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Recommended Citation
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IN THE SUPREME COURT OF THE STATE OF UTAH

THOMAS C. MABEY and LOUISE S. MABEY, his wife, Plaintiffs and Respondents, vs. KAY PETERSON CONSTRUCTION COMPANY, INC., a Utah corporation, Defendant and Appellant.	
WASATCH CABINET COMPANY, INC. a Utah corporation, Plaintiff, vs. KAY PETERSON CONSTRUCTION COMPANY, INC., a Utah corporation, et al., Defendants.	Case No. 18338

BRIEF OF APPELLANT

Appeal from the Decision of the Second Judicial District Court of Davis County, State of Utah
Honorable J. Duffy Palmer, District Judge

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FILED
JUN 15 1982
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

THOMAS C. MABEY and LOUISE S. MABEY, his wife, Plaintiffs and Respondents, vs. KAY PETERSON CONSTRUCTION COMPANY, INC., a Utah corporation, Defendant and Appellant.	
	Case No. 18338
WASATCH CABINET COMPANY, INC., a Utah corporation, Plaintiff, vs. KAY PETERSON CONSTRUCTION COMPANY, INC., a Utah corporation, et al., Defendants.	

NATURE OF THE CASE

This is an action involving opposing claims by the Plaintiffs Thomas C. and Louise S. Mabey and the Defendant Kay Peterson Construction Company, Inc. against each other. Plaintiffs Mabeys' claims were for damages resulting from breach of a written contract and breach of warranty in connection with the construction and sale of a home. Defendant Kay Peterson Construction Company, Inc. also claimed damages for breach of contract and included an additional request for equitable relief in the form of contract reformation.

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DISPOSITION IN THE LOWER COURT

The case was tried to the court. At the conclusions of trial, the court found that the written contract between the Plaintiffs and Defendant was formed under a mutual mistake of fact. Having so found, the court, rather than reforming the contract to conform to the parties intention and understanding, simply entered judgment in favor of both the Plaintiffs Thomas C. and Louise S. Mabey and the Defendant Kay Peterson Construction Company, Inc. The court also entered judgment in favor of the Plaintiffs on their claims for breach of warranty. From the court's judgment this appeal has been taken by the Defendant Kay Peterson Construction Company, Inc.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of that portion of the judgment entered in favor of the Plaintiffs Thomas C. and Louise S. Mabey, together with modification of that portion of the judgment entered in favor of the Defendant Kay Peterson Construction Company, Inc. to conform said portion of the judgment to the undisputed evidence adduced at trial.

STATEMENT OF FACTS

The central issue in this case concerns the preparation and execution of a written contract (Pl.Ex.C) between the Plaintiffs Thomas C. and Louise S. Mabey (Respondents herein) and the Defendant Kay Peterson Construction Company, Inc. (Appellant herein) for the purchase of a home constructed by the Defendant Kay Peterson Construction Company, Inc. For

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convenience the parties will be hereafter referred to as "Mabeys" (or individually as "Tom Mabey", "Louise Mabey") and "Kay Peterson Construction" or "the Construction Company." The court properly and correctly found at the close of the trial proceedings that there had been a mutual mistake of fact in the formation and preparation of the written contract (T-132). However, rather than reform the contract so as to reflect the parties' actual intentions, the court chose instead to award damages to the Mabeys apparently for alleged breach of the contract by Kay Peterson Construction and to award damages to Kay Peterson Construction allegedly resulting from the mutual mistake.

About three or four months prior to November, 1979 the Mabeys and Mr. Kay Peterson on behalf of Kay Peterson Construction discussed the possibility of building a home on Lot 1 Indian Springs Estates, the property which is the subject of this litigation (T-40). The Mabeys understood that Kay Peterson Construction would build a house on that lot and if the house met with their approval they would purchase it (T-43,44).

Sometime thereafter in the fall of 1979, Kay Peterson Construction began construction of a home on Lot 1 (T-40). The construction loan for the home was obtained by Kay Peterson Construction from Mountain West Savings and Loan. The lot itself was owned at the time by a corporation named Mountain West Development. There was also an underlying mortgage on the lot in favor of Zion's Mortgage Corporation.

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When the construction loan commitment was secured a check in the amount of $18,500 was drawn from the construction loan fund to obtain a release from Zion's Mortgage on behalf of Mountain West Development. Title to the lot was then put up as security on the construction loan (T-86,87,117,122). Mountain West Development eventually received $27,000 for the lot, the money being disbursed through Mountain West Savings & Loan and distributed partly to Mountain West Development with the remainder to Zion's Mortgage as described above (T-86,87).

The plans to be followed in the construction of the home were submitted to Kay Peterson Construction by Tom Mabey. Mr. Mabey had acquired the plans out of a plan book and had made substantial modifications and changes therein before he submitted them to the Construction Company (T-35,41). During the course of construction of the home, the Mabeys added their input. The Mabeys sub-contracted and paid separately for the plumbing (T-25,46); they installed the insulation themselves, took care of clean up and paid separately for the security system and some railing which were included in the home (T-25); they were consulted by Kay Peterson Construction concerning the orientation of siding on the exterior surface of the home (T-47), the location of a basement window (T-48), the addition of a fireplace (T-49), the framing of the bathtub and the facing installed around it (T-50,51). The Mabeys selected the color of paint, the location and design of cabinets and light fixtures and the carpeting for the home (T-37). They also obtained a commitment from Mountain West Savings and

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Loan for a loan to purchase the home (T-14,Pl.Ex.A). Notwithstanding this not inconsiderable involvement in the construction phase of the home, it was the Mabey's understanding that they were neither committed nor obligated in any way to purchase the home once it was built (T-53).

Around the middle of March, 1980, construction was nearing completion. In order to facilitate the financing of the home through Mountain West Savings and Loan, Tom Mabey prepared in his own hand a written contract on a standard Earnest Money Receipt form (Pl.Ex.C, T-58). For convenience this contract will be referred to hereinafter as "the Earnest Money Contract." In connection with the preparation of the Earnest Money Contract, Tom Mabey asked Mr. Kay Peterson, the president of Kay Peterson Construction, for an estimate of the cost of the completed project (T-58). In turn, Mr. Peterson asked the company bookkeeper, Mrs. Squires, to prepare the estimate from the Construction Company's records (T-97,115). Mrs. Squires prepared the estimate from the construction draw records of Kay Peterson Construction and as to unfinished items, from the supplier's bids or the original cost estimates (T-97, 103). Mrs. Squires' estimate sheet became the document referred to on the face of the Earnest Money Contract as the "Projected Cost Estimate", Exhibit A. This document was incorporated into and became the third page attached to the Earnest Money Contract (Pl.Ex.C,T-95,96).

