

1990

Marlin K. Loosle and Theresa L. Loosle v. First Federal Savings & Loan Association of Logan and Hilliam Abstracting and Insurance Agency, Trustee : Brief of Appellant

Utah Supreme Court

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Miles P. Jensen; Attorney for Respondents.

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UTAH SUPREME COURT
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BRIEF

IN THE SUPREME COURT, STATE OF UTAH

MARLIN K. LOOSLE AND
THERESA L. LOOSLE,

Plaintiffs and Appellants,

vs.

Case No. 900534

FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN and
HILLIAM ABSTRACTING AND
INSURANCE AGENCY, Trustee,

Defendants and Appellees.

BRIEF OF APPELLANT

Appeal from the civil Summary Judgment entered by final
order by the Honorable F. L. GUNNELL, District Judge of the First
District Court for Box Elder County, State of Utah.

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Argument Classification 14.b.

FILED

JUL 29 1991

CLERK SUPREME COURT,
UTAH

MARLIN K. LOOSLE AND
THERESA L. LOOSLE,

VS.

FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN and
HILLIAM ABSTRACTING AND
INSURANCE AGENCY, Trustee,

Appeal from the civil Summary Judgment entered by final order by the Honorable F. L. GUNNELL, District Judge of the First District Court for Box Elder County, State of Utah.

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Argument Classification 14.b.

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STATEMENT OF JURISDICTION

The authority which confers jurisdiction on the Court to hear this Appeal is Article VIII, Section 3, Utah State Constitution; Utah Code Annotated, 78-2-2, Rule 3(i), Utah Rules of Appellate Procedure.

ISSUES

1. Whether the trial court erred by granting summary judgment in favor of defendant\respondents after making a specific finding that there were genuine issues of material fact which should be decided by a jury.

The standard of review to be applied to this issue is correctness without deference to the trial court, because the trial court, when faced with a motion for summary judgment must follow the relevant Utah civil procedure rule. Rule 56(c) of U.R.C.P. provides that the "judgment sought shall be rendered forthwith if the pleadings, depositions... and (affidavits)... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". If there is any issue of material fact, the court, as a matter of law, cannot grant a summary judgment motion.

2. Whether the trial court erred in its decision that as a matter of law, plaintiff\appellant could not sustain or establish the requisite elements of its case and therefore, did not allow

the jury to make the ultimate finding.

The standard of review to be applied to this issue is the correctness standard. In Re Infant Anonymous, 760 P.2d 916 (Utah Ct. App. 1988).

DETERMINATIVE STATUTES AND RULES

Utah Const. art. I section 10:

"In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

Utah Code Annotated section 78-21-2 (1953):

"All questions of fact, where the trial is by jury, other than those mentioned in the next section (78-21-3), are to be decided by the jury, and all evidence thereon is addressed them except when otherwise provided."

Utah Code Annotated section 78-21-1 (1953):

"In actions for the recovery of specific real or personal property, with or without damages or for money claimed for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered."

Rule 38(a), Utah R. Civ. P.:

"(a) Right preserved. The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties."

STATEMENT OF THE CASE

a. Nature of the case

This is an appeal from a Summary Judgment and Judgment and Decree signed by the Honorable F. L. GUNNELL, District Judge in the First Judicial District Court of Box Elder County. Said Judgments have been declared final judgments by the Court pursuant to Rule 54(b).

b. Course of the Proceedings and Disposition at the trial Court

Marlin and Theresa Loosle brought this action in the first District Court of Box Elder County to quiet title in their property against the claimed right of Defendants. Both parties moved for Summary Judgment, which Trial Court Judge Gunnell in his Findings and Ruling decided in favor of Defendant First Federal Savings and Loan and Hillam Abstracting And Insurance Agency, Trustee.

c. Relevant Facts

Appellants were owners of a house that was purchased with financing through defendant\respondent. After purchasing the home, appellants drilled a new well for water to supplement the existing water supply. 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.

Appellants brought this action because they felt they were misrepresented by the defendant\respondent's first appraisal in 1980.

