

2015

Red Bridge Capital, LLC, a Utah Limited Liability Company, Plaintiff and Appellee, vs. Don Lagos, LLC, a Utah Limited Liability Company, Mellon Valley, LLC, a Utah Limited Liability Company, and Roland N. Walker, an Individual, and Sally Walker, an Individual, Defendants and Appellants : Appellant's Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

RED BRIDGE CAPITAL, LLC, a Utah
limited liability company,

Plaintiff and Appellee,

vs.

DOS LAGOS, LLC a Utah limited
liability company, MELLON
VALLEY, LLC, a Utah limited liability
company, and ROLAND N. WALKER,
an individual, and SALLY WALKER,
an individual.

Defendants and Appellants.

APPELLANT'S BRIEF

Appellate Case No.: 20141123

District Court Case No. 120902931

ON APPEAL FROM THE DECISION OF THE THIRD DISTRICT COURT, SALT
LAKE COUNTY, JUDGE KENNEDY, DISTRICT JUDGE

David Leta
Andrew Hardenbrook
SNELL & WILMER, LLP
15 West South Temple, Ste 1200
Salt Lake City, Utah 84101
Attorneys for Appellee Red Bridge
Capital, LLC

Evan A. Schmutz (3860)
Andy V. Wright (11071)
DURHAM JONES & PINEGAR
3301 N. Thanksgiving Way, Ste 400
Lehi, Utah 84043
Attorneys for Appellants

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UTAH APPELLATE COURTS

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Andrew Hardenbrook
SNELL & WILMER, LLP
15 West South Temple, Ste 1200
Salt Lake City, Utah 84101
Attorneys for Appellee Red Bridge
Capital, LLC

Evan A. Schmutz (3860)
Andy V. Wright (11071)
DURHAM JONES & PINEGAR
3301 N. Thanksgiving Way, Ste 400
Lehi, Utah 84043
Attorneys for Appellants

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT.....	1
STATEMENT OF THE ISSUES.....	1
CONSTITUTIONAL OR STATUTORY PROVISIONS	5
STATEMENT OF THE CASE	5
STATEMENT OF FACTS.....	8
SUMMARY OF THE ARGUMENT	22
ARGUMENT	28
I. THE DISTRICT COURT ERRED IN CONVERTING THE PENDING MOTIONS OF THE PARTIES, WHICH HAD BEEN SET FOR EVIDENTIARY HEARING, INTO CROSS MOTIONS FOR SUMMARY JUDGMENT AND DECIDING TO SUMMARILY DISPOSE OF THE CLAIMS WITHOUT TAKING EVIDENCE	28
A. It was error for the District Court to render summary judgment in favor of Red Bridge and against Defendants while genuine questions of material fact remained unresolved.....	30
II. THE DISTRICT COURT ERRED IN DENYING DEFENDANTS’ MOTION FOR SATISFACTION OF JUDGMENT	32
A. Defendants Performed the Terms of the Settlement Agreement.....	32
B. The Defendants complied with the terms of the Settlement Agreement and Plaintiff Red Bridge was obligated to release and deem the Stipulated Judgment satisfied	33
C. Defendants’ Satisfied the Requirements of the Settlement Agreement by Substantial Performance.....	38
III. THE DISTRICT COURT ERRED IN ITS APPLICATION OF LAW REGARDING MISTAKE AND WAIVER.....	40
A. The Court failed to allow evidence of mutual mistake and erred in its interpretation of Utah law.....	40

B. The District Court erred in not allowing evidence of unilateral mistake and erred in its interpretation of Utah law	43
IV. THE TRIAL COURT ERRED IN CONSTRUING AND APPLYING THE LAW OF WAIVER	45
V. THE DISTRICT COURT ERRED IN AWARDING RED BRIDGE ITS ATTORNEY'S FEES	47
A. Red Bridge's Request for Attorneys Fees Should Be Reversed for the Reasons Stated Above	47
B. Red Bridge has no Basis to Recover Attorneys' Fees Because There is no Action to Enforce the Settlement Agreement as Required by the Attorneys' Fees Clause in the Settlement Agreement	47
C. Even if an Award of Attorneys' Fees is Appropriate, Red Bridge's Attorneys' Fees were Excessive	48
CONCLUSION	50

TABLE OF AUTHORITIES

A. Cases

<i>Arbogast Family Trust v. River Crossing, LLC</i> , 2010 UT 40, P10, 238 P. 3d 1035 (Utah 2010).....	2
<i>Benjamin v. Amica Mut. Ins. Co.</i> , 140 P.3d 1210 (Utah 2006)	40
<i>Bill Brown Realty, inc. v. Abbott</i> , 562 P.2d 238 (Utah 1977)	30
<i>Brinton v. IHC Hosps., Inc.</i> , 973 P.2d 956 (Utah 1998)	45
<i>Burningham v. Westage Resorts, Ltd.</i> , 2013 UT App 244 ¶ 12, 317 P.3d 445	41, 42
<i>Cache County v. Beus</i> , 1999 UT App 134, ¶¶ 36-37, 978 P.2d 1043	39
<i>Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC</i> , 2009 UT 27, 207 P.3d 1235 (Utah 2009) 1	
<i>Cafferty v. Hughes</i> , 2002 UT App 105, 46 P.3d 233, <i>aff'd</i> , 2004 UT 22	48
<i>Cottonwood Mall v. Sine</i> , 830 P.2d 266 (Utah 1992)	48
<i>Cross v. Olsen</i> , 2013 UT App 135, 303 P.3d 1030	38
<i>Daniels v. Gamma West Brachytherapy, LLC</i> , 2009 UT 66 (Utah 2009)	3
<i>DCM Inv. Corp. v. Pinecrest Inv. Co.</i> , 2001 UT 91, 34 P.3d 785	45
<i>Dixie State Bank v. Bracken</i> , 764 P.2d 985 (Utah 1988)	47, 48
<i>E&H Land, Ltd. v. Farmington City</i> , 2014 UT App 237, 336 P.3d 1077	42
<i>Ellis v. Estate of Ellis</i> , 2007 UT 77, 169 P.3d 441 (Utah 2007)	3
<i>Equitable Life Ins. Co. v. Ross</i> , 849 P.2d 1187 (Utah Ct. App. 1993)	48
<i>Free Motion Fitness, Inc. v. Wells Fargo Bank West</i> , 2009 UT App 120	30
<i>Guardian State Bank v. Stangl</i> , 778 P.2d 1 (Utah 1989)	43, 44

<i>Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints</i> , 565 P.2d 63 (Utah 1977)	44
<i>John Call Engineering, Inc. v. Manti City Corp.</i> , 743 P.2d 1205.....	44
<i>Kendall Ins., Inc. v. R&R Group, Inc.</i> , 2008 UT App 235, 189 P.3d 114	41, 42
<i>Kenny v. Rich</i> , 2008 UT App 209, P23 (Utah Ct. App. 2008).....	5, 44
<i>Kukla v. Nat'l Distillers Products Co.</i> , 483 F.2d 619 (6th Cir. 1973).....	31
<i>Martin v. Lauder</i> , 2010 UT APP 216, 239 P.3d 519 (Utah Ct. App. 2010)	1, 2, 3
<i>McArthur v. State Farm Mut. Auto. Ins.</i> , 2012 UT 22, 274 P.3d 981	38
<i>Merrick Young Inc., v. Wal-Mart Real Estate Bus. Trust</i> , 2011 UT App 164, 257 P.3d 1031	32, 42, 44
<i>Mid-America Pipeline Co. v. Four-Four, Inc.</i> , 2009 UT 43, 216 P.3d 352 (Utah, 2009)..	1
<i>Morgan v. Morgan</i> , 795 P.2d 684 (Utah Ct. App. 1990).....	49
<i>Mountain Sates Telephone & Telegraph v. Sohm</i> , 755 P.2d 155 (Utah 1988)	44
<i>Rees v. Intermountain Health Care, Inc.</i> , 808 P.2d 1069	32, 45
<i>Richardson v. Hart</i> , 2009 UT App 387, 223P.3d 484 (Utah Ct. App. 2009)	1
<i>Saleh v. Farmers Ins. Exch.</i> , 133P.3d 428 (Utah 2006)	40
<i>Sandberg v. Klein</i> , 576 P.2d 1291 (Utah 1978)	30
<i>Saunders v. Sharp</i> , 840 P.2d 796 (Utah Ct. App. 1992)	39
<i>Selvig v. Blockbuster Enterprises, LC</i> , 2011 UT 39, 266 P.3d 691 (Utah 2011)..	31, 42, 44
<i>Soter's, Inc. v. Deseret Federal Sav. & Loan Ass'n</i> . 857 P.2d 935 (Utah 1993).....	32, 45
<i>Stake Center Locating, Inc., v. Logix Comm., L.P.</i> , No. 2:13-CV-1090 TS, WL 3792602 (D. Utah June 18, 2015)	41, 42
<i>State v. Rodrigues</i> , 2009 UT 62, 218 P.3d 610 (Utah 2009)	2, 3

<i>Strohm v. Clearone Communs., Inc.</i> , 2013 UT 21	49
<i>Tangren Family Trust v. Tangren</i> , 2008 UT ¶ 20	3, 42
<i>Thompson v. Smith</i> , 620 P.2d 520 (Utah 1980).....	44
<i>United Park City Mines Co. v. Stichting Mayflower Mountain Fonds</i> , 2006 UT 35, 140 P.3d 1200 (Utah 2006)	4
<i>West One Trust Co. v. Morrison</i> , 861 P.2d 1058 (Utah Ct. App. 1993).....	41
<i>Wolf Mtn. Resorts, LC, v. ASC Utah, Inc.</i> , 2011 UT App 425, 268 P.3d 872	32, 42, 44
<i>Zion's Props., Inc. v. Holt</i> , 538 P.2d 1319 (Utah 1975)	39
Statutes	
Rule 52(a), U.R.Civ.P.	30
Rule 56, U.R.Civ.P.....	30

JURISDICTIONAL STATEMENT

This Court's jurisdiction rests upon Utah Code Annotated Section 78A-4-103(2)(j).