The "Projected Cost Estimate" showed $77,565.00 as the amount of

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the "Loan Disbursed to Date," unpaid bills of $12,734.96 and estimated completion costs on the remaining items of $43,768.44 to arrive at an overall cost estimate for the construction of $134,068.40. This figure included an item on line 37 designated "Lot Payoff - $9,000.00." Mrs. Squires, a reliable and experienced employee, gave the estimate to Mr. Peterson who, in turn, delivered ot ti Mr. Mabey (T-58,115). Upon receipt of the estimate, Mr. Mabey prepared the first page of the Earnest Money Contract (on the standard Earnest Money Receipt form), and set the total cost figure at $136,000 to accord Mr. Peterson approximately a $2,000 "buffer" against cost-overruns on the estimated figures (T-27,58,63).

The Earnest Money Contract provided in part that it covered only the home and the improvements which had been constructed, and not the lot itself (Pl.Ex.C,T-119). The lot was acquired by the Mabeys through a purchase and trade with a third party. In other words, the lot was purchased by a Mr. Jerry James, who then traded the lot to the Mabeys in exchange for interests of the Mabeys in other property (Pl.Ex.B;T-18,19,116). This exchange took place because the Mabeys believed they would not be able to afford to buy the home if the cost of the lot ($27,000) (T-61, 86,87) were included in the purchase price and had to be financed also (T-18,19,39).

During his review of the cost estimate sheet prepared by Mrs. Squires and in his discussions with Mr. Peterson, Tom Mabey was concerned that the lot price of $27,000.00 might be incorrectly included in the total cost

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shown on the sheet (T-60). He placed a question mark adjacent to line 37 which read "lot payoff: $9,000," wrote in the margin directly above that "was remaining $18,000 . . ." and drew an arrow to the figure on line 1 of the sheet which read "Loan Disbursed to Date: 3/5/80" (T-60, 61). He asked Mr. Peterson whether the $18,000 balance (i.e., the difference between the "lot pay off" figure of $9,000 and the $27,000 lot price) was included in the "Loan Dispursed to Date 3/5/80" figure of $77,565 (T-60). Both Mr. Mabey and Mr. Peterson were aware that the underlying mortgage on the lot in favor of Zion's Mortgage had been satisfied by an advance in the approximate sum of $18,000 from the construction loan proceeds (T-60,61). Although Mr. Peterson had not supervised the preparation of the cost estimate or discussed it with his bookkeeper, he honestly believed the advance to be covered in that figure and told Mr. Mabey that it was so included (T-61). On this basis, and since the Earnest Money Contract was to cover the home only, the parties agreed to reduce the price shown on the Earnest Money Contract by $27,000, the full price of the lot, rather than only by $9,000, the lot payoff figure shown on line 37 of the cost estimate (T-61,62). The concluding paragraph of the Earnest Money Contract was then altered by Tom Mabey to read as follows:

> The purchase price is based on all costs relative to the construction of the dwelling as per plans and specifications plus an $8,500.00 Seller's profit. However, the total cost shall be based on the projected cost estimate, Exhibit A, attached and hereby made a part of this agreement, and in no event shall said total cost exceed ~~$136,000~~ $109,000.00

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unless agreed upon in writing by both Buyer and Seller.

The reduction of the price term was initialled by the parties and reflected the deletion of the price of the lot, which both parties believed to be included in the cost estimate attached to the Earnest Money Contract as Exhibit A (T-62,116).

In fact, Mrs. Squires omitted to include the additional $18,000 for the lot in computing the figures shown on the "Projected Cost Estimate" (T-118). Mr. Peterson believed this figure was included, as did Mr. Mabey, at the time the contract was executed. It was precisely because of this mutual understanding that the Earnest Money Contract price was reduced by $27,000 instead of $9,000 (T-62,118). When Mr. Peterson discovered the mistake, he immediately contacted Tom Mabey and brought it to his attention. However, the latter refused to rescind or correct the contract and arranged to close the loan transaction with his bank based on the figures shown on the Earnest Money Contract (T-27,28,118).

When the funds acquired from the bank based on the mistaken contract purchase price had been distributed, Kay Peterson Construction was unable to pay all of the suppliers and sub-contractors on the home. These materialmen and sub-contractors then filed liens against the Mabey's home and initiated actions for payment (T-28;R-46 through R-140). When the Mabeys learned of the outstanding and unpaid liens, they brought the action in the lower court captioned Thomas C. Mabey and Louise S. Mabey v. Kay Peterson Construction Company, Inc., Civil No. 1-28199 to recover against

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Kay Peterson Construction. The lien claims on the home were consolidated in the action styled Wasatch Cabinet Co., Inc. v. Kay Peterson, et al., Civil No. 2-28838. The Mabeys then arranged to compromise and satisfy the outstanding liens and borrowed funds from Zion's Bank to make payment thereon (T-28,29;Pl.Ex.G). By the time of trial all liens had been settled and the only claims outstanding in the Wasatch action were cross-claims between the Mabeys and Kay Peterson Construction which were identical to the complaint and counterclaims contained in the Mabey v. Kay Peterson Construction action. Therefore, the two cases were consolidated for trial (R-26,175).

At the conclusion of the trial, the court ruled that the Earnest Money Contract had been formed under a mutual mistake of fact. The court then awarded judgment to Kay Peterson Construction based on the amount originally demanded in the counterclaim filed on behalf of Kay Peterson Construction. The court also awarded judgment to the Mabeys for the amount expended by them to satisfy the unpaid lien claims, together with damages for the interest they paid on the loan and attorney's fees (T-132,133).

The court also awarded damages in the sum of $5,400.00 to the Mabeys for the alleged failure of Kay Peterson Construction to complete construction on certain items in the home in a quality workmanlike manner (T-132). While no detailed list of defects was contained in the complaint, the complaint did allege generally defects in workmanship and request an award of damages in the sum of $5,440.00 (R-2).