SUMMARY OF ARGUMENT

The plaintiffs established that the property in question, despite the improvements made and the fact that all property in that area rose in value, was appraised for approximately twenty-four thousand dollars less than the appraisal at the time of their purchase eight years earlier. Both appraisals were done by the defendant\respondent, who was also the lender. This lead plaintiffs to believe that their detrimental reliance on defendant\respondent coupled with negligent misrepresentation by defendant\respondent caused them monetary damages. Utah courts have established that when a person or entity is in a position of supposed expertise where it should be obvious that the person asking will rely on the information requested and furnished, that person or entity is often held liable under the doctrine of "negligent misrepresentation".

Whether the well that the plaintiff's and their neighbors drilled for water which ultimately provided culinary water for the property in question was appurtenant to the property is an ultimate fact upon which the jury would base a decision as to who should prevail in the matter concerning the well being appurtenant to the property. Ultimate facts are not to be withheld from the jury. This involves a right to a jury trial

which was denied by the court granting summary judgment.

Summary judgment is not appropriate where there is a question of fact raised by the pleadings and affidavits that is material to the resolution of the case. Summary judgment was not appropriate here because there was an issue of material fact concerning negligent misrepresentation by the defendant\respondent and whether the well drilled by plaintiff and his neighbors is appurtenant to the property as raised by the pleadings, affidavits and depositions.

ARGUMENT

I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING A SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS WHEN THERE EXISTED MATERIAL FACTS CONCERNING NEGLIGENT MISREPRESENTATION BY DEFENDANT AND A QUESTION AS TO WHETHER THE WELL DUG BY PLAINTIFF AND HIS NEIGHBORS WAS APPURTENANT TO THE PROPERTY.

The plaintiffs in this case had a right to a jury trial because there is a question as to whether the defendant had negligently misrepresented the value of the property the plaintiff purchased at the time of purchase. The Utah Code states in pertinent part:

"In actions for the recovery of specific real or personal property, with or without damages... an issue of fact may be tried by a jury unless a jury trial is waived..."
Utah Code Annot. section 78-21-1 (1953).

The Utah Supreme Court interpreted the same provision and had this to say:

"... It is our opinion that the above language, if given a reasonable and rational construction, must be interpreted as

declaring that all issues of fact relating to possession and right to possession of specific real or personal property may be determined by a jury unless a jury trial is waived..." Holland v Wilson, 8 Utah 2d 11, 14-15, 327 P.2d 250, 252 (1958).

More recently the Utah Supreme Court has said:

"... There is a right to a jury trial on all questions of fact in any action to determine the right to possession of real property. Holland v Wilson, 8 Utah 2d 11, 14-15, 327 P.2d 250, 252 (1958); see Utah Code Ann. section 78-21-1 (1987); Utah R. Civ. P. 38(a). The present case is clearly one to determine the right to possess real property. Therefore, the Hansens were entitled to have the question of the location of the corner determined by the judge only if that question is one of law." Hansen v Stewart, 761 P.2d 14, 15 (Utah 1988).

In the present case, 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. In other states the doctrine of negligent misrepresentation has been applied to banks. In California one court in Francis v Eisenmayer, 340 P.2d 54 (Cal. App. 1959), said:

"...Liability is predicated on the alleged fact that the plaintiffs have been misled by the bank's agent to their prejudice. A cause of action in tort may arise against a bank for misrepresentation of its duties and functions independent of any contractual relationship."

The trial court, when faced with a motion for summary judgment, must follow the relevant Utah civil procedure rule. Rule 56(c) of U.R.C.P. provides that the "judgment sought shall be rendered forthwith if the pleadings, depositions... and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, according to the rule, if there is any

genuine issue of material fact, the court, as a matter of law, cannot grant a summary judgment motion.

The court's role in determining whether a motion for summary judgment should be granted has been further defined and documented in recent Utah case law. According to the Utah Supreme Court, in Barlow Society v Commercial Security Bank, 723 P.2d 398 (Utah 1986); Durnham v Margetts, 571 P.2d 1332 (Utah 1977); Brower v Brown, 744 P.2d 1337 (Utah 1987), the following guidelines are to be strictly adhered to: (1) the Court must construe the facts in a light most favorable to the non-moving party, (2) summary judgment should only be granted when the matter is clear and there is no room for doubt, and (3) if there is a statute governing the exercise of summary judgment in a particular context, the statute should be followed.