STATEMENT OF THE ISSUES

A. Questions Presented and Standard of Review

1. The District Court erred in denying Defendants' Motion for Satisfaction of Judgment because the Defendants had fully or substantially complied with all material terms of the Settlement Agreement, the Plaintiff received the full fruits of the Agreement and Plaintiff was required to release the stipulated judgment.

Standard of Review: The Appellate Court standard of review is for Correctness. *See Mid-America Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, ¶19, 216 P.3d 352 (Utah, 2009) (citation omitted) (stating that "[t]he interpretation of a contract is controlled by the intentions of the parties to the contract."); *See Also Richardson v. Hart*, 2009 UT App 387, P6, 223 P.3d 484 (Utah Ct. App. 2009) (stating that "[w]e review a district court's interpretation of a written contract for correctness, granting no deference to the court below." (citing *Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, P 21, 207 P.3d 1235 (Utah 2009); *see Also Martin v. Lauder*, 2010 UT APP 216, 239 P.3d 519, P4 (Utah Ct. App. 2010) .

Preservation for Appeal. [R. at 775, 3891].

2. The District Court erred by failing to hold an evidentiary hearing on Defendants' Motion for Satisfaction of Judgment when an evidentiary hearing was

scheduled, witnesses were subpoenaed and present, a pre-hearing order had been entered for that purpose and abundant questions of material fact remained in order to decide the issues presented in Defendants' Motion for Satisfaction of Judgment.

Standard of Review: The Appellate Court standard of review is for Correctness. *See Arbogast Family Trust v. River Crossing, LLC*, 2010 UT 40, P10, 238 P. 3d 1035 (Utah 2010) (stating that "[t]he interpretation of a rule of procedure is a question of law that we review for correctness.") (citing *State v. Rodrigues*, 2009 UT 62, P11, 218 P.3d 610 (Utah 2009); *see Also Martin v. Lauder*, 2010 UT APP 216, 239 P.3d 519, P4 (Utah Ct. App. 2010) ("An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party.")).

Preservation for Appeal. [R. at 775, 3891].

3. The District Court erred by adjudicating the Motion for Satisfaction of Judgment as a Motion for Summary Judgment but then failed to make any determination as to material questions of fact and failed to enter any memorandum decision. Specifically, the District Court failed to articulate any grounds on the record or in its order as to why it denied Defendants' Motion for Satisfaction of Judgment.

Standard of Review. The Appellate Court standard of review is for Correctness. *See Arbogast Family Trust v. River Crossing, LLC*, 2010 UT 40, P10, 238 P. 3d 1035 (Utah 2010) (stating that "[t]he interpretation of a rule of procedure is a question of law

that we review for correctness.”) (citing *State v. Rodrigues*, 2009 UT 62, P11, 218 P.3d 610 (Utah 2009)); *See Also Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, P46 (Utah 2009) (stating that “the district court's interpretation of . . . statutes and the common law are questions of law that we review for correctness.”) (citing *Ellis v. Estate of Ellis*, 2007 UT 77, P 6, 169 P.3d 441 (Utah 2007)).

Preservation for Appeal. [R. at 775, 3891].

4. The District Court erred when it incorrectly interpreted Utah law with respect to allowing evidence regarding the parties’ mutual and/or unilateral mistake relating to the inclusion of an errant legal description in the Settlement Agreement. The District Court apparently determined that evidence of mistake cannot be introduced to reform or modify a contract if the contract contains an integration clause. Such a ruling is legal error. In doing so, the District Court incorrectly interpreted *Tangren Family Trust v. Tangren*, 2008 UT ¶ 20.

Standard of Review. The Appellate Court standard of review is for Correctness. The District Court’s determination is a question of law due to its determination not to take evidence on mistake and the ultimate conclusion to disregard the Defendants’ claim for mistake. *See Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, P46 (Utah 2009) (stating that “the district court's interpretation of . . . statutes and the common law are questions of law that we review for correctness.”) (citing *Ellis v. Estate of Ellis*, 2007 UT 77, P 6, 169 P.3d 441 (Utah 2007)); *See Also Martin v. Lauder*, 2010 UT APP 216, 239 P.3d 519, P4 (Utah Ct. App. 2010) (“An appellate court reviews a trial court’s legal

conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party.”).

Preservation for Appeal. [R. at 775, 3891]

5. The District Court erred in not finding that Plaintiff’s Counsel’s August 27, 2014 email and memorandum (R. at 1748-1752) delineating each encumbrance to be removed from the Strip Parcel, which representation did not include a demand that the telecommunications easement was to be removed from the Strip Parcels, to be a waiver by Plaintiff of that condition.

Standard of Review. Issues of waiver are reviewed as a mixed question of law and fact. *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, P 21, 140 P.3d 1200 (Utah 2006) (stating “[a]ppellate courts review the issue of waiver as a mixed question of law and fact: ‘[W]hether the trial court employed the proper standard of waiver presents a legal question which is reviewed for correctness, but the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations.’”).

Preservation for Appeal. [R. at 775, 3891]

6. The District Court erred in granting Plaintiff attorneys’ fees and costs because the judgment had been satisfied and further erred in finding that Plaintiff’s attorneys’ fees were reasonable in this matter.

Standard of Review. The award of fees is an issue of law that is reviewed used the correctness standard. *See Kenny v. Rich*, 2008 UT App 209, P23 (Utah Ct. App. 2008) (citations omitted) (stating that whether attorney fees are recoverable in an action is a question of law, which is reviewed for correctness). The “[c]alculation of reasonable attorney fees is in the sound discretion of the trial court . . . and will not be overturned in the absence of a showing of a clear abuse of discretion.” *Id.*

Preservation for Appeal. [R. at 2373, 3892]

CONSTITUTIONAL OR STATUTORY PROVISIONS

There is no constitutional or statutory provision material to this appeal.

STATEMENT OF THE CASE

A. Nature of Case and Procedural History.

This appeal is from a final Order Denying Defendants’ Motion for Satisfaction of Judgment entered in the Third District Court of Salt Lake County against Defendants/Appellants Dos Lagos, LLC, Mellon Valley, LLC, Roland N. Walker, and Sally Walker and the subsequent Order Granting Plaintiff’s Motion for Award of Attorney’s Fees and Costs and Augmenting Judgment entered in the Third District Court of Salt Lake County against Appellants Dos Lagos, LLC, Mellon Valley, LLC, Roland N. Walker, and Sally Walker. At the time Defendant’s Motion was heard, the trial court converted such motion and Plaintiff’s opposition thereto to cross motions for summary judgment, considered the proceedings as a motion for summary judgment, and entered a

final order denying Defendants' motion and granting Plaintiff's motion, despite the existence of genuine issues of material fact.

This case arises out of a deficiency action against the Defendants following the foreclosure by Plaintiff Red Bridge Capital, LLC ("Plaintiff" or "Red Bridge") of two parcels of real property in Washington County, Utah. Prior to trial, the parties entered into a Settlement Agreement on May 15, 2013 in which the Defendants agreed to a Stipulated Judgment in the amount of \$2,000,000; however, the parties also agreed that if the Defendants performed certain actions identified in the Settlement Agreement, Plaintiff would promptly release the judgment and file a satisfaction of judgment.

Defendants contend that they completely or substantially and materially performed all of their obligations and duties under the Settlement Agreement. However, Plaintiff refused to release and satisfy the judgment. Therefore, Defendants filed their Motion for Satisfaction of Judgment, which was converted by the trial court to a motion for summary judgment. Plaintiff opposed the motion and asserted that Defendants had not performed under the Settlement Agreement, asserting various questions of fact as to the Defendants' performance. Defendants asserted that a mutual mistake existed in the Settlement Agreement which affected, in part, the Defendants' performance, but that Defendants had nevertheless performed completely or substantially under the circumstances of mistake and that the Court should deem the judgment fully satisfied. Defendants requested an evidentiary hearing on these issues. The Court set an evidentiary hearing on July 3, 2014. Notwithstanding that the July 3,

2014 hearing was scheduled as an evidentiary hearing and that prehearing exhibits and facts were submitted in advance, the Court expressly converted the motion to cross motions for summary judgment, refused to receive evidence and failed to provide any basis for so doing. The District Court summarily denied Defendants' motion, granted Plaintiff's motion and entered a final order leaving the full amount of the judgment intact, notwithstanding the existence of genuine issues of material fact concerning Defendants' performance of the terms of the Settlement Agreement and the Defendants' contention that mutual or unilateral mistakes existed in the Settlement Agreement regarding the nature and extend of Defendants' obligations thereunder.

The Defendants contended below and contend in this appeal that not only did they comply with all the requirements and conditions of the Settlement Agreement, thereby entitling them to a release and satisfaction of the \$2,000,000 Stipulated Judgment, but that it was clear error for the Court to allow Red Bridge to retain the substantial monetary and property benefits of the Defendants' performance under the Settlement Agreement while at the same time permitting Red Bridge to keep and pursue collection of the full amount of the Stipulated Judgment, without requiring a valuation and accounting of what Defendants had given Red Bridge in performance under the Settlement Agreement.

In addition, based on the Court's errors in denying Defendants' Motion for Satisfaction of Judgment, Plaintiff moved for an award of attorney's fees under the Settlement Agreement which motion was granted. Defendants opposed the Motion for

Attorney's fees because the judgment had been satisfied and further that Plaintiff's attorney's fees were clearly excessive and unreasonable in this matter.

STATEMENT OF FACTS

1. This case arose due to claims of deficiency by Plaintiff after it foreclosed on land that was previously owned by Defendant Mellon Valley, LLC within Washington County, Utah. *See* Settlement Agreement, a copy of which is attached to the Addendum as **Exhibit A** (hereinafter "Settlement Agreement"), at Recitals A & B. (R. at 777, 808).

2. During the deficiency litigation and on or about May 15, 2013, the parties in the above captioned case entered into a Settlement Agreement resolving all disputes arising in the above captioned litigation. *See* Settlement Agreement, generally. (R. at 808).

3. The real property that was foreclosed on by Red Bridge consists of two parcels, one lying on the west side of Sand Hollow Road in the City of Hurricane, and the other lying on the west side of the road. *See Id.* at Recitals, generally. (R. at 778, 808). The Settlement Agreement defines the two foreclosed parcels as the "Properties" and they will be referred to herein by the same term.

