

2001

# Melvin Dale Peterson v. Nick J. Nikols : Brief of Appellant

Utah Court of Appeals

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Donna M. Trotter; McKeachnie, Allred, McClellan .

John Walsh; Attorney at Law.

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## Recommended Citation

Brief of Appellant, *Melvin Dale Peterson v. Nick J. Nikols*, No. 20010403 (Utah Court of Appeals, 2001).  
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IN THE UTAH COURT OF APPEALS

-----000000000000-----

MELVIN DALE PETERSON and  
DARLENE PETERSON,

Plaintiffs and Appellees,

vs.

NICK J. NIKOLS, et al.,

Defendants and Appellants.

;

;

;

;

;

;

DISTRICT COURT CASE  
NO. 990000069

COURT OF APPEALS CASE  
NO. 20010403-CA

PRIORITY 15

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BRIEF OF THE APPELLANT

-----

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

DUCHESNE COUNTY, STATE OF UTAH

ROOSEVELT DEPARTMENT

-----

HONORABLE JOHN R. ANDERSON

PRESIDING

---

DONNA M. TROTTER  
McKEACHNIE, ALLRED,  
McCLELLAN & TROTTER  
855 EAST 200 NORTH (112-10)  
ROOSEVELT, UTAH  
84066

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84109

Telephone: (801) 467-9700

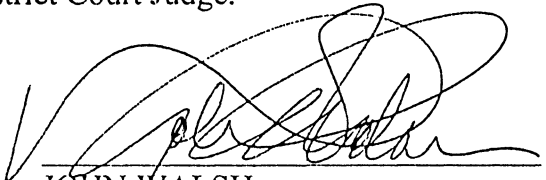
**FILED**  
Utah Court of Appeals

OCT 23 2001

Paulette Stagg  
Clerk of the Court

The previously paid filing fee shall constitute the filing fee in this Second Amended Notice of Appeal as per Order from Judge Anderson, District Court Judge.

Dated this 11<sup>th</sup> day of June, 2001.

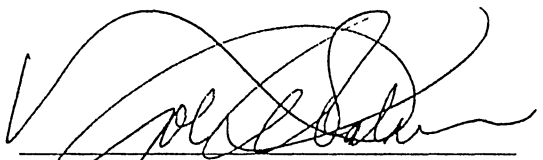


JOHN WALSH  
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing SECOND AMENDED NOTICE OF APPEAL to the Plaintiff by mailing the same to DONNA M. TROTTER, ATTORNEY AT LAW, 855 EAST 200 NORTH, ROOSEVELT, UTAH, 84066.

Dated this 11<sup>th</sup> day of June, 2001.



JOHN WALSH  
ATTORNEY AT LAW

JOHN WALSH  
ATTORNEY AT LAW, #3371  
2319 FOOTHILL DRIVE, SUITE 270  
SALT LAKE CITY, UTAH  
84109  
Telephone: 467-9700

FILED  
DISTRICT COURT  
DUCHESE COUNTY UTAH  
JUN 12 2001  
BY JOANNE McKEL, CLERK  
TWS DEPUTY

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IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT  
IN AND FOR DUCHESE COUNTY  
STATE OF UTAH  
ROOSEVELT DEPARTMENT

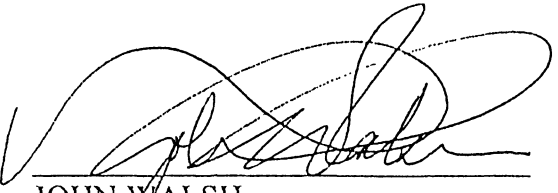
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MELVIN DALE PETERSON and DARLENE PETERSON,	;	<b>SECOND</b>
Plaintiffs,	;	<b>AMENDED NOTICE OF APPEAL</b>
vs.	;	Civil No. 990000069
NICK J. NIKOLS, et al.,	;	Judge John R. Anderson
Defendants.	;	

-----0000000000000000-----

Notice is hereby given that the Defendant, Nick J. Nikols, appeals the Judgment executed and entered on or about November 30<sup>th</sup>, 2000, the Findings of Fact and Conclusions of Law, executed and entered on or about November 30<sup>th</sup>, 2000, Amended Order Per Ruling dated 25<sup>th</sup> day of January, 2001 which was executed and entered in or about February, 2001, the Judgment executed and entered on April 5<sup>th</sup>, 2001 as well as the Corrected Judgment entered and executed by the above referenced court on or about May 31, 2001, and each and every part of the subject ruling by the Trial Court, to the Utah Supreme Court. The Appellant hereby appeals the entire ruling and judgment entered and executed by the Honorable John R. Anderson.

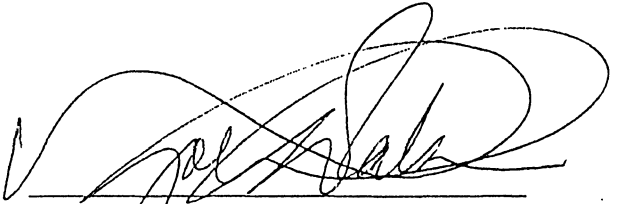
Dated this 2nd day of May, 2001.

  
\_\_\_\_\_  
JOHN WALSH  
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing  
AMENDED NOTICE OF APPEAL to the Plaintiff by mailing the same to DONNA M.  
TROTTER, ATTORNEY AT LAW, 855 EAST 200 NORTH, ROOSEVELT, UTAH, 84066.

Dated this 2nd day of May, 2001.

  
\_\_\_\_\_  
JOHN WALSH  
ATTORNEY AT LAW

JOHN WALSH  
ATTORNEY AT LAW, #3371  
2319 FOOTHILL DRIVE, SUITE 270  
SALT LAKE CITY, UTAH  
84109  
Telephone: 467-9700

---

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT

IN AND FOR DUCHESNE COUNTY

STATE OF UTAH

ROOSEVELT DEPARTMENT

-----0000000000000000-----

MELVIN DALE PETERSON and  
DARLENE PETERSON,

; **AMENDED NOTICE OF APPEAL**

Plaintiffs,

;

vs.

;

Civil No. 990000069

NICK J. NIKOLS, et al.,

;

Judge John R. Anderson


Defendants.

;

-----0000000000000000-----

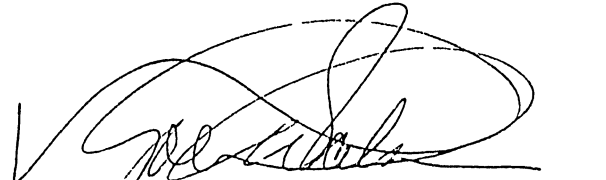
Notice is hereby given that the Defendant, Nick J. Nikols, appeals the Judgment executed and entered on or about November 30<sup>th</sup>, 2000, the Findings of Fact and Conclusions of Law, executed and entered on or about November 30<sup>th</sup>, 2000, Amended Order Per Ruling dated 25<sup>th</sup> day of January, 2001 which was executed and entered on or about February, 2001, and the Judgment executed and entered on April 5<sup>th</sup>, 2001 and each and every part of the subject ruling by the Trial Court, to the Utah Supreme Court. The Appellant hereby appeals the entire ruling and judgment entered and executed by the Honorable John R. Anderson.

Dated this 15th day of March, 2001.

  
\_\_\_\_\_  
JOHN WALSH  
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing to GAYLE F. McKEACHNIE, of McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C. of the foregoing NOTICE OF APPEAL, by mailing the same in the United States Mails, addressed to GAYLE F. McKEACHNIE, of McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P. C., ATTORNEYS AT LAW, 72 NORTH 300 EAST (123-14) ROOSEVELT, UTAH, 84066, this 15<sup>th</sup> day of March, 2001.