Relevant to the preceding guidelines, the Utah Supreme Court in the recent case of Chapman v Primary Children's Hospital, 784 P.2d 1181 (Utah 1989), stated that "close calls" on factual issues "are for juries, not judges, to make." Id. at 1186. Thus, summary judgment is not appropriate unless the parties affidavits and other instruments make it clear that no genuine issue remains as to matters of material fact.

These guidelines are significant to the present case. The facts to this case are not clear to the point that they leave no doubt. There is a definite question as to whether the defendant negligently misrepresented the first appraisal for the value of the land. It is the plaintiffs contention that the defendant may

have represented an inflated value of the property at the time the plaintiff was securing a loan in order to make more money in interest. It is hard to see how after making many improvements to the land over an eight year stretch the value of it could decrease by approximately \$24,000.00 despite the fact that other property in the area had all increased in value.

Also at issue in this case is ownership and water rights connected to a well that plaintiff and his neighbors drilled on a neighbors property. Defendants claim that the ownership in the well is appurtenant to the property and therefore, goes with the property. Plaintiffs contend differently.

Defendants base their claim on the fact that the language contained in the deed says that all 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... shall become part of, or go with, the property.

Defendants further claim that without the rights to the water coming from this well, the property would suffer a great loss in value because there would not be any usable culinary water to the house. They seem to be forgetting, however, that when plaintiffs purchased the home, they purchased the same culinary water rights that would exist, and did in fact exist, before the well. And they purchased the home for approximately \$24,000.00 more than the home is now worth with the rights to the

new well.

Plaintiffs contend that the rights to the well can and should be separate from the rest of the property. In Utah, water rights can be separated from the land upon which they have been used and are considered independent of any rights in land. Whitmore v Salt Lake City, 89 Utah 387, 57 P.2d 726 (1936); but the water user must connect himself by title to the right he claims. Salina Creek Irr. Co. v Salina Stock Co., 7 Utah 456, 27 p. 578 (1891), aff'd 163 U.S. 109 (1896). The user must either receive the right through deed or similar instrument, or petition with the State Engineer for appropriation of the right. Utah Code Ann. sections 73-3-1 and 73-5-13 (1953); Salina, supra..

In the present case, the plaintiff has filed for appropriation of the rights to that water with the State Engineer and is at this time still waiting for the results to that petition.

The issue or controversy over whether the defendant negligently misrepresented the value of the property to the plaintiff and the question of whether the rights to the water in the new well are appurtenant to the property are material issues of fact that should be decided by a jury after having testimony and evidence presented to them.

II. SUMMARY JUDGMENT WAS IMPROPER BECAUSE THERE WAS A GENUINE ISSUE OF FACT CONCERNING WHETHER THE PLAINTIFFS HAD ESTABLISHED AND MET THE REQUISITE ELEMENTS CONCERNING THEIR CASE.

In Dugan v Jones, 615 P.2d 1239, the Utah Supreme Court outlined the elements necessary to establish an action in deceit based on fraudulent misrepresentation. The elements outlined are: A representation; concerning a presently existing material fact; which was false; which representor either knew to be false or made recklessly knowing that he had insufficient knowledge upon which to base such representation; for purpose of inducing other party to act upon it; that the other party, acting reasonably and in ignorance of its falsity, did in fact rely upon it; and was thereby induced to act; to his injury and damage. Id. at 1240.

It is a question of fact whether the defendant misrepresented the value of the property at the time of purchase and it is a known fact that the plaintiff suffered damages in the approximate amount of \$24,000.00 not including interest that would also have been paid over time, pushing the amount of damage much higher. It seems, therefore, that if the elements outlined by the Utah Supreme Court in Dugan are not satisfied, there is at least a question as to whether they could be satisfied.

The court in Dugan also held that, "a vendee of real property, in absence of facts putting him on notice, has no duty to investigate to determine whether vendor has misrepresented the area conveyed". Id. at 1240. From this it is evident that at the time of the first appraisal, the plaintiff did not have the necessary responsibility to double check to make sure the defendant was not misrepresenting him. Whether the defendant was

indeed misrepresenting the plaintiff is a fact that must now be decided on by a jury.

In Norton v Blackham, 669 P.2d 857,859 (Utah 1983), the Utah Supreme Court found that "Summary Judgment is appropriate if the pleadings, Affidavits and other submissions of the parties show that no genuine issue of material fact exists..." 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.

