

1990

Marlin K. Loosle and Theresa L. Loosle v. First Federal Savings & Loan Association of Logan, Hillam Abstracting and Insurance Agency, Trustee, (Appellees), All Pro Real Estate Incorporated, a Utah Corporation, Quality Builders Incorporated, a Utah Corporation, and William C. Packer dba Quality Builders : Brief of Appellee

Utah Supreme Court

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BRIEF

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DOCKET NO. 900534

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MARLIN K. LOOSLE and THERESA L. )  
LOOSLE, )

Plaintiffs and Appellants. )

vs. )

FIRST FEDERAL SAVINGS & LOAN )  
ASSOCIATION OF LOGAN, HILLAM )  
ABSTRACTING AND INSURANCE )  
AGENCY, Trustee, (Appellees), )  
ALL PRO REAL ESTATE )  
INCORPORATED, a Utah )  
Corporation, QUALITY BUILDERS )  
INCORPORATED, a Utah )  
Corporation, and WILLIAM C. )  
PACKER dba QUALITY BUILDERS, )

Defendants. )

Case No. 900534

Case Type: APPEAL

Priority No. 16

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BRIEF OF APPELLEES

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AN APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT  
OF THE STATE OF UTAH, COUNTY OF BOX ELDER,  
THE HONORABLE F. L. GUNNELL PRESIDING

---

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Hillam Abstracting and  
Insurance Agency, Appellees

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CLERK SUPREME COURT  
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### PRELIMINARY STATEMENT

This appeal involves two cases which were consolidated. The principal parties to the two cases involved in this appeal are Marlin K. Loosle and Theresa L. Loosle who will be referred to as Loosles, and First Federal Savings and Loan Association of Logan who will be referred to as First Federal. The first case in time is a fraud/misrepresentation case in which Loosles are Plaintiffs and First Federal is Defendant. This action was filed May 4, 1989 in the Box Elder County District Court as Case No. 89000021CA and will be referred to as the misrepresentation action. The Trial Court entered a Summary Judgment in favor of First Federal in the misrepresentation action on May 17, 1990; this Judgment will be referred to as the Summary Judgment.

On March 8, 1990, First Federal as Plaintiff filed an independent action against Loosles as Defendants to quiet title to certain water rights. This action was filed in the Box Elder County District Court as Case No. 900000129QT and will be referred to as the quiet title action. Case No. 900000129QT was ultimately consolidated into case No. 890000213CA. After a trial on June 15, 1990, the Trial Court entered a Judgment and Decree in favor of First Federal on August 1, 1990. This Judgment will be referred to as the Quiet Title Judgment.

References to the Clerk's record will be by the designation R. References to the transcript will be by the letters "Tr" followed by the page and line. All emphasis is added unless otherwise noted. Still pending in the Trial Court is an action by First

Federal against Loosles for a deficiency judgment following a Trust Deed foreclosure and a misrepresentation and fraud action by Loosles against All Pro Real Estate Incorporated, a Utah Corporation, Quality Building Incorporation, a Utah Corporation, and William C. Packer dba Quality Builders, the realtors and parties involved in Loosles' acquisition by exchange of the real property hereafter referenced.

### STATEMENT OF ISSUES

Following are the issues presented to this Court for review and the standard for appellate review for each issue:

1. Should Loosles' Brief be disregarded, the Trial Court decisions affirmed and/or the appeal dismissed with prejudice due to Loosles' failure to comply with Utah Rules of Appellate Procedure and to cite to the record in the Brief? The standard for review is evaluation of the compliance and exercise of discretion as to sanctions. Uckerman v. Uckerman, 588 P.2d 142 (Utah, 1978).

2. Did the Trial Court correctly grant First Federal's Motion For Summary Judgment (R. pp. 90-93) on Loosles' claims for misrepresentation? The Trial Court decided this issue as a matter of law on undisputed facts. The standard for review is for correctness. Projects Unlimited v. Copper State Thrift, 798 P.2d 738 (Utah, 1990). Bountiful v. Riley, 784 P.2d 1174 (Utah, 1989).

3. Have Loosles met their burden of marshalling the evidence in support of the Trial Court's decision to quiet title to certain water rights in favor of First Federal and then showing that such

evidence, reviewed in the light most favorable to the Trial Court's decision, failed to sustain such decision? This is a question of fact and the standard of review is "clearly erroneous" Rule 52[a], Utah Rules of Civil Procedure, and Scharf v. BMG Corporation, 700 P.2d 1068 (Utah, 1985).

#### STATUTES AND RULES

The following statutes and rules are subject to interpretation by this Court in this appeal:

Rule 24(a)(7), URAP:

All statements of fact and references to the proceedings below shall be supported by citations to the record.

Rule 24(a)(9), URAP:

The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on. (Emphasis added).

Rule 24(e), URAP:

References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence and admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

Rule 24(k), URAP:

. . . Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

§ 73-1-11, U.C.A., (1953 as amended):

A right to the use of water appurtenant to land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; . . . provided that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance . . .

§ 78-12-26, U.C.A., (1953, as amended):

Within three years:

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Rule 52(a), URCP:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially ... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous ...

#### STATEMENT OF THE CASE

1. On or about May 4, 1989, Loosles filed a Complaint (R. pp. 1-7) against Defendants First Federal and Hillam Abstracting claiming misrepresentation by First Federal and seeking to enjoin a foreclosure sale by First Federal and Hillam against real property owned by Loosle and pledged by Trust Deed to First Federal as Beneficiary with Hillam Abstracting as Trustee. Tr. Exhibit No. 6.



2. On or about June 7, 1989, the Court granted Loosles' request for an injunction stopping the sale, subject to posting bond. R. pp. 41, 46-47. Loosle failed to post the required bond and Hillam Abstracting rescheduled and held the foreclosure sale on July 25, 1989.

3. On October 2, 1989, the Trial Court granted First Federal leave to file a Counterclaim against Loosle for a deficiency remaining after the foreclosure sale and First Federal filed the Counterclaim against Loosles. R. pp. 48-49, 56-64.

4. On January 2, 1990, the Trial Court signed an Order permitting Loosles to amend their Complaint and to add additional party Defendants (the realtors and grantors involved in Loosles' acquisition by exchange of certain real property). R. pp. 65-66.

5. On or about March 8, 1990, First Federal filed an independent action against Loosles (Civil No. 900000129QT) to quiet title to certain water rights used in connection with the real property which was subject of the foreclosure. R. pp. 420-437.

6. At a hearing on March 13, 1990, the Trial Court ordered that Civil No. 900000129QT be merged into Civil No. 89000213CA and signed the Order April 9, 1990. R. p. 145.

7. On April 2, 1990, Loosles filed the Amended Complaint naming as additional Defendants, All Pro Real Estate Incorporated, Quality Builders Incorporated, and William L. Packer d/b/a Quality Builders (hereafter collectively "Packer"). R. pp. 166-174.

8. On April 5, 1990, the Box Elder County Sheriff served Quality Builders, All Pro Real Estate and William L. Packer. R. pp. 178-180.

9. Pursuant to First Federal's and Hillam's Motion For Summary Judgment on Plaintiffs' Complaint in the misrepresentation, on May 17, 1990, the Trial Court signed the Order dismissing Loosles' Amended Complaint against First Federal and Hillam Abstracting. R. pp. 194-199.

10. On May 21, 1990, Loosles filed their first Notice Of Appeal in this matter which was dismissed by the Supreme Court on August 20, 1990. R. pp. 202-203.

11. After a trial on June 15, 1990 of First Federal's quiet title action, the Trial Court signed Findings Of Fact And Conclusions Of Law and a Judgment And Decree on August 1, 1990 determining all water rights issues between First Federal and Loosles in First Federal's favor as initially raised in Civil No. 900000129QT. R. pp. 302-317.

12. On August 31, 1990, Loosle filed a second Notice Of Appeal of the Summary Judgment previously appealed and of the quiet title matters determined August 1, 1990. R. pp. 324-325.

13. On October 18, 1990, the Supreme Court dismissed Loosles' second appeal and on November 5, 1990 remitted the case to the District Court.

14. On or about October 29, 1990, Loosles requested Rule 54(b) certification; and on November 7, 1990 the Trial Court signed

the Order declaring the May 17, 1990 and August 1, 1990 judgments as final. R. pp. 333-335.

15. On November 13, 1990, Loosles filed their third Notice of Appeal. R. pp. 406-407.

16. On or about November 21, 1990, First Federal filed a Motion to Dismiss the appeal because of the matters still pending in the District Court and the belated Rule 54(b) certification which the Supreme Court denied on December 6, 1990.

#### STATEMENT OF FACTS

1. In 1980 Loosles owned a home in Perry, Box Elder County, Utah.

2. Loosles contacted realtor Kevin Packer of All-Pro Realty regarding a home and 3.12 acres of real property for sale located in Box Elder County, Utah (hereinafter mentioned as the "Harper Ward Property" or "Property"). Mr. Packer was a neighbor and friend. Marlin Loosle Deposition, 1989 (hereafter "M.L. Dep. 1989" - the June 21, 1989 Deposition is referenced by 1989 and the April 20, 1990 Deposition is referenced by 1990), p. 9, line 13.

3. The listed price for the Harper Ward Property was \$89,900.00. M.L. Dep., 1989, p. 16, line 15.

4. After a two (2) or three (3) week period and numerous visits to the Property, Loosles decided to acquire the Harper Ward Property through an exchange of the equity of their home in Perry. Loosles executed an Earnest Money Receipt And Offer To Purchase on September 10, 1980 and it was accepted by the exchanging

Seller/Buyer, Quality Builders, Inc. on September 11, 1980. There was no negotiation of price whatsoever, either of the value of the home in Perry or of the value placed on the home in Harper Ward. M.L. Dep., 1989, p. 14, lines 8-25; p. 22, lines 22-25; p. 23, lines 1-16; p. 28, lines 20-23.

5. Loosles previously owned homes in Arizona, Colorado, Texas, and Perry, Utah, and never dickered or negotiated purchase or selling prices - they always paid for or sold at the asking price. See M.L. Dep., 1989, p. 23, lines 1-17.

6. Loosles felt their realtors, All-Pro Realty, represented them in the transaction. M.L. Dep., 1989, p. 15, lines 14-17. Loosles trusted their realtors ("our neighbor and friend", M.L. Dep., 1989, p. 9, lines 13-16, Jeff Packer and Kevin Packer . . . "And I felt he (Kevin) was pretty knowledgeable. And being a neighbor and going to church with him every week, you know, we didn't doubt what he was saying was so." M.L. Dep., 1989, p. 15, lines 23-24.

7. Plaintiff Marlin Loosle is an aerospace engineer with a B.S. degree in manufacturing engineering. M.L. Dep., 1989, p. 4, lines 7-8.

8. Marlin Loosle relied on the real estate people as to the price being fair when he exchanged his home in Perry. M.L. Dep., 1989, p. 6, lines 22-23. "I relied on them for the value of the house and the condition of the house and everything." M.L. Dep., 1989, p. 7, lines 6-7.

9. Kevin or Jeff Packer "indicated that (\$89,900.00) was what it was selling for, and that was what it was worth. . ."

Q. Did you believe and accept that?

A. Sure.

Q. Did you rely on that?

A. Yes.

M.L. Dep., 1989, p. 16, lines 18-24.

Q. Did you talk about value of the home with anyone other than Kevin or Jeff Packer?

A. No. . .

M.L. Dep., 1989, p. 16, line 25, and p. 17, lines 1-2.

Theresa Loosle's testimony is almost identical. Theresa Loosle Deposition 1989 (hereafter "T.L. Dep., 1989" - the June 21, 1989 Deposition is referenced by 1989 and the April 20, 1990 Deposition is referenced by 1990), p. 4, lines 4-11.

10. The terms of exchange for the Harper Ward Property were that Loosles would trade to Quality Builders, Inc., the Loosles' home in Perry, Utah, and Quality Builders would assume the remaining mortgage balance of \$38,021.05 on the Perry home. Loosles would obtain a loan for \$67,000.00 secured by the Harper Ward Property, the proceeds of which were to be paid to Quality Builders, Inc., so that Quality had no further interest in the Harper Ward Property. M.L. Dep., 1989, Dep. Exhibit No. 1.

11. Loosles and/or the realtor contacted Paul Petersen, who was a loan officer for First Federal in Brigham City, Utah, regarding borrowing the \$67,000.00 that Loosles had agreed to pay to Quality Builders. M.L. Dep., 1989, Dep. Exhibit Nos. 2 and 5.

12. Loosles' loan was approved and Plaintiffs executed a Trust Deed Note and Trust Deed secured by the Harper Ward Property

on September 16, 1980 for the benefit of First Federal. M.L. Dep., 1989, Dep. Exhibit Nos. 5, 8 and 9.

13. The principal amount of the Note was \$67,000.00 with interest at twelve and three-quarters percent (12-3/4%) per annum and monthly payments of \$728.00. M.L. Dep., 1989, Dep. Exhibit No. 8.

14. Loosles knew nothing at the time of the September, 1980 closing of an appraisal of the Property done by First Federal in the sum of \$87,000.00 and never saw the appraisal until 1988. M.L. Dep., 1989, p. 43, lines 1-17.

15. Loosles made regular monthly payments on the Note and Trust Deed from October, 1980 through August, 1988. M.L. Dep., 1989, p. 61, lines 21-24. In April or May, 1988, Loosles went into First Federal's Brigham City Office to inquire about refinancing the Property. M.L. Dep., 1989, p. 56, lines 3-7. As part of the refinancing, First Federal obtained an appraisal valuing the Property as of May 23, 1988 at \$63,500.00. M.L. Dep., 1989, Exhibit No. 3. On or about June, 1988, Loosles obtained a second appraisal on the Property estimating its value as of 1988. M.L. Dep., 1989, p. 42, lines 1-5. Shortly after obtaining the 1988 appraisals, Loosles defaulted in their payments on the loan obligation and a Notice Of Default was filed on February 2, 1989 by Hillam as Trustee of the Trust Deed. Tr. Exhibit No. 7.