  
\_\_\_\_\_  
JOHN WALSH  
ATTORNEY AT LAW

JOHN WALSH  
ATTORNEY AT LAW  
SUITE 270, 2319 FOOTHILL DRIVE  
SALT LAKE CITY, UTAH  
84109  
Telephone: 467-9700

---

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT  
IN AND FOR DUCHESNE COUNTY  
STATE OF UTAH  
ROOSEVELT DEPARTMENT

-----oooooooooooooooo-----

MELVIN DALE PETERSON and	;	
DARLENE PETERSON,		NOTICE OF APPEAL
	;	
Plaintiffs,		
	;	Civil No. 990000069
vs.		
	;	
NICK J. NIKOLS, and ALL UNKNOWN		Judge John R. Anderson
PERSONS WHO HAVE OR CLAIM TO	;	
HAVE ANY RIGHT, TITLE, ESTATE		
LIEN OR INTEREST IN THE PROPERTY	;	
DESCRIBED HEREIN WHICH IS THE		
SUBJECT OF THIS LAWSUIT,	;	
Defendants.	;	

-----oooooooooooooooo-----

Notice is hereby given that the Defendant, Nick J. Nikols, appeals the Judgment executed and entered on or about November 30th, 2000, the Findings of Fact and Conclusions of Law, executed and entered on or about November 30th, 2000, and the Amended Order Per Ruling Dated 25th Day of January, 2001, which was executed and entered on or about February, 2001, and each and every part of the subject ruling by the Trial Court, to the Utah Supreme Court. The Appellant hereby appeals the entire ruling and judgment entered and executed by the Honorable John R. Anderson.



The Court having made its Findings of Fact and entered its Conclusions of Law, and based thereon, the Court hereby,

ORDERS, ADJUGES, AND DECREES that:

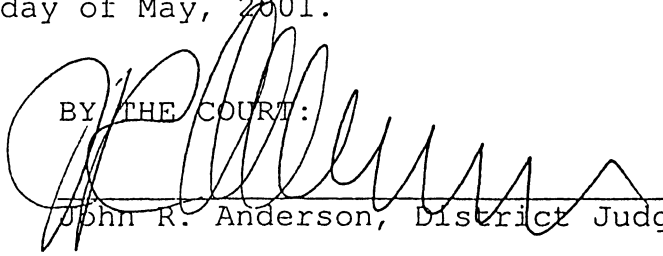
1. The defendants, Nick J. Nikols is awarded Judgment in the amount of \$4,385.00.

2. Defendant, NICK J. NIKOLS, is hereby declared to have no interest in the above described real property and title is hereby quieted in the Plaintiffs, Melvin Dale Peterson and Darlene Peterson as against any claims of the named Defendant, Nick J. Nikols in the following described lands in Duchesne County, State of Utah, more particularly described as follows:

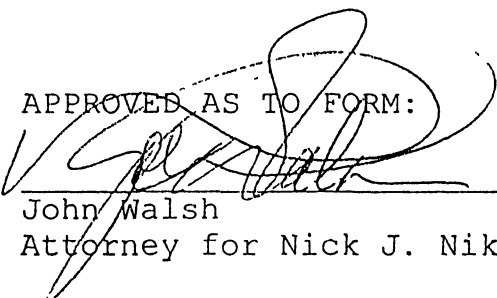
Township 3 South, Range 2 West, Uintah Special Meridian  
Section 23: Lots 11 and 12 (SE 1/4 SE 1/4)

DATED this 31<sup>st</sup> day of May, 2001.

BY THE COURT:

  
John R. Anderson, District Judge

APPROVED AS TO FORM:

  
John Walsh  
Attorney for Nick J. Nikols

FILED  
IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY  
BY \_\_\_\_\_

JOANNE MOORE, CLERK  
BY \_\_\_\_\_ DEPUTY

DONNA M. TROTTER - 8084  
GAYLE F. McKEACHNIE - 2200  
McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.  
Attorneys for Plaintiff  
855 East 200 North (112-10)  
Roosevelt, Utah 84066  
Telephone: (435)722-3928

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY  
STATE OF UTAH, ROOSEVELT DEPARTMENT

---

MELVIN DALE PETERSON and	)	
DARLENE PETERSON,	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
NICK J. NIKOLS, and ALL UNKNOWN	)	CORRECTED
PERSONS WHO HAVE OR CLAIM TO	)	JUDGMENT
HAVE ANY RIGHT, TITLE, ESTATE	)	
LIEN OR INTEREST IN THE PROPERTY	)	
DESCRIBED HEREIN WHICH IS THE	)	
SUBJECT OF THIS LAWSUIT,	)	Civil No. 990000069
	)	
	)	Judge: John R. Anderson
Defendants.	)	

---

This matter having come before the Court on a conference telephone call initiated by Defendants counsel. John Walsh attorney for Defendants and Gayle McKeachnie attorney for Plaintiffs participated.

The Court clarified its previous rulings and Judgment, and that clarification is incorporated herein.

**CERTIFICATE OF MAILING**

I do hereby certify that on the \_\_\_\_\_ day of January, 2001, I mailed, postage prepaid, or delivered by hand, a true and correct copy of the attached document to:


Gayle F. McKeachnie  
Donna M. Trotter  
855 East 200 North (112-10)  
Roosevelt, Utah 84066

By hand

John Walsh  
2319 Foothill Drive, Suite 270  
Salt Lake City, Utah 84109

By mail

Dated this 25<sup>th</sup> day of January, 2001.

  
\_\_\_\_\_  
Deputy Court Clerk  
Eighth Judicial District Court  
Roosevelt Department

In The Eighth Judicial District Court Of Duchesne County  
State of Utah - Roosevelt Department

MELVIN DALE PETERSON and  
DARLENE PETERSON,

Plaintiff,

vs.

NICK J. NIKOLS, and ALL  
UNKNOWN PERSONS WHO  
HAVE OR CLAIM TO HAVE  
ANY RIGHT, TITLE, ESTATE  
LIEN OR INTEREST IN THE  
PROPERTY DESCRIBED  
HEREIN WHICH IS THE  
SUBJECT OF THIS LAWSUIT

Defendants.

**RULING**

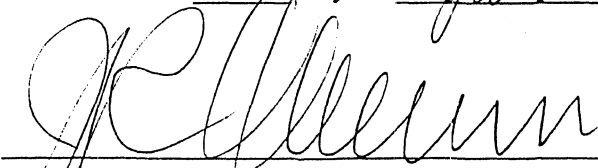
Civil No.990000069

FILED  
DISTRICT COURT  
DUCHESE COUNTY, UTAH  
JAN 25 2001  
JAN 25 2001  
CLERK  
DEPUTY

Before the Court is the Defendant's Motion to Amend or Alter Judgement. The Court has issued its ruling and carefully reviewed the memoranda filed both in support of the Motion to Alter the Judgment and the memoranda issued in opposition. The Court in carefully reviewing the matter will recognize that the Court did make an error by not crediting the defendant with \$4000.00 rather than \$3000.00 in its original calculations in rendering judgment. The judgment will be affirmed in all respects for the reasons set forth in Plaintiff's Memorandum in Opposition to the defendant's motion except for the change in the amount paid by the defendant, and that will be \$4000.00 rather than \$3000.00.

The original judgement of the Court should be modified in order to correct the payment and be consistent with this ruling.