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At trial Mabeys introduced two written exhibits in support of the claim for defects. The first was a letter dated October 8, 1980 from Tom Mabey to his attorney, Mr. Diumenti, listing seventeen (17) claimed defects in construction (Pl.Ex.H). The second was dated November 4, 1981 and styled "Correction Report." This document contained a list of only ten (10) claimed defects in construction (Pl.Ex.I). Tom Mabey testified that there were now no items other than those shown on the "Correction Report" (Pl.Ex.I) which he alleged were deficient (T-31,32). Mr. Diumenti also represented to the court that his client was only claiming the right to recover on the ten (10) alleged defects in the inspection report, not the seventeen (17) listed in the earlier letter (T-67). The court accepted the exhibits for informational purposes only and not as proof of the truth of what was recited therein (T-73).

In chambers and before trial, counsel for Mabeys had represented to the court that the Utah State Department of Contractors had found at a hearing conducted just several days before trial on November 25, 1981 some workmanship in the home to be defective and that the Department had issued an order to that effect which required the defects to be corrected. The court apparently believed this to constitute a prior adjudication of these claims, notwithstanding the fact that counsel for Kay Peterson Construction advised the court that neither he nor his client were aware of any such order by the Department of Contractors. During the trial, the court alluded to this earlier meeting in chambers and proceeded to sustain evidentiary objections and limit the scope of

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examination related to the alleged defects (T-31,66).

The only evidence submitted at trial concerning the damages resulting from the alleged ten (10) defects was the testimony of Tom Mabey who stated that he estimated the total cost to repair the alleged defects, based upon the cost of materials and an hourly charge of $17.00 per hour, would be $5,400.00 (T-34,35). No additional details as to the breakdown or manner of calculation were provided.

Following the trial counsel for Kay Peterson Construction submitted objections to the proposed Findings of Fact and Conclusions of Law prepared by Mr. Diumenti. Attached thereto was an affidavit from Steven Schwendimen of the Attorney General's office which set forth that the "Inspection Report" (Pl.Ex.I) was nothing more than a form of complaint to which Kay Peterson Construction was required to respond. No determination relative to the validity or accuracy of the alleged defects contained therein had been made (R-204).

Following a hearing on the objections, the court signed the findings of fact and conclusions of law and the judgment as proposed without further comment.

ARGUMENT

POINT I: HAVING CORRECTLY AND PROPERLY FOUND THAT THERE WAS A MUTUAL MISTAKE OF FACT IN THE FORMATION AND EXECUTION OF THE EARNEST MONEY CONTRACT, THE TRIAL COURT ERRED IN THE FOLLOWING PARTICULARS:

A. THE TRIAL COURT ERRED IN FAILING TO ENTER JUDGMENT REFORMING

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THE CONTRACT TO CONFORM TO THE INTENTION AND UNDERSTANDING OF THE PARTIES.

It has long been the law in Utah that upon finding that a written instrument, due to a mutual mistake of fact, does not reflect the actual intention or understanding of the parties, the court will reform the instrument and enter judgment according to the terms of the instrument as reformed. The rule of law was applied by this court in Intermountain Farmer's Association v. Peart, 30 Utah 2d 201, 515 P.2d 614 (1973) to reform a deed from the plaintiff to the defendants and decrease the amount of property conveyed from five acres to two acres upon a showing that the plaintiff intended to convey only two acres and the defendants expected to receive no more.

The rule was also found applicable in Jensen v. Manilla Corporation of the Church of Jesus Christ of Latter Day Saints, 565 P.2d 63 (Utah, 1977) to increase the amount of property sold under a real estate contract when it was established at trial that the purchaser, Jensen, thought he was buying and the real estate agent for the seller, the Church, thought he was selling all of a certain parcel of property located between two existing fence lines, even though the contract for sale failed to include in its description the south 32 feet of the property and this same 32 foot parcel had been subsequently conveyed by the Church to a third party. In affirming the reformation of the contract by the trial court, this court cited with approval from Powell on Real Property:

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The power to obtain reformation of a written instrument exists when it can be satisfactorily proved (1) that the instrument as made failed to conform to what both parties intended; . . .

6 Powell on Real Property §903 at 268.8-.10(1977)
Id at 64

This court also noted that parol evidence is specifically admissible to show that a writing does not conform to the intent of the parties, Id at 64; cf: Sine v. Harper, 118 Utah 415, 222 P.2d 571 (1951), Janke v. Beckstead, 8 Utah 2d 247, 332 P.2d 933 (1958).

The rule of reformation has been extended by this court to reform not only specific terms of written instruments as demonstrated above, but also the entire character of a written document or series of documents. In Kesler v. Rogers, 542 P.2d 354 (Utah, 1975) the plaintiff, Kesler, was the purchaser on contract of a 480 acre tract of land and a nearby 318 acre tract, the contract for sale of which smaller tract included cattle and other personal property. Conveyances from the sellers for all of the real and personal property were held in escrow, pending performance by Kesler. Kesler was then approached by one Kershaw, who wished to acquire only the 480 acre parcel and after some negotiation Kesler and Kershaw entered into an agreement to sell the 480 acre tract. Since the documents evidencing title to the property were held in an escrow under Kesler's contract of purchase, the parties agreed that Kesler would assure marketable title in the 480 acre parcel by giving Kershaw a security interest in all the escrow property, which security interest would terminate

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as to the 318 acre parcel and personal property upon transfer of title to the 480 acre parcel. By mistake the documents used to facilitate the transaction recited simply that all the property was conveyed to Kershaw. When Kershaw subsequently sold all of his holdings to the defendant Rogers, the documents evidencing the sales transaction between Kershaw and Rogers were not prepared to reflect the understanding between Kesler and Kershaw concerning the security interest arrangement; instead the documents perpetuated the erroneously prepared language from the earlier transaction. Shortly after the sale was completed, Rogers, with the aid of several other people, siezed a number of cows from Kesler, claiming ownership under the written agreements with Kershaw.