16. The Deed of Trust signed by the Loosles, which was subject of the foreclosure, provided as part of the pledge and conveyance:

TOGETHER with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents (subject however to the rights and authorities given herein to Lender to collect and apply such rents), royalties, mineral, oil and gas rights and profits, water, water rights, and water stock, and all fixtures now or hereafter attached to the property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Deed of Trust; and all of the foregoing, together with said property (or the leasehold estate if this Deed of Trust is on a leasehold) are herein referred to as the "Property". Tr. Exhibit No. 6.

17. The water used in connection with the Harper Ward Property was a spring immediately to the east of and in front of the home (hereafter the "Loosle Spring") and is located on the Property. The spring was the only source of culinary and irrigation water for the Property in 1980 when Loosles acquired by exchange the Property. Tr. p. 28, lines 5-16.

18. On March 23, 1983, Loosles, along with Thomas Calvin Thorpe, Vonda J. Thorpe, Von R. Curtis and Barbara F. Curtis (neighbors) entered into a verbal and written agreement to each pay certain sums and provide certain labor to jointly drill a well to serve each of the three (3) parties' homes and real property, the well to be located on land owned by the Curtises, near each of the parties' homes. Loosles performed substantial trenching and installed piping from the well to the Property. The well drilling was successful and thereafter Thomas C. Thorpe filed Water Appropriation No. 57296 (29-2775) on the well. Tr. p. 18, lines 19-25; p. 19, lines 1-6; p. 36, lines 6-25, Exhibit Nos. 9, 10, 11 and 12.

19. On or about January 21, 1982 Thomas C. Thorpe, on behalf of Loosles, Von R. Curtis and Thomas C. Thorpe, filed Water Right No. 29-2775 for the use of an underground water well for three (3) families. The State Engineer approved the Application To Appropriate. While the well right is in the name of Thomas C. Thorpe, certain other agreements were executed between the parties reflecting their actual agreement and understanding. Tr. p. 19, lines 1-6; p. 37, lines 6-25, Exhibit Nos. 9, 10, 11 and 12.

20. On or about May 18, 1988, Loosles filed a request to appropriate spring water for irrigation and stockwatering from the Loosle Spring. That application had not been acted upon by the State Engineer at the time of Trial. Tr. p. 20, lines 14-19, Exhibit No. 14.

21. Based on the current plumbing and line connections, the well water from the Thorpe Well and the spring water from the Loosle Spring, are the only sources of culinary water to the home. Tr. p. 52, lines 7-25; pp. 46-49.

22. The well water has been the sole source of culinary water utilized in the home since 1982 and is the only acceptable culinary water source and is critical to the use and value of the Property. Tr. p. 52, lines 7-25.

23. First Federal was the successful bidder on the Property at the Trustee's Sale held July 25, 1989. Tr. Exhibit No. 23.

24. The Trustee's Deed to First Federal on the Property and water rights provided:

TOGETHER with all the improvements now or hereafter erected on the property, and all improvements, rights,



appurtenances, rents, royalties, mineral oil and gas rights and profits, water, water rights and water stock, and all fixtures now or hereafter attached to the property, all as further described in said Trust Deed, without warranty as to title. Tr. Exhibit No. 23.

### **SUMMARY OF ARGUMENTS**

First Federal submits four (4) arguments to the Court. The first is that Loosles' Brief is totally devoid of references to the Record or the Transcript and fails to comply with the Utah Rules of Appellate Procedure and consequently the Trial Court Judgments must be affirmed or the appeal dismissed with prejudice.

First Federal next argues that the Trial Court correctly granted Summary Judgment on Loosles' claims of misrepresentation. The uncontroverted testimony of Loosles as cited herein and to the Trial Court shows there could have been no misrepresentation from First Federal and no reliance by Loosles --- based upon Loosles' belated claim that First Federal's appraisal is erroneous. Loosles knew nothing of the appraisal for eight (8) years after closing. Loosles want lenders to be guarantors of property values. Loosles provided no evidence whatsoever to the Trial Court nor do they provide any evidence in their Brief that First Federal made any untrue representations to Loosles, that Loosles relied upon it and even if Loosles relied on First Federal's appraisal Loosles provided no evidence First Federal's 1980 appraisal was wrong. Loosles' own testimony says they have no cause of action and their brief raises no question with the Trial Court's Order. R. pp. 194-199. Even if the Trial Court were not affirmed on this basis,

First Federal argues the statute of limitations bars Loosles action.

The Findings of Fact, Conclusions of Law and Judgment and Decree entered August 1, 1990 in the quiet title action were supported by substantial, competent evidence. R. pp. 302-317. This evidence, construed in the light most favorable to the Trial Court's ruling, establishes the intent to have water rights appurtenant to the Property and pledged to First Federal. Loosles have failed to marshall the evidence sustaining this Judgment by the Court and to show that such evidence does not sustain the Court's Judgment. Failing so to do, the Judgment of the Trial Court should be affirmed.

First Federal also requests attorney's fees in defending this appeal either because of the contractual provisions of the Promissory Note and Trust Deed between Loosles and First Federal or because of the failure to comply with the Utah Rules of Appellate Procedure. Tr. Exhibit Nos. 5 and 6.

### ARGUMENT

#### I

LOOSLES' BRIEF DOES NOT COMPLY WITH THE UTAH RULES OF APPELLATE PROCEDURE, RULES 24(a)(7), 24(a)(9), 24(e), AND 24(k) BECAUSE IT PROVIDES NO REFERENCE WHATEVER TO THE TRIAL COURT RECORD AND PROCEEDINGS, AND THE TRIAL COURT JUDGMENTS SHOULD BE AFFIRMED OR LOOSLES' APPEAL SHOULD BE DISMISSED WITH PREJUDICE.

Rule 24(a)(7), URAP provides:

All statements of fact and references to the proceedings below shall be supported by citations to the record.

Rule 24(a)(9), URAP provides:

The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

And Rule 24(e), URAP further provides:

References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence and admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

Rule 24(k), URAP states:

. . . Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

The Rules are clear. There is no ambiguity. The purpose of an appeal is to frame and articulate issues. Loosles' Brief neither frames nor articulates and makes a meaningful response by First Federal very difficult. If Loosles file a Reply Brief and suddenly provide numerous citations to the record as the basis for their positions, First Federal is placed in a totally unfair position, not having had opportunity to reply to the same.

The contents of the Loosles' Brief are consistent in terms of non-compliance with Rules 24(a)(7), 24(a)(9) and 24(e) URAP:

1. Course of the Proceedings - No references to the record.
2. Relevant Facts ----- No references to the record.
3. Summary of Argument ----- No references to the record.

4. Argument. ----- No references to the record.

5. Conclusion ----- No references to the record.

The Addendum to the Loosle Brief is neither incorporated by reference nor cited. Issues cannot be framed absent reference to a record that shows certain facts were in evidence and considered by the Trial Court. Then the Supreme Court can evaluate the law and the facts. But absent a showing of where the facts relied upon are to be found in the record there are no issues. As the Court of Appeals stated in Christensen v. Munns, 812 P.2d 69 (Utah App., 1991):

Appellants' brief contains . . . no citations to the record, no legal authorities and no analysis whatsoever. Their brief is not in compliance with our rules which require the brief of the appellant to contain an argument. . . Thus, we decline to address this issue and assume the correctness of the judgment below. . . At 72.

. . .

Further, appellants challenge is that the trial court's finding is unsupported by the evidence in the record. But, appellants have failed to marshal the evidence as required by our standard of review . . . At 73.

The New Mexico Supreme Court dealt with this same issue in Tofoya v. Tofoya, 500 P.2d 409 (N.M., 1972), when it specifically held:

There is not one single reference to a transcript page in the entire brief in chief and the references to the transcript wholly fail to comply with the requirements of Rule 15(6), 16(b) and (16(e)), supra. Accordingly, we will not review the record or consider the claimed errors relied upon for reversal. At 409. (Citations omitted)

Also see Methola v. County of Eddy, 629 P.2d 350 (N.M. App., 1981).

Specifically, Loosles state in their argument, "there has been evidence presented that shows that there is a question as to whether the defendant negligently misrepresented the plaintiff in 1980 when they appraised the property in question for \$89,900.00." (Loosle Brief, Page 8, Line 17.) Was this in the Trial Court record? What was the "evidence presented"? Which "evidence"? Where is the "evidence" found? One can only guess, assume or speculate.

The Loosle Brief 'Statement of the Case' under 'Relevant Facts' says, "Approximately eight years after purchasing the home, on the advice of defendant/respondent, appellant sought to refinance the home and found out that the home appraised for approximately twenty-four thousand dollars less than the purchase price despite many improvements and a general increase in property value in the area." (Loosle Brief, Page 5, Line 21.) The statement is replete with factual allegations but that is all they are --- allegations. No facts or citations are presented that these assertions are found in verified, admissible evidence in the Record. Almost every paragraph of the Loosle Brief likewise contains unsubstantiated claims of "facts" in evidence at the Trial Court which were not in evidence as represented by Loosles' Brief.

Loosles continue to argue, "There is a definite question as to whether the defendant negligently misrepresented the first appraisal for the value of the land." (Loosle Brief, Page 9, Line 24.) First Federal represented nothing to Loosles. They prepared an "in house" appraisal in the ordinary course of business.

Affidavit of Paul Petersen. R. pp. 94-96. In Dirks v. Cornwell, 754 P.2d 946 (Utah App., 1988), the Utah Appellate Court stated:

We note initially that defendants' brief on appeal fails to conform to Rule 24(a) of the Rules of the Utah Court of Appeals because there are no citations to the record. Rule 24(a) requires that each party make a concise statement of the facts and cite to the pages in the record where those facts are supported. We have previously ruled that if a party fails to adhere to this rule, "the court will assume the correctness of the judgment below. 'This Court need not, and will not, consider any facts not properly cited to, or [sic] supported by, the record.' " (quoting Koulis and Uckerman cases hereafter cited) . . . We could, therefore, *sua sponte* disregard defendants' brief on appeal and assume the correctness of the judgment below. However, we also affirm the trial court's judgment on the merits. At 947-948.

Since the case involved no issues of fact, the Court dealt with the merits. But it appears since Loosles are asking for consideration of facts in their appeal, the holding of Dirks regarding a deficient brief means the Trial Court decision should be affirmed. In Koulis v. Standard Oil Company of California, 746 P.2d 1182 (Utah App., 1987), the Appellate Court held that, "If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below." (Citations omitted) At 1184. The Loosle Brief is identical in rule non-compliance with the briefs submitted in the Dirks and Koulis cases, which mandates the affirmance of the Trial Court. Fackrell v. Fackrell, 740 P.2d 1318, 1319 (Utah, 1987); Trees v. Lewis, 738 P.2d 612, 612-12 (Utah, 1987). See also White River Shale Oil Corp v. Pub. Serv. Comm'n of Utah, 700 P.2d 1088, 1089

n.1 (Utah, 1985); State v. Tucker, 657 P.2d 755, 756-57 (Utah, 1982).

The Advisory Committee Note to Utah Rules of Appellate Procedure on Rule 24 also requires each party submitting a brief to set forth a properly documented argument: "The argument shall contain the contentions of the appellant with respect to the issues presented and the reasons therefore, with citations to the authorities, statutes, and parts of the record relied on. " Loosles provide none of this in their Brief.

Loosles argue about property values, deeds, easements, a well, **appraisals**, culinary water, misrepresentations, trust deeds, improvements, water appropriations and property values without one reference to an Exhibit, an Affidavit, a Deposition, or the Record. In State in Interest of M.S. v. Salata, 806 P.2d 1216, (Utah App., 1991), the Court of Appeals wrote, "Salata's failure to specify in his brief an instance of alleged error by the trial court and his failure to refer to relevant authority leave his argument unsupported, and we decline to consider it." At 1218.

First Federal has prepared its Brief with citations to the Record. If Loosles are now "flushed out" in their Reply Brief and cite all the previously "unknown" places in the record from which their argument and "facts" are based, the appellate process becomes a "cat and mouse" game that is neither efficient nor fair. "In the case at bar, the pleadings on their face show a genuine issue of **material fact**. The deposition of the Plaintiffs show contested material facts." Loosle Brief, p. 13. line 6. Which paragraphs of

the pleadings; which factual issues; where in the 230-plus pages of Loosles' depositions? Loosles disclose nothing in their brief but such conclusory statements that make response very difficult without citation to specifics and to the Record.

As the Utah Supreme Court stated in Uckerman v. Uckerman, 588 P.2d 142 (Utah, 1978), "This Court need not, and will not, consider any facts not properly cited to, or supported by, the record." At 144. This Court should not condone non-compliance with critical, fundamental rules of appellate procedure. Loosles' failures go to the very essence of the appellate process of framing issues. The Court should affirm the ruling of the Trial Court or the appeal should be dismissed with prejudice.

## II

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO FIRST FEDERAL BECAUSE LOOSLES COULD NOT RELY ON FIRST FEDERAL'S 1980 "IN HOUSE" APPRAISAL, WHEN LOOSLES FIRST LEARNED OF THE APPRAISAL IN 1988, WHICH APPRAISAL LOOSLES CLAIM CONSTITUTED THE MISREPRESENTATION.

The Loosles' claim of misrepresentation is totally lacking in the legal and factual allegations required to establish a cause of action. Loosles provide not one shred of evidence that First Federal misrepresented anything to Loosles and that Loosles relied upon the same. Loosles state in their Brief, "Appellants (Loosles) brought this action because they felt they were misrepresented by the defendant/respondent's (First Federal) first appraisal in 1980." Loosle Brief, p. 6, lines 1-3.



A. THE APPRAISAL PERFORMED BY FIRST FEDERAL WAS FOR INTERNAL AUDITING PURPOSES ONLY IN MAKING THE LOAN TO THE LOOSLES; LOOSLES DID NOT KNOW FIRST FEDERAL HAD AN APPRAISAL IN ITS FILE UNTIL 1988 AND THEREFORE, THE LOOSLES DID NOT RELY UPON ANY REPRESENTATIONS MADE IN FIRST FEDERAL'S APPRAISAL.