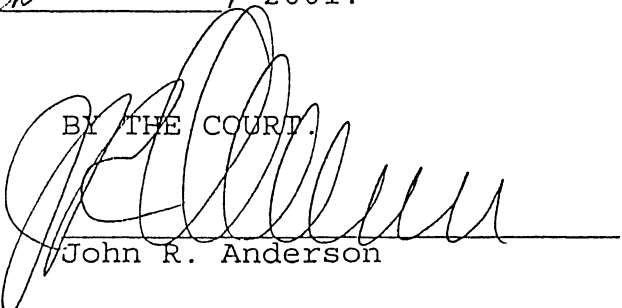
DATED this 25 day of Jan, 2001.

  
\_\_\_\_\_  
John R. Anderson, District Court Judge

Applying the formula from the evidence before the Court, the Court finds the property in its present state could be sold for \$30,000. On that basis, the loss of his bargain, or the loss of the benefit of his bargain under the contract is \$35,000, plus the total of the taxes and the water assessments. The seller has had the use and benefit of \$39,886 from the dates paid, however, seller has had to wait to get marketable title. It is the Court's opinion that the amount retained is not inequitable or exorbitant in view of the Petersons' actual damages, i.e., \$35,507. The Court is of the opinion that \$3,385 should be refunded by Petersons, and no additional amounts paid by Nikols. For reasons heretofore stated on the record, attorney's fees will not be awarded. No costs are awarded. The plaintiff is to prepare findings and judgment.

DATED this 22 day of Feb, 2001.

BY THE COURT.

  
John R. Anderson

percentage value to the amount of the forfeiture, but only can enter into a specific analysis of each case according to its facts.

The language in *Cole v Parker*, 5 Utah 2d 263, 300 P.2d 623(1956) is instructive:

".....absent fraud, the seller is entitled to be credited, in the computation of damage sustained because of the breach of contract, the difference between the contract price and the price for which he can sell the forfeited property."

One of the items set forth in *Perkins v Spencer*, 121 Utah 468, 243 P.2d 446(1952) is the analysis of the loss of an advantageous bargain.

The appraiser who prepared the report which was rejected as evidence by the Court was not present for cross-examination. The only evidence the Court has as to the value of this unique piece of property was the price which Nikols was willing to pay, to wit, \$65,000.

While having no direct bearing on the actual value of the land, the Duchesne County Assessor had listed the property as having a value of about \$25,000 in 1982.

Further from the evidence adduced at trial, Commercial Security Bank was willing to lend \$25,000 as against the value of the real estate without insisting on having the improvements or the buildings insured.

perhaps the door frame had been broken and was hanging, but could be repaired for \$350.

The seller has claimed loss of rents due to the alleged vandalism, but the Court will not allow loss of rents as the seller had a duty to mitigate his damage and could have initiated repairs sufficient to get the property re-rented.

The seller has claimed reimbursement for property tax assessed and Indian water fees assessed during the period of occupancy.

The Court finds these actual out of pocket damages to be \$422.65 for fourteen months prorated taxes and \$84.21 for Indian water assessments.

The most difficult part of the Court's ruling will be based on the analysis of the seller's loss of bargain. Recognizing the principal that parties should be permitted to enter into contracts that may actually be one-sided or unreasonable should be rejected by the Court. It is generally held that persons have a right to contract freely to make real and genuine mistakes when their dealings are at arms length. See for example *Carlson v Hamilton*, 8 Utah 2d.272,332 P.2d989(1958).

There is a line of Utah cases dealing with forfeitures under paragraph 16(a) of the Utah Version of the Uniform Real Estate Contract, and whether such forfeitures are inequitable or exorbitant. This Court, in reviewing the cases, cannot assign a

The Court must analyze the seller's actual and apparent damages to determine whether under the case law to allow the seller to retain the moneys paid by the buyer would be fair and equitable, or whether the amount proposed to be forfeited is inequitable as being exorbitant.

The Court must analyze the seller's actual damages.

The seller has claimed destruction of the property and loss of rental value because the purchaser failed to keep the property insured.

The Court finds that the defendant did in fact let the policy lapse, but heard no evidence as to whether vandalism would be covered under any policy, or what the actual costs of the vandalism would be. There was no valid evidence at trial to support any numerical claims for vandalism or damages.

The buyers indicated they really attached no value to the building itself. It was an old structure and their interest was in the unique value of the land.

The seller testified that the property had been rented in the past for a rental value of \$250 per month.

Based upon the state of the record, the Court cannot, as a matter of fact finding, determine that there was an actual dollar monetary property vandalism loss.

The defendant's testified there was a broken out window, and



applicable to the case. Reference is made to that ruling dated April 7, 2000. Plaintiffs elected to terminate the contract under paragraph 16(a) and took possession of the property about June 1, 1983. On the basis of that ruling, the only issue reserved for trial was the determination as to whether or not the money paid into the contract should be allowed as a forfeiture (whether it reasonably approximated the seller's actual damages) or whether to allow the plaintiffs to retain the amounts paid would be unconscionable and unreasonable.

From the evidence adduced at trial, it appears as though pursuant to the uniform real estate contract entered into by the parties September 10, 1981, the purchaser Nick Nikols agreed to pay \$65,000 for the property. He also agreed among other covenants to keep the property insured and pay the general property taxes and other assessments.

Nikols paid \$20,000 down on the date of closing, \$10,000 within 30 days, and payments to the bank in the first mortgage position of \$488 per month together with some late charges and other payments, totaling by a preponderance of the evidence \$5,856. There was also evidence adduced that Nikols paid an additional \$4,000 at or near the time he ceased making payments to the bank.

The Court, from the record, finds that Nikols paid a total of \$39,856.

FILED  
IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY, UTAH  
FEB 21 2001  
JAMES R. CLARK  
Jm - J. PUT.

GAYLE F. McKEACHNIE - 2200  
CLARK A. McCLELLAN - 6113  
McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.  
Attorneys for Plaintiffs  
72 North 300 East (123-14)  
Roosevelt, Utah 84066  
Telephone: (435) 722-3928

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY  
STATE OF UTAH, ROOSEVELT DEPARTMENT

---

MELVIN DALE PETERSON and	)	
DARLENE PETERSON,	)	
	)	
	)	
Plaintiffs,	)	AMENDED ORDER
vs.	)	PER RULING
	)	DATED 25 <sup>TH</sup> DAY
	)	OF JANUARY, 2001
NICK J. NIKOLS, and ALL UNKNOWN	)	
PERSONS WHO HAVE OR CLAIM TO	)	
HAVE ANY RIGHT, TITLE, ESTATE	)	
LIEN OR INTEREST IN THE PROPERTY	)	
DESCRIBED HEREIN WHICH IS THE	)	
SUBJECT OF THIS LAWSUIT,	)	
	)	Civil No. 990000069
Defendants.	)	Judge: John R. Anderson
	)	

---

The above captioned matter came on regularly for trial September 21, 2000, in the above entitled Court before the Honorable John R. Anderson sitting without jury. The parties appearing in person, by and through counsel. Evidence was adduced, argument was made, and the Court makes and enters the following ruling.

The Court has heretofore entered a ruling considering motions for summary judgment on the elements of law the Court felt were

2. Nikols, forfeited his interest in the Uniform Real Estate Contract by failing to abide by its terms.

3. The amount of the payments made by Nikols, which were retained by Petersons, was not exorbitant or inequitable in view of Petersons' actual damages.

4. Nick J. Nikols is entitled to a judgment against Melvin Dale Peterson and Darlene Peterson in the amount of \$3,385.00.