In affirming the trial court's judgment, which reformed the documents of conveyance into documents reflecting the intended security agreement and awarded Kesler damages against Rogers for the wrongful taking of his cattle, this court recited the basic rule for reformation of instruments:

> . . . [A]s between the immediate parties, where the terms of the written instrument are mistaken in that they do not show what the true intent and agreement between the parties was, it may be reformed to show that intent.
> <u>Id</u> at 358

The clear and undisputed facts adduced at the trial of this action establish, and the trial judge properly ruled, that the price term in the written contract between the Plaintiffs Mabey and the Defendant Kay Peterson Construction (the Earnest Money Contract - Pl.Ex.C) was erroneously formulated under a mutual mistake of fact. The parties intended that

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the Earnest Money Contract should reflect the purchase price of the home only, and not the lot on which it was constructed. Both parties honestly, but mistakenly, believed that the cost breakdown sheet attached to the Earnest Money Contract as Exhibit A included the entire $27,000 cost of the lot, $9,000 shown as a "lot payoff" figure on line 37, the remaining $18,000 included as part of the "Loan Disbursed to Date" figure of $77,565.00 on line 1. Both parties agreed to reduce the price shown on line 53 of the first page of the Earnest Money Contract by $27,000, from $136,000 to $109,000, mistakenly believing that by so altering the Earnest Money Contract they were accurately setting forth their intention to show only the cost of the home on the contract. In fact, the $18,000 payment advanced by the bank from the construction loan to pay off the prior mortgage had not been included by the Defendant's bookkeeper, Mrs. Squires, when she prepared the cost breakdown sheet. In order to accurately reflect the intention and understanding of the parties, the $136,000 purchase price initially shown on the Earnest Money Contract should have been reduced by only $9,000 (the "lot payoff" figure on line 37 of the cost estimate sheet) to $127,000, rather than reduced by the full $27,000 to $109,000.

Having correctly determined that because of mutual mistake, the Earnest Money Contract did not reflect the parties intention, the trial court should have entered judgment reforming the price term

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of the contract and ordering it to be increased from $109,000 to $127,000. Since the trial court did not, it behooves this august body to apply the legal principles of reformation enunciated by this court in the foregoing cited cases and require the trial court to so act.

As a final observation it should be noted that in cases involving mutual mistake courts have on occasion awarded relief in the form of recision, rather than reformation, of the written instrument. See: Ross v. Harding, 64 Wash.2d 231, 391 P.2d 526 (1964), Elsinore Union Elementary School District v. Kastorff, Cal. , 353 P.2d 713 (1960). The Defendant Kay Peterson Construction urges this court to consider that such a remedy would be entirely inappropriate here. Neither party has ever requested recision of the Earnest Money Contract. Moreover, the Mabeys have lived in the home which is the subject of the contract since its completion in the spring of 1980 and have (presumably) made payments during that period on the loans they obtained to purchase the home. To attempt at this time to undo the transaction rather than reform it, would be to create additional, involved and unnecessary problems concerning property valuation, payments made, reasonable rental value, etc. The Defendant Kay Peterson Construction requested reformation in its counterclaim and in its case as presented at trial. The Mabeys claimed only damages. Recision would only exacerbate the difficulties created by the parties' mistake, not resolve them.

B. THE TRIAL COURT ERRED IN FAILING TO AMEND DEFENDANT KAY PETERSON CONSTRUCTION'S COMPLAINT AND IN FAILING TO ENTER JUDGMENT IN

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FAVOR OF DEFENDANT KAY PETERSON CONSTRUCTION ACCORDING TO THE UNDISPUTED EVIDENCE ADDUCED AT TRIAL.

Once the trial court had properly concluded that there was a mutual mistake of fact in the formation of the price term of the Earnest Money Contract and the clear and undisputed evidence established that the amount of the mistake was $18,000, the trial court was compelled under Rules 15(b) and 54(c)(1) of the Utah Rules of Civil Procedure to consider the Defendant Kay Peterson Construction's counterclaim amended, to conform it to the evidence presented and to enter judgment accordingly on behalf of the Defendant Kay Peterson Construction in the sum of $18,000. The first part of Rule 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after the judgment; but failure to so amend does not affect the result of the trial of these issues."
> (Emphasis added.)

Rule 54(c)(1) provides in pertinent part:

> Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.
> (Emphasis added.)

In interpreting these rules, this court has continually emphasized that the judgment of the trial court should reflect proper application of the law to the evidence and findings actually determined at

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trial, regardless of the pleadings of the parties and the claims or defenses which may or may not have been expressed therein. In First Security Bank of Utah, N.A. v. Colonial Ford, Inc., 597 P.2d 859 (Utah, 1979) this court reviewed the application of both Rule 15(b) and Rule 54(c)(1) and observed:

> Whatever else may be said about whether it is mandatory or discretionary under the rules just quoted to grant such a motion to amend, it could not be made plainer that the underlying purpose of the rules is that judgment should be granted in accordance with the law and the evidence as the ends of justice require; and that this is true whether the pleadings are actually amended or not.
> Id at 861 (Emphasis added.)

In its examination of Rule 15(b), this court in General Insurance Company of America v. Carnicero Dynasty Corporation, 545 P.2d 502 (Utah, 1976) stated:

> The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried. There must, of course, be either express or implied consent of the parties for the trial of issues not raised in the pleadings. Implied consent may be found where one party raises an issue material to the other party's case, or where evidence is introduced without objection.
>
> Significantly, the first part of Rule 15(b) is not permissive in terms, for it provides that issues tried by express or implied consent shall be treated as if raised in the pleadings. Even failure to amend does not affect the result of the trial of these issues
> Id at 506 (Emphasis added.)

See also: Holdaway v. Hall, 29 Utah 2d 77, 505 P.2d 295 (1973); Palombi v. D & C Builders, 22 Utah 2d 297, 452 P.2d 325 (1969); Pope v. Pope, 589 P.2d 752 (Utah, 1978).