Loosles allege in their original and Verified Complaint dated April 28, 1988 that First Federal performed an appraisal appraising the Harper Ward property at \$87,000.00 in September, 1980. Loosles allege that they "relied" upon First Federal's appraisal in accepting the value of the real property. See paragraphs 8 and 13 of Loosles' Verified Complaint. R. pp. 1-7. Since these paragraphs are deleted in the Loosles' Amended Verified Complaint, Loosles' Verified Amended Complaint contains no specific allegation of misrepresentation or fraud against First Federal, but only against the Packers. R. pp. 166-174. The only colorable allegation in the Amended Verified Complaint is that First Federal "obtained an appraisal of the real property and the fair market value of the real property was in the sum of \$87,000.00 that it would be a good investment." Amended Complaint, paragraph 12. R. pp. 166-174.

The elements of an action in deceit based on fraudulent misrepresentation are as follows:

- (1) A representation;
- (2) Concerning a presently existing material fact;
- (3) which was false;
- (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representations;
- (5) for the purpose of inducing the other party to act upon it;
- (6) that the other party, acting reasonably and in ignorance of its falsity;

- (7) did in fact rely upon it;
- (8) and was thereby induced to act;
- (9) to his injury and damage.

Dugan v. Jones, 615 P.2d 1239, 1246 (Utah, 1980).

In order for there to be a finding of fraud/misrepresentation by First Federal, Loosles must demonstrate the existence of all nine (9) elements. Taylor v. Gasor, Inc., 607 P.2d 293, 294 (Utah, 1980); Horton v. Horton, 695 P.2d 102, 105 (Utah, 1984). Loosles assert in their Complaint and Amended Complaint that First Federal made a representation as to the value of the property to them through the appraisal.

Theresa Loosle relates what First Federal (Paul Peterson) told her:

A. Well, he told us that, you know, this was the selling price for the home. And he went through the whole thing with us. This was the selling price, this was what First Federal was willing to assume, you know, and go along with us.

T.L. Dep., 1989, p. 7, lines 13-17.

Loosles made a decision to exchange their home in Perry and contacted Jeff and Kevin Packer of All-Pro Realty concerning the exchange. Jeff and Kevin Packer showed Loosles the Property several times prior to the Loosles deciding to purchase the Harper Ward Property. M.L. Dep., 1989, p. 14, lines 10-23. The listing price for the Harper Ward Property was \$89,900.00. M.L. Dep., 1989, p. 16, line 15. Mr. and Mrs. Loosle discussed the value of the Harper Ward Property with Kevin Packer and Jeff Packer and Packers informed them \$89,900.00 was the sale price of the home and that is what it was worth. M.L. Dep., 1989, p. 16, lines 18-20 and

T.L. Dep., 1989, p. 9, lines 15-17. Marlin and Theresa Loosle believed and accepted the information they received from Kevin Packer and Jeff Packer regarding the value of the Property. Mrs. Loosle relates what she and her husband did after looking at the home:

. . . and we both liked it. So we didn't question the price. You know. We didn't dicker. We didn't do anything. We just trusted him (Kevin Packer).

T.L. Dep., 1989, p. 9, lines 15-17.

The Loosles relied upon the information they received from Kevin and Jeff Packer regarding the value of the home and signed the Earnest Money And Offer To Purchase on September 10, 1989. M.L. Dep., 1989, p. 16, line 22; p. 28, lines 20-23.

At no time prior to the execution of the Earnest Money And Offer To Purchase agreement did Loosles ever contact or receive any representations or information from First Federal or any of its agents. M.L. Dep., 1989, p. 47, lines 17-24; p. 48, lines 1-7.

Q. Would it be a fair statement that in terms of the price of your home and the price of the home in Harper Ward you pretty much relied on what Kevin Packer had told you?

A. Yes, we did.

Q. Was there anyone else that you'd relied upon?

A. No.

T.L. Dep., 1989, p. 10, lines 6-11.

See also T.L. Dep., 1989, p. 23, line 5. After the Earnest Money Agreement had been signed the Loosles applied for a loan from First Federal. M.L. Dep., 1989, Dep. Exhibit No. 2. The Loosles signed the remaining loan documentation on September 16, 1989. M.L. Dep., 1989, Dep. Exhibit Nos. 8 and 9.

Clearly, at no time prior to the Earnest Money Agreement being executed had First Federal or its agents made any representations to Loosles. They had no contact with them! Mr. Loosle has no recollection of meeting or talking to Mr. Petersen until after signing the Earnest Money. M.L. Dep., 1989, p. 29, lines 4-10, Dep. Exhibit No. 1. Jeff and Kevin Packer made the only representations concerning the value of the Harper Ward Property. In fact, Plaintiff Marlin K. Loosle acknowledges in his deposition:

Q. You knew when you went into First Federal Savings in 1980 to sign the loan documents that you already had signed a binding, legal contract?

A. Yes, uh-huh.

M.L. Dep., 1989, p. 61, line 5.

Thus, a binding, valid contract had been entered into by the Loosles to exchange the homes and property prior to any conversations or meetings with First Federal or any of its agents.

When Loosles agreed to exchange the homes and signed the Earnest Money And Offer To Purchase on September 10, 1980 no appraisal had been shown to them. They did not request one. The Earnest Money was not contingent on any appraisal. T.L. Dep., 1989, p. 14, lines 16-18. The Loosles had merely relied upon the representations made by Jeff and Kevin Packer and their own opinion ". . . We felt it was a good price". T.L. Dep., 1989, p. 17, line 12. Therefore, the essential element of a representation being communicated to the Loosles cannot be met as a matter of fact or as a matter of law. Loosles' Brief does not argue otherwise. Because Loosles cannot show a representation by First Federal concerning the value of the Harper Ward Property prior to them signing their

contract to acquire the home, an action for fraudulent misrepresentation cannot be pursued against First Federal and the Trial Court correctly ruled. The Loosles had already acted, there could be no reliance.

Loosles allege that First Federal induced Loosles to acquire the Property by performing an appraisal of the Property at \$87,000.00. . . . "at the time of the first appraisal the Plaintiff (Loosles) did not have the necessary responsibility to double check to make sure the Defendant (First Federal) was not misrepresenting him." Loosles' Brief, p. 12, lines 23-26. Loosles claim in the Verified Complaint that they relied upon that 1980 appraisal but at Marlin Loosle's deposition he states:

Q. Did you ever know that First Federal had done an appraisal when you got your first loan?

A. No.

Q. You did not then know that First Federal had done any type of an appraisal in connection with the loan at the time you purchased the home?

A. No.

M.L. Dep., 1989, p. 38, lines 5-11.

Q. So your first knowledge that First Federal had even done an appraisal would have been in 1988; is that correct?

A. In 1988, uh-huh.

M.L. Dep., 1989, p. 43, lines 10-13.

Mrs. Loosle's knowledge and time frame of knowledge of a First Federal appraisal is identical to that of her husband. See T.L. Dep., 1989, p. 15, lines 19-22.

Marlin Loosle and Theresa Loosle had no idea until 1988 that a First Federal appraisal had been performed on the property in 1980, approximately eight (8) years after the purchase of the home.

The only conceivable claim in the entire Record on the Summary Judgment is that First Federal made a loan and somehow by doing this they warranted the value of the Property to Loosles.

Q. Do you know if Paul Petersen had ever been on the property in Harper Ward in 1980 when you closed your loan, prior to that time?

A. I do not.

Q. Did you make any inquiry of him?

A. No.

T.L. Dep., 1989, p. 18, lines 11-16. (See also M.L. Dep., 1989, p. 77, lines 1-5.)

Q. Do you have any basis for believing that Paul Petersen knew that the home was worth or valued at some figure other than \$89,900.00 at the time you closed your loan?

A. No. I just assumed that he knew that, being he was making the loan.

T.L. Dep., 1989, p. 18, lines 22-25; p. 19, lines 1-2.

Q. Can you tell me as best you recall exactly what what [sic] was said in your meeting at First Federal Savings with Paul Petersen?

A. What was said?

Q. Yes. And what was done?

A. Well, basically he said-- It was like Marlin said. It was a lot of chit-chat, you know, about buying the home and he mentioned how, you know, that it sounded like a great area or whatever. You know. Home or whatever you want to say. Farm. I think most people, or men maybe I should say, like a lot of area. And so I think we talked about that a little bit. You know. And then he proceeded to present us with the papers. and That's about it.

T.L. Dep., 1989, p. 23, lines 8-25.

Q. Did you have any knowledge that there had been any appraisal of the property, or would be any appraisal of the property done at the time you closed the loan?

A. No.

T.L. Dep., 1989, p. 24, lines 7-10.

Even had Loosles known of the appraisal in 1980, it valued the property at 97% of the price on "paper" for which it was being exchanged. M.L. Dep., 1989, Dep. Exhibit No. 10. There is nothing in the Record to establish the 1980 appraisal was incorrect. First Federal provided the Trial Court verified un rebutted evidence it was correct. See Affidavit of Paul Petersen, paragraph 11. R. pp. 94-96. When Loosles did not even know if the loan closing officer, Paul Petersen, had been on the property, how could they rely on any representations of value? T.L. Dep., 1989, p. 18, lines 11-16. First Federal provided a loan --- nothing more, nothing less.

Q. Was First Federal providing any service to you and your husband other than providing a loan?

A. No.

T.L. Dep., 1989, p. 16, line 25; p. 17, lines 1-2.

Specifically, the essential element of a representation of value being made through the 1980 First Federal appraisal, together with the essential element of reliance by Loosles cannot be established.

Q. At the time of the closing did you discuss values with him? (Paul Petersen)

A. I can't recall any specific things. He knew that we were--that I was interested in the acreage and the general area and this type of thing, and we kind of discussed that. And he said he was happy for us, you know, and this type of thing. Just general chit-chat, I think.

Q. Would it be a fair statement that the primary representations that were made to you of value of the home in Harper Ward were made by your realtor?

A. Kevin?

Q. Yes.

A. Yes. Absolutely.

M.L. Dep., 1989, p. 43, lines 23-25; p. 44, lines 1-4.

That hardly constitutes a basis for a claim of fraud, misrepresentation, or reasonable reliance against First Federal.

Loosles provided nothing to the Trial Court to show First Federal knew or should have known its 1980 appraisal was incorrect. A 1988 appraisal shows nothing concerning the validity or accuracy of a 1980 appraisal. Loosles provided nothing to show the 1980 values placed on the Perry property being exchanged were incorrect. What if both properties were equally over-priced? Loosles never allege First Federal misrepresented any value of the Perry property. First Federal provided an Affidavit of Paul Petersen stating the appraisal was for "in house" use and was "not performed for or at the request of the Loosles". R. pp. 94-96. That remains uncontradicted. Lenders are not insurers to every borrower of the value of property. The Findings of Fact attached as Exhibit "A" to this Brief have inserted in each paragraph the specific support from the Record.

Loosles' Brief claims, "There is a definite question as to whether the Defendant (First Federal) negligently misrepresented the first appraisal for the value of the land." Loosles' Brief, p. 9, line 24. How could Loosles rely on this? Loosles signed the Earnest Money before they ever saw First Federal; they knew nothing of the "in house" appraisal; they relied on the realtor for the values of both properties.

<u>Element</u>	<u>Evidence</u>
(1) Representation ---	None - never knew of appraisal.
(2) Material Fact ---	None - no evidence Property worth less than \$89,900.00 exchange price.
(3) False ---	None - Paul Petersen affidavit uncontradicted.



- (4) Knew False -  
Recklessly --- None.
- (5) Inducing --- None - Earnest Money signed before  
Loosles saw First Federal and only  
purpose for seeing First Federal -  
to obtain a loan.
- (6) Other Party -  
Acting  
Reasonably --- None - relied on realtor for value -  
did not dicker.
- (7) Reliance --- None.
- (8) Induced to Act --- None.
- (9) To Injury  
and Damage --- None.

Even accepting the Loosles' statements as correct, there is no cause of action.

**B. EVEN IF FIRST FEDERAL HAD MADE FRAUDULENT MISREPRESENTATIONS TO LOOSLES, THE TRIAL COURT'S SUMMARY JUDGMENT MUST STAND BECAUSE LOOSLES' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.**

Generally, a statute of limitation runs against any cause of action when the cause of action comes into being. Leach v. Anderson, 535 P.2d 1241, 1244 (Utah, 1975). A cause of action arises the moment an action may be maintained to enforce it, and the statute of limitations is then set in motion. O'Hair v. Kounalis, 463 P.2d 799, 800 (Utah, 1970); Ash v. State, 572 P.2d 1374, 1379 (Utah, 1977).

A complaining party does not have to have actual notice of the alleged fraud. Koulis v. Standard Oil Co. of Cal., 746 P.2d 1182, 1185 (Utah App. 1987). The Utah Court of Appeals stated in Koulis:

However, if one is fully informed of such facts and information as would put a person of ordinary intelligence and prudence upon inquiry, and one makes no inquiry, then he or she is deemed to have discovered all that would have been revealed, and the running of the statute of limitations commences. At 1185.

See also Gibson v. Jensen, 158 P. 426, 427 (Utah, 1916).

The Utah Supreme Court said that one who claims to be defrauded must exercise reasonable prudence and diligence in discovering the fraud and seeking a remedy for it or that party will be precluded from doing so. Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898, 901 (Utah, 1976).

Regarding the duty of an individual to investigate a representation the Supreme Court stated:

The one who complains of being injured by such a false representation cannot heedlessly accept as true whatever is told him, but has a duty of exercising such degree of care to protect his own interest as would be exercised by an ordinary, reasonable and prudent person under the circumstances; and if he fails to do so, is precluded from holding someone else to account for the consequences of his own neglect. Jardine v. Brunswick Corporation, 423 P.2d 659, 662 (Utah, 1967).