Because there are issues of material fact, this case should not have been decided by summary judgment. The Utah Supreme Court set out general parameters further explaining when a motion for summary judgment should and should not be granted in Durnham v Margetts, 571 P.2d 1332 (Utah 1977). In that case the Court said:

"Summary judgment... should not be done on conjecture, but only when the matter is clear; and in the case of doubt, the doubt should be resolved in allowing the challenged party opportunity of at least attempting to prove his right to recover... (U)nless the court is able to conclude that there is no dispute on material facts... the court should not summarily... render judgment... as a matter of law." Id. at 1338. (Emphasis added).

The matters in this case are not clear, and therefore, the outcome of this case should ultimately be decided by a jury.

CONCLUSION

When a person seeks to buy property and has the bank from which he intends to borrow the money do the appraisal, that


person usually trusts that the appraisal is accurate. But when a person buys the property and finds out approximately eight years later that the value of the property has decreased by over 25%, despite many improvements to the property and a general increase in property values in the area, he begins to wonder if the value illustrated by the first appraisal was indeed accurate. This is what has happened in the case at hand.

The plaintiffs in this case, Marlin and Theresa Loosle, contend that they were negligently misrepresented by the defendants and as a result, they suffered damages. Unfortunately, the defendants were granted a summary judgment despite the fact that material issues of fact exist.

Summary judgment is not appropriate if there are issues of material fact, and as has been outlined, there are such issues in this case involving not only the negligent misrepresentation, but also whether the well dug by the plaintiff and his neighbors is appurtenant to the property. Therefore, the outcome of this trial should have been decided by a jury, not the judge on a summary judgment.

The plaintiff respectfully asks that the trial court be reversed and judgment entered in favor of the plaintiff. Alternatively, the plaintiff asks that the Supreme Court reverse the summary judgment granted by the trial court and remand for a new trial based on the material issues that remain unresolved.

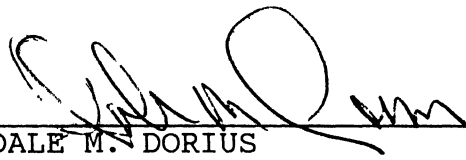
RESPECTFULLY SUBMITTED this 26th day of July, 1991.



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Brigham City, UT 84302

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Appellant to Respondents' attorney, MILES P. JENSEN, at P. O. Box 525, Logan, UT 84321 this 26th day of July, 1991.



DALE M. DORIUS

ADDENDUM

Memorandum Decision dated April 4, 1990.

Findings of Fact and Conclusions of Law dated May 17, 1990.

Judgment and Order dated May 17, 1990.

Findings of Fact and Conclusions of Law dated August 1, 1990.

Judgment and Decree dated August 1, 1990.

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APR 05 1990

DALE M. LOHUIS

Attorney at Law

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

MARLIN K. LOOSLE and THERESA	:	
L. LOOSLE,	:	
Plaintiffs,	:	MEMORANDUM DECISION
	:	
vs	:	Civil No. 890000213
	:	
FIRST FEDERAL SAVINGS & LOAN	:	
ASSOCIATION OF LOGAN and	:	
HILLAM ABSTRACTING AND	:	
INSURANCE AGENCY, Trustee,	:	
Defendants	:	

This matter came before the Court on Defendant's Motion for Summary Judgment. The Court having reviewed the Motion supporting affidavits and reviewed the memorandum filed in connection therewith as well as the opposition thereto along with the affidavit and supporting documents, issues the following MEMORANDUM OPINION:

MEMORANDUM OPINION

In reverse order the Court finds that there may be a genuine issue of a material fact with respect to whether or not the statute of limitations applies to the facts of this case. So, that portion of the Motion for Summary Judgment is Denied.

In the mind of the Court the more clear issue is the question of whether or not there is an issue remaining as to the alleged

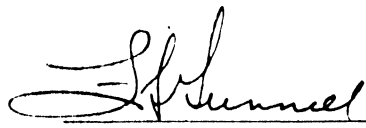
misrepresentation. A review of the file and the material contained in the file indicates the following:

- 1. The financial arrangements as to the purchase price were made prior to any involvement of the bank.
- 2. The banks' involvement was solely that of the lender and the bank was not serving in any fiduciary relationship with the Plaintiff other than in the handling of the money.
- 3. The appraisal made by the bank was made by their agents for their 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 lawsuit.