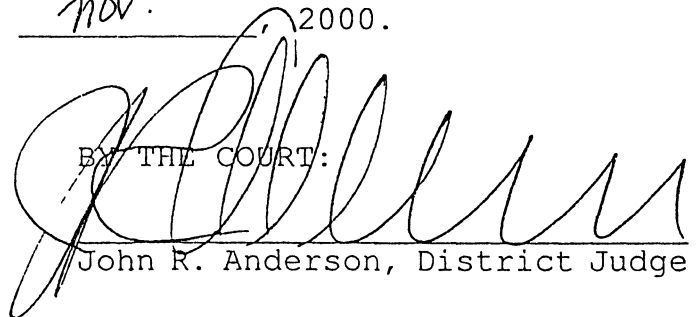
5. Ownership of the property described herein is hereby quieted to the Plaintiffs, Melvin Dale Peterson and Darlene Peterson:

Township 3 South, Range 2 West, Uintah Special Meridian  
Section 23: Lots 11 and 12 (SW1/4SE1/4)

6. Each party must pay their own attorneys fees and costs.

DATED this 30<sup>th</sup> day of Nov., 2000.

BY THE COURT:



John R. Anderson, District Judge

APPROVED AS TO FORM:

\_\_\_\_\_  
John Walsh  
Attorney for Nick J. Nikols

14. The property in its present state could be sold for \$30,000.

15. The loss of the benefit of the bargain to Petersons is \$35,000, plus the total of the taxes and water assessments.

16. All unknown persons who have or claim to have any right, title, estate lien or interest in the property described herein, were served by publication which was completed August 15, 2000.

17. The time for answering Plaintiff's complaint has expired as to the unknown defendants.

18. The Defendants identified as "all unknown persons who have or claim to have any right, title, estate lien or interest in the property described herein" failed to plead or otherwise defend in this action.

19. The default of all unknown persons who have or claim to have any right, title, estate lien or interest in the property has been entered.

#### CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes:

1. Nikols owes no further amounts to Petersons under the Uniform Real Estate Contract.

\$5,856.00. Nikols also paid an additional \$3,000.00 at or near the time he ceased making payments. For a total paid by Nikols of \$38,856.00.

6. Nikols did not pay all the sums due under the contract.

7. Nikols did let the insurance policy on the property lapse.

8. Nikols failed to pay the real property taxes and the Indian Water assessments.

9. Petersons elected to terminate the Real Estate Contract under paragraph 16(A) and took possession of the premises about June 1, 1983.

10. There was no valid evidence at trial to support any numerical claims for vandalism or damages.

11. Petersons paid \$442.65 for taxes and \$84.21 for the Indian water fees during the time Nikols was in occupancy of the property.

12. Petersons had rented the property in the past for \$250 per month.

13. Nikols agreed to pay \$65,000 for this property.

The Court, having heard the testimony of witnesses, the exhibits presented, and the arguments made, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Plaintiffs, Melvin Dale Peterson and Darlene Peterson, (Petersons) have presented competent evidence of their title and right to possession of the real property described as:

Township 3 South, Range 2 West, Uintah Special Meridian

Section 23: Lots 11 and 12 (SW1/4SE1/4)

(The Property)

2. Petersons entered into a Uniform Real Estate Contract (the contract) on September 10, 1981 to sell their interest in the property.

3. The purchaser under the contract was the Defendant Nick J. Nikols (Nikols).

4. According to the terms of the contract, Nikols agreed, among other covenants, to keep the property insured and pay the general property taxes and other assessments.

5. Nikols paid \$20,000.00 down on the day of closing, \$10,000.00 within 30 days, and made payments to Commercial Security (the bank holding first mortgage position) in the amount of

NOV 30 2000

CLERK  
BY *PA* DEPUTY

DONNA M. TROTTER - 8084  
GAYLE F. McKEACHNIE - 2200  
McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.  
Attorneys for Plaintiff  
855 East 200 North (112-10)  
Roosevelt, Utah 84066  
Telephone: (435) 722-3928

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY  
STATE OF UTAH, ROOSEVELT DEPARTMENT

---

MELVIN DALE PETERSON and	)	
DARLENE PETERSON,	)	
	)	FINDINGS OF FACT
Plaintiffs,	)	
	)	AND
vs.	)	
	)	CONCLUSIONS OF LAW
NICK J. NIKOLS, and ALL UNKNOWN	)	
PERSONS WHO HAVE OR CLAIM TO	)	
HAVE ANY RIGHT, TITLE, ESTATE	)	
LIEN OR INTEREST IN THE PROPERTY	)	
DESCRIBED HEREIN WHICH IS THE	)	
SUBJECT OF THIS LAWSUIT,	)	
	)	Civil No. 990000069
	)	
	)	Judge: John R. Anderson
Defendants.	)	

---

The above entitled case came before the Court, sitting without a jury, on the 21<sup>st</sup> day of September, 2000.

Plaintiffs and Defendant Nick J. Nikols were present, with their attorneys, Plaintiffs being represented by Donna M. Trotter and Defendant Nick J. Nikols being represented by John Walsh.

MAILING CERTIFICATE

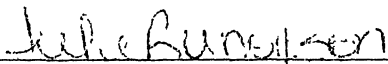
STATE OF UTAH                    )  
                                      ) ss.  
COUNTY OF UINTAH            )

Julie Runolfson, being duly sworn, says:

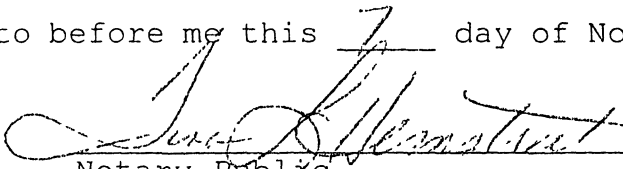
That she is employed in the office of McKEACHNIE, ALLRED & McCLELLAN & TROTTER, P.C., attorney for Plaintiffs, herein; that she served the attached JUDGMENT, by placing a true and correct copy thereon in an envelope addressed to:

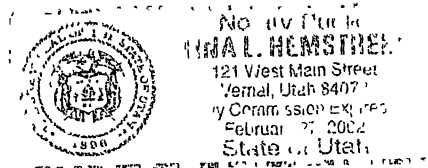
JOHN WALSH  
ATTORNEY AT LAW  
2319 FOOTHILL DR., SUITE 270  
SALT LAKE CITY UT 84109

and deposited the same, sealed, with first class postage prepaid thereon, in the United States Mail at Vernal, Utah, on the 7<sup>th</sup> day of November, 2000.

  
\_\_\_\_\_  
Julie Runolfson

Subscribed and sworn to before me this 7 day of November, 2000.

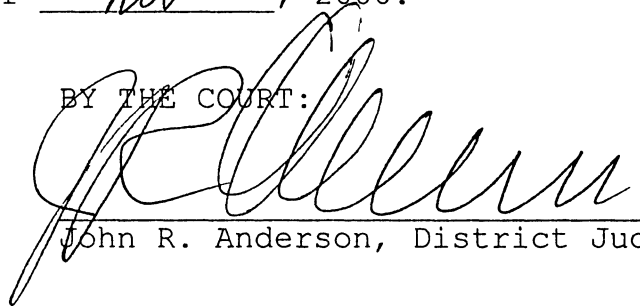
  
\_\_\_\_\_  
Notary Public  
Residing at Vernal, Utah





DATED this 30<sup>th</sup> day of Nov., 2000.