When parties enter into an arms-length transaction and certain representations are made then the Utah Supreme Court has held that where the underlying facts are reasonably within the knowledge of the parties, the complaining party is obligated to take reasonable steps to inform himself and protect his interests. Sugarhouse Finance Company v. Anderson, 610 P.2d 1369, 1373 (Utah, 1980). Loosles apparently took those steps with their realtors and felt comfortable. M.L. Dep., 1989, p. 16, lines 16-24.

Loosles exchanged the property at the listing price. They made no effort to negotiate the values placed by the realtor on

either home and they did not check with any other real estate agents, friends or neighbors. "And so we just took his (Kevin Packer's) recommendation and his word from that point on." M.L. Dep., 1989, p. 60, lines 1-6.

From 1980 through 1988 Loosles received tax notices every year from the Box Elder County Assessor's Office. M.L. Dep., 1989, p. 36, lines 17-19. It is clear from the tax notices that the Box Elder County Assessor's Office valued the property in 1986 through 1988 at \$59,167.00. First Federal's Memorandum of Points and Authorities in Support of Motion For Summary Judgment, Exhibits D-1, D-2 and D-3; R. pp. 97-119. Furthermore, Marlin Loosle testified that the tax notices did have some indication as to valuation on them when he received them. M.L. Dep., 1989, p. 36, line 22. However, he did not make any inquiry of anyone regarding the tax notices and the values that were established. He simply complained every year that the taxes seemed to be going up. M.L. Dep., 1989, p. 36, line 25; p. 37, line 1.

From 1980 through 1988 Loosles were clearly put on notice that the value of the property may have been lower than the exchange price. For example, in an exchange it is possible to exchange \$1,000.00 per bushel apples for \$1,000.00 per bushel oranges. Loosles provided the Trial Court nothing concerning the accurate or inaccurate value placed on the Perry property which was exchanged for the Harper Ward Property.

Since the Loosles are claiming misrepresentation, they must exercise reasonable prudence and diligence in discovering the

misrepresentation. Jardine v. Brunswick Corporation, 423 P.2d 659 (Utah, 1967). Loosles did not exercise any prudence or diligence in discovering or in seeking a remedy for the purported wrong. Their Complaint for fraud/misrepresentation was not filed until April 24, 1989, over eight and one-half (8-1/2) years after they acquired the Property by exchange. The statute of limitations for fraud is as follows:

Within three years:

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Utah Code Ann., §78-12-26 (1953 as amended).

If Loosles made a bad business decision in 1980, they cannot shift that burden to First Federal.

Q. Did you ever ask him (Paul Petersen), "Is the property worth \$89,900.00"?

A. No, I don't recall specifically asking that.

Q. Did you ever ask that of the Packers?

A. I'm not sure. It seemed like we said to Kevin, "Does that sound reasonable to you? Is that what we should--" Because, you know, I wanted the acreage. And as I recall talking to Kevin, you know, "Does that sound good to you? Does that sound like that would be a good thing for us?" And he indicated yes. And so we just took his recommendation and his word from that point on.

Q. Were you somewhat anxious for the property? Was it something you'd always wanted and never quite had?

A. In retrospect, I think I probably was more anxious than was advisable. . .

M.L. Dep., 1989, p. 59, lines 21-25; p. 60, lines 1-10.

Even if one assumes all nine (9) elements of misrepresentation are met by Loosles, the statute of limitations has long expired and the right to any claim is extinguished.

The Trial Court correctly found no representation, no reliance and no cause of action for Loosles.

### III

THE TRIAL COURT CORRECTLY QUIETED TITLE TO CERTAIN WATER RIGHTS IN FAVOR OF FIRST FEDERAL AND THERE IS ADEQUATE EVIDENCE IN THE TRIAL RECORD TO SUPPORT THE FACTUAL FINDINGS OF THE TRIAL COURT THAT THE SPRING AND WELL WATERS WERE APPURTENANT TO THE REAL PROPERTY AND WERE PLEDGED TO FIRST FEDERAL.

The basic issues at trial were as follows:

1. Are the spring waters to the Loosle Spring and Thorpe Well appurtenant to the Property?

2. If the rights to use of water from the Loosle Spring and Thorpe Well are appurtenant to the Property, were they pledged to First Federal by virtue of the Trust Deed executed between Loosles and First Federal?

The Trial Court, after hearing all the testimony, held that the waters were appurtenant and were pledged to First Federal --- both of these issues basically revolve around the intent of the parties. The Loosles' Brief does not cite one (1) Finding of Fact or Conclusion of Law entered by the Trial Court which is not supported in the record. Loosles made no demand for jury trial in this matter, and even if they did, they waived the right to the same by making no objection at the time of trial.

Rule 52(a) of the Utah Rules of Civil Procedure provides in part:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially ... Findings of fact, whether

based on oral or documentary evidence, shall not be set aside unless clearly erroneous ..."

In its decision on the standard of appellate review, Scharf v. BMG Corporation, 700 P.2d 1068 (Utah 1985), the Utah Supreme Court determined the Loosle's burden in order to overcome a trial court's findings of fact:

To mount a successful attack on the trial court's findings of fact, an appellant must marshal all of the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings.

In Cornish Town v. Koller, 758 P.2d 919 (Utah 1988), the Supreme Court provided the nexus between Rule 52(a), Utah Rules of Civil Procedure, and Scharf (supra) in the following language:

First, review of findings of fact is controlled by rule 52(a) of the Utah Rules of Civil Procedure. To mount a successful challenge to trial court findings under this rule, an appellant must marshal the evidence supporting the trial court's findings. At 922.

In State v. Moore, 802 P.2d 732 (Utah App., 1990), the Utah Court of Appeals held that "If the appellant fails to so marshal the evidence, the appellate court need not consider the challenge to its sufficiency." At 738-739.

Loosles have failed to meet or to even undertake the marshalling requirement. In fact, all Loosles have done, at best, is to argue the Trial Court's conclusions and have not even suggested there is an inadequate basis in the record. This does not begin to meet the marshalling burden Loosles must carry. Under State v. Moore, supra, this Court need not consider the challenge of Loosles to the Trial Court's decision.

The counter point to Loosles' failure to marshal the evidence supporting the Trial Court's findings and demonstrate the evidence failed to support the Trial Court's findings is that the Trial Court's findings and decision were based on substantial, credible evidence, and this Court should not invade the Trial Court's province to assess and weigh that evidence unless the Trial Court abused its discretion. The Findings of Fact attached as Exhibit "D" to this Brief have inserted in each paragraph the specific support from the Transcript of the Trial for the finding of the same.

Assuming, arguendo, that Loosles had marshalled the evidence in favor of the verdict, that evidence, viewed in the light most favorable to the Court's Judgment, is competent and supports the Court's Judgment. In Western Fiberglass, Inc. v. Kirton, McConkie and Bushnell, 789 P.2d 34 (Ut. App., 1990), the Court held:

Resolution of a factual dispute is a matter for the jury as trier of the fact, unless evidence on the issues "so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case."

The Deed of Trust signed by Loosles, which was subject to the foreclosure, pledged:

TOGETHER with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents (subject however to the rights and authorities given herein to Lender to collect and apply such rents), royalties, mineral, oil and gas rights and profits, water, water rights, and water stock, and all fixtures now or hereafter attached to the property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Deed of Trust; and all of the foregoing, together with said property (or the leasehold estate if

this Deed of Trust is on a leasehold) are herein referred to as the "Property". Tr. Exhibit No. 6.

When the Loosles purchased the Property in 1980, the Loosle Spring was the sole source of culinary and irrigation water. The Loosle Spring is located on the property immediately in front of the home. Tr., p. 28, lines 5-16. The Loosles subsequently found that the Spring caused flooding in the basement and that the Spring water was not good for drinking or cooking when there was a heavy rain storm or during the summer season when irrigation water was running through a cement ditch which passes in front of the Property, between the Spring source and the public highway. Tr., p. 33, lines 12-17; Tr., p. 34, lines 3-11; Tr., p. 35, lines 11-17. Consequently, for some period of time after taking possession the Loosles hauled water into the home for drinking purposes and cooking purposes. Tr., p. 34, lines 16-25. At the time the Loosles acquired the Property by exchange and delivered the Trust Deed to First Federal, no filings with the State Engineer had been made upon the Loosle Spring. Tr., p. 28, lines 2-4.

Subsequent to this time, the Thorpes, Curtises and Loosles agreed to share in the cost of the construction of a well on the Curtis' property, a nearby neighbor. This occurred in 1982-83. Tr. Exhibit Nos. 9 and 10. While originally designed as a three (3) family well, it ultimately became a five (5) family well, with the Loosles owning a proportionate interest (from  $\frac{1}{3}$  to  $\frac{1}{5}$ ) in the well and the water from it. Mr. Thorpe filed on the well with the State Engineer's Office for a three (3) family well. Tr., p. 39, lines 7-13. Mr. Thorpe subsequently filed for two (2)



additional families. Tr., p. 39, lines 14-17. The well was completed and hooked up in 1982 or early 1983. Underground piping was placed from the well to the Loosle home. Tr., p. 44-45-46. The well water was piped so that either the well water or the Spring water could be diverted to be used inside the Loosle home. Tr., p. 50, lines 3-12. Even though there is simply a valve which will change the source of water to the home from the well water to the Spring water, since 1982 the Loosles have solely used the well water for culinary purposes in the home. Tr., p. 52, lines 7-25.

The applicable Utah statute appears to be §73-1-11:

A right to the use of water appurtenant to land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; . . . provided that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance . . . Utah Code Ann. (1953 as amended)

An after acquired water right passes to an existing lienholder:

Generally, every right or interest held by a mortgagor in and to the mortgaged property, together with all **SUBSEQUENTLY ACQUIRED RIGHTS**, easements, and privileges which are necessary and essential to the full enjoyment of the property, passes with the mortgage . . .

Mortgages, 55 Am.Jur.2d § 803.

The question of whether or not the water is appurtenant to the land is basically a question of the intent of the parties.

Easements in gross are not favored, however, and a water right or easement will ordinarily be presumed not to be in gross where it can fairly construed to be appurtenant to some other estate. If a water right is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its

use, and there is nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross.

Waters, 78 Am.Jur.2d 233.

The Loosles owned the Property at the time the well and Spring rights were utilized and filed upon; it is clear that the well and Spring were the only sources of water for the land in question (Tr., p. 52, lines 7-25); that Loosles were the sole users of the Spring (Tr., p. 35, lines 18-24, p. 36, lines 5-17); it is also clear and undisputed that the only land owned by the Loosles in the area was the Property served by the spring and by the well (Tr., p. 64, lines 14-23), and that Loosles intended the spring and well rights to be utilized on this Property. (Tr., p. 56, lines 1-6; Tr., p. 58, lines 19-22; Tr., p.66, lines 15-19.) Tr. Exhibit 14. All of the Loosles' pleadings, affidavits and filings as well as the testimony at trial suggest that they considered the well, changes to the spring and use of the water rights to be an improvement to this Property. Tr., p. 51, lines 14-17. If it was an improvement to this property, it was an appurtenance to it. Tr., p. 75, lines 6-9. The fact that Loosles have utilized the well water since 1982 as the sole source of culinary and domestic water for this Property, speaks very strongly of their intent. Tr., p. 52, lines 7-25; p. 53, lines 23-25; p. 55, lines 2-5; p. 74, lines 10-15. Also, the Application to the State Engineer to utilize the Spring water solely for irrigation and stockwatering further demonstrates that Loosles considered the well water the

sole source of culinary water for the Property, because it was the only other water source. Tr. Exhibit No. 14.

As the Utah Supreme Court stated in Bauer v. Prestwich, 578 P.2d 1283 (1978), "The use of water upon land makes it appurtenant to that land; and unless it was separately deeded away, it would pass with the land." At 1284. As the Supreme Court of Montana stated in Adams v. Chilcott, 597 P.2d 1140 (Montana, 1979), "When a thing is used for the benefit of land, it is deemed appurtenant to the land ... if the property is transferred without an express reservation of the appurtenant water rights, they accompany the land." At 1145.

The State of Washington holds likewise, as in Foster v. Sunnyside Valley Irrigation District, 687 P.2d 841 (Wash. 1984) the Court wrote, "A water right is considered real property which is appurtenant to and passes with the conveyance of the land which receives its beneficial use." At 844. Since the rights to use of the Spring water and well water are appurtenant to the land, they were pledged to First Federal by virtue of the Trust Deed executed between the parties.

The only and sole source of culinary drinking water for this property is the well. It is not only necessary but essential to the full and reasonable enjoyment of the Property.

A conveyance of land upon a foreclosure sale must of necessity - at least, as between the parties to the mortgage - carry with it a water right appurtenant to the land, acquired and used by the mortgagor for the benefit of the land, although obtained after the execution of the mortgage and before the sale on foreclosure.

Mortgages, 55 Am.Jur.2d § 804.

The case of Stephens v. Burton, 546 P.2d 240 (Utah, 1976), specifically upheld the concept of § 73-1-11, Utah Code Ann. (1953, as amended), "We believe and hold that the water appurtenant to the two tracts of land conveyed is the amount of water which was beneficially used thereon before and at the time of the sale." At 241. As the Utah Supreme Court stated in Roberts v. Roberts, 584 P.2d 378 (1978), "In Utah, a deed which conveys land to a grantee also conveys the right to use appurtenant water, unless expressly reserved. Appurtenant water is the amount of water beneficially used on the land before and at the time of the sale." There is no dispute that the well water was beneficially used for the domestic and culinary uses prior to the Trustee's Sale, and that the spring water was used for irrigation purposes by the Loosles.

There was no reservation of any water rights by the Loosles in the Trust Deed conveyance and pledge to First Federal. Tr. Exhibit No. 6. Furthermore, the water which was appurtenant to the land and used at the time of the conveyance through the Trustee's Sale and Trustee's Deed, was the water of the Thorpe Well and Loosle Spring. Tr. Exhibit No. 23. There was no express reservation made whatsoever in the Trustee's Deed.