4. One of the Defendants in this matter, Mellon Valley, LLC ("Mellon Valley"), owned two parcels of land on either side of Sand Hollow Road that lay between the Properties and Sand Hollow Road, both on the east and west side of the road. Thus, neither of the Properties had direct access to Sand Hollow Road. The Settlement

Agreement and the parties have referred to these two parcels owned by Mellon Valley as the “Strip Parcels” and they will be referred to herein by the same term. *See Id.* at Recital D. (R. at 808).

5. A map depicting the Properties and the Strip Parcels (shown on the map as Parcels A and B) is included in the Addendum as **Exhibit B**; R. at 778, 806, 1721. The map was attached to Defendants’ Motion for Satisfaction of Judgment. (*Id.*)

6. The Settlement Agreement entered between the parties was structured to provide for certain performances to occur upon execution of the Settlement Agreement, and for other performances to occur up to 180 days thereafter. The Settlement Agreement involved both the Properties and the Strip Parcels. The Settlement Agreement also involved a Master Communications Easement (“Communications Easement”), which was owned by EVD Communications Infrastructure, LLC (“EVD”), a non-party to the litigation.

7. Under the Settlement Agreement, the parties agreed to the following:
- a. Defendants would pay Red Bridge the sum of \$150,000.00 in cash (Settlement Agreement at ¶ 1);
 - b. Defendants would consent to entry of a deficiency judgment in the amount of \$2,000,000.00 (Settlement Agreement at ¶ 2);
 - c. Defendants would cause EVD to execute an easement termination, terminating the Communications Easement with regard to the Properties. The termination of the Communications Easement was to be “free and clear of any and all liens or encumbrances. Defendants were given 180 days after entry of the judgment to

remove any such liens or encumbrances affecting the Communications Easement (Settlement Agreement at ¶ 4(a));

- d. Upon execution of the Settlement Agreement, Mellon Valley would execute and deliver an Access and Utility Easement to Red Bridge across the Strip Parcels, to permit each of the Properties access to Sand Hollow Road for general vehicular access and placement of underground and above-ground utility lines in four locations (two from the west and two from the east) across the Properties. Within 180 days after the entry of judgment, Defendants were to cause all liens and encumbrances to be removed from the Strip (Settlement Agreement at § 4(b));
- e. Within 180 days after entry of judgment, Defendant Mellon Valley and Red Bridge would negotiate in good faith to enter into a mutually acceptable Development Agreement regarding the Strip Parcels and the Properties.

(Settlement Agreement at § 4(c)); (R. at 778-779, 808).

8. The Settlement Agreement also provided that if “each of the events in paragraphs 1 and 4(a) – (c) occurs”, then promptly upon the expiration of the 180 day period Red Bridge would file a satisfaction of the judgment and release any liens it had perfected regarding the judgment without any additional. (R. at 808).

9. Upon the execution of the Settlement Agreement, Defendants made the required payment of \$150,000 to Red Bridge. (R. at 779; *see also* Stipulated Facts for July 3, 2014 Hearing at ¶13, R. at 2185).

10. Upon execution of the Settlement Agreement, Defendants consented to a stipulated deficiency judgment against Defendants in the amount of the \$2,000,000. (R. at 779, 808).

11. Defendants caused Mellon Valley to execute a termination of the Communications Easement in compliance with ¶ 4(a) of the Settlement Agreement. (R. at 779; *see* Partial Termination of Master Communication Easement for Elim Valley in favor of Red Bridge at R. at 1737 attached to *see also* August 8, 2013 Letter from counsel for Defendants Addendum as **Exhibit C** at R. at 1723).

12. Defendants caused Mellon Valley to execute and deliver an Access and Utility Easement as to the Strip Parcels, free and clear of encumbrances in compliance with ¶ 4(b) of the Settlement Agreement. (*see* August 8, 2013 Letter from C. Dunn to D. Leta and attached Amended and Restated Access and Utility Easement included in Addendum as **Exhibit C**, R. at 1723).

13. Defendants negotiated in good faith toward a mutually acceptable Development Agreement regarding the Strip Parcels; however, despite good faith attempts to enter into a mutually acceptable Development Agreement, the parties did not enter into a new Development Agreement. (*See* July 31, 2013 Letter from C. Dunn, a copy of which is included in the Addendum as **Exhibit D**; R. at 888-889).

14. Defendants believed in good faith that the parties agreed to maintain the existing Development Agreement, which had been entered into between Defendants and Hurricane City for the entire 2,300 Elim Valley Development as a controlling development agreement for the Strip Parcels and the properties foreclosed by Red Bridge. *See Id.* at § 4(c); R. Walker Aff. at ¶ 10 (R. at 916); *see also* L. Walker Aff. at ¶ 9 (R. at 895); *See Also* November 14, 2013 Letter from C. Dunn. (R. at 922-924).

Access and Utility Easement

15. The Settlement Agreement defines the “Strip Parcels” as parcels “...that are owned by Mellon and that are parallel to Sand Hollow Road, which bisects the Strip Parcels.” *See* Settlement Agreement at Recital D (emphasis added). (R. at 780).

16. The Settlement Agreement contains a legal description for the Strip Parcels, together with a surveyor’s map of the Strip Parcels, at Exhibit B of the Settlement Agreement. A copy of the map depicting the Strip Parcels as used in the Settlement Agreement is included in the Addendum as **Exhibit B**; R. at 778, 1721. (R. at 780-781).

17. Following execution of the Settlement Agreement, and in the process of performing thereunder, Defendants discovered that the legal descriptions contained in Exhibit B of the Settlement Agreement were in error, because they mistakenly included a small portion of land (approximately one tenth of an acre) that was owned by a non-party Elim Valley Planning & Development, LLC (“EVPD”). *See* Map included in the Addendum as **Exhibit B**; R. at 1721; and the Map included in the Addendum as **Exhibit B**; R. at 806; (the Exhibit 1721 Map shows a parcel that is owned by Elim Valley Planning & Development, LLC of which a small triangle is included in the Parcel A depiction on the Exhibit C Map).

18. Elim Valley Planning & Development, LLC was not a party to the above captioned litigation and was not a party to the Settlement Agreement. *See* Docket, generally; *See also* Settlement Agreement at p. 1 and signature pages.

19. The EVPD property was insignificant in size and insignificant in providing any benefit to Red Bridge as part of the fruits of the Settlement Agreement. *See* (R. at 1721, 806).

20. The judgment was entered on or about May 23, 2013 and therefore Mellon Valley had until November 19, 2013, to “to cause all liens and encumbrances to be removed from the Strip Parcels.” of encumbrances. (Emphasis added). *See Id.* (R. at 782).

21. On or about June 26, 2013, David E. Leta, Counsel for Red Bridge, sent a letter to Counsel for the Defendants and informed them that he had obtained a “Title Commitment” that “... reflects that Elim Valley Planning & Development, LLC is a vested owner of the Strip Parcels *together with* Mellon Valley, LLC.” Leta Letter, dated June 26, 2013, a copy of which, without the enclosures, is included in the Addendum as **Exhibit E**; R. at 856 (emphasis in original). (R. at 782).

22. With his June 26, 2013 Letter, Mr. Leta requested Defendants to, among other things, execute an Amended and Restated Access and Utility Easement that included Elim Valley Planning & Development, LLC as a grantor of the easement. *See Id.*

23. Without comprehending the prior mistake in the legal descriptions attached to the Settlement Agreement, and in reliance on the representation of Mr. Leta, counsel for Defendants caused Defendants and Elim Valley to execute an Amended and Restated Access and Utility Easement that included Elim Valley Planning & Development, LLC

(hereinafter “Elim Valley”) as grantor, thus perpetuating the mistake. *See* August 8, 2013 Letter from C. Dunn, a copy of which, is included in the Addendum as **Exhibit C**. (R. at 1723).

24. In an effort to correct the mistake, Defendants obtained a corrected legal description, and a new corrected map depicting the Strip Parcels, a copy of which is included in the Addendum as **Exhibit F**; R. at 864-877, 806.

25. Upon discovery of the mistake, counsel for Defendants wrote a November 14, 2013 Letter to counsel for Red Bridge and identified that the Settlement Agreement contained a mutual mistake of fact concerning the erroneous legal description of the Strip Parcels, which included a small portion of land that did not belong to Mellon Valley but instead belonged to a third party and non-party to the Settlement Agreement, Elim Valley. Dunn explained that a judgment lien in favor of T & R Lumber, as referenced in the title. However, attached to the Settlement Agreement mistakenly the legal description contained a small portion of land owned by Elim Valley. Dunn stated that he would work on an amendment to the Settlement Agreement in order to correct the mistaken legal description, excepting the portion of land owned by Elim Valley. *See* November 14, 2013 Letter from A. Dunn to D. Leta (R. at 864, 1981).

26. In his letter of November 14, 2013, A. Dunn documented that Strip Parcels owned by *Mellon Valley* were free and clear of encumbrances. *See id*;

27. On November 15, 2013, D. Leta, counsel for Red Bridge, responded to A. Dunn's letter of November 15, 2013. *See* Email from Leta dated November 15, 2013, a copy of which is included in the Addendum as **Exhibit G**; R. at 2013; (R. at 783).

28. In addition to its having been included in the legal description of the Strip Parcels by mistake, the Elim Valley property (consisting of approximately one tenth of an acre) was encumbered by a judgment lien of de minimus in the amount of \$39,901.45. *See* Order Granting Partial Summary Judgment Against Elim Valley Planning & Development, LLC, p. 2. (R. at 883, 884).

29. The T & R Lumber judgment lien on the Elim Valley property affected a very small section of frontage on Second Hollow Road. By contrast, the frontage on Strip Parcel A owned by Mellon Valley, across which Red Bridge had been given access to Sand Hollow Road was approximately 1000 feet long. A correction of the mistake and removal of the Elim Valley property from the legal description would not cause a material impact on Red Bridge's right to select two points of access for vehicular access and utilities under the Settlement Agreement. *See* Settlement Agreement.

30. Defendants worked with counsel for Red Bridge to release certain easements, encumbrances and to address all issues raised by Red Bridge to ensure that Red Bridge was provided the access and utility easements it bargained for under the Settlement Agreement. *See* August 8, 2013 Letter from A. Dunn to D. Leta and attached signed Amended and Restated Access and Utility Easement R. at 1723-1736, included in

Addendum as **Exhibit C**; *see also* October 30, 2014 Subordination Agreement (R. at 1949); *see also* November 14, 2013 Dunn Letter; *See also* November 15, 2013 Leta Email. (R. at 2013).