BY THE COURT:



John R. Anderson, District Judge

APPROVED AS TO FORM:

\_\_\_\_\_  
John Walsh  
Attorney for Nick J. Nikols

t:\peterson\melvin\judgment

6. The time for answering Plaintiff's complaint has expired as to the unknown defendants.

7. The Defendants identified as "all unknown persons who have or claim to have any right, title, estate lien or interest in the property described herein" failed to plead or otherwise defend in this action.

8. The default of all unknown persons who have or claim to have any right, title, estate lien or interest in the property has been entered.

IT IS ORDERED that Plaintiffs, Melvin Dale Peterson and Darlene Peterson, be awarded judgment against Defendants, and that ownership of the property described herein is hereby quieted to the Plaintiffs, Melvin Dale Peterson and Darlene Peterson:

Township 3 South, Range 2 West, Uintah Special Meridian  
Section 23: Lots 11 and 12 (SW1/4SE1/4)

IT IS ORDERED that Defendant Nick J. Nikols be awarded judgment against Plaintiffs, Melvin Dale Peterson and Darlene Peterson in the amount of \$3,385.00.

IT IS ORDERED that each party pay their own attorneys fees and costs.

The Court, having heard the testimony of witnesses, the exhibits presented, and the arguments made, the Court finds as follows:

1. The Plaintiffs, Melvin Dale Peterson and Darlene Peterson, have presented to the Court, by testimony of competent witnesses, evidence of their title and possession.

2. The Defendant Nick J. Nikols, the purchaser under a Uniform Real Estate Contract dated September 10, 1981, forfeited his interest in the contract by failing to abide by its terms.

3. The amount of the payments made by Nick J. Nikols, which were retained by Melvin Dale Peterson and Darlene Peterson pursuant to Paragraph 16(A) of the Uniform Real Estate Contract, was not exorbitant or inequitable in view of Melvin Dale Peterson and Darlene Peterson's actual damages.

4. Nick J. Nikols is entitled to be refunded \$3,385.00 of the payments made to Melvin Dale Peterson and Darlene Peterson.

5. All unknown persons who have or claim to have any right, title, estate lien or interest in the property described herein, were served by publication which was completed August 15, 2000.

DONNA M. TROTTER - 8084  
GAYLE F. McKEACHNIE - 2200  
McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.  
Attorneys for Plaintiff  
855 East 200 North (112-10)  
Roosevelt, Utah 84066  
Telephone: (435)722-3928

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH, ROOSEVELT DEPARTMENT

---

MELVIN DALE PETERSON and	)	
DARLENE PETERSON,	)	
	)	JUDGMENT
Plaintiffs,	)	
vs.	)	
	)	
NICK J. NIKOLS, and ALL UNKNOWN	)	
PERSONS WHO HAVE OR CLAIM TO	)	
HAVE ANY RIGHT, TITLE, ESTATE	)	
LIEN OR INTEREST IN THE PROPERTY	)	
DESCRIBED HEREIN WHICH IS THE	)	
SUBJECT OF THIS LAWSUIT,	)	Civil No. 990000069
	)	
	)	Judge: John R. Anderson
Defendants.	)	

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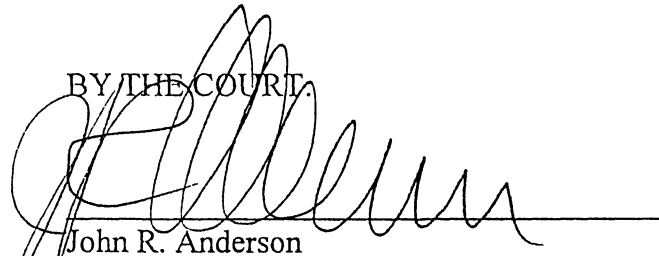
The above case came before the Court, sitting without a jury, on the 21<sup>st</sup> day of September, 2000.

Plaintiffs and Defendant Nick J. Nikols were present, with their attorneys, Plaintiffs being represented by Donna M. Trotter and Defendant Nick J. Nikols being represented by John Walsh.

Applying the formula from the evidence before the Court, the Court finds the property in its present state could be sold for \$30,000. On that basis, the loss of his bargain, or the loss of the benefit of his bargain under the contract is \$35,000, plus the total of the taxes and the water assessments. The seller has had the use and benefit of \$38,886 from the dates paid, however, seller has had to wait to get marketable title. It is the Court's opinion that the amount retained is not inequitable or exorbitant in view of the Petersons' actual damages, i.e., \$35,507. The Court is of the opinion that \$3,385 should be refunded by Petersons, and no additional amounts paid by Nikols. For reasons heretofore stated on the record, attorney's fees will not be awarded. No costs are awarded. The plaintiff is to prepare findings and judgment.

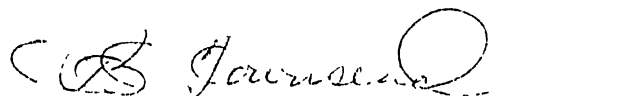
DATED this 28<sup>th</sup> day of September, 2000.

BY THE COURT.

  
John R. Anderson  
Judge, Eighth District Court

#### MAILING CERTIFICATE

I do hereby certify that on the 2<sup>nd</sup> day of October, 2000, I hand delivered or mailed, postage prepaid, a true and correct copy of the foregoing Ruling to the following: John Walsh, Attorney at Law, 2319 Foothill Drive, Suite 270, Salt Lake City, Utah 84109; and to Donna M. Trotter, Attorney at Law, 855 East 200 North (112-10), Roosevelt, Utah 84066.

  
Deputy Court Clerk

The seller has claimed reimbursement for property tax assessed and Indian water fees assessed during the period of occupancy.

The Court finds these actual out of pocket damages to be \$422.65 for fourteen months prorated taxes and \$84.21 for Indian water assessments.

The most difficult part of the Court's ruling will be based on the analysis of the seller's loss of bargain. Recognizing the principal that parties should be permitted to enter into contracts that may actually be one-sided or unreasonable should not be rejected by the Court. It is generally held that persons have a right to contract freely to make real and genuine mistakes when their dealings are at arms length. See for example *Carlson v Hamilton*, 8 Utah 2d. 272, 332 p.2d 989 (1958).

There is a line of Utah cases dealing with forfeitures under paragraph 16(a) of the Utah Version of the Uniform Real Estate Contract, and whether such forfeitures are inequitable or exorbitant. This Court, in reviewing the cases, cannot assign a percentage value to the amount of the forfeiture, but only can enter into a specific analysis of each case according to its facts.

The language in *Cole v Parker*, 5 Utah 2d 263, 300 p.2d 623 (1956) is instructive:

".....absent fraud, the seller is entitled to be credited, in the computation of damage sustained because of the breach of contract, the difference between the contract price and the price for which he can sell the forfeited property."

One of the items set forth in *Perkins v Spencer*, 121 Utah 468, 243 p.2d 446 (1952) is the analysis of the loss of an advantageous bargain.

The appraiser who prepared the report which was rejected as evidence by the Court was not present for cross-examination. The only evidence the Court has as to the value of this unique piece of property was the price which Nikols was willing to pay, to wit, \$65,000.

While having no direct bearing on the actual value of the land, the Duchense County Assessor had listed the property as having a value of about \$25,000 in 1982.

Further from the evidence adduced at trial, Commercial Security Bank was willing to lend \$25,000 as against the value of the real estate without insisting on having the improvements or the buildings insured.

Nikols paid \$20,000 down on the date of closing, \$10,000 within 30 days, and payments to the bank in the first mortgage position of \$488 per month together with some late charges and other payments, totaling by a preponderance of the evidence \$5,856. There was also evidence adduced that Nikols paid an additional \$3000 at or near the time he ceased making payments to the bank.