In Salt River Valley Water Users' Association v. Kovacovich, 411 P.2d 201 (Ariz. App. 1966), the Arizona Court of Appeals specifically held . . . "a water right is attached to the land on which it is beneficially used and becomes appurtenant thereto, and that the right is not in any individual or owner of the land. It is in no sense a floating right, nor can the right, once having

attached to a particular piece of land, be made to do duty to any other land, with certain exceptions. . . ." At 203.

The language of the Deed of Trust is clear and unmistakable, inasmuch as the conveyance clearly included, "together with all of the improvements now OR HEREAFTER ERECTED ON THE PROPERTY, AND ALL . . . WATER, WATER RIGHTS ... AND ALL FIXTURES NOW OR HEREAFTER ATTACHED TO THE PROPERTY ALL OF WHICH, INCLUDING REPLACEMENTS AND ADDITIONS THERETO, SHALL BE DEEMED TO BE AND REMAIN A PART OF THE PROPERTY COVERED BY THIS DEED OF TRUST . . . ." Also, in the foreclosure process, the Notice of Default, the Notice of Trustee's Sale, and the Trustee's Deed, all contain almost the same language. The Trustee's Deed specifically provided:

TOGETHER with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, royalties, mineral oil and gas rights and profits, water, water rights and water stock, and all fixtures now or hereafter attached to the property, all as further described in said Trust Deed, without warranty as to title. Tr. Exhibit No. 23.

Whatever rights, title and interest which Loosles had in the well and in the Spring, were conveyed, transferred and pledged to First Federal and when foreclosed upon, passed to First Federal as appurtenances, improvements, and water rights used beneficially in connection with the Loosle property.

Loosles have not met their burden of showing that the evidence so clearly preponderates in their favor that reasonable people would not differ on the outcome of the case. In Cambelt International Corporation v. Dalton, 745 P.2d 1239 (Utah 1987), the Supreme Court states: "We consider the evidence in the light most

favorable to the verdict, and will not overturn it on appeal when it is supported by substantial and competent evidence." At 1242.

The Trial Court Judgment is based on appropriate findings and the application of such factual findings to the law and should be affirmed.

#### **IV**

##### **FIRST FEDERAL SHOULD BE AWARDED ATTORNEY'S FEES INCURRED IN RESPONDING TO LOOSLES' APPEAL.**

The Promissory Note and Trust Deed executed by Loosles in favor of First Federal clearly provide for attorney's fees. Tr. Exhibit Nos. 5 and 6. The quiet title action stemmed from Loosles' claim that certain water rights were not pledged to First Federal and were not owned by First Federal after the Trustee's Sale. The Trial Court found otherwise. Since provided by contract, the attorney's fees incurred by First Federal are recoverable in this matter. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah, 1988); Elder v. Triax Co., 740 P.2d 1320 (Utah, 1987).

Furthermore, Rule 24(k) of the Utah Rules of Appellate Procedure clearly provides that the court may charge attorney fees against Loosles because of the noncompliance with the Rules of Appellate Procedure in their Brief, as previously described.

In the event the Judgments of the Trial Court in this case are upheld on this appeal, First Federal respectfully requests that this Court order the Loosles to pay First Federal the attorney's fees incurred by First Federal on this and the two (2) prior

appeals and to remand the issue as to the amount of such attorney's fees to the Trial Court for determination.

CONCLUSION

This Court should affirm the Trial Court's Judgments or should dismiss Loosles' Appeal because of Loosles' failure to comply with the Rules of Appellate Procedure. In any event Loosles' attacks upon the Trial Court's Judgments are without basis in law or in fact. Loosles do not attack any of the Trial Court's Findings on the misrepresentation or on the quiet title action. This Court should find that Loosles have not met their burden of marshalling the evidence and that the Trial Court's decisions are based on substantial and creditable evidence and are supported in the Record and Transcript. In addition, First Federal should be awarded attorney's fees for the appeal and such other relief as the Court deems just.

DATED this 18th day of February, 1992.

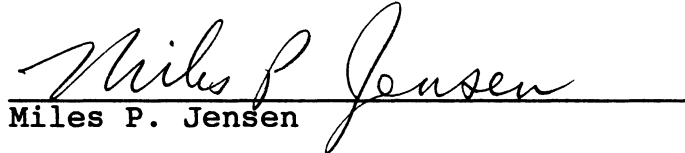
Respectfully submitted,

OLSON & HOGGAN, P.C.

  
Miles P. Jensen

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered four (4) exact copies of the foregoing Brief of Appellees, to Appellant's Attorney, Dale M. Dorius, at 29 South Main, P.O. Box U, Brigham City, Utah, 84302, this 18th day of February, 1992.

  
Miles P. Jensen

wpd/mpj/ffab/loosle.sta  
N-55.159PF



APPENDIX

EXHIBIT "A"

EXHIBIT " A "

*Findings of Fact signed May 17, 1990 based on Trial Court's Memorandum Decision dated April 4, 1990. References to evidence supporting each Finding in bold.*

FINDINGS OF FACT

1. Plaintiffs are residents of Box Elder County, State of Utah, and were owners of a certain home and real property located in Box Elder County, State of Utah and more particularly described as follows:

Beginning at a point on the West right-of-way line of Utah Highway No. 69 as presently located 1035.33 feet South and 69 feet West from the Northeast corner of Section 22, Township 10 North, Range 2 West, Salt Lake Base and Meridian, thence South 1\*27'30" East along said right-of-way 225.5 feet, thence South 86\*48'30" West 603 feet, thence North 1\*27'30" West 225.5 feet, thence North 86\*48'30" East 603 feet to the point of beginning.

(hereafter real property)

Together with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, royalties, mineral oil and gas rights and profits, water, water rights and water stock, and all fixtures now or hereafter attached to the property, all as further described in said Trust Deed, without warranty as to title.

2. The Defendant, First Federal Savings & Loan Association of Logan, is a Utah corporation with its place of business in Brigham City, Box Elder County, Utah.

3. The Defendant, Hillam Abstracting and Insurance Agency, Trustee, is a Utah corporation.

4. On or about September 11, 1980 the Plaintiffs entered into an Earnest Money Agreement and Offer to Purchase, with All Pro Real Estate Incorporated, a Utah corporation, and Quality Builders Incorporated, a Utah corporation, to acquire the real property described in Finding No. 1. *M.L. Dep., 1989, p. 28, lines 10-23.*

5. On or about the 16th day of September, 1980, Plaintiffs executed a Trust Deed and Trust Deed Note in favor of Defendant, First Federal Savings & Loan Association of Logan, with Hillam Abstracting and Insurance Agency as Trustee, and said Trust Deed was recorded in the office of the Box Elder County Recorder, State of Utah on the 17th day of September, 1980, as Entry No. 80733H in Book 336 at Page 382; and said Trust Deed Note was secured by the aforementioned Trust Deed. *M.L. Dep., 1989, p. 53, lines 9-25.*

6. Plaintiffs entered into the Earnest Money Agreement and Option to Purchase, and agreed on the purchase price and financial arrangements to purchase the home and real property described in Findings of Fact No. 1 prior to any involvement or contact with First Federal Savings & Loan Association of Logan. *M.L. Dep., 1989, p. 29, lines 2-7; p. 47, line 25; p. 48, lines 1-7.*

Plaintiffs did not rely on Defendants' representations as to the value of said home and real property described in Finding No. 1. *M.L. Dep., 1989, p. 59, lines 21-25; p. 60, lines 1-10; T.L. Dep., 1989, p. 10, lines 6-11; p. 23, line 5; p. 9, lines 15-17.*

7. An appraisal done by Defendant, First Federal Savings Association of Logan, on said real property was done by agents of First Federal for its internal purposes as a matter of documenting the legitimacy of the loan for their auditors and had no bearing in the obtaining of the initial transaction which gives rise to this litigation and Defendants never relied on said appraisal in purchasing said real property. *M.L. Dep., 1989, p. 43, lines 10-13; p. 56, lines 3-7, T.L. Dep., 1989, p. 15, lines 19-22; p. 24, lines 7-10; Paul Petersen Affidavit, paragraphs 5-7, R. pp. 94-96.*

8. No fiduciary relationship become established between the Plaintiffs and Defendant, First Federal Savings & Loan Association of Logan, except as to the handling of money and not in any respect as to the allegations of Plaintiffs' Complaint. *T.L. Dep., 1989, p. 16, line 25; p. 17, lines 1-2.*

EXHIBIT "B"

EXHIBIT "B"

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR THE COUNTY OF BOX ELDER

-----	
MARLIN K. LOOSLE and THERESA )	
L. LOOSLE, )	
Plaintiffs, )	FINDINGS OF FACT AND
	CONCLUSIONS OF LAW
vs. )	
FIRST FEDERAL SAVINGS & LOAN )	
ASSOCIATION OF LOGAN, HILLAM )	
ABSTRACTING AND INSURANCE )	
AGENCY, Trustee, ALL PRO REAL )	
ESTATE INCORPORATED, a Utah )	
Corporation, QUALITY BUILDERS )	
INCORPORATED, a Utah )	
Corporation, and WILLIAM L. )	
PACKER dba QUALITY BUILDERS, )	Civil No. 89000213CA
Defendants. )	
-----	

Plaintiffs having made their Motion For Summary Judgment and the Defendants, First Federal Savings & Loan Association Of Loan and Hillam Abstracting And Insurance Agency, having replied to the same, and the Court having reviewed the file and being fully advised in the premises and having issued its Memorandum Decision dated April 4, 1990, hereby makes the following:

FINDINGS OF FACT

1. Plaintiffs are residents of Box Elder County, State of Utah, and were owners of a certain home and real property located in Box Elder County, State of Utah and more particularly described as follows:

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ATTORNEYS AT LAW  
56 WEST CENTER  
P.O. BOX 525  
LOGAN UTAH 84321  
(801) 752 1551

NOTION OFFICE  
3 EAST MAIN  
P.O. BOX 115  
LOGAN UTAH 84337  
(801) 257 3885

Beginning at a point on the West right-of-way line of Utah Highway No. 69 as presently located 1035.33 feet South and 69 feet West from the Northeast corner of Section 22, Township 10 North, Range 2 West, Salt Lake Base and Meridian, thence South 1\*27'30" East along said right-of-way 225.5 feet, thence South 86\*48'30" West 603 feet, thence North 1\*27'30" West 225.5 feet, thence North 86\*48'30" East 603 feet to the point of beginning.

(hereafter real property)

Together with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, royalties, mineral oil and gas rights and profits, water, water rights and water stock, and all fixtures now or hereafter attached to the property, all as further described in said Trust Deed, without warranty as to title.

2. The Defendant, First Federal Savings & Loan Association of Logan, is a Utah corporation with its place of business in Brigham City, Box Elder County, Utah.

3. The Defendant, Hillam Abstracting and Insurance Agency, Trustee, is a Utah corporation.

4. On or about September 11, 1980 the Plaintiffs entered into an Earnest Money Agreement and Offer to Purchase, with All Pro Real Estate Incorporated, a Utah corporation, and Quality Builders Incorporated, a Utah corporation, to acquire the real property described in Finding No. 1.

5. On or about the 16th day of September, 1980, Plaintiffs executed a Trust Deed and Trust Deed Note in favor of Defendant, First Federal Savings & Loan Association of Logan, with Hillam Abstracting and Insurance Agency as Trustee, and said Trust Deed was recorded in the office of the Box Elder County Recorder, State of Utah on the 17th day of September, 1980, as Entry No. 80733H in Book 336 at Page 382; and said Trust Deed Note was secured by the aforementioned Trust Deed.

6. Plaintiffs entered into the Earnest Money Agreement and Option to Purchase, and agreed on the purchase price and financial arrangements to purchase the home and real property described in

Findings of Fact No. 1 prior to any involvement or contact with First Federal Savings & Loan Association of Logan. Plaintiffs did not rely on Defendants' representations as to the value of said home and real property described in Finding No. 1.

7. An appraisal done by Defendant, First Federal Savings Association of Logan, on said real property was done by agents of First Federal for its internal purposes as a matter of documenting the legitimacy of the loan for their auditors and had no bearing in the obtaining of the initial transaction which gives rise to this litigation and Defendants never relied on said appraisal in purchasing said real property.

8. No fiduciary relationship become established between the Plaintiffs and Defendant, First Federal Savings & Loan Association Of Logan, except as to the handling of money and not in any respect as to the allegations of Plaintiffs' Complaint.

From the foregoing Findings Of Fact, the Court now makes and enters the following:

#### CONCLUSIONS OF LAW

1. The foregoing appear to be uncontroverted facts as to the elements which would be required to sustain an action based on fraudulent representation as set forth in the case of Dugan v. Jones, 615 P.2d 1239 (Utah 1980), and consequently the Plaintiffs as a matter of law cannot sustain or establish the requisite elements for their cause of action and, accordingly, Defendants' Motion For Summary Judgment is granted and Plaintiffs' Complaint and Amended Complaint and causes of action as against Defendants, First Federal Savings & Loan Association of Logan and Hillam Abstracting and Insurance Agency, as Trustee, are dismissed with prejudice.

2. Based on the foregoing, it cannot be controverted that there was no reasonable reliance by the Plaintiffs upon any actions of Defendants, First Federal Savings & Loan Association of Logan or its agents or upon Hillam Abstracting and Insurance Agency as Trustee.

3. The depositions of Plaintiffs Marlin K. Loosle and Theresa L. Loosle are on file with the Court and, pursuant to the request of Defendants, are accordingly published for purposes of Defendants' Motion For Summary Judgment.

DATED this 17 day of May, 1990.

17/ F L GUNNELL  
F. L. Gunnell, District Judge

MAILING CERTIFICATE

I hereby certify that I mailed an exact copy of the foregoing Findings Of Fact And Conclusions Of Law, to Plaintiffs' Attorney, Dale M. Dorius, at P. O. Box U, Brigham City, Utah 84302, and to Quinn D. Hunsaker, Attorney for Defendants, All Pro Real Estate Incorporated, Quality Builders Incorporated and William L. Packer, at 102 South 100 West, Brigham City, Utah 84302, postage prepaid in Logan, Utah, this 14th day of May, 1990.