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At the trial of the case at bar no objection was raised by the Plaintiffs Mabey to the testimony of Kay Peterson, the president of the Defendant Kay Peterson Construction, concerning the innocent and inadvertent omission of the $18,000 bank advance from the cost estimate attached to the Earnest Money Contract nor concering the mistaken belief of the parties that the $18,000 payment was included in the cost estimate. In fact, Tom Mabey testified that he also believed the $18,000 advance to be included in the figures shown on the cost estimate sheet. The only objection made by the Mabeys was in connection with the business records of Kay Peterson Construction which were introduced to establish that the $77,565.00 amount shown as "Loan Disbursed to Date" on line 1 of the cost estimate sheet in fact represented advances only for materials and labor and not the $18,000 lot payment, and the objection was made on the grounds of lack of foundation (T-120,121). This objection was overruled by the court (T-121). No objection to this evidence was made on the grounds that it was irrelevent or beyond or outside the scope of the pleadings. It is clear from Rule 15(b) as explained in Carnicero, supra, and from Rule 54(c)(1) as noted in Colonial Ford, supra, that the court below was compelled at the close of trial to grant judgment to the Defendant Kay Peterson Construction "in accordance with the law and the evidence" Colonial Ford, supra at 861. The trial court was required upon a finding of mutual mistake to enter judgment reforming the price term of the Earnest Money Contract upwards by $18,000 from

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$109,000 to $127,000, and to award judgment to Kay Peterson Construction for $18,000.

Notwithstanding the clear requirements of the Rules of Civil Procedure and the law, the trial court awarded the Defendant Kay Peterson Construction only the sum of $11,037.46, which was the exact same amount originally requested in the counterclaim initially filed on behalf of Kay Peterson Cosntruction against the Plaintiffs Mabey. This court must remedy the lower court's error and require entry of a judgment reforming the Earnest Money Contract and awarding Kay Peterson Construction the sum of $18,000.00.

C. THE TRIAL COURT ERRED IN AWARDING DAMAGES TO THE PLAINTIFFS MABEY FOR INTEREST AND ATTORNEY'S FEES INCURRED.

At the conclusion of trial, having correctly determined there was a mutual mistake of fact in the formation of the Earnest Money Contract, the court then proceeded to render judgment both to the Defendant Kay Peterson Construction and to the Plaintiffs Mabey (T-132,133). The errors in those aspects of the judgment for the Defendent Kay Peterson Construction have been discussed previously in this brief.

With respect to the judgment in favor of the Plaintiffs Mabey (and excepting for the moment the award for the cost of repairs, which is considered infra), the court allowed judgment for (a) the payments made by Plaintiffs Mabey to satisfy the oustanding liens on the home, (b) the interest accrued at 18% on the money borrowed by Mabeys to pay the liens and (c) attorney's fees in the sum of $2,500.00. The court did not offer

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an explanation of its basis or reasoning for any of the awards to the Mabeys, other than to remark that the interest incurred by the Mabeys on the money borrowed to pay the liens was "a valid claim" (T-132). While the award for moneys expended by the Mabeys to satisfy outstanding liens could reasonably be considered a set-off against the judgment that should have been entered in favor of Kay Peterson Construction in reforming the Earnest Money Contract, in view of the court's finding of mutual mistake, the additional awards to the Mabeys are erroneous and must be reversed.

The key to a legally consistent judgment involves the clear recognition that the parties' respective positions relative to the Earnest Money Contract are not merely conflicting, but rather that they are mutually exclusive. The trial court's decision turned upon the interpretation of the facts and circumstances surrounding the formation and execution of the contract. The evidence presented required the court to resolve the question of whether the Earnest Money Contract provided for a $109,000.00 fixed price or whether, due to mutual mistake, the price term should be reformed to $127,000.00. Most assuredly, one cannot have it both ways. Plaintiffs Mabeys' claims for damages were entirely premised upon the former contention, whereas Defendant Kay Peterson Construction's position was based upon the latter assertion. That is to say, Mabeys' claims for breach of contract and for damages in the form of reimbursement of the

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amounts paid in excess of the contract price to satisfy lien claimants are valid only if the amounts they paid were actually in excess of the contract price. If they were not, then the Mabeys merely paid for the improvements which they selected and received, there was no contract breach by Kay Peterson Construction and Mabeys have no basis for complaint against the Construction Company. Conversely, Defendant Kay Peterson Construction's position is that there was an innocent mutual mistake in determining the price term. Consequently, the Earnest Money Contract should be reformed to adjust the purchase price upward by $18,000.00. As so reformed, the contract price is in excess of the amounts paid by the Mabeys for the house, regardless of whether those payments were made directly to Kay Peterson Construction or to third party lien claimants. There can be, therefore, no breach of the Earnest Money Contract by Kay Peterson Construction.

This conclusion is not merely an academic point; it has practical consequences. They are:

(1) If the Earnest Money Contract was not breached, then there is no basis for an award of interest upon the amounts borrowed by the Mabeys to pay the lien claimants, as the same would be, at best, consequential damages for a breach of contract.

(2) If the Earnest Money Contract was not breached, then there is no basis for an award of attorney's fees to the Mabeys, as the same must be either predicated on a breach of the contract (Pl.Ex.3, lines 47 and 48) or found to be consequential damages incurred in satisfying lien claimants.

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The undisputed evidence clearly supports the position that upon reformation of the Earnest Money Contract to reflect the understanding of the parties, there was no breach thereof by the Defendant Kay Peterson Construction. Adjusting the price term of the contract upwards by $18,000 from $109,000 to $127,000, and considering the amounts paid by the Mabeys to satisfy the liens gives the following:

Erroneous Contract Price		$109,000.00
Mistaken Exclusion from Price		18,000.00
Reformed Contract Price		127,000.00
Amounts Paid by Mabeys		
Paid to Kay Peterson Construction	($109,000.00)	
Paid to Lien Claimants	(9,737.00)	
Total Paid		(118,737.00)
Net Balance Due Under Contract		$ 8,263.00

Not only are there no damages accruing to Mabeys under the reformed contract for payments in excess of the contract price, there is an unpaid balance owing to Kay Peterson Construction. The reason that the lien claimants were not paid is obvious. The Mabeys received a mistaken windfall and ended up paying Kay Peterson Construction $18,000 less than they should have. Had Kay Peterson Construction received the correct amount, the materialmen and the sub-contractors who filed liens would have been easily satisfied. The fact that the Mabeys paid the lien claimants directly, rather than through the Defendant Kay Peterson Construction is not in itself a ground for any complaint. The question is whether the Mabeys paid more than

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the contract price. The answer is that, in view of the mutual mistake, they did not. Indeed, they got something of a bargain.