31. On August 27, 2013 counsel for Red Bridge sent an email and memorandum in which Plaintiff identified and outlined all the title issues which it stated needed to be corrected in order to ensure compliance with the Settlement Agreement. (R. at 1748). Addendum as **Exhibit H**.

32. The memorandum sent by counsel reviewed the title commitment which was issued by First American Title Company. In the memorandum, counsel stated that he was addressing “each title exception and how it may affect the Easement, and directives for [the Defendants] to resolve the title issue in compliance with the parties['] Settlement Agreement.” (R. at 1749) (emphasis added).

33. Counsel identified ten title exceptions that would affect the Easement and therefore affect “compliance with the parties['] Settlement Agreement.” Counsel distinctly and expressly omitted any reference to exception number 20 on the title commitment which exception identified the Master Communications Easement over the Strip Parcels.

34. Thereafter, on November 5, 2013 counsel for Plaintiff wrote an email and stated, for the first, time that “we think the defendants should subordinate the Master Communications Easement (Exception 20) to the Access Easement over the Strip Parcels.” (R. at 19032-33).

35. In response, on November 14, 2013, counsel for Defendants wrote back and stated: “the first time you have requested a subordination with regard to the master Communications Easement as to the Strip Parcels was in your November 8, 2013 email even though it was referenced in the title commitment as Exception 20 that you sent months ago. While we do not believe that that easement is a lien or encumbrance that was intended to be removed under the Settlement Agreement, we will agree to subordinate this interest as to the specific locations of the Utility Easement when they are determined. Please modify the subordination agreement as to the specific locations of the Utility Easement when they are determined.” *See* November 14, 2013 Letter from Dunn to Leta, (R. at 1981).

36. On or about August 1, 2013, the Defendants executed and delivered to the Plaintiff the Partial Termination of Master Communications Easement for Elim Valley on the foreclosed property in accordance with ¶ 4(a) of the Settlement Agreement. *See* R. at 1737, 2187; Letter to Counsel from A. Dunn at R. at C. This satisfied Defendants’ performance under ¶ 4(a) of the Settlement Agreement.

Development Agreement

37. On or about July 31, 2013, Counsel for Mellon Valley wrote to Counsel for Red Bridge regarding various items relating to the Settlement Agreement. *See* July 31, 2013 Letter from C. Dunn, a copy of which is included in the Addendum as **Exhibit D**; (R. at 1663). In furtherance of Mellon Valley’s duty to negotiate in good faith concerning a development agreement, in the July 31 letter: “[a]s you recall,

paragraph 4(c) of the Settlement Agreement anticipates discussions toward entering into a new development agreement between the parties. Please contact me at your earliest convenience to identify which individuals of your clients will be meeting with my clients so that I can facilitate an appropriate meeting to discuss and negotiate a development agreement that will comply with the intent of paragraph 4(c) of the Settlement Agreement.” *Id.* at p. 2. (R. at 1663).

38. Red Bridge did not respond to that portion of Defendants’ July 31, 2013 Letter and did not identify “...which individuals of [Red Bridge] will be meeting with [Defendants] so [Dunn could] facilitate an appropriate meeting to discuss and negotiate a development agreement that will comply with the intent of paragraph 4(c) of the Settlement Agreement.” Affidavit of C. Dunn (hereinafter “Dunn Aff.”) at ¶ 3 (R. at 891).

39. On or about August 8, 2013, Mr. Dunn reminded Mr. Leta in a letter that he had not heard a response for the items identified in his July 31, 2013, which items included identifying the individuals that would be negotiating the development agreement. *See* August 8, 2013 Letter from C. Dunn (Addendum as **Exhibit C**; R. at 1723); *See also* Settlement Agreement at § 4(c).

40. Once again, Red Bridge did not respond to Defendants. *See* Dunn Aff. at ¶ 4; *see also* Settlement Agreement at § 4(c).

41. Lorin Walker, a representative of Defendants, “reached [out] to Red Bridge to schedule a meeting and discuss the development agreement,” but his “attempts

to scheduled such a meeting with Red Bridge but Red Bridge did not respond to his requests to meet. *See* Affidavit of Lorin Walker (hereinafter “L. Walker Aff.”) at ¶¶ 3 & 4; R. at 895; (R. at 786).

42. On October 30, 2013, Counsel for Defendants again asked Counsel for Red Bridge for a time “when our clients can meet to work out the Development Agreement contemplated by the Settlement Agreement.” *See* Letter from A. Dunn dated October 30, 2013, a copy of which is included in the Addendum as **Exhibit I**; R. at 1822-1827; (R. at 786).

43. Finally, on October 31, 2013, counsel for Red Bridge emailed counsel for Defendant and demanded a proposed written development agreement from Defendants, Red Bridge never provided any proposed written development agreement applicable to the Strip Parcels and the properties foreclosed by Red Bridge for the parties to review. Dunn Aff. at ¶ 6. Email from Leta dated October 31, 2013, a copy of which is included in the Addendum as **Exhibit J**; R. at 1829-1836; (R. at 786). Red Bridge did not identify any of its representatives who would attend the meeting.

44. To the request that Defendant provide a written proposed development agreement for the Strip Parcels and the Red Bridge properties, Counsel for Defendant responded by reiterating his proposal that the exiting Development Agreement be used by the parties. *See* Email from C. Dunn dated November 4, 2013 at 9:37 AM; (R. at 787).

45. Mr. Dunn's office sent a copy of the recorded Development Agreement for all of the 2,300 acres of Elim Valley to Mr. Leta on November 4, 2013. Dunn Aff. at ¶ 5.

46. The parties in this matter and their counsel finally met on Monday, November 11, 2013 to negotiate the development agreement (hereinafter "November 11, 2013 Meeting"). *See* R. Walker Aff. at ¶ 7; *See also* Affidavit of Lorin Walker (hereinafter "L. Walker Aff.") at ¶¶ 5 & 6; *See also* November 14, 2013 Letter from C. Dunn. (R. at 922).

47. At the November 11, 2013 Meeting, Red Bridge agreed that it would accept the Elim Valley Development Agreement in satisfaction of the requirement under §4(c) of the Settlement Agreement. *See* R. Walker Aff. at ¶ 10; *See Also* L. Walker Aff. at ¶ 9; *See also* November 14, 2013 Letter from C. Dunn. (R. at 922).

48. In spite of Red Bridge's November 11, 2013 agreement to accept the Elim Valley Development Agreement in satisfaction section 4(c) of the Settlement Agreement, Red Bridge again proposed that Defendants simply deed the Strip Parcels to Red Bridge. *See* November 15, 2013 Letter from Leta. (R. at 926).

49. On November 18, 2013, ignoring its agreement for the Settlement Agreement, asserted Red Bridge that "...there is no practical commercial development that is possible on the Strip Parcels" to purportedly argue that Defendants simply deed the Strip Parcels to Red Bridge. *See* November 18, 2013 Letter from Leta, a copy of which is attached to the Addendum as **Exhibit K**. (R. at 934).

50. On November 19, 2013, Counsel for Defendants wrote a letter outlining Defendants' compliance with the Settlement Agreement and the good faith steps taken by Defendants to "...negotiate in good faith to enter into a mutually acceptable development agreement...". See November 19, 2013 Letter from C. Dunn, a copy of which is attached to the Addendum as **Exhibit L**. (R. at 937).

51. Red Bridge's Counsel responded to Defendant and stated that "[i]t was not the responsibility of Red Bridge to initiate or propose a new development agreement." November 19, 2013 Letter from Leta. (R. at 939-940).

52. On May 27, 2014, the Defendants filed a Motion for Satisfaction of Judgment requesting that the District Court enforce the Settlement Agreement, find that the Defendants have complied with all material terms of the Settlement Agreement and issue an order "declaring the stipulated judgment entered . . . on May 23, 2013 satisfied pursuant to Utah R. Civ. P. 58B(b)." [R. at 775-776].

53. On June 19, 2014, the Court held a telephonic scheduling conference on Defendants' Motion for Satisfaction as well as the Plaintiff's Application for Writ of Execution. On June 24, 2014 the Court entered its order on the scheduling conference and ordered the following:

- a. That an evidentiary hearing would be held on the motions on July 3, 2014 commencing at 9:00 a.m. for the remainder of the day until resolved;
- b. That the parties were to identify exhibits, witnesses in advance of the evidentiary hearing and were to submit stipulated facts to the Court.

See June 24, 2014 Scheduling Order [R. at 2156].

54. Although, Red Bridge had earlier asserted that it was entitled to judgment because the parties failed to enter into a development agreement, and Defendants failed to transfer title to the Strip Parcels, counsel for Red Bridge abandoned that argument during the hearing because of the Court's belief that there existed issues of fact as to whether Red Bridge had negotiated in good faith to enter into a development agreement (Tr. 47:9-20; 56: 4-11)

55. Despite the Court's Order that an evidentiary hearing would be held, and despite his statements regarding the need to take evidence on questions of fact, the Court abruptly and without explanation entered a bench ruling, denying Defendants' motion and granting Red Bridge's Motion. The Court's bench ruling, if it can be called such is stated below: 57:12 – 59:20.

SUMMARY OF THE ARGUMENT

At the core of this appeal is the dispute that arose between the parties as to whether Defendants performed under the Settlement Agreement. The resolution of this dispute required a determination as to whether there was a mutual or unilateral mistake in the Settlement Agreement that relieved Defendants of performance, whether Red Bridge had waived Defendants' performance as to one issue, and acted in good faith in negotiating a development agreement, and, ultimately, whether the Court should determine that Defendants had substantially performed under the Settlement Agreement so that the judgment was satisfied. These issues required a trial in order to

resolve the disputed factual questions necessary to allow the Court to make a final legal determination.

In its June 24, 2014 scheduling order, the Court ordered that an evidentiary hearing be held on July 3, 2014. The Court set the evidentiary hearing in order to have a final trial on the issues of performance under the Settlement Agreement and to determine whether the judgment was satisfied and should be released or whether Defendants had not sufficiently performed and if the judgment should remain in place and Red Bridge should be permitted to commence collection efforts on the judgment. The parties complied with the scheduling order and presented pretrial witness lists, stipulated facts, and a joint exhibit list.