\_\_\_\_\_  
Miles P. Jensen

MPJ/2  
federal.fof

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EXHIBIT "C"

BRIGHT DISTRICT

EXHIBIT "C"

MAY 15 11 25 AM '90

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR THE COUNTY OF BOX ELDER

-----  
MARLIN K. LOOSLE and THERESA )  
L. LOOSLE, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
FIRST FEDERAL SAVINGS & LOAN )  
ASSOCIATION OF LOGAN, HILLAM )  
ABSTRACTING AND INSURANCE )  
AGENCY, Trustee, ALL PRO REAL )  
ESTATE INCORPORATED, a Utah )  
Corporation, QUALITY BUILDERS )  
INCORPORATED, a Utah )  
Corporation, and WILLIAM L. )  
PACKER dba QUALITY BUILDERS, )  
 )  
Defendants. )  
-----  
JUDGMENT AND ORDER  
  
Civil No. 89000213CA

Plaintiffs having made its Motion For Summary Judgment, and the Defendants, First Federal Savings & Loan Association Of Logan and Hillam Abstracting And Insurance Agency, having replied to the same, and the Court having reviewed the file and being fully advised in the premises and having issued its Memorandum Decision dated April 4, 1990 and the Court having previously entered its Findings Of Fact And Conclusions Of Law;

It is hereby ORDERED as follows:

1. The Plaintiffs as a matter of law cannot sustain or establish the requisite elements for its cause of action, which would be required to sustain an action based on fraudulent representation as set forth in the case of Dugan v. Jones, 615 P.2d

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1239 (Utah 1980), and, accordingly, Defendants' Motion For Summary Judgment is granted and Plaintiffs' Complaint, Amended Complaint and causes of action as against Defendants, First Federal Savings & Loan Association of Logan and Hillam Abstracting and Insurance Agency, as Trustee, be and are hereby dismissed with prejudice.

2. The depositions of Plaintiffs Marlin K. Loosle and Theresa L. Loosle are on file with the Court and, pursuant to the request of Defendants, are accordingly published for purposes of Defendants' Motion For Summary Judgment.

DATED this 15 day of May, 1990.

15151 - 11/15/90  
F. L. Gunnell, District Judge

#### MAILING CERTIFICATE

I hereby certify that I mailed an exact copy of the foregoing Judgment and Order, to Plaintiffs' Attorney, Dale M. Dorius, at P. O. Box U, Brigham City, Utah 84302, and to Quinn D. Hunsaker, Attorney for Defendants, All Pro Real Estate Incorporated, Quality Builders Incorporated and William L. Packer, at 102 South 100 West, Brigham City, Utah 84302, postage prepaid in Logan, Utah, this 14th day of May, 1990.

Miles P. Jensen

MPJ/2  
loosle.jd

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EXHIBIT "D"

**EXHIBIT " D "**

*Findings of Fact signed August 1, 1990 from June 15, 1990 trial. References to evidence supporting each Finding in bold.*

**FINDINGS OF FACT**

1. Plaintiffs Marlin K. Loosle and Theresa L. Loosle (hereafter "Loosles") are subject to the jurisdiction of this Court.

2. Loosles acquired the following described real property (hereafter the "Property") on September 16, 1980:

Beginning at a point on the West right-of-way line of Utah Highway No. 69 as presently located 1035.33 feet South and 69 feet West from the Northeast corner of Section 22, Township 10 North, Range 2 West, Salt Lake Base and Meridian, thence South 1\*27'30" East along said right-of-way 225.5 feet, thence South 86\*48'30" West 603 feet, thence North 1\*27'30" West 225.5 feet, thence North 86\*48'30" East 603 feet to the point of beginning.

*Tr. p. 16, lines 1-7 - Exhibit No. 4.*

3. In connection with their purchase of the Property, on or about September 16, 1980, the Loosles, for valuable consideration, made, executed, and delivered to First Federal Savings and Loan Association of Logan (hereafter "FirstFed") that certain Trust Deed Note dated September 16, 1980 in the principal amount of \$67,000.00. By and through the Note, Loosles agreed to pay to FirstFed, or its order, the sum of \$67,000.00, together with interest on the unpaid principal balance thereof at the rate of twelve and three/fourths percent (12.75%) per annum from and after the date of the Note. *Tr. p. 16, lines 12-13 - Exhibit No. 5.*

4. To secure the payment of the indebtedness evidenced by the Note, Loosles made, executed and delivered to FirstFed that certain Trust Deed dated September 16, 1980 (hereafter "Trust Deed"). The Trust Deed was recorded in the office of the Box Elder County,

Utah, Recorder on September 17, 1980 as Entry No. 80733H in Book 336 at Page 382 and pledged the Property. *Tr. p. 17, line 1 - Exhibit No. 6.*

5. The Trust Deed provided as part of the Property pledged:

TOGETHER with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents (subject however to the rights and authorities given herein to Lender to collect and apply such rents), royalties, mineral, oil and gas rights and profits, water, water rights, and water stock, and all fixtures now or hereafter attached to the property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Deed of Trust; and all of the foregoing, together with said property (or the leasehold estate if this Deed of Trust is on a leasehold) are herein referred to as the "Property": (Emphasis added.)

*Exhibit No. 6.*

6. The Property consists of 3.12 acres of real property with a home and outbuildings and is located adjacent to and west of State Highway 69, about 5 miles North of Brigham City, Utah, in the "Harper Ward" area of Box Elder County, Utah. *Exhibit Nos. 1, 2, 3 and 4.*

7. The Property has three (3) springs on it - two (2) of which are north of the home and supply a pond. The springs north of the home tend to be alkaline and salty and have not been used for culinary purposes. *Tr. p. 29, lines 5-11, 23-24; p. 30, lines 2-5.*

8. The third spring (hereafter "Loosle Spring") on the Property is located in front/east of the home. Loosles filed an Application To Appropriate Water from the Loosle Spring with the State Engineer on May 18, 1988, which Application has not been acted upon by the State Engineer. *Tr. p. 20, line 14 - Exhibit 14.*

9. The Loosle Spring was the only source of culinary water for the home in 1980 when Loosles acquired the Property and was also used for irrigation purposes on the Property. *Tr. p. 28, lines 5-16.*

10. The Loosle Spring was piped under the home to the rear/west side of the home into a pump house and collecting tank where it could be pumped into the home. The pump required electricity to function. The Loosle Spring water could also flow onto the Property and was used for irrigation purposes by Loosles from 1980 through August, 1989 when Loosles vacated the Property. *Tr. p. 30, lines 5-20; p. 32, lines 2-10; p. 33, lines 2.*

11. Within a few days after Loosles moved onto the Property in 1980 they found the Loosle Spring water unacceptable for purposes of drinking. *Tr. p. 33, lines 12-17; p. 35, lines 11-17.*

Loosles commenced hauling water into the home for drinking and for some cooking. They would obtain and haul water from nearby neighbors in containers every two (2) or three (3) days or sometimes once a week, depending on the season and amount of water used. *Tr. p. 34, lines 16-25.*

The Loosle Spring continued to supply water for household purposes other than drinking. *Tr. p. 35, lines 1-10.*

12. The Loosle Spring became contaminated and tasted "brackish" whenever there was a heavy rain and became contaminated and tasted "brackish" during each irrigation season (April through October) when water from a nearby ditch seemed to contaminate the spring and increase its flow. *Tr. p. 34, lines 3-11.*

13. In 1982 Loosles, along with Thomas Calvin Thorpe, Vonda J. Thorpe (hereafter collectively Thorpe), Von R. Curtis and Barbara F. Curtis (hereafter collectively Curtis) (all neighbors) entered into a verbal agreement to jointly dig a well on property owned by the Curtis' to serve each of the three (3) parties' homes and the interest of the Loosles in the well was for the benefit of the real property owned by Loosles. The well was dug to the South and East of the Property and across Highway 69. It consisted of the well, a pump, pump house, reservoir and one water line to serve the users. The well drilling was successful and thereafter Thomas C. Thorpe filed a Water Appropriation No. 57296 (29-2775) claim on the well with the office of the State Engineer of the State of

Utah. The State Engineer approved the well application for the use, among others, of three (3) families (domestic plus .25 acres irrigation per family) on September 17, 1982. *Tr. p. 37, lines 6-25 - Exhibit Nos. 9 and 10.*

14. Thorpes, Loosles and Curtis' completed piping of the water from the well to each of their properties, including the Property, in late 1982 or early 1983. *Tr. pp. 46-49.*

15. The well and well water right is now the only water right available in connection with the Property which is useable year-round for culinary purposes and which is piped underground to serve the same and the plumbing for the home on the Property is designed so as to be able to use water from the well. The well water serves the Property and home by gravity flow and requires no pumping and no electricity to be used. *Tr. p. 46-49; p. 54, lines 19-22; p. 56 lines 1-6; p. 54, lines 19-22.*

16. The pipeline from the well is initially a four inch (4") line covered by a protective casing and is 4-5 feet deep as it goes West from the well to Highway 69. The line then goes underneath Highway 69. On the West side of Highway 69 the pipeline splits into one (1) line to serve Thorpe (further to the West) and one (1) line to serve the Property (to the North). When it divides to serve Thorpe and the Property, the line to the Property is a two inch (2") line 4-5 feet deep covered by sand and other soil materials to protect it from damage from rocks. *Tr. pp. 46-49.*

17. The well pipeline crosses property originally owned by Curtis for which there is a deeded easement in favor of Loosles evidenced by that Quit Claim Deed dated July 8, 1986 and recorded July 8, 1986 in Book 420 at Page 823 in the Office of the Recorder of Box Elder County, Utah. The well pipeline then traverses property owned by Thorpe and for which there was agreement that Thorpe would give Loosles a written deeded easement, although there is no evidence such an easement has been executed and delivered. The well pipeline from the well to the Property and home was dug



with the approval and help of Curtis and Thorpe. *Tr. pp. 46-49 - Exhibit No. 15.*

18. The well pipeline connects to the line to the pumphouse and to the home on the Property and has a valve system so the well water can be used in the home and/or to irrigate, and alternatively, by switching a valve, the Loosle Spring water can be used in the home and/or to irrigate. *Tr. p. 50, lines 3-12; p. 57, lines 9-11.*

19. Since late 1982 or early 1983 Loosles have not hand carried water into the home and the well water has been used daily since then and has been the exclusive source of domestic/culinary water. *Tr. p. 52, lines 7-25.*

20. The Loosle Spring, Loosle Spring water rights, spring pump and pumphouse, spring collecting tank, well, well pipeline, well pipeline easements, as defined in Finding No. 17, well pumphouse, well pump, well reservoir, well water rights, and attachments to the foregoing are all permanent improvements to the Property (hereafter collectively referred to as Improvements). *Tr. p. 53, lines 10-22; p. 61, lines 15-25; p. 66, lines 15-19; p. 69, lines 12-17.*

21. The Improvements are appurtenant to the Property, are used beneficially in connection with it and are essential and critical to have the Property and home useable and marketable without a substantial loss in value. *Tr. p. 56, lines 11-23; p. 57, lines 23-25; P. 58, lines 1-5; P. 71, lines 15-23; p. 94, lines 6-24.*

22. The Loosle Spring water and well water and water rights (hereafter collectively referred to as "Water Rights") are appurtenant to the Property, are used beneficially in connection with it and are essential and critical to have a marketable and useable piece of real property and home. *Tr. p. 77, lines 13-16.*

Without the Water Rights and Improvements the home on the Property has no reasonably useable water for culinary purposes and its value would be substantially

reduced. *Tr. p. 60, lines 3-6; p. 61, lines 15-23; p. 74, lines 10-15; p. 75, lines 5-9; p. 104, lines 6-23.*

23. By reason of Loosles' default in one or more of the installments due under the Note, FirstFed caused a Notice of Default to be served upon Loosles. The Notice of Default was recorded in the Office of the Box Elder County, Utah, Recorder on February 2, 1989 in Book 469 at Page 541. The Notice of Default was not cured nor was the obligation and Trust Deed reinstated within the time allowed by law. *Tr. p. 17, lines 10 - Exhibit No. 7.*

24. A Notice of Trustee's Sale dated June 26, 1989 was prepared and by reason of Loosles' failure to cure or reinstate the Trust Deed, FirstFed caused a Trustee's Sale to be held on Tuesday, July 25, 1989 at the Box Elder County Courthouse. *Tr. p. 17, lines 16-17 - Exhibit No. 8.*

25. FirstFed, being the highest bidder therefore, bought the Property secured by the Trust Deed for Sixty-three Thousand Five Hundred and 00/100 Dollars (\$63,500.00). *Tr. p. 21, line 17 - Exhibit No. 23; p. 101, lines 5-7.*

26. FirstFed is presently the owner of the following described real property which they acquired at the Trustee's Sale on July 25, 1989, pursuant to a foreclosure sale against Loosles, who were the prior owners of the property:

Beginning at a point on the West right-of-way line of Utah Highway No. 69 as presently located 1035.33 feet South and 69 feet West from the Northeast corner of Section 22, Township 10 North, Range 2 West, Salt Lake Base and Meridian, thence South 1\*27'30" East along said right-of-way 225.5 feet, thence South 86\*48'30" West 603 feet, thence North 1\*27'30" West 225.5 feet, thence North 86\*48'30" East 603 feet to the point of beginning.

*Tr. p. 21, lines 17 - Exhibit No. 23.*

27. Loosles claim and assert an interest or ownership in the Water Rights and Improvements adverse to the claim of FirstFed, and such claims of Loosles are without any right whatever, and the Loosles have no estate, right, title or interest whatever in said

Water Rights and Improvements or any part thereof. *Tr. p. 62, lines 16-22.*

28. Any claims of Loosles to the Water Rights and Improvements are void and of no effect because the Water Rights and Improvements were pledged by Loosles to FirstFed and then acquired by FirstFed as part of the foreclosure (Trustee's Sale) of the Property. *Exhibit Nos. 6, 7, 8 and 23.*

29. FirstFed and the Property have a great need and necessity for the Water Rights and Improvements and any and all rights and claims of Loosles to Water Rights and Improvements as described are void and of no effect and title should be quieted in the current record title owner of the Property, FirstFed. *Tr. p. 63, lines 3-13.*

30. Good Water Rights and successful culinary wells are very difficult to find and obtain in the Harper Ward area of Box Elder County and there is no city culinary water nearby. *Tr. p. 64 - lines 5-13; p. 105 - lines 2-5.*

31. This decision is binding and is a determination of rights as to the Water Rights and Improvements and other items indicated as between Loosles and FirstFed and not for any rights as to any third parties or other parties not before the Court.