Applying the foregoing which appear to be uncontroverted facts to the elements which are required to sustain an action based on fraudulent representation as set forth in the case of Dugan v. Jones, 615 P.2d 1239 the Court is of the opinion that the Plaintiff as a matter of law cannot sustain or establish the requisite elements and accordingly the Defendant's Motion for Summary Judgment is Granted.

The Counsel for Defendant to prepare an order in conformance with this opinion.

DATED this 4 day of April, 1990.


F.L. GUNNELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, postage prepaid, to the following:

Dale M. Dorius, Attorney at Law, P.O. Box U, Brigham City, UT 84302
and Miles P. Jensen, OLSON & HOGGAN, Attorney at Law, 56 West
Center, P.O. Box 525, Logan, UT 84321.

DATED this 4th day of April, 1990.


Marla Liljenquist
Deputy Clerk

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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.)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Civil No. 89000213CA

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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REMONTON OFFICE
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P.O. BOX 115
MONTON 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 became 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.

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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 14 day of May, 1990.

/s/
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
Miles P. Jensen

MPJ/2
federal.fof

BRIGHAM DISTRICT

MAY 15 11 26 AM '90

Miles P. Jensen (#1686)
OLSON & HOGGAN
Attorneys at Law
56 West Center
P.O. Box 525
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Telephone (801) 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, 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

Case No. 892220-1

MAY 17 1990

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239 (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 M. 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.


F. L. Gunnell, District Judge

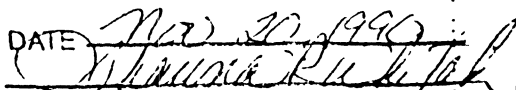
MAILING CERTIFICATE

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 4th day of May, 1990.


Miles P. Jensen

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

DATE May 30, 1990

DEPUTY CLERK

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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, ALL PRO)	
REAL ESTATE INCORPORATED, a Utah)	
Corporation, QUALITY BUILDERS)	
INCORPORATED, a Utah Corporation,)	
and WILLIAM L. PACKER dba QUALITY)	
BUILDERS,)	
)	
Defendants.)	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. 890000213-51

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,

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.

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

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

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.

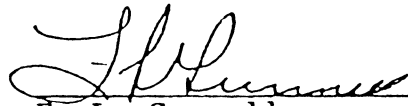
10. The Court finds that the language of the Trust Deed as interpreted and applied to this fact situation and based on the testimony of the parties and exhibits, as to the intentions of the Loosles, indicates that the Water Rights and Improvements are covered by the language of the Trust Deed and whatever 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.

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.

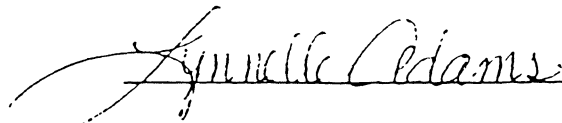
13. Loosles should be forever barred, enjoined and restrained from making or asserting any claim or interest in or to FirstFed's Water Rights and Improvements or clouding any portion thereof or in any way questioning, disturbing or attempting to disturb or interfere with the referenced Water Rights and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

DONE in open Court this 15th day of June, 1990 and signed in open Court this 1 day of ^{Aug.}~~July~~, 1990.


F. L. Gunnell
District Court Judge

CERTIFICATE OF HAND DELIVERY

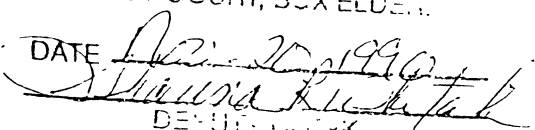
I hereby certify that I hand delivered an exact copy of the foregoing Findings Of Fact And Conclusions Of Law to Plaintiffs' Attorney, Dale M. Dorius, at P. O. Box U, 29 South Main Street, Brigham City, Utah 84302, this 16th day of July, 1990.



MPJ/1
loosle.fof

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

DATE


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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.

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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MICROFILMED

Case No. 890000213-58

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 collect 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.)

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

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 ^{Aug}~~July~~, 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.

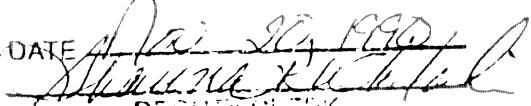


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loosle.jd

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

DATE Aug 16, 1990

DEPUTY CLERK