. Armstrong, 798 P.2d 84, 88 (Mont. 1990). The Mostrongs discussed this formula in their major brief. The Jacksons, accordingly, have no reason to claim this damage.

The Jacksons further claim that they would be prejudiced by rescission because of alleged damage to the property committed by the Mostrongs. The Mostrongs are not aware of any evidence on the record that they damaged the property. If there is such evidence, it is highly contested and the trial court made no finding as to this issue. The Jacksons' claim is, therefore, highly improper on appeal. Even if such damage should be found to have actually occurred, however, an adjustment for the damage could be made by

deducting it from any amount returned to the Mostrongs. This argument is improper, unsupported by the record, and does not serve to defeat the Mostrongs' claim for rescission.

CONCLUSION

The record indicates that the Mostrongs are entitled to rescind their contract with the Jacksons and, accordingly, are entitled to the return of their investment in the contract. There are several grounds for rescission of this contract, all of which are supported by the record, including: (1) The Jacksons' contractual breach in failing to convey legal access to the property; (2) the Jacksons contractual breach in failing to convey, as per the parties' expectation, property which met underwriters' standards of financeability; (3) Lee Roy Jackson's fraudulent and/or negligent misrepresentations regarding access to the property and/or the construction of the house; and (4) the parties' mutual and/or unilateral mistakes of fact in selling and purchasing unmarketable and unfinanceable property. The record also indicates that the Mostrongs did not sit on their rights, but, after reasonably attempting to cure the problems, acted promptly in attempting to rescind the contract; and that rescission is the equitably proper means of working out a just resolution to this problem. Accordingly, the Mostrongs respectfully request that this Court overrule the factual findings and legal conclusions of the trial court and enter judgment in their favor.

DATED this 23d day of November, 1992

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing
was mailed to the following, postage prepaid, this 23d day of
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