The Court, from the record, finds that Nikols paid a total of \$38,856.

The Court must analyze the seller's actual and apparent damages to determine whether under the case law to allow the seller to retain the moneys paid by the buyer would be fair and equitable, or whether the amount proposed to be forfeited is inequitable as being exorbitant.

The Court must analyze the seller's actual damages.

The seller has claimed destruction of the property and loss of rental value because the purchaser failed to keep the property insured.

The Court finds that the defendant did in fact let the policy lapse, but heard no evidence as to whether vandalism would be covered under any policy, or what the actual costs of the vandalism would be. There was no valid evidence at trial to support any numerical claims for vandalism or damages.

The buyers indicated they really attached no value to the building itself. It was an old structure and their interest was in the unique value of the land.

The seller testified that the property had been rented in the past for a rental value of \$250 per month.

Based upon the state of the record, the Court cannot, as a matter of fact finding, determine that there was an actual dollar monetary property vandalism loss.

The defendant's testified there was a broken out window, and perhaps the door frame had been broken and was hanging, but could be repaired for \$350.

The seller has claimed loss of rents due to the alleged vandalism, but the Court will not allow loss of rents as the seller had a duty to mitigate his damage and could have initiated repairs sufficient to get the property re-rented.

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IN THE EIGHTH JUDICIAL DISTRICT COURT  
DUCHESNE COUNTY, STATE OF UTAH  
ROOSEVELT DEPARTMENT

---

MELVIN DALE PETERSON and  
DARLENE PETERSON,

Plaintiffs,

vs.

NICK J. NIKOLS, et al,

Defendants.

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**ORDER**

Civil No. 990000069

Judge John R. Anderson

---

The above captioned matter came on regularly for trial September 21, 2000, in the above entitled Court before the Honorable John R. Anderson sitting without a jury. The parties appearing in person, by and through counsel. Evidence was adduced, argument was made, and the Court makes and enters the following ruling.

The Court has heretofore entered a ruling considering motions for summary judgment on the elements of law the Court felt were applicable to the case. Reference is made to that ruling dated April 7, 2000. Plaintiffs elected to terminate the contract under paragraph 16(a) and took possession of the property about June 1, 1983. On the basis of that ruling, the only issue reserved for trial was the determination as to whether or not the money paid into the contract should be allowed as a forfeiture (whether it reasonably approximated the seller's actual damages) or whether to allow the plaintiffs to retain the amounts paid would be unconscionable and unreasonable.

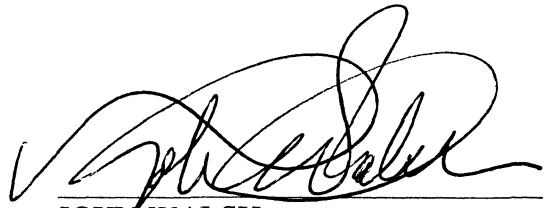
From the evidence adduced at trial, it appears as though pursuant to the uniform real estate contract entered into by the parties September 10, 1981, the purchaser Nick Nikols agreed to pay \$65,000 for the property. He also agreed among other covenants to keep the property insured and pay the general property taxes and other assessments.



### **CERTIFICATE OF MAILING**

I hereby certify that I caused to be mailed two copies of the foregoing APPELLANTS BRIEF to the Plaintiffs/Appellees by mailing the same to DONNA TROTTER, MCKEACHNIE, ALLRED, MCCLELLAN & TROTTER, P.C., ATTORNEYS AT LAW, 72 NORTH 300 EAST (123-14) ROOSEVELT, UTAH, 84066.

Dated this 23<sup>rd</sup> day of October, 2001.

  
\_\_\_\_\_  
JOHN WALSH  
ATTORNEY AT LAW

It was a benefit to the Defendant as it was his security for the almost \$40,000.00.

Hence, there is no basis to penalize the Defendant for something each party joined in for the mutual benefit of each.

Appellant submits that it is unconscionable to reward the Plaintiffs under these circumstances.

Mr. Nikols had paid all but \$6,000.00 on the contract to the Petersons, (Transcript page 48) and only had monthly payments left to Commercial Security Bank, beyond that.

Hence, Plaintiffs received \$34,000.00 of \$40,000.00 or eighty five per cent of what they had coming, and it is unconscionable to allow them to keep both the money and the land, as all that Nikols had left to pay beyond the \$6,000.00 was the monthly payments to Commercial Security Bank.

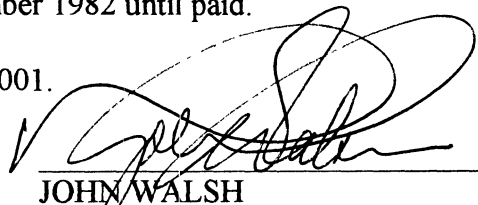
#### RELIEF SOUGHT

Appellant submits that \$39,886.00 (Record at 273 and 277) was paid by Nikols. That \$34,000.00 was paid in cash and the balance was paid to Commercial Security Bank for a total of \$39,886.00, which Petersons had the use and benefit of for almost two decades.

The parties had agreed to an interest rate of fourteen and one-quarter per cent. (Transcript at pages 7, 68)

Appellant respectfully requests that this Court reverse the Trial Court and award Defendants the \$39,885.00 (less the water assessments and taxes) with the same to bear interest at 14 ¼ (fourteen and one-quarter) per cent from November 1982 until paid.

Respectfully submitted this 22nd day of October, 2001.

  
JOHN WALSH  
ATTORNEY AT LAW

because the Seller had to wait to get marketable title.

At the time of trial there was not a shred of evidence that the Plaintiffs had been damaged in any way by virtue of the Notice of Contract.

At the time of trial there was no evidence that the plaintiffs attempted to borrow against the property and the cloud on the title prevented or otherwise affected the same in any way.

At the time of trial there was no evidence that the Plaintiffs attempted to develop the property and the cloud on the title prevented or otherwise affected the same in any way.

At the time of trial there was no evidence that the Plaintiffs attempted to sell the subject property and the cloud on the title prevented or otherwise affected the same in any way.

Appellant respectfully submits that there is not a shred of evidence to support the Conclusion of Law that the Plaintiffs are entitled to mega dollars from the Defendant because they have been damaged by the Notice of Contract.

Defendant had the right to have his Notice of Contract filed against the property and it was error for the Trial Court to penalize the Defendant for the same.

Plaintiffs were not entitled to marketable title until they paid to the Defendant what was rightfully his.

Defendant's Notice of Contract secured his interest and until Plaintiffs paid off the debt they were not entitled to have the Notice of Contract removed from the title.

The judgment by the Trial Court for \$4,886.00 validates and legitimizes the right of the Defendant to have his security in the property and to have his Notice securing the same.

The Notice of Contract was a mutually beneficial document filed jointly by the parties.

It was a benefit to the Plaintiffs as it was the basis for which they received almost \$40,000.00.

matter of law that the value of the property in 2000 was only \$30,000.00 was manifest error.

That evidence was in excess of two decades old, and after Plaintiffs let the \$20,000.00 cabin go to waste and also have the water removed from the property as well as the electrical removed from the property.

Appellant submits that it is telling that the Plaintiff admitted on the stand that he never attempted to do anything regarding the cabin until he engaged a person to be a witness for trial, some weeks before the trial itself. (Note Transcript at page 42)

As to Argument Three, Appellant submits that it was error for the Court to reward the Plaintiffs and penalize the Defendant, because the “Plaintiffs had to wait to get marketable title.”

It was the Plaintiff that was required to prosecute the matter.