32. There were no documents available at the time of execution of the Trust Deed to further evidence title to the Water Rights other than as referenced in the Trust Deed.

33. The Trust Deed is the determining document with the language cited in Finding Of Fact No. 5 inasmuch as: (a) it applies to improvements on the property either existing or subsequent; (b) it applies and pledges certain kinds of property interests which will occur and which need not be directly located on the Property, such as easements, rights and appurtenances; (c) it includes water and water rights, which often do occur off of the property; and (d) it includes fixtures. *Exhibit No. 6.*

34. The Court finds that the language of the Trust Deed as interpreted and applied to this fact situation and based on the

testimony of the parties and exhibits, as to the intentions of the Loosles, indicates that the Water Rights and Improvements are covered by the language of the Trust Deed and whatever right, title and interest of the Loosles when the Trust Deed was signed and after acquired of the Loosles in and to Water Rights and Improvements and any documents evidencing that right, title and interest is owned by FirstFed by virtue of its purchase at the foreclosure sale. *Exhibit Nos. 6 and 23.*

35. There is no or inadequate evidence that the Loosles ever severed or used their interest in the Well or water from the Well on anything but the Property. *Tr. p. 56, lines 1-6.*

36. There is no or inadequate evidence that the Loosles ever severed or used their interest in the Loosle Spring on anything but the Property. *Tr. p. 36, lines 8-17.*

37. The Loosles' sole reason and intent for the Well, the Improvements and the establishment of the Well water rights was for the improvement and benefit of the Property and is an improvement pledged to FirstFed within the language of the Trust Deed. *Tr. p. 54, lines 19-25; p. 55, lines 1-25; p. 56, lines 1-6.*

38. The Loosles were interested in having two (2) sources of water to serve the Property, and both sources were pledged to FirstFed and any and all interest in said Water Rights and Improvements now belong to FirstFed and are part of the Property. *Tr. p. 46-49; p. 53, lines 10-22; p. 54, lines 19-22; p. 56 lines 1-6, 11-23; p. 57, lines 23-25; P. 58, lines 1-5; p. 61, lines 15-25; p. 66, lines 15-19; Tr. p. 69, lines 12-17; P. 71, lines 15-23; p. 94, lines 6-24.*

EXHIBIT "E"

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR THE COUNTY OF BOX ELDER

MARLIN K. LOOSLE and  
THERESA L. LOOSLE,

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS & LOAN  
ASSOCIATION OF LOGAN, ALL PRO  
REAL ESTATE INCORPORATED, a Utah  
Corporation, QUALITY BUILDERS  
INCORPORATED, a Utah Corporation,  
and WILLIAM L. PACKER dba QUALITY  
BUILDERS,

Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Civil No. 890000213CA

This matter came on for hearing at 10:00 o'clock a.m. on Friday, June 15, 1990, in the Court Room in the County Courthouse at Brigham, Box Elder County, Utah, the Honorable F. L. Gunnell presiding. The matter in issue was Defendant First Federal Savings and Loan Association of Logan's Complaint dated March 8, 1990, originally filed as Civil No. 900000129, now consolidated with Civil No. 890000213CA. The Plaintiffs were present in person and were represented by their counsel, Dale M. Dorius, and Defendant, First Federal Savings & Loan Association of Logan, was present and represented by its counsel, Olson & Hoggan, Miles P. Jensen, and the parties having called certain witnesses, introduced certain exhibits, and having made certain arguments to the Court, and the Court being fully advised in the matter, and having heard the

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Case No. 890000213-57

AUG 1 1990

testimony, reviewed the exhibits and other documents on file, and having issued its oral decision from the Bench, the Court hereby makes the following:

#### FINDINGS OF FACT

1. Plaintiffs Marlin K. Loosle and Theresa L. Loosle (hereafter "Loosles") are subject to the jurisdiction of this Court.

2. Loosles acquired the following described real property (hereafter the "Property") on September 16, 1980:

Beginning at a point on the West right-of-way line of Utah Highway No. 69 as presently located 1035.33 feet South and 69 feet West from the Northeast corner of Section 22, Township 10 North, Range 2 West, Salt Lake Base and Meridian, thence South 1\*27'30" East along said right-of-way 225.5 feet, thence South 86\*48'30" West 603 feet, thence North 1\*27'30" West 225.5 feet, thence North 86\*48'30" East 603 feet to the point of beginning.

3. In connection with their purchase of the Property, on or about September 16, 1980, the Loosles, for valuable consideration, made, executed, and delivered to First Federal Savings and Loan Association of Logan (hereafter "FirstFed") that certain Trust Deed Note dated September 16, 1980 in the principal amount of \$67,000.00. By and through the Note, Loosles agreed to pay to FirstFed, or its order, the sum of \$67,000.00, together with interest on the unpaid principal balance thereof at the rate of twelve and three-fourths percent (12.75%) per annum from and after the date of the Note.

4. To secure the payment of the indebtedness evidenced by the Note, Loosles made, executed and delivered to FirstFed that certain Trust Deed dated September 16, 1980 (hereafter "Trust Deed"). The Trust Deed was recorded in the office of the Box Elder County, Utah, Recorder on September 17, 1980 as Entry No. 80733H in Book 336 at Page 382 and pledged the Property.

5. The Trust Deed provided as part of the Property pledged:

TOGETHER with all the improvements now or hereafter erected on the property, and all easements, rights,

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appurtenances, rents (subject however to the rights and authorities given herein to Lender to collect and apply such rents), royalties, mineral, oil and gas rights and profits, water, water rights, and water stock, and all fixtures now or hereafter attached to the property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Deed of Trust; and all of the foregoing, together with said property (or the leasehold estate if this Deed of Trust is on a leasehold) are herein referred to as the "Property": (Emphasis added.)

6. The Property consists of 3.12 acres of real property with a home and outbuildings and is located adjacent to and west of State Highway 69, about 5 miles North of Brigham City, Utah, in the "Harper Ward" area of Box Elder County, Utah.

7. The Property has three (3) springs on it - two (2) of which are north of the home and supply a pond. The springs north of the home tend to be alkaline and salty and have not been used for culinary purposes.

8. The third spring (hereafter "Loosle Spring") on the Property is located in front/east of the home. Loosles filed an Application To Appropriate Water from the Loosle Spring with the State Engineer on May 18, 1988, which Application has not been acted upon by the State Engineer.

9. The Loosle Spring was the only source of culinary water for the home in 1980 when Loosles acquired the Property and was also used for irrigation purposes on the Property.

10. The Loosle Spring was piped under the home to the rear/west side of the home into a pump house and collecting tank where it could be pumped into the home. The pump required electricity to function. The Loosle Spring water could also flow onto the Property and was used for irrigation purposes by Loosles from 1980 through August, 1989 when Loosles vacated the Property.

11. Within a few days after Loosles moved onto the Property in 1980 they found the Loosle Spring water unacceptable for purposes of drinking. Loosles commenced hauling water into the home for drinking and for some cooking. They would obtain and haul

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water from nearby neighbors in containers every two (2) or three (3) days or sometimes once a week, depending on the season and amount of water used. The Loosle Spring continued to supply water for household purposes other than drinking.

12. The Loosle Spring became contaminated and tasted "brackish" whenever there was a heavy rain and became contaminated and tasted "brackish" during each irrigation season (April through October) when water from a nearby ditch seemed to contaminate the spring and increase its flow.

13. In 1982 Loosles, along with Thomas Calvin Thorpe, Vonda J. Thorpe (hereafter collectively Thorpe), Von R. Curtis and Barbara F. Curtis (hereafter collectively Curtis) (all neighbors) entered into a verbal agreement to jointly dig a well on property owned by the Curtis' to serve each of the three (3) parties' homes and the interest of the Loosles in the well was for the benefit of the real property owned by Loosles. The well was dug to the South and East of the Property and across Highway 69. It consisted of the well, a pump, pump house, reservoir and one water line to serve the users. The well drilling was successful and thereafter Thomas C. Thorpe filed a Water Appropriation No. 57296 (29-2775) claim on the well with the office of the State Engineer of the State of Utah. The State Engineer approved the well application for the use, among others, of three (3) families (domestic plus .25 acres irrigation per family) on September 17, 1982.

14. Thorpes, Loosles and Curtis' completed piping of the water from the well to each of their properties, including the Property, in late 1982 or early 1983.

15. The well and well water right is now the only water right available in connection with the Property which is useable year-round for culinary purposes and which is piped underground to serve the same and the plumbing for the home on the Property is designed so as to be able to use water from the well. The well water serves the Property and home by gravity flow and requires no pumping and no electricity to be used.

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16. The pipeline from the well is initially a four inch (4") line covered by a protective casing and is 4-5 feet deep as it goes West from the well to Highway 69. The line then goes underneath Highway 69. On the West side of Highway 69 the pipeline splits into one (1) line to serve Thorpe (further to the West) and one (1) line to serve the Property (to the North). When it divides to serve Thorpe and the Property, the line to the Property is a two inch (2") line 4-5 feet deep covered by sand and other soil materials to protect it from damage from rocks.

17. The well pipeline crosses property originally owned by Curtis for which there is a deeded easement in favor of Loosles evidenced by that Quit Claim Deed dated July 8, 1986 and recorded July 8, 1986 in Book 420 at Page 823 in the Office of the Recorder of Box Elder County, Utah. The well pipeline then traverses property owned by Thorpe and for which there was agreement that Thorpe would give Loosles a written deeded easement, although there is no evidence such an easement has been executed and delivered. The well pipeline from the well to the Property and home was dug with the approval and help of Curtis and Thorpe.

18. The well pipeline connects to the line to the pumphouse and to the home on the Property and has a valve system so the well water can be used in the home and/or to irrigate, and alternatively, by switching a valve, the Loosle Spring water can be used in the home and/or to irrigate.

19. Since late 1982 or early 1983 Loosles have not hand carried water into the home and the well water has been used daily since then and has been the exclusive source of domestic/culinary water.

20. The Loosle Spring, Loosle Spring water rights, spring pump and pumphouse, spring collecting tank, well, well pipeline, well pipeline easements, as defined in Finding No. 17, well pumphouse, well pump, well reservoir, well water rights, and attachments to the foregoing are all permanent improvements to the Property (hereafter collectively referred to as Improvements).

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21. The Improvements are appurtenant to the Property, are used beneficially in connection with it and are essential and critical to have the Property and home useable and marketable without a substantial loss in value.

22. The Loosle Spring water and well water and water rights (hereafter collectively referred to as "Water Rights") are appurtenant to the Property, are used beneficially in connection with it and are essential and critical to have a marketable and useable piece of real property and home. Without the Water Rights and Improvements the home on the Property has no reasonably useable water for culinary purposes and its value would be substantially reduced.

23. By reason of Loosles' default in one or more of the installments due under the Note, FirstFed caused a Notice of Default to be served upon Loosles. The Notice of Default was recorded in the Office of the Box Elder County, Utah, Recorder on February 2, 1989 in Book 469 at Page 541. The Notice of Default was not cured nor was the obligation and Trust Deed reinstated within the time allowed by law.

24. A Notice of Trustee's Sale dated June 26, 1989 was prepared and by reason of Loosles' failure to cure or reinstate the Trust Deed, FirstFed caused a Trustee's Sale to be held on Tuesday, July 25, 1989 at the Box Elder County Courthouse.

25. FirstFed, being the highest bidder therefore, bought the Property secured by the Trust Deed for Sixty-three Thousand Five Hundred and 00/100 Dollars (\$63,500.00).

26. FirstFed is presently the owner of the following described real property which they acquired at the Trustee's Sale on July 25, 1989, pursuant to a foreclosure sale against Loosles, who were the prior owners of the property:

Beginning at a point on the West right-of-way line of Utah Highway No. 69 as presently located 1035.33 feet South and 69 feet West from the Northeast corner of Section 22, Township 10 North, Range 2 West, Salt Lake Base and Meridian, thence South 1\*27'30" East along said right-of-way 225.5 feet, thence South 86\*48'30" West 603

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feet, thence North 1\*27'30" West 225.5 feet, thence North 86\*48'30" East 603 feet to the point of beginning.

27. Loosles claim and assert an interest or ownership in the Water Rights and Improvements adverse to the claim of FirstFed, and such claims of Loosles are without any right whatever, and the Loosles have no estate, right, title or interest whatever in said Water Rights and Improvements or any part thereof.

28. Any claims of Loosles to the Water Rights and Improvements are void and of no effect because the Water Rights and Improvements were pledged by Loosles to FirstFed and then acquired by FirstFed as part of the foreclosure (Trustee's Sale) of the Property.

29. FirstFed and the Property have a great need and necessity for the Water Rights and Improvements and any and all rights and claims of Loosles to Water Rights and Improvements as described are void and of no effect and title should be quieted in the current record title owner of the Property, FirstFed.

30. Good Water Rights and successful culinary wells are very difficult to find and obtain in the Harper Ward area of Box Elder County and there is no city culinary water nearby.

31. This decision is binding and is a determination of rights as to the Water Rights and Improvements and other items indicated as between Loosles and FirstFed and not for any rights as to any third parties or other parties not before the Court.

32. There were no documents available at the time of execution of the Trust Deed to further evidence title to the Water Rights other than as referenced in the Trust Deed.