The reversible errors assigned by Defendants and Appellants to the Court below commenced with the Court's procedural errors in connection with the July 3, 2014 hearing. At the hearing, the Court determined that Defendants' pending motion for satisfaction of judgment and Red Bridge's pending motion to begin executing on the judgment would be converted to and treated as cross motions for summary judgment and stated: "I'm particularly interested in what issues of fact remain open. I see both of these motions as basically cross motions for summary judgment on the issues." (Tr., at 5). Having made the determination to treat the pending motions under a summary judgment standard, the Court did not permit the introduction of evidence, instead issuing a summary and confusing bench ruling in which the Court denied

Defendants' motion, granted Red Bridge's motion, and disregarded or failed to resolve a number of legal and evidentiary issues not addressed in the Court's bench ruling.

Pursuant to the Settlement Agreement, Defendants agreed to entry of a Stipulated Judgment in the amount of \$2,000,000. Further under the Settlement Agreement, the parties agreed that Defendants would perform a number of contractual obligations in consideration within a stated period of time, for which performance Red Bridge would file a satisfaction of judgment and release all claims against Defendants. However, if Defendants failed to perform their obligations, the Settlement Agreement provided that Red Bridge would retain any consideration given by Defendants under the Agreement and be permitted to collect on the judgment.

The real property at issue in this case concerns two parcels which were foreclosed on by Red Bridge. One of those parcels lies to the east of Sand Hollow Road along SR-9 and the other parcel lies to the west of Sand Hollow Road along SR-9. The parcels did not have vehicular access to Sand Hollow Road and lacked a utilities easement. Defendant Mellon Valley, LLC owns two parcels that lie between the properties foreclosed by Red Bridge and Sand Hollow Road. A map depicting the properties in relation to Sand Hollow Road and SR-9 is included in the Addendum and attached as **Exhibit B**. The parcels that are owned by Mellon Valley were referred to by the parties in the Settlement Agreement as "Strip Parcels". The parcels that were foreclosed on by Red Bridge are depicted on the map and labeled "Red Bridge Capital

LLC Parcel No. H-4-2-1-1123” and “Red Bridge Capital LLC Parcel No. H-4-2-1-1107”.

Red Bridge desired access to its properties for utilities and vehicular traffic, and desired that an easement for communications across the greater Elim Valley be released as to the two properties Red Bridge had foreclosed. Therefore, in the Settlement Agreement, Red Bridge agreed to file a satisfaction of the judgment and release all claims against Defendants if they would (a) pay \$150,000, (b) consent to the deficiency judgment in the amount of \$2,000,000, (c) provide the partial termination of the communications easement, (d) provide a general blanket access and utility easement across the Strip Parcels and remove liens and encumbrances from the Strip Parcels, and (e) negotiate in good faith to enter into a development agreement for the foreclosed parcels and the Strip Parcels. Red Bridge acknowledged the value of this consideration under the Settlement Agreement to be equivalent to the \$2,000,000 judgment it would receive.

The issues regarding Defendants’ performance that were left for determination at the evidentiary hearing were: (a) whether a small parcel (approximately one tenth of an acre) owned by a non-party to the Settlement Agreement was included in the description of the Strip Parcel by mistake and should not have been included in the property for which removal of liens and encumbrances was required; (b) whether the non-removal of a \$39,000 judgment lien on the small parcel, in light of the \$2,000,000 value of the total consideration under the Settlement Agreement, constituted a material

breach of performance; (c) whether the Settlement Agreement required termination of the Communications Easement on the Strip Parcels and, is so, whether that demand had been waived by Red Bridge; and (d) Defendants had negotiated in good faith to enter into a development agreement for the subject properties.

Despite the existence of numerous genuine issues of fact, the District Court converted the pending motions to cross motions for summary judgment, refused to take evidence, and disposed of the case in a summary bench ruling without issuing the required statement of grounds for the decision. It is clear that the Court's denial of the Defendants' Motion for Satisfaction (and granting of Red Bridge's motion for execution on the judgment) hinged solely on¹ the alleged failure of the Defendants to provide an unencumbered easement over the 1/10th of an acre parcel of property that belonged to the non-party Elim Valley. As noted above, Defendants were prepared to put on evidence at the evidentiary hearing that the inclusion in the legal description of this errant 1/10th of an acre parcel was a mutual mistake that warranted a reformation and modification of the Settlement Agreement pursuant to Utah law.

Further, regardless of whether there was in fact a judgment lien on property that was owned by non-party Elim Valley, such does not affect the Defendants' compliance

¹ Due to the District Court's lack of findings, conclusions or any holdings, on the record or in its order, the Defendants are constrained in their ability to know the basis for the Court's ruling. However, it is clear that the District Court did not find that the Defendants had breached any other provision of the Settlement Agreement, including the obligation to negotiate in good faith with Red Bridge on a development agreement for the properties. *See* Transcript of July 3, 2014 Hearing, R. at 3891, p. 47.

with the terms of the Settlement Agreement because the Defendants have in fact provided clear and unencumbered access and utility easements to Red Bridge on the Strip Parcels on Defendants' property and Red Bridge currently possess and enjoys such access and utility easements on the Strip Parcels. Such evidence was proffered to the Court and Defendants were prepared to introduce the same but were prevented from doing so.

In denying the Defendants' Motion for Satisfaction, the District Court erred in several respects; namely: (1) by refusing to allow the Defendants to put on evidence concerning their performance of the terms of the Settlement Agreement (2) by refusing to allow evidence of the parties' mutual mistake concerning an errant legal description of property included and attached to the Settlement Agreement; (3) incorrectly interpreting Utah law with respect to mistake, either mutual or unilateral; (4) by refusing to permit evidence on the question of Red Bridge's waiver; (5) by failing to provide any ruling or basis upon which the Court denied Defendants' Motion for Satisfaction; (6) by refusing to determine that the Defendants had substantially complied with the material terms of the Settlement Agreement, such that Red Bridge has received an unjustified and improper double recovery.

In addition, the Court erred in granting Red Bridge its attorney's fees in relation to Defendants' alleged breach of the Settlement Agreement. Attorney's fees should not have been awarded to Red Bridge under the Settlement Agreement on two grounds: first, the Defendants had complied with the Settlement Agreement and were

entitled to a determination from the Court that they had so complied. In addition, Red Bridge's fees were excessive and inappropriate.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONVERTING THE PENDING MOTIONS OF THE PARTIES, WHICH HAD BEEN SET FOR EVIDENTIARY HEARING, INTO CROSS MOTIONS FOR SUMMARY JUDGMENT AND DECIDING TO SUMMARILY DISPOSE OF THE CLAIMS WITHOUT TAKING EVIDENCE.

On June 19, 2014, the Court held a telephonic scheduling conference on Defendants' Motion for Satisfaction as well as the Plaintiff's Application for Writ of Execution. On June 24, 2014 the Court entered its order on the scheduling conference and ordered the following: (a) that an evidentiary hearing would be held on the motions on July 3, 2014 commencing at 9:00 a.m. for the remainder of the day until resolved; and (b) that the parties were to identify exhibits, witnesses in advance of the evidentiary hearing and were to submit stipulated facts to the Court. See June 24, 2014 Scheduling Order [R. at 2156].

On July 3, 2014, the parties appeared for hearing ready to conduct a trial on the remaining factual and legal issues. At the outset of the hearing, the court converted the pending motions to cross motions for summary judgment. Said the Court: "I'm particularly interested in what issues of fact remain open. I see both of these motions basically as cross motions for summary judgment on the issues." Tr., at 5.

First, Defendants advised the Court the evidence would show that Defendants had timely submitted a proposed development agreement, and that Red Bridge had agreed to accept that proposed development agreement in satisfaction of one of the performance requirements of the Settlement Agreement. (Tr. 5:10 – 7:1). Second, counsel advised the Court that the evidence would show the small piece of property owned by the non-party Elim Valley was included in the property description attached to the Settlement Agreement by mistake and the Settlement Agreement should be reformed accordingly to correct the mistake. (Tr. 7:3 – 8:7; 11:7-22). Third, counsel advised the Court that the evidence would show Defendants had satisfied the contractual requirement regarding the termination of the Communications Easement and, even if the Court were to find an additional requirement was called for under the Settlement Agreement, Red Bridge had expressly waived the same. (Tr. 51:2 – 54:17).

During the hearing, the Court on a number of occasions recognized the existence of material facts in dispute on Defendants' theory of the case. For example, at one point in discussing Defendants' theory of mistake, either mutual or unilateral, the Court stated: "And if you say it's a mistake of fact, then I guess I would let you try to show that there was a mistake of fact. But if it's a unilateral mistake, I'm not sure that I can hear evidence on the unilateral side, because it seems to me that that would violate the parole evidence rule." (Tr., at 16:8-16).

Notwithstanding the Court's own recognition of the existence of factual issues, the Court abruptly and without explanation issued a confused and unsupported bench ruling

without allowing evidence to be presented. To compound the Court's error in refusing to take evidence and resolve questions of material fact, the Court failed to issue a statement explaining the ground for his decision, as required by Rule 52(a), U.R.Civ.P.

By treating the Defendants' Motion and Red Bridge's Opposition as cross motions for summary judgment, the Court was obligated to issue a written ruling detailing the grounds for its decision to allow for meaningful appellate review. *See Free Motion Fitness, Inc. v. Wells Fargo Bank West*, 2009 UT App 120 (a trial court should explain its decision in a written memorandum or order so that the appellate court is not required to search the record in an attempt to reconstruct the trial court's reasoning). Indeed, this requirement is all the more important in this matter because Defendants' Motion for Satisfaction and Red Bridge's Opposition were both based on "more than one ground" for their respective positions. The Court openly acknowledged that the Ruling was based on multiple grounds. (Tr., at 59:14-20).

A. It was error for the District Court to render summary judgment in favor of Red Bridge and against Defendants while genuine questions of material fact remained unresolved.