Obviously in cases of mutual mistake there are two innocent parties. Therefore, in determining who should bear the burden of the mistake, it is appropriate to consider who obtained the benefits thereof. The Mabeys obtained and now enjoy the benefits of the labor and materials represented by the lien claims they paid. The cabinets, carpeting and other items are in their home and are used by them daily. It is hardly unfair that they should be required to pay for them, and that is all they have done by satisfying the lien claimants. They may be disappointed by discovery of the mistake, but they have not been injured. Conversely, shifting the burden to the Defendant Kay Peterson Construction merely adds insult to injury. Kay Peterson Construction received no benefit from the goods and services represented by the lien claims. But for the Mabeys' the money they paid is the same. Had they not paid it to the lien claimants, they would owe it to Kay Peterson Construction under the reformed contract and Kay Peterson Construction would owe the lien claimants. So it is ultimately inconsistent to reform the price term of the Earnest Money Contract and then award damages on the basis of the original contract price, as the trial court apparently attempted to do. Once again, one cannot have it both ways.

In summary, this is not a case of off-setting errors, although it may superficially appear to be so at first glance. By reforming the

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Earnest Money Contract as must be done under these circumstances, to remedy the parties' mutual mistake, the Mabeys' claim for breach of contract must be extinguished. That is to say, the Mabeys have not been required to pay more than the reformed contract price. If there is no breach of the reformed contract terms, then there is no basis for an award of attorney's fees to Mabeys, whether as consequential damages for settlement of lien claims or as direct compensation for services rendered in this action, and claims for interest on the amounts ostensibly borrowed by the Mabeys to pay for the liens must also be dismissed. As there was no contract breach, there can be no damages, much less consequential damages, attendant thereon, and this court should so hold.

POINT II: PLAINTIFFS FAILED TO CARRY THEIR BURDEN OF PROOF WITH RESPECT TO DAMAGES RESULTING FROM CLAIMED DEFECTIVE WORKMANSHIP, AND THE COURT ERRED IN GRANTING JUDGMENT TO PLAINTIFFS ON THOSE CLAIMS.

It is axiomatic in the law that before a party may be awarded a judgment for damages, sufficiently detailed and adequate evidence as to the existence and the amount of damages and the manner of their computation must be presented to the court. 22 Am. Jur. 2d Damages §22. Failing the submission of proof which is of a nature that would allow reasonable ascertainment of the basis for and amount of damages, the court must deny an award of any more than nominal damages to the complaining party. Doyle v. McBee, 161 Colo. 130, 420 P.2d 247 (1966),

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B & B Farms, Inc. v. Matlock's Fruit Farms, Inc., 73 Wash.2d 146, 437 P.2d 178 (1968). It should be observed that this rule requires reasonable certainty in two separate and distinct factual areas: first, it must be reasonably certain that damages exist, i.e., the plaintiff must establish by sufficient evidence that he has been damaged and that there is a factual basis on which to award damages; and second, the amount of the damages which the plaintiff has suffered must be susceptible to reasonable ascertainment. Plaintiffs Mabey failed at trial to meet adequately this standard of certainty in either area.

Turning first to an examination of that part of the rule which concerns reasonable certainty in determining amount of damage, the Utah Supreme Court has regularly adhered to and espoused the above-noted "damage certainty rule" when determining whether the amount of a damage award has been proper. In Johnson v. Hughes, 120 Utah 50, 232 P.2d 362 (1951), this court reviewed a lower court decision granting damages to the plaintiff homeowners and against the defendant contractor resulting from sub-standard workmanship in the construction of two homes. In examining the trial court record and for the most part sustaining the judgment entered, the Supreme Court noted that damage amounts had been individually itemized. In other words, the total judgment entered was based on the amounts separately determined by the trial court as necessary to repair each of the alleged defects. Id, 232 P.2d at 364. Nevertheless, this court reversed and remanded with respect to those elements

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of damage which had not been segregated, observing that an award of damages required greater certainty than that provided by the unsegregated evidence. Id at 366.

In Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597 (1962), a case involving an alleged breach of a land sale contract, this court noted that the measure of damages in a contract breach action is the market value of the property at the time of the breach less the contract price to the vendee. In applying this rule the court referred to the need for reasonable certainty in damage amount determinations:

> . . . to recover damages plaintiff must prove not only that she has suffered a loss, but must also prove the extent and amount thereof. Furthermore, to warrant a recovery based on the value of the property there must be proof of its value or evidence of such facts as will warrant a finding of value with reasonable certainty.
> 368 P.d. at 601 (Emphasis added.)

The rule of certainty in damage awards is common in other jurisdictions as well. In Louis Lyster, General Contractor, Inc. v. Town of Las Vegas, 75 N.M. 426, 405 P.2d 646 (1965) the New Mexico Supreme Court reviewed a lower court damage award against a contractor based upon a claim for breach of contract resulting from defects that appeared in the construction of a sewage facility. The court stated that:

> If the defect is remediable from a practical standpoint, recovery generally will be based on the market price of completing or correcting the performance, and this will generally be shown by the cost of getting work done or completed by another person.
> 405 P.2d at 668 (Court's emphasis.)

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Noting that damages must be of the kind and character susceptible to proof and the amount allowed must be subject to reasonable ascertainment, the court reversed the trial court's damage award of $19,043.00 and remanded, pointing out that the only evidence as to the damage amount adduced at trial was the testimony of T. E. Scanlon, an engineer, who in response to counsel's inquiry stated that his estimate of cost to repair the defects "was roughly twenty thousand dollars," Id at 667. The court refused to allow an award based on evidence which it characterized as no more than a "rough estimate."

Turning to the record in the case at bar, the sole evidence presented to establish the amount of damages for the alleged defects in construction consisted of the following exchange between the Plaintiff Tom Mabey and his own counsel, Mr. Diumenti, concerning the cost of reparing the alleged defects:

> Q Do you have an idea of the cost of the materials, whether it be mortar, nails, the electrical wiring, and the amount of time necessary to effect those repairs?
>
> A Yes I do.
>
> Q And what is your estimate?
>
> A I have estimated about $5,400.00.
>
> Q And that is based on what hourly charge?
>
> A Well it's based about on an average of 14 to 20 dollars, about $17.00 an hour.
>
> Q Have you in estimating that, did you take into account the economy of time, for instance, that while perfa-tape and plaster is drying, somebody could be fixing an electrical doorbell?