Plaintiffs initially brought an action in 1983 and failed to follow through with the matter and the same was dismissed for “failure to prosecute.”

Those words are telling, Plaintiffs “failed to prosecute” their claim and so the Court dismissed the original action.

Plaintiff continued to “fail to prosecute” until 1999, and then the Court rewards the Plaintiffs for “failing to prosecute.”

The words of the Court spell out the clear motive of the Plaintiffs to “fail to prosecute” as noted on page 231, “The seller has had the use and benefit of \$38,886.00 . . .” This use and benefit was almost for two full decades.

The troubling part of that analysis is that the Plaintiffs not only had the use and the benefit of the money, they had the use and benefit of the property.

There is surely no incentive to prosecute and the Trial Court rewarded the Plaintiffs handsomely for their “failure to prosecute” in awarding mega damages against the Defendants,

to determine damages was the value of the property at the time of Trial.

This method penalizes the Defendant.

The evidence to support the Conclusion that the property in September of 2000, is \$30,000.00 because the Assessor appraised the property in 1982 at \$25,000.00 is not competent evidence.

The only other evidence regarding value in 2000, was the fact that Commercial Security Bank in 1979, loaned \$25,000.00 without requiring the improvements or the buildings to be insured.

This evidence is not competent for many reasons: (1) The loan was used to upgrade the property, (2) The loan was actually for \$41,072.64. The evidence regarding the loan did not include a critical piece of the picture, which was the face amount of the loan to value. Was this a 100 (one hundred) per cent to value or was this a 50 (fifty) per cent to value loan. The nature of the loan itself was on recreational raw land and so it is fair to say that the loan to value ration was not even close to one hundred per cent.

However, the Court was left to speculate as to the same and in fact assumed the same when it held that since the loan was for \$25,000.00 in 1979, the value of the same property in 2000 was \$30,000.00.

As noted above the loan was actually for \$41,072.64 and if this were a fifty percent to value loan then the actual value of the property was well in excess of the \$65,000.00 which was the agreed price between the parties.

Furthermore, according to Mr. Peterson, the sale of the property was in the nature of a forced sale, as he was in a crisis and needed to get money and right away. (Transcript at page 2)

Hence, the measure of damages by taking the evidence in 1979, and concluding as a

correctness. White vs. Gary L. Deeselhorst, N.P. Ski Corp 879 P2d 1371, (Utah, 1994).

Appellant raises four (4) reasons why the computation of damages by the Trial Court was in error. (1) The Trial Court erred when it determined the Plaintiffs' damages by considering the value of the property at the time of trial, instead of at the time of breach; (2) The Trial Court erred when it determined that the value of the land was merely \$30,000.00 when there was no evidence of the same; (3) The Trial Court erred when it awarded mega damages to the Plaintiffs because they had to wait to get marketable title and (4) The Trial Court erred when it awarded mega damages for the filing of the Notice of Contract.

All four (4) of these issues challenge the damage issue only, and the Conclusions of Law regarding the same.

Appellant claims that it was an error in law for the Trial Court to determine the Plaintiffs' damages by considering the value of the property at the time of trial instead of at the time of breach.

The method of determining damages by the Trial Court is further compounded by the fact that the Plaintiffs are in exclusive control and possession of the property during the said seventeen plus years, and yet the Defendant is liable for any diminution in value to the same, when he does not have the ability to make any changes to said property or safeguard it in any way.

Hence, the Trial Court has held the Defendant liable for any diminution of value to the property, when he was without possession or control, whereby he could mitigate any potential loss or damage.

The Trial Court was very clear when it stated that the date that the Plaintiffs retook the property was June of 1983. The Trial Court was very clear when it disclosed that the value used

Defendant's version of what occurred here is not on appeal either. Defendant contends that he met with Plaintiffs in the fall of 1982, and he agreed to return the property to Petersons and Petersons promised to return the money paid to him. Nikols version has credibility because he only owed Petitioners another \$6,000.00 and then the balance to Commercial Security Bank.

However, Nikols kept his Notice of Contract against the property securing his position and his claim for the return of monies paid.

Neither side did anything for years, and now Petersons want to reap both the benefit of keeping the property and the benefit of keeping the monies paid.

The Trial Court ruled that the Statute of Limitations had not run, and no one, and especially the Plaintiffs have not appealed the same.

Hence, the only issue before this Court is the issue of damages, as the writing that secured the Defendants position against the property was a writing within the Statute of Frauds. It was signed by the party to be charged and it was recorded against the subject land.

Hence, the Defendant remained in a secured position against the property, until he was paid his money.

Defendant claims that the damages were calculated incorrectly and so this is not a challenge to the Findings of Fact, which would require that the Defendant marshal all of the evidence in support of the Finding and then show where it was an abuse of discretion for the Court to make such a Finding.

Hence, this is not a challenge to the Findings of Fact, rather it is a challenge to the Conclusions of Law where the standard of review is much different. See Child vs. Gonda, 972 P2d 425 (Utah, 1998).

Here there is no presumption of validity, and the Appellate Court will review for

When the Court awarded to Defendants the sum of \$4,385.00 (note record at page 297) the Court is ruling that that amount is the sum due to the Defendants under the contract.

Hence, everything about the said Notice of Contract was legitimate in every way, and there is no basis for the Trial Court to conclude that the Notice was wrongful thereby entitling the Plaintiffs to mega damages.

In the case of Perkins vs. Spencer, 243 P.2d, (Utah, 1952) the Utah Supreme Court quoted a provision in the case of Young vs. Hansen 218 p.23 666, 669:

“ . . . The contract did not provide for retention of the money and even if it did, it is questionable that such a provision, could be enforced, as defendants would acquire an unconscionable advantage and be unjustly enriched at the expense of the plaintiffs as there is no showing that defendants have suffered any damage.” (Emphasis added)

Here, the Plaintiffs have not shown where they sustained any damage whatsoever, from the Notice of Contract, being filed against the property.

The Notice of Contract was a filing that the Plaintiffs, and each of them individually signed, and had recorded so that they could get many thousands of dollars.

Now after the fact to reward the Plaintiffs for the filing of the same and concomitantly penalize the Defendant for the same, is to award damages when “there is no showing that (Plaintiffs) have suffered any damage.”

Hence, this Court should reverse the Trial Court, and enter judgment for Defendant in the sum of \$39,886.00 plus the agreed upon interest.

### **CONCLUSION**

This whole appeal is regarding just one issue, i.e.: Damages.

This is not an appeal from the Summary Judgment. This is not an appeal regarding the Statute of Limitations, nor laches nor estoppel etc. but only the issue of damages.



The Trial Court awarded the mega damages to the Plaintiffs on the basis that somehow they had some injury or had sustained some loss from the Notice of Contract being on the property.

The testimony of Plaintiffs however, was just to the contrary, as noted on page 22 of the transcript, Plaintiffs were not even interested in selling the subject property after retaking the same:

“Q. (BY MS. TROTTER) Did you attempt to list or list or attempt to sell the property after Mr. Nikols’ default?

A. No.

Q. And why was that?

A. I was having plenty of problems making the payments, doing this and that and I wasn’t interested in selling the property at that time.”

Here there is no basis for the Trial Court to award damages to the Plaintiffs when there was no evidence that the Plaintiffs had sustained any kind of damage.

The Notice of Contract was exactly that, and apparently the exact contract was recorded, so there can be no claim that one overstated the amounts they had coming like so often is the case in wrongful liens.

The Notice of Contract represented to the world that Nikols was buying the property.