Having determined to convert the parties' pending motions to cross motions for summary judgment and refuse to permit evidence on the factual issues remaining open on several key issues, the Court was required to follow the standards governing motions for summary judgment, pursuant to Rule 56, U.R.Civ.P., which permits a judgment to be entered only where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The existence of disputes as to

material facts disallow the granting of summary judgment. *Bill Brown Realty, inc. v. Abbott*, 562 P.2d 238 (Utah 1977). When material facts are in dispute, a matter is not proper for summary judgment and can only be resolved by a trial. *Sandberg v. Klein*, 576 P.2d 1291 (Utah 1978).

Even though this matter arose out of the context of a settlement agreement, which can ordinarily be enforced through summary proceedings, it is error not to hold an evidentiary hearing where there are factual disputes regarding the terms of the settlement agreement or the performance thereof. As held by the Sixth Circuit Court of Appeals a case involving facts comparable to those before us:

“The summary procedure is admirably suited to situations where, for example, a binding settlement bargain is conceded or shown, and the excuse for nonperformance is comparatively unsubstantial. On the other hand, it is ill-suited to situations presenting complex factual issues related either to the formation or the consummation of the contract, which only testimonial exploration in a more plenary proceeding is apt to satisfactorily resolve.”

Kukla v. Nat'l Distillers Products Co., 483 F.2d 619, 621 (6th Cir. 1973).

With respect to a question of mutual or unilateral mistake of fact, evidence is required in order to resolve the question. The District erred in not receiving evidence of mistake based on Utah law which holds that although the interpretation of a contract is a question of law when it is being interpreted by its words, it becomes a question of fact when it is being interpreted by extrinsic evidence of intent. *Selvig v. Blockbuster Enterprises, LC*, 2011 UT 39, ¶ 18, 266 P.3d 691 (Utah 2011). In other words, whether a mistake occurred is a question of fact for the finder of fact to decide. *See Morrison*, 861

P.2d at 1062; *Wolf Mtn. Resorts, LC, v. ASC Utah, Inc.*, 2011 UT App 425, ¶ 9, 268 P.3d 872; *Merrick Young Inc., v. Wal-Mart Real Estate Bus. Trust*, 2011 UT App 164, ¶17, 257 P.3d 1031.

With respect to a question of waiver, evidence is required to resolve the question. The Utah appellate courts have defined waiver as “the intentional relinquishment of a known right.” See *Soter’s, Inc. v. Deseret Federal Sav. & Loan Ass’n*, 857 P.2d 935 (Utah 1993). Waiver requires three elements: (1) an existing right, benefit, or advantage; (2) knowledge of its existence; and (3) an intention to relinquish the right. See *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069 at 1074-75. In *Soter*, the Utah Supreme Court held that although the question on appeal is “frequently [] whether, as a matter of law, intentional relinquishment was or was not shown . . . this legal question is intensely fact dependent . . .” *Id.* at 940. In addition, although a waiver “must be distinctly made, [] it may be express or implied.” *Id.*

II. THE DISTRICT COURT ERRED IN DENYING DEFENDANTS’ MOTION FOR SATISFACTION OF JUDGMENT.

A. Defendants Performed the Terms of the Settlement Agreement.

Pursuant to the terms of the Settlement Agreement, section 5 required Red Bridge to release the Stipulated Judgment if the Defendants:

- (1) paid \$150,000.00 to Red Bridge (*see* Settlement Agreement §1);
- (2) provided a termination of the communications easement on the foreclosed property (*id.* §4(a));

- (3) provided an Access and Utility Easement on Mellon Valley's property free and clear of encumbrances (*id.* §4(b)); and
- (4) "...negotiate[d] in good faith to enter into a mutually acceptable Development agreement..." (*id.* §4(c)).

See Settlement Agreement, generally, Addendum as **Exhibit A**.

As demonstrated above, the Defendants fulfilled each and every one of the foregoing requirements of the Settlement Agreement and Red Bridge has received all bargained for performances thereunder. The parties valued these performances at \$2,000,000. Defendants have performed under the Settlement Agreement and have provided Red Bridge with all the material performances thereunder.

Because the Defendants completed all requirements under the Settlement Agreement, the Defendants were entitled to a satisfaction of judgment. Notwithstanding the Defendants' compliance with the terms of the Settlement Agreement, Red Bridge refused to release the Stipulated Judgment and the District Court erred in denying the Defendants' Motion for Satisfaction of Judgment.

B. The Defendants complied with the terms of the Settlement Agreement and Plaintiff Red Bridge was obligated to release and deem the Stipulated Judgment satisfied.

As set forth above, the Defendants have materially complied with the terms and conditions of the Settlement Agreement and are entitled to a satisfaction and release of the Stipulated Judgment. Defendants will address each of the required conditions of the Settlement Agreement below.

Payment of \$150,000 to Red Bridge – Settlement Agreement at §1.

First, as required by section 1 of the Settlement, the Defendants promptly and timely paid the required \$150,000.00 to Red Bridge. This fact was stipulated to by the parties in advance of the July 3, 2014 evidentiary hearing. *See* Stipulated Facts for July 3, 2014 Hearing at ¶13, R. at 2185.

Termination of Master Communications Easement -- Settlement Agreement at §4(a).

Second, section 4(a) of the Settlement Agreement required that within 180 days the Defendants were to “eliminate and terminate the Communications Easement with regard to the Properties [the foreclosed upon properties] by executing an easement termination . . . and delivering the same to Red Bridge’s counsel.” *See* Settlement Agreement at §4(a).

On or about August 1, 2013, in accordance with section 4(a) of the Settlement Agreement, the Defendants executed and delivered to the Plaintiff the Partial Termination of Master Communications Easement for Elim Valley as requested. *See* Partial Termination of Master Communications Easement for Elim Valley at R. at 1737, *see also* Stipulated Facts for July 3, 2014 Hearing at ¶23, R. at 2187; *see also* August 8, 2013 Letter to Counsel from A. Dunn at R. at 1723. As such, there is no dispute that this term of the Settlement Agreement has been fulfilled. Red Bridge has received this performance and benefitted therefrom.

Development Agreement -- Settlement Agreement at §4(c).

Although the District Court and Red Bridge expressly stated, for purposes of the Defendants' Motion for Satisfaction, that section 4(c) of the Settlement Agreement concerning the negotiation of a mutually agreeable development agreement, was deemed satisfied and not a part of the Court's decision to deny the Defendants' Motion², the Defendants will briefly address their compliance of the same.

The Settlement Agreement explicitly states that:

Mutual Development Agreement. Within one-hundred and eighty (180) days after entry of the Judgment, Mellon, or its successor or assign, and Red Bridge, or its successor or assigns, shall negotiate in good faith to enter into a mutually acceptable development agreement (the "Development Agreement") regarding the Strip Parcels and the Properties that provides for the mutual future development of the Strip Parcels and the Properties in a manner that is satisfactory to both Red Bridge and Mellon...

Settlement Agreement at § 4(c) (emphasis added).

² As demonstrated in the transcript of the July 3, 2014 Evidentiary Hearing, the District Court and counsel for Red Bridge conceded that the Defendants had complied with section 4(c) of the Settlement Agreement, because otherwise there were abundant questions of fact that necessitated an evidentiary hearing. *See (Tr., at 47)*:

"Court: Well, Mr. Leta, if we're going to get into whether there was a good faith negotiations back under this language in November of 2011 (sic) or leading up to that even, don't we have a whole bunch of facts that we need to talk about?"

"Leta: If we go there, I agree . . ."

"Court: So you can abandon that argument [the Defendants' compliance under section 4(c) of the Settlement Agreement] for the sake of this proceeding . . . [because] there's no question of fact on these other two issues."

"Leta: Yes, no question of fact on the other two issues . . ."

Defendants accepted the obligation to "...negotiate in good faith to enter into a mutually acceptable development agreement..." In July of 2013, the Defendants began to ask Red Bridge for a meeting for that purpose. Red Bridge ignored those requests, contending that "[i]t was not the responsibility of Red Bridge to initiate or propose a new development agreement." *See* November 19, 2013 Letter from Leta (**Exhibit L**).

Defendants proposed the parties enter into the Elim Valley Development Agreement and master plan which already contained a specific plan for the Strip Parcels and the properties foreclosed by Red Bridge. *See* Email from C. Dunn dated November 4, 2013 at 9:37 AM. (R. at 911-912).

After receiving this proposed development agreement from Defendants, Red Bridge did not respond to the request for a meeting until the November 11, 2013. At the meeting, Red Bridge's Attorney, Mr. Budge, stated that the Elim Valley Development Agreement was not modifiable, and Red Bridge stated it would accept the Elim Valley Development Agreement without changes.

Despite the parties' agreement to accept the existing Elim Valley Development Agreement for the Strip Parcels on November 11, 2013, Counsel for Red Bridge stated that "...we do not see how it makes sense for [Mellon Valley to] continue to own the Strip Parcels separate and apart from the Properties that are owned by Red Bridge unless [Mellon Valley] can provide a concrete, written concept and development plan that shows a proposed joint development of the Strip Parcels that is mutually beneficial to both them and the properties." Letter November 15, 2013 from Leta.

This, coupled with the fact that Red Bridge never presented a proposed development agreement or proposed changes to the existing Elim Valley Development Agreement and failed to respond to requests to meet on the development agreement until October, 2013, shows that Red Bridge did not intend to "...negotiate in good faith to enter into a mutually acceptable development agreement...". It shows that Red Bridge intended from the inception of the Settlement Agreement to have the Strip Parcels deeded to it. Conversely, the Defendants "...negotiate[d] in good faith to enter into a mutually acceptable development agreement..." as required by the Settlement Agreement.

Access And Utility Easement

As set forth above, the Settlement Agreement required that Defendant "Mellon Valley" would execute and deliver an Access and Utility Easement on its property (the Strip Parcels) free and clear of encumbrances to "permit[] each of [Red Bridge's] Properties to have access to Sand Hollow Road for general vehicular access from a least two separate locations for each of the Properties . . ." *See* Settlement Agreement at §4(b). In addition, the Access and Utility Easement was to allow Red Bridge to install "such underground and above-ground utility lines and facilities as may be necessary or appropriate . . ." *Id.*

In its recitals, the Settlement Agreement affirmatively states that the Strip Parcels, which are those parcels negotiated by the parties for the foregoing easements, are "owned by Mellon [Valley]", (*See* Settlement Agreement at Recital D). In

compliance therewith, and on August 8, 2013, Defendants delivered the executed Amended and Restated Access and Utility Easement in the form requested and required by counsel. *See* August 8, 2013 Letter from C. Dunn to D. Leta and attached Amended and Restated Access and Utility Easement included in Addendum as **Exhibit C, R.** at 1723.