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A Yes I did.
[T-34,35 (Emphasis added.)]

No other evidence of any kind was presented to the court or exists in the record to testablish the amount of the damages claimed. The testimony of Mr. Mabey that repair costs are "about $5,400.00" based upon an average hourly wage of "about $17.00 an hour" clearly does not meet the standard of this court and other courts, which standard requires proof or evidence as will warrant a finding of a damage amount "with reasonable certainty." Bunnell v. Bills, supra, Lyster, General Contractor, Inc. v. Town of Las Vegas, supra.

As a further indication of the suspect and uncertain nature of the testimony presented concerning the amount of claimed damages, it should be noted that in Plaintiffs Mabeys' original complaint the amount requested as damages for the alleged faulty construction was $5,440.00 (R-2). By the time of trial the number of alleged defects in construction claimed by the Mabeys had been pared down from seventeen itemized in a letter from Tom Mabey to his legal counsel (Pl.Ex.H) to only ten shown on the Correction Report from the State Board of Contractors (Pl.Ex.I). Notwithstanding the fact that the number of defects claimed by the Mabeys had been reduced at trial by more than 40%, Mr. Mabey's estimate of repair costs ($5,400.00) for the items shown on the Correction Report (see T-34) exceeded 99% of and was only $40 less than the amount originally claimed in the complaint, which, one must assume, was based on the original list of claimed

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defects in Mr. Mabey's letter! Considering the substantial reduction in the number of defects alleged from the time the complaint was filed until the time of trial, the amazing similarity between the amount claimed by Plaintiffs Mabey in their complaint and the amount expressed by Tom Mabey while on the witness stand would lead one to conclude that in testifying, either Mr. Mabey erroneously based his estimate for repairs on the original list of alleged defects or else he simply increased his estimate of repair cost for the remaining alleged defects as the length of the list was reduced. Regardless of the reasons or basis for Mr. Mabey's testimony, when it is viewed and tested with the closeness required by the rules of law adhered to by this court, it must be found inadequate to support the amount of damages awarded by the trial court.

Turning to that aspect of the certainty of damage rule which requires a party to show by sufficient and competent evidence that a basis for an award of damages exists, a review of the trial transcript and documentary evidence presented clearly demonstrates that here also, the Mabeys failed to carry their burden. At trial the Mabeys presented two written documents containing lists of alleged defects in construction. The first, a letter from Tom Mabey to Mr. Diumenti, his attorney, (Pl.Ex.H) listed seventeen complaints concerning the construction of the home. The second, a legal-sized document styled "Correction Report" (Pl.Ex.I) listed ten separate items. These exhibits were admitted, but due to objection from Defendant's counsel, they were admitted solely for informational purposes, and not to establish the truthfulness of

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the allegations contained in the documents. In other words, the trial court ruled in receiving the exhibits that they were not evidence the alleged defects actually existed or that the Defendant Kay Peterson Construction was responsible or liable for their repair. Therefore, in order for the trial court to have properly awarded damages to the Mabeys based upon defective workmanship, the evidence thereof must have come from other documents or testimony.

The only other evidence presented to the court concerning the alleged defects in construction was the testimony of Tom Mabey, who vaguely stated that there were "inadequacies" and "deficiencies," which he wrote down on Plaintiff's Exhibit H, the excluded document (T-29,30). He also testified that agents from the State Department of Contractors had inspected the home and made a list of what they felt were "deficiencies" (T-31), which list was the excluded Plaintiff's Exhibit I.

No evidence of any kind was presented to show the cause of the alleged defects or to connect or link them to the Defendant Kay Peterson Construction. For example, there was no evidence presented to show whether the alleged roof leak was due to poor workmanship or whether it resulted from improper design of the roof. Remember it was Tom Mabey who obtained, substantially modified and delivered the construction plans to Kay Peterson Construction (T-41). Mr. Mabey admitted on cross-examination that some of the so-called "deficiencies"

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shown on the "Correction Report" (Pl.Ex.I) were items left out of the construction of the home because their inclusion would have violated state building codes (T-68,69).

What is clear from a close review of the trial transcript is that the trial court, relying on the representations of Plaintiffs' counsel in chambers before trial, believed the "Correction Report" (Pl.Ex.I) to be a prior adjudication by the State Board of Contractors of the liability of the Defendant Kay Peterson Construction for repair of the items listed on the report, notwithstanding the representations of Defendant's counsel in chambers that neither he nor his client were aware of any such order or judgment. Moreover, the lower court limited the scope of examination and sustained objections to testimony and evidence, apparently in reliance on that belief.

Reference to the court's comments in this connection is instructive. For example, when Mr. Diumenti asked Mr. Mabey during his examination if there were additional defects in the home which were not included in the Correction Report, the trial judge interrupted, stating:

> Now Mr. Diumenti if I understand your question, I think the ground rules I laid in there was [sic] that anything other than those that the Department said were deficient we would not consider.
>
> (T-31, lines 27-30) (Emphasis added.)

The exchange between the court and counsel at T-66 and T-67 again reveals the thinking of the trial judge:

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> THE COURT: I just limited Mr. Jensen from even talking about anything in addition to that because if this man comes in and says all these additional defects are in this house, the State man has gone out and inspected and found only these defects in this house, I said to Mr. Diumenti that you are not going to be able to talk about all these things that you imagine are real because the State didn't find it.
> (Emphasis added.)

Contrary to the trial court's belief, the Correction Report was not an adjudication of defects or contractor liability. It was nothing more than a form of complaint, used to initiate administrative proceedings before the State Board of Contractors. Affidavit of Steven Schwendiman (R204-206).

In summary, a careful review of the trial transcript shows that the Mabeys' claims of defective workmanship were based on vague assertions, inaccurate characterization of documents and little else. The certainty which must be present to sustain an award for damages is clearly absent from the record. The trial court's judgment must be reversed.

POINT III: THE COURT'S FINDINGS ON DAMAGES INCURRED BY DEFENDANT KAY PETERSON CONSTRUCTION RESULTING FROM THE MUTUAL MISTAKE OF THE PARTIES AND DAMAGES INCURRED BY PLAINTIFFS MABEY RESULTING FROM ALLEGED DEFECTIVE WORKMANSHIP ARE UNSUPPORTED BY THE EVIDENCE.