33. The Trust Deed is the determining document with the language cited in Finding Of Fact No. 5 inasmuch as: (a) it applies to improvements on the property either existing or subsequent; (b) it applies and pledges certain kinds of property interests which will occur and which need not be directly located on the Property, such as easements, rights and appurtenances; (c)

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it includes water and water rights, which often do occur off of the property; and (d) it includes fixtures.

34. The Court finds that the language of the Trust Deed as interpreted and applied to this fact situation and based on the testimony of the parties and exhibits, as to the intentions of the Loosles, indicates that the Water Rights and Improvements are covered by the language of the Trust Deed and whatever right, title and interest of the Loosles when the Trust Deed was signed and after acquired of the Loosles in and to Water Rights and Improvements and any documents evidencing that right, title and interest is owned by FirstFed by virtue of its purchase at the foreclosure sale.

35. There is no or inadequate evidence that the Loosles ever severed or used their interest in the Well or water from the Well on anything but the Property.

36. There is no or inadequate evidence that the Loosles ever severed or used their interest in the Loosle Spring on anything but the Property.

37. The Loosles' sole reason and intent for the Well, the Improvements and the establishment of the Well water rights was for the improvement and benefit of the Property and is an improvement pledged to FirstFed within the language of the Trust Deed.

38. The Loosles were interested in having two (2) sources of water to serve the Property, and both sources were pledged to FirstFed and any and all interest in said Water Rights and Improvements now belong to FirstFed and are part of the Property.

From the foregoing Findings of Fact, the Court now makes and enters the following:

#### CONCLUSIONS OF LAW

1. First Federal Savings And Loan Association Of Logan (hereafter FirstFed) is presently the owner of the following described real property (hereafter the Property) which they acquired at the Trustee's Sale on July 25, 1989, pursuant to a

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foreclosure sale against Marlin K. Loosle and Theresa L. Loosle (hereafter Loosles), who were the prior owners of the Property:

Beginning at a point on the West right-of-way line of Utah Highway No. 69 as presently located 1035.33 feet South and 69 feet West from the Northeast corner of Section 22, Township 10 North, Range 2 West, Salt Lake Base and Meridian, thence South 1\*27'30" East along said right-of-way 225.5 feet, thence South 86\*48'30" West 603 feet, thence North 1\*27'30" West 225.5 feet, thence North 86\*48'30" East 603 feet to the point of beginning.

2. The Trust Deed is the determining document with the language cited in Finding Of Fact No. 5 inasmuch as it applies to improvements on the property either existing or subsequent; inasmuch as it applies and pledges certain kinds of property interests which will occur and not be located on the Property, such as easements, rights and appurtenances; it includes water and water rights, which often do occur adjacent to or nearby the Property and for fixtures.

3. Based on the intention of Loosles and the language of the Trust Deed, whatever right, title and interest then and now of the Loosles in and to the Loosle Spring (including but not limited to the Application To Appropriate dated May 18, 1988, Application No. A63206) and in any documents evidencing any right, title, interest or claim is owned by and vested in FirstFed.

4. Based on the intention of Loosles and the language of the Trust Deed, whatever right, title and interest of Loosles in the well, well water, easements and improvements (including but not limited to rights to use of a share of the well under Appropriation No. 57296 (29-2775) and in any documents evidencing any right, title, interest or claim in said well, well water, easements and improvements is owned by and vested in FirstFed.

5. The Loosles' sole reason for the Well, easements and the improvements to the water system and the establishment of the Well water rights was for the improvement and benefit of the Property.

6. The Loosle Spring, spring pump and pumphouse, spring collecting tank, well, well pipeline, well pipeline easements, well

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pumphouse, well pump, well reservoir, well water rights, and improvements and attachments to the foregoing are all permanent improvements to the Property (hereafter collectively referred to as Improvements).

7. The Improvements are appurtenant to the Property, are used beneficially in connection with it and are essential and critical to have the Property and home useable and marketable without a substantial loss in value.

8. The Loosle Spring water and well water (hereafter collectively referred to as "Water Rights") are appurtenant to the Property, are used beneficially in connection with it and are essential and critical to the use and marketing of the Property and home. Without the Water Rights and Improvements the home on the Property has no reasonably useable water for culinary purposes and its value would be substantially reduced.

9. Any and all rights and claims of Loosles to Water Rights and Improvements as described are null and void and of no effect and title should be quieted in the current record title owner of the Property, FirstFed.

10. The Court finds that the language of the Trust Deed as interpreted and applied to this fact situation and based on the testimony of the parties and exhibits, as to the intentions of the Loosles, indicates that the Water Rights and Improvements are covered by the language of the Trust Deed and whatever right, title and interest of the Loosles when the Trust Deed was signed and after acquired of the Loosles in and to Water Rights and Improvements and any documents evidencing that right, title and interest is owned by FirstFed by virtue of its purchase at the foreclosure sale.

11. The Loosles' sole reason and intent for the Well, the Improvements and the establishment of the Well water rights was for the improvement and benefit of the Property and is an improvement pledged to FirstFed within the language of the Trust Deed.

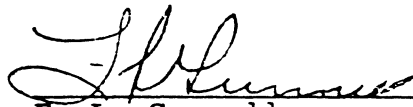
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12. The claims, right, title and interest of FirstFed in and to said Water Rights and Improvements is superior, free and clear of any title or claim of Loosles and all claims of Loosles are null and void and Loosles should be decreed to have no estate in, interest in, lien or encumbrance upon or right of use or sale of said Water Rights and Improvements.

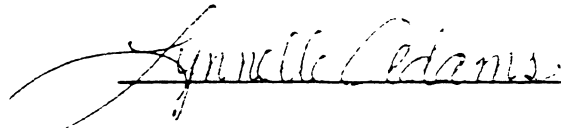
13. Loosles should be forever barred, enjoined and restrained from making or asserting any claim or interest in or to FirstFed's Water Rights and Improvements or clouding any portion thereof or in any way questioning, disturbing or attempting to disturb or interfere with the referenced Water Rights and Improvements.

DONE in open Court this 15th day of June, 1990 and signed in open Court this 1 day of ~~July~~<sup>Aug.</sup>, 1990.

  
F. L. Gunnell  
District Court Judge

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered an exact copy of the foregoing Findings Of Fact And Conclusions Of Law to Plaintiffs' Attorney, Dale M. Dorius, at P. O. Box U, 29 South Main Street, Brigham City, Utah 84302, this 16th day of July, 1990.



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I, CERTIFY THAT THE FOREGOING  
IS A TRUE AND CORRECT COPY  
OF THE ORIGINAL FILED IN FIRST  
DISTRICT COURT COA ELDER.

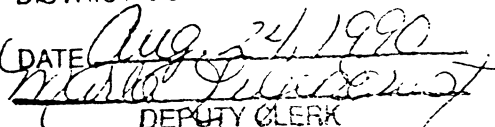
(DATE Aug. 24, 1990  
  
DEPUTY CLERK



EXHIBIT "F"

EXHIBIT "F"

Miles P. Jensen (#1686)  
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Telephone: 752-1551

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR THE COUNTY OF BOX ELDER

MARLIN K. LOOSLE and  
THERESA L. LOOSLE,

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS & LOAN  
ASSOCIATION OF LOGAN, ALL PRO  
REAL ESTATE INCORPORATED, a Utah  
Corporation, QUALITY BUILDERS  
INCORPORATED, a Utah Corporation,  
and WILLIAM L. PACKER dba QUALITY  
BUILDERS,

Defendants.

JUDGMENT AND DECREE

Civil No. 890000213CA

This matter came on for hearing at 10:00 o'clock a.m. on Friday, June 15, 1990, in the Court Room in the County Courthouse at Brigham, Box Elder County, Utah, the Honorable F. L. Gunnell presiding. The matter in issue was Defendant First Federal Savings and Loan Association of Logan's Complaint dated March 8, 1990, originally filed as Civil No. 900000129, now consolidated with Civil No. 890000213CA. The Plaintiffs were present in person and were represented by their counsel, Dale M. Dorius, and Defendant, First Federal Savings & Loan Association of Logan, was present and represented by its counsel, Olson & Hoggan, Miles P. Jensen, and the parties having called certain witnesses, introduced certain exhibits, and having made certain arguments to the Court, and the Court being fully advised in the matter, and having heard the

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Date 11/1/90 Roll No. 14

Case No. 890000213-58

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testimony, reviewed the exhibits and other documents on file, and having issued its oral decision from the Bench, and having heretofore made and entered its Findings of Fact and Conclusions of Law, the Court hereby makes the following:

JUDGMENT AND DECREE

It is hereby ORDERED, ADJUDGED and DECREED as follows:

1. First Federal Savings And Loan Association Of Logan (hereafter FirstFed) is presently the owner of the following described real property (hereafter the Property) which they acquired at a Trustee's Sale on July 25, 1989, pursuant to a Trust Deed foreclosure against Marlin K. Loosle and Theresa L. Loosle (hereafter Loosles), who were the prior owners of the Property:

Beginning at a point on the West right-of-way line of Utah Highway No. 69 as presently located 1035.33 feet South and 69 feet West from the Northeast corner of Section 22, Township 10 North, Range 2 West, Salt Lake Base and Meridian, thence South 1\*27'30" East along said right-of-way 225.5 feet, thence South 86\*48'30" West 603 feet, thence North 1\*27'30" West 225.5 feet, thence North 86\*48'30" East 603 feet to the point of beginning.

2. Pursuant to a loan from FirstFed to Loosles, Loosles made, executed and delivered to FirstFed that certain Trust Deed dated September 16, 1980 (hereafter Trust Deed) and recorded in the Office of the Box Elder County, Utah, Recorder on September 17, 1980 as Entry No. 80733H in Book 336 at Page 382 which Trust Deed was the basis for the foreclosure and Trustee's Sale above described and which Trust Deed pledged:

TOGETHER with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents (subject however to the rights and authorities given herein to Lender to coollect and apply such rents), royalties, mineral, oil and gas rights and profits, water, water rights, and water stock, and all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Deed of Trust; and all of the foregoing, together with said property (or the leasehold estate if this Deed of Trust is on a leasehold) are herein referred to as the "Property": (Emphasis added.)

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3. The language of the Trust Deed cited in paragraph 2 applies to improvements on the property either existing or subsequent; applies and pledges certain kinds of property interests which will occur and not be located on the Property, such as easements, rights and appurtenances - includes water and water rights, which often do occur adjacent to or nearby the Property and includes fixtures.

4. Based on the intention of Loosles and the language of the Trust Deed, whatever right, title and interest then and now of the Loosles in and to the Loosle Spring (including but not limited to the Application To Appropriate dated May 18, 1988, Application No. A63206) and in any documents evidencing any right, title, interest or claim is owned by and vested in FirstFed.

5. Based on the intention of Loosles and the language of the Trust Deed, whatever right, title and interest of Loosles in the well, well water, easements and improvements (including but not limited to rights to use of a share of the well under Appropriation No. 57296 (29-2775) and in any documents evidencing any right, title, interest or claim in said well, well water, easements and improvements is owned by and vested in FirstFed.

6. The Loosles' sole reason for the Well, easements and the improvements to the water system and the establishment of the Well water rights was for the improvement and benefit of the Property.

7. The Loosle Spring, spring pump and pumphouse, spring collecting tank, well, well pipeline, well pipeline easements, well pumphouse, well pump, well reservoir, well water rights, and improvements and attachments to the foregoing are all permanent improvements to the Property (hereafter collectively referred to as Improvements).

8. The Improvements are appurtenant to the Property, are used beneficially in connection with it and are essential and critical to have the Property and home useable and marketable without a substantial loss in value.

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9. The Loosle Spring water and well water (hereafter collectively referred to as "Water Rights") are appurtenant to the Property, are used beneficially in connection with it and are essential and critical to the use and marketing of the Property and home. Without the Water Rights and Improvements the home on the Property has no reasonably useable water for culinary purposes and its value would be substantially reduced.

10. Any and all rights and claims of Loosles to Water Rights and Improvements as described are null and void and of no effect and title is hereby quieted in the current record title owner of the Property, FirstFed.

11. The Court finds that the language of the Trust Deed as interpreted and applied to this case and based on the testimony of the parties and exhibits, as to the intentions of the Loosles, indicates that the Water Rights and Improvements are covered by the language of the Trust Deed and whatever right, title and interest of the Loosles when the Trust Deed was signed and any and all after acquired right, title and interest of the Loosles in and to Water Rights and Improvements and any documents evidencing that right, title and interest is owned by FirstFed by virtue of its purchase at the Trustee's Sale described in paragraph 1, above.

12. The Loosles' sole reason and intent for the Well, the Improvements and the establishment of the Well water rights was for the improvement and benefit of the Property and is an improvement pledged to FirstFed within the language of the Trust Deed.

13. The claims, right, title and interest of FirstFed in and to said Water Rights and Improvements is superior, free and clear of any title or claim of Loosles and all claims of Loosles are null and void and Loosles are hereby decreed to have no estate in, interest in, lien or encumbrance upon or right of use or sale of said Water Rights and Improvements.


14. Loosles are forever barred, enjoined and restrained from making or asserting any claim or interest in or to FirstFed's Water Rights and Improvements or clouding any portion thereof or in any

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way questioning, disturbing or attempting to disturb or interfere with the referenced Water Rights and Improvements.

DONE in open Court the 15th day of June, 1990 and signed this 1 day of ~~July~~<sup>Aug</sup>, 1990.

  
F. L. Gunnell  
District Court Judge

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered an exact copy of the foregoing Findings Of Fact And Conclusions Of Law to Plaintiffs' Attorney, Dale M. Dorius, at P. O. Box U, 29 South Main Street, Brigham City, Utah 84302, this 16th day of July, 1990.

MPJ/1  
loosle.jd

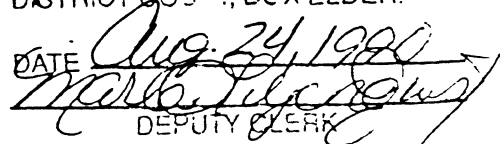


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I, CERTIFY THAT THE FOREGOING  
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DATE

Aug. 24, 1990  
  
DEPUTY CLERK