There are no encumbrances on the Strip Parcels owned by Mellon Valley and the Amended and Restated Access and Utility Easement fully allows Red Bridge “to have access to Sand Hollow Road for general vehicular access from a least two separate locations for each of the Properties . . . [and install] such underground and above-ground utility lines and facilities as may be necessary or appropriate . . .” *Id.* Therefore, the Defendants have fully complied with the requirements of §4(b) of the Settlement Agreement and the District Court erred by failing to find the same.

C. **Defendants’ Satisfied the Requirements of the Settlement Agreement by Substantial Performance.**

Even if the Court, after taking evidence on the question of mistake, were to have determined that the small parcel owned by Elim Valley was properly included in the Settlement Agreement, the \$39,000 judgment lien remaining thereon was not material to Defendants’ entire performance under the agreement.

It is important to note, however, that “[o]nly a material breach will excuse further performance by the non-breaching party.” *Cross v. Olsen*, 2013 UT App 135, ¶ 26, 303 P.3d 1030, 1035. *See also McArthur v. State Farm Mut. Auto. Ins.*, 2012 UT 22, ¶ 28 n.

7, 274 P.3d 981. In essence, “not every minor failure justifies nonperformance and rescission of the contract.” *Id.* (quoting *Saunders v. Sharp*, 840 P.2d 796, 806 (Utah Ct. App. 1992)). For the breach to be material, “[i]t must be something so substantial that it could be reasonably deemed to vindicate the other’s refusal to perform.” *Id.* (quoting *Zion’s Props., Inc. v. Holt*, 538 P.2d 1319, 1321 (Utah 1975)).

“Whether a breach of a contract constitutes a material breach is a question of fact.” *Orlob*, 2005 UT App at ¶ 26.

The substantial compliance doctrine, requires a trial court to determine the materiality of the breach, and then decide whether the breaching party had substantially complied with the “contract”. Guidance as to when a breach is “material” is provided in the Restatement (Second) of Contracts. *Cache County v. Beus*, 1999 UT App 134, ¶¶ 36-37, 978 P.2d 1043, 1050. In *Beus*, the Utah Court of Appeals reviewed the doctrine of when substantial performance is sufficient to satisfy a contractual obligation, and following the Restatement (Second) of Contracts, held:

We have previously noted that the issue of whether a breach is substantial enough to foreclose the application of equitable principles is particularly fact sensitive... Certainly, it should be employed on summary judgment only in cases where the equities go only one way—which is not the case here. There were sufficient facts before the trial court on summary judgment to prevent ejectment of Cache County as a matter of law. However, there were clearly disputed issues of fact as to the adverse consequences that would be suffered by the parties and the equities to require a trial on the issue of substantial compliance.

Cache County v. Beus, 1999 UT App 134, ¶ 40, 978 P.2d 1043, 1050-51

III. THE DISTRICT COURT ERRED IN ITS APPLICATION OF LAW REGARDING MISTAKE AND WAIVER.

A. The Court failed to allow evidence of mutual mistake and erred in its interpretation of Utah law.

Red Bridge's entire argument below on this point was that the Defendants did not provide unencumbered easements over the Strip Parcels because there was a judgment lien on the 1/10th of an acre sliver of property that was owned by non-party Elim Valley. As set forth above, this property was not owned by Mellon Valley and its inclusion in the Strip Parcels was by mistake as the legal description describing the Strip Parcels attached to the Settlement Agreement was not noticed until November of 2013. *See* November 14, 2013 Letter from A. Dunn to D. Leta.

"[I]f the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language." *Benjamin v. Amica Mut. Ins. Co.*, 140 P.3d 1210, 1217 (Utah 2006) (quoting *Saleh v. Farmers Ins. Exch.*, 133P.3d 428, 449 (Utah 2006)). Here, the Settlement Agreement is unambiguous. Recital D of the Settlement Agreement defines the "Strip Parcels" as parcels "...that are owned by Mellon and that are parallel to Sand Hollow Road, which bisects the Strip Parcels." (emphasis added). Further, the requirement to provide the Access and Utility Easement was only agreed to by Mellon Valley – Elim Valley was not even a party to the litigation or the Settlement Agreement. *See* § 4(b) of the Settlement Agreement. Thus, there was no requirement for Elim Valley to provide any

easement in the Settlement Agreement and there is certainly no requirement for Elim Valley to provide any easement free and clear of encumbrances.

The legal descriptions attached to the Settlement Agreement including the 1/10th of an acre owned by Elim Valley were in error, but even so, the amount and location of the 1/10th of an acre is so negligible that it does not materially impact the rights of Red Bridge to the Access and Utility Easement in any significant manner. Mellon Valley provided the Access and Utility Easement free and clear of any encumbrances as to the property owned by Mellon Valley. This complies with both the intent and the letter of the Settlement Agreement.

Pursuant to Utah precedent, “[a] mutual mistake of fact can provide the basis for equitable rescission or reformation of a contract even when the contract appears on its face to be a ‘complete and binding agreement.’” *Burningham v. Westage Resorts, Ltd.*, 2013 UT App 244 ¶ 12, 317 P.3d 445 (quoting *West One Trust Co. v. Morrison*, 861 P.2d 1058, 1061 (Utah Ct. App. 1993); See also *Stake Center Locating, Inc., v. Logix Comm., L.P.*, No. 2:13-CV-1090 TS, WL 3792602 (D. Utah June 18, 2015) (citation omitted); *Kendall Ins., Inc. v. R&R Group, Inc.*, 2008 UT App 235, ¶ 15, 189 P.3d 114 (acknowledging that “Utah courts have consistently recognized the doctrine of mutual mistake of fact as a basis for equitable rescission [or reformation] of a contract that appears on its face to be an integrated contract.”).

The District Court erroneously ruled at the July 3, 2014 Evidentiary Hearing that if a contract is integrated extrinsic evidence of a mutual mistake is inadmissible. (See

Transcript of July 3, 2014 Hearing). Such an interpretation of Utah law is clear error.

Although Utah courts do not allow extrinsic evidence to prove whether an agreement is integrated, it is well established that extrinsic evidence is allowed to determine whether a contract, integrated or not, should be reformed or rescinded due to various factors, including mutual mistake. *See Tangren Family Trust v. Tangren*, 2008 UT ¶ 20, 182 P.3d 326; *E&H Land, Ltd. v. Farmington City*, 2014 UT App 237, ¶ 25, 336 P.3d 1077.

The District erred in not receiving evidence of mistake based on Utah law which holds that although the interpretation of a contract is a question of law when it is being interpreted by its words, it becomes a question of fact when it is being interpreted by extrinsic evidence of intent. *Selvig v. Blockbuster Enterprises, LC*, 2011 UT 39, ¶ 18, 266 P.3d 691 (Utah 2011). In other words, whether a mistake occurred is a question of fact for the finder of fact to decide. *See Morrison*, 861 P.2d at 1062; *Wolf Mtn. Resorts, LC, v. ASC Utah, Inc.*, 2011 UT App 425, ¶ 9, 268 P.3d 872; *Merrick Young Inc., v. Wal-Mart Real Estate Bus. Trust*, 2011 UT App 164, ¶17, 257 P.3d 1031.

Because a “mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain,” the party alleging that a mutual mistake occurred must establish through extrinsic evidence the intent of both parties. *Id.* This burden is not satisfied by showing one party’s understanding of the other party’s intent. *Id.* at ¶ 14. Rather, one must prove that a mutual mistake occurred by establishing both parties’ actual intent. *See Logix*, WL 3792602 at *6; *Burningham*, 2013 UT App at ¶¶ 14-15; *Kendall*, 2008 UT App at ¶¶ 17-

18 (affirming trial court's decision to rescind contract because "[t]he evidence relating to the state of the client files during the negotiation period and to the differences reflected in the automated database after the sale [was] sufficient to support the trial court's mutual mistake finding.").

Because Utah precedent establishes that a court should allow extrinsic evidence to demonstrate that a mutual mistake occurred even if a contract in question is an integrated contract, the issue of whether a mutual mistake occurred is a question of fact for the jury to decide. The District Court erred in not allowing the Defendant to present evidence of the parties' mutual mistake.

B. The District Court erred in not allowing evidence of unilateral mistake and erred in its interpretation of Utah law.

In addition to the Defendants' arguments that the Settlement Agreement should have been modified and reformed as to the 1/10th of an acre on the basis of mutual mistake, the Defendants also presented argument and were prepared to introduce evidence of unilateral mistake allowing equitable relief on this issue.

Utah appellate courts have recognized and held that a party is entitled to equitable relief under a unilateral mistake theory if it can demonstrate that a "party's mistake of fact is coupled with knowledge of the mistake by the other party or a mistake is produced by fraud or other inequitable conduct by the nonerring party." *Guardian State Bank v. Stangl*, 778 P.2d 1, 5 (Utah 1989). See also *Taylor*, 2011 UT App at ¶ 47 (citation omitted). Other inequitable conduct includes situations where the nonerring party, after

learning of the unilateral mistake, attempts to take advantage of the mistake. *See Mountain Sates Telephone & Telegraph v. Sohm*, 755 P.2d 155 (Utah 1988).

In such a situation, when a party either knows about the other party's unilateral mistake, creates the mistake, or after learning of the mistake, attempts to take advantage of the mistake, the courts will generally treat the case as a mutual mistake case. *See Id.* In other words, "the mistake provides a basis for reformation." *Guardian*, 778 P.2d at 5; *See also Thompson v. Smith*, 620 P.2d 520, 523-24 (Utah 1980); *Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints*, 565 P.2d 63 (Utah 1977).