The standard for review of findings of fact in equity cases has been enunciated by this court in countless appellate decisions, which for the sake of brevity are not collected and cited here. Rather, a typical, but comprehensive explanation of that standard is excerpted:

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> due to the advantaged position of the trial court we will review its findings and judgments with considerable indulgence, and will not disagree with and upset them unless the evidence clearly preponderates against them, or the court has mistaken or misapplied the law applicable thereto.
>
> Pagano v. Walker, 539 P.2d 452,454 (Utah, 1975)

From the foregoing it is clear that this court will not overturn lower court findings in equity cases which are supported by some evidence and are in harmony with the law.

The trial court's findings relative to the equitable holding that the Earnest Money Contract was formulated and executed under a mutual mistake of fact are as follows:

> FINDINGS OF FACT NO. 17: That defendant Kay Peterson Construction Company erred in the preparation of Exhibit A upon which Exhibit the parties negotiated the purchase price of the residence in the sum of $11,037.47 to its detriment. Said error arose out of defendant Kay Peterson Construction Company's omission from consideration a transaction concerning the subject lot in November 1979.
>
> FINDINGS OF FACT NO. 18: That prior to the 25th day of March 1980, plaintiffs and defendant Kay Peterson Construction Company reviewed and discussed Exhibit A and neither was aware of the defendant's mistake. From which mistake defendant Kay Peterson Construction Company suffered a loss in his contemplation of $11,037.37 [sic].

The difficulty with these findings is obvious on their face: They fail to consider at all the clear and undisputed evidence presented at trial that it was the Earnest Money Contract in setting forth the purchase price of the home only, that was executed under a mutual mistake of fact (see Point I.A., *supra*). Moreover, the findings recite that the amount of damages resulting from the mistake was $11,037.47, an amount which

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nowhere appears in the trial proceedings. (That number is the damage amount requested in Defendant Kay Peterson Construction's original counterclaim [R-16].) The only evidence presented to the lower court concerning the amount of the mistake (and hence, the amount of damages) clearly establishes that figure as $18,000.00 (see Point I.B., supra). As noted above the standard for review on appeal requires only some evidence to support findings. In this instance there is no evidence whatsoever. The findings must be rejected by this court as inadequate and incorrect.

As with the standard for review in equity cases, this court's procedures for reviewing findings in actions at law have also been stated many times. Again, turning to just one such statement we read:

> . . . on review we survey the evidence in the light favorable to the findings, which ever party they may favor; . . . they will not be disturbed on appeal if they are supported by substantial evidence."
>
> Bramel v. Utah State Road Commission, 24 Utah 2d 50, 52, 465 P.2d 534 (1970)

While as in equity matters, this court attempts in actions at law to view favorably the trial court's findings, the applicable review standard is slightly higher. The findings in an action at law must be "supported by substantial evidence." Turning to the lower court's findings in this action dealing with the recovery at law by the Plaintiffs Mabey for damages resulting from faulty workmanship, we note:

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FINDINGS OF FACT NO. 11: Defendant Peterson Construction Company [sic] failed to complete the construction of the residence located on the subject real property in a quality workmanlike fashion as contemplated by the parties in respect to the following inadequacies: See attached Exhibit A.

FINDINGS OF FACT NO. 12: As a result of defendant Kay Peterson Construction Company's failure to complete the improvements in a quality workmanlike fashion as contemplated by the parties, plaintiffs Mabey will be required to expend the sum of $5,400.00 to remedy the inadequacies.

As has been explained and argued at some length in Point II of this brief, the evidence presented by the Mabeys in support of their damage claims falls considerably short of the standards necessary for proof thereof. Defendant Kay Peterson Construction submits that the same difficulty afflicts the above findings. The evidence presented (what little there was) can hardly be found to meet a standard for review which requires "substantial evidence." The findings must be stricken.

CONCLUSION

At the close of trial, the lower court properly and correctly found that there had been a mutual mistake in the formation of the Earnest Money Contract entered into by the parties for the sale of the home. Error arose, however, when the trial court failed to properly apply the law to its findings. This court must now rectify that error and require (1) reformation of the Earnest Money Contract to reflect the parties' intention and understanding, (2) entry of a judgment in favor of the Defendant Kay Peterson Construction which conforms to the evidence and (3) reversal of the judgment entered in favor of the Plaintiffs Mabey

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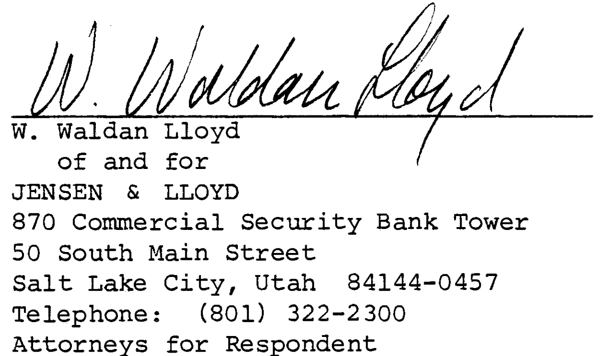
for consequential interest and attorney's fees.

The judgment of the trial court for damages resulting from alleged defects in construction does not find adequate support in the evidence presented at trial, because the standard of certainty required for damage awards was not met by the Plaintiffs Mabey. This court must reverse the judgment of the trial court.

The trial court's findings concerning the mutual mistake of the parties and the damages resulting from alleged construction defects do not meet the standards for review expressed by this court and must be rejected.

Respectfully submitted this 15th day of June, 1982.



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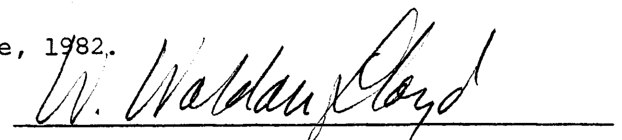
CERTIFICATE OF SERVICE

I hereby certify that I served two (2) true and accurate copies of the foregoing Brief of Appellant upon counsel for the Plaintiffs and Respondents, George S. Diumenti, Esq. of and for DIUMENTI, HARWARD & NELSON by mailing the same, postage prepaid, to their offices at 505 South Main Street, Bountiful, Utah 84010.

DATED this 15th day of June, 1982.



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