For a court to rescind a contract due to a unilateral mistake, the party seeking the relief must demonstrate by clear and convincing evidence that: (1) to enforce the contract with the mistake made would be unconscionable; (2) the matter as to which the mistake was made must relate to a material feature of the contract; (3) the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake; and (4) it must be possible to give relief by way of rescission or reformation without serious prejudice to the other party. *See Davis*, 475 P.2d at 835. *See also John Call Engineering, Inc. v. Manti City Corp.*, 743 P.2d 1205, 1209-1210. Because such analysis goes to the intent of the party, whether a unilateral mistake occurred is a question of fact for the jury to decide. *Selvig*, 2011 UT at ¶ 18; *Morrison*, 861 P.2d at 1062; *Wolf Mtn. Resorts*, 2011 UT App at ¶ 9; *Merrick Young*, 2011 UT App at ¶ 17.

IV. THE TRIAL COURT ERRED IN CONSTRUING AND APPLYING THE LAW OF WAIVER.

The Utah appellate courts have consistently recognized that a party may waive its rights under a contract by acting inconsistently with such rights and failing to invoke such rights in a timely manner. *See Kenny v. Rich*, 186 P.3d 989 (Utah App. 2008): “Where a party is contractually bound to follow certain procedures and timelines in order to invoke specified contractual rights, and the party fails to do so, the party waives his or her rights.” *See Brinton v. IHC Hosps., Inc.*, 973 P.2d 956, 966 (Utah 1998) (“[T]he trial court correctly required [the party] to timely assert each objection to purported ... violations of the [contract], in compliance with his contractually assumed duty, or relinquish them[as waived].”); *see also DCM Inv. Corp. v. Pinecrest Inv. Co.*, 2001 UT 91, ¶ 9, 34 P.3d 785 (“[Defendant]’s failure to choose either option [as required by the contract] resulted in waiver of its contractual right to select an option.”).

The Utah appellate courts have defined waiver as “the intentional relinquishment of a known right.” *See Soter’s, Inc. v. Deseret Federal Sav. & Loan Ass’n*, 857 P.2d 935 (Utah 1993). Waiver requires three elements: (1) an existing right, benefit, or advantage; (2) knowledge of its existence; and (3) an intention to relinquish the right. *See Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069 at 1074-75. In *Soter*, the Utah Supreme Court held that although the question on appeal is “frequently [] whether, as a matter of law, intentional relinquishment was or was not shown . . . this legal question is intensely

fact dependent . . .” *Id.* at 940. In addition, although a waiver “must be distinctly made, [] it may be express or implied.” *Id.*

Here, Plaintiff Red Bridge, through Counsel, waived any right it may have had to insist or demand that the Master Communications Easement be removed or subordinated on the Strip Parcels. As set forth above, on August 27, 2014 counsel for Red Bridge sent an email and memorandum in which Plaintiff identified and outlined all the title issues which it stated needed to be corrected in order to ensure compliance with the Settlement Agreement. (R. at 1748). Significantly, the memorandum sent by counsel reviewed the title commitment which was issued by First American Title Company. In the memorandum, counsel distinctly stated that he was addressing “each title exception and how it may affect the Easement, and directives for [the Defendants] to resolve the title issue in compliance with the parties['] Settlement Agreement.” (R. at 1749) (emphasis added). Importantly, Counsel identified ten title exceptions that would affect the Easement and therefore affect “compliance with the parties['] Settlement Agreement.” However, counsel distinctly and expressly omitted any reference to exception number 20 on the title commitment which exception identified the Master Communications Easement over the Strip Parcels. Therefore, based on *Kenny* and *Soter's*, there can be no question that Plaintiff, through counsel, distinctly and expressly waived and relinquished any right (if any existed) to demand that the Master Communications Easement was to be subordinated on the Strip Parcels.

V. THE DISTRICT COURT ERRED IN AWARDING RED BRIDGE ITS ATTORNEY'S FEES.

A. Red Bridge's Request for Attorneys Fees Should Be Reversed for the Reasons Stated Above.

For the reasons stated above, Red Bridge should not prevail on Defendant's Motion for Satisfaction of Judgment and is therefore not entitled to attorneys' fees. If the denial of the Defendant's Motion is reversed, then the Defendant becomes the prevailing party and Red Bridge is no longer entitled to an award of attorneys' fees. Thus, for the reasons established above that outline why the lower court should be reversed on its determination of the Motion for Satisfaction of Judgment, Red Bridge's attorneys' fee award should also be reversed.

B. Red Bridge has no Basis to Recover Attorneys' Fees Because There is no Action to Enforce the Settlement Agreement as Required by the Attorneys' Fees Clause in the Settlement Agreement.

Red Bridge has no basis to recover attorneys' fee because this was not an action to enforce the Settlement Agreement. "In Utah, attorney fees are awardable only if authorized by statute or by contract. If provided for by contract, the award of attorney fees is allowed only in accordance with the terms of the contract." *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988)(citations omitted).

In this case, Red Bridge brought its Motion for Attorneys' Fees based on the Settlement Agreement provision that provides that attorneys' fees and costs are recoverable to the prevailing party of "a legal action . . . to enforce any term or provision of the [Settlement] Agreement." Settlement Agreement at ¶ 10; Plaintiff's Motion for

Award of Attorney's Fees and Costs at ¶ 2. However, Red Bridge's attorneys' fees were incurred in defending Defendant's Motion for Satisfaction of Judgment. Overall, this was not a motion to enforce the Settlement Agreement, but was an action for the lower court to determine and declare that the Settlement Agreement was performed. Because these fees were not incurred from an action to enforce the Settlement Agreement, attorneys' fees are not recoverable and Red Bridge's award of attorneys' fees should be reversed.

C. Even if an Award of Attorneys' Fees is Appropriate, Red Bridge's Attorneys' Fees were Excessive.

The District Court erred in finding Red Bridge's attorneys' fees reasonable and granting Red Bridge an excessive amount of attorneys' fees. In Utah, "[a] party who requests ... attorney fees has the burden of presenting evidence sufficient to support an award." *Cafferty v. Hughes*, 2002 UT App 105, ¶ 28, 46 P.3d 233, 239 *aff'd*, 2004 UT 22, ¶ 28, 89 P.3d 148 (*Cottonwood Mall v. Sine*, 830 P.2d 266, 268 (Utah 1992)).

Further, any award of attorneys' fees "must be reasonable." *Equitable Life Ins. Co. v. Ross*, 849 P.2d 1187, 1194 (Utah Ct. App. 1993). While the, "[c]alculation of reasonable attorney fees is in the sound discretion of the trial court," the court must properly consider important factors of reasonableness. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). "The evaluation of reasonableness is guided by the following considerations:

1. What legal work was actually performed?

2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?"

Strohm v. Clearone Communs., Inc., 2013 UT 21, ¶ 51 (citations omitted). It is error if the court fails to address the reasonableness of attorneys' fees. *Morgan v. Morgan*, 795 P.2d 684, 688 (Utah Ct. App. 1990)(remanding where "there is no independent attempt by the court to characterize the fees as reasonable.").

In this case, the lower court erred in denying the Defendant's objection to the attorneys' fees and in finding Red Bridge's attorneys' fees reasonable. Particularly, Red Bridge's attorneys' fees were excessive because (1) Red Bridge's counsel's hourly rate was excessive and (2) Red Bridge's counsel was inefficient. Red Bridge sets out all facts supporting its attorneys' fees in the Affidavit of David Leta of Snell & Wilmer, Red Bridge's lead counsel. Mr. Leta sets out his hourly rate of \$550 per hour and explains that the billing rates of those who worked on the case "is commensurate with their education and experience, and are comparable to hourly rates charged by like professionals performing like services at regional law firms with offices in Salt Lake City, Utah." However, this statement does not establish if this is commensurate with attorneys located in Salt Lake City or throughout the entirety of the regional firm.

Next, Red Bridge's counsel was inefficient in the hours it expended and how it allocated work. Particularly, Red Bridge's counsel expended approximately 42.35 hours more than Defendant's counsel. Walker's counsel conducted the same tasks and litigated the same hearings and only expended 74.45 hours, in contrast to 116.8 hours expended Red Bridge's counsel at a much higher and unreasonable billing rate. Particularly, Mr. Leta, at his \$550 per hour rate, did over 75 percent of the work on the case, while he had attorneys with substantially lower billable rates of \$215.00 and \$275.00 work minimally on the case. Nothing in Mr. Leta's Affidavit explains why he was required to do a large majority of the work where he had other attorneys with significantly lower billable rates as compared to Mr. Leta's rate of \$550 per hour.

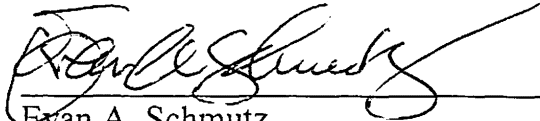
The lower court failed to recognize that the Defendant challenged and disputed the exact elements that a court must consider in determining if attorneys' fees are reasonable. In sum, the court erred in granting Red Bridge's attorneys' fees where its fees were unreasonable as established above.

CONCLUSION

For the reasons and upon the authority set forth herein, Appellant requests the Court of Appeals to Reverse the Orders appealed from and remand for further proceeding.

RESPECTFULLY SUBMITTED this 27 day of July, 2015.

DURHAM JONES & PINEGAR



Evan A. Schmutz

Andy V. Wright

Attorneys for Appellant

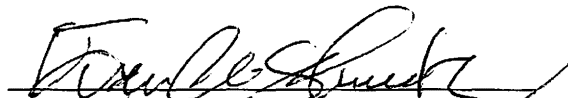
Certificate of Compliance with Rule 24(f)(1)

1. This brief complied with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 3031 words, in total.

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows 2010, Times New Roman, Font Size 13.

DATED this 27 day of July, 2015.

DURHAM JONES & PINEGAR



Evan A. Schmutz

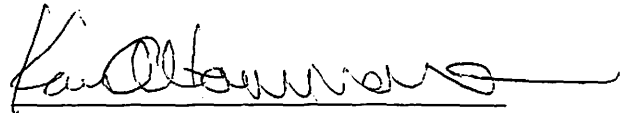
Andy V. Wright

Attorneys for Appellant

PROOF OF SERVICE

I hereby certify that, on the 27 day of July, 2015, two true and correct copies of the foregoing **BRIEF OF APPELLANT** were mailed, postage prepaid, to the following:

David Leta
Andrew Hardenbrook
SNELL & WILMER, LLP
15 West South Temple, Ste 1200
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read "Andrew Hardenbrook", written over a horizontal line.