Plaintiffs reaped handsomely from the said contract, i.e.: \$39,886.00 and Nikols was absolutely legitimate in his claim in every way.

Hence, there is no basis whatsoever to award mega damages to the Plaintiff because they had to wait to get marketable title.

In the Judgment by the Court the Notice of Contract was legitimized as the said notice established a claim that Nikols had on the property.

Dated this 28<sup>th</sup> day of September, 2000.

BY THE COURT:

/s/ John R. Anderson

John R. Anderson

Judge, Eighth District Court”

There is no basis to penalize the Defendant for claiming an interest in the title.

Here the Plaintiffs needed some large sums of money in a flash. The parties agreed to an arrangement and Plaintiff paid \$39,886.00 (thirty nine thousand eight hundred eighty six dollars). This is the corrected figure as the Court amended the original judgment as noted on pages 297 and 298 of the Record.

After the parties had entered into the subject agreement the Notice of Contract remained for years and years, as noted in Argument Three above.

Plaintiffs did nothing about the cloud on the title as they did not remember that it was even there.

Note page 34 of the Record, which is an Affidavit filed by Melvin Peterson:

“12. In the last sixteen years, Petersons have had no contact from Nikols and believed the no longer claimed an interest in this property until the Duchesne County Recorder advised the Petersons that the Notice of Contract filed by Nikols relating to the Contract had never been released.”

Also note the Record at pages 42 and 43 as follows:

“Petersons had heard no word from Nikols in sixteen years and did not realize that Nikols still claimed an interest until they were advised by the Duchesne County Recorder’s office that Nikols’ Notice of Contract had never been released. (See Melvin Peterson’s affidavit.)”

By Plaintiff’s own admission he sustained no loss from the Notice of Contract, because he did not even know it was there until the Duchesne County Recorder informed him of the same.

Page 8

A. He did.

Q. And did he pay the \$10 in \$45 days?

A. I believe so.

Q. Okay, and you said he made 12 payments of \$488?

A. I believe so.

Note Record at pages 128 through 131, suggests that the actual contract was recorded in the Duchesne County Records Office.

As noted above, this Notice of Contract was placed against the subject property to give notice that a contract had been entered into between the parties.

As a matter of law, the Plaintiffs Melvin Dale Peterson and Darlene Peterson remained the record title owners, and Nick J. Nikols was buying the same, hence the Plaintiffs are not displaced in reference to the title in any way.

On page 231 the Trial Court awarded mega damages to the Plaintiffs because the Notice of Contract had remained on the property for so long.

At page 231 of the Record is the Order, signed by Judge John R. Anderson, on September 28, 2000 with the following:

*“Applying the formula from the evidence before the Court, the Court finds the property in its present state could be sold for \$30,000. On that basis, the loss of bargain or the loss of the benefit of the bargain under the contract is \$35,000, plus the total of the taxes and the water assessments. The seller has had the use and benefit of \$38,886 from the dates paid, however, seller has had to wait to get marketable title. It is the Court’s opinion that the amount retained is not inequitable or exorbitant in view of the Peterson’s actual damages, i.e., \$35,507. The Court is in the opinion that \$3,385 should be refunded by Petersons, and no additional amounts paid by Nikols. For reasons heretofore stated on the record, attorney’s fees will not be awarded. No costs are awarded. The Plaintiff is to prepare findings and judgment.*

This Notice is made and executed this 10th day of September, 1981.

Melvin Dale Peterson

MELVIN DALE PETERSON

Darlene Peterson

DARLENE PETERSON

Seller

Nick J. Nikols

NICK J. NIKOLS

Buyer

STATE OF UTAH )

: ss.

County of SALT LAKE )

On this 10th day of September, 1981, personally appeared  
before me, MELVIN DALE PETERSON AND DARLENE PETERSON, his wife, as Sellers,  
NICK J. NIKOLS as Buyer

the signers of the within instrument, who duly acknowledged to me that they  
executed the same.

Thomas Sue Lick  
Notary Public

My Commission Expires: 8-24-85

Residing at: Salt Lake City, Utah

This Notice of Contract was recorded in order for Plaintiffs to raise immediate cash  
because of tragedy involving their daughter who had been burned, as noted on page 2 of the  
Transcript:

Q. Why did you decide to sell this property?

A. I decided to sell it because I had a daughter that was burned very badly at the time  
and I needed the money desperately for – that's the main reason.

Plaintiff needed the \$20,000.00 (twenty thousand) down; another \$10,000.00 (ten  
thousand) in forty five days and then made another twelve (twelve) payments of \$488.00 (four  
hundred eighty eight) all according to the Plaintiff himself, testifying on page 7 and 8:

Q. Did he pay the \$20,000 down at the time of closing?

By virtue of the same, this Court should reverse the Trial Court and enter judgment in favor of the Defendant, Nick Nikols in the amount of \$39,886.00 plus the agreed upon interest from time of breach to the time of payment.

ARGUMENT FOUR

IT WAS ERROR FOR THE TRIAL COURT TO AWARD ANY DAMAGES  
BY VIRTUE OF THE NOTICE OF CONTRACT

At page 132 of the Record is the Notice of Contract, which is as follows:

When Recorded Mail to:  
NICK J. NIKOLS  
2256 Lake Line Circle  
Salt Lake City, Utah 84109 218663  
ENTRY NO. DATE 7-19-81 TIME 10:59 BOOK A-85 PAGE 370  
FEE \$ 4.50 RECORDED AT REQUEST Utah Title & Abstract  
Marion W. Burdick DUCHESNE COUNTY RECORDER A. Faulkner DEPUTY  
NOTICE OF CONTRACT T-79110  
24457

The undersigned hereby gives notice of interest in and to the following described property by virtue of an unrecorded Contract, dated September 10, 1981, by and between MELVIN DALE PETERSON and DARLENE PETERSON, his wife, as Seller and NICK J. NIKOLS as Buyer. Said property situated in Duchesne County, State of Utah, described as follows:

TOWNSHIP 3 SOUTH OF RANGE 2 WEST OF THE UINTAH SPECIAL MERIDIAN.

SECTION 23: Lots 11 and 12 (SW $\frac{1}{4}$ SE $\frac{1}{4}$ )

Hence, when the Trial Court holds that Plaintiffs are entitled to mega damages from the Defendant, because, “seller had to wait to get marketable title” it is tantamount to rewarding the Plaintiffs for sitting on their rights.

In fact, it was not until February 6, 1999, that Plaintiffs did anything to clear the title of the Notice of Contract. Note the record at page 179, wherein Plaintiffs first engaged their current law firm to bring this action.

As noted on page 22 of the Transcript Melvin Peterson testified that it was a conscious decision not to prosecute this matter back at the time that he filed his action in 1983, some seventeen plus years before trial herein, i.e.: September 21, 2000.

As a result, Appellants submit that it was wholly inappropriate to penalize Nikols for Petersons’ conduct, by holding that Nikols has to pay because, “seller has had to wait to get marketable title.”

This is all the more compounded, when one looks at the Notice of Contract rightfully being recorded against the property and legitimately staying on the title until the Defendant was paid what he was entitled to, as set forth in Argument Four herein.

In the case of Jacobsen vs. Swan, 278 P.2d 294, (Utah, 1954) the Court went through a similar analysis when it stated on page 229, “. . .since the property had not decreased in value and there were no other equities in plaintiff’s favor.”

Here the sellers sustained no damage from the Notice of Contract, and therefore they are not entitled to any from the filing of the said Notice.

By virtue of the same, this Court should reverse the Trial Court and enter judgment in favor of the Defendant, Nick Nikols in the amount of \$39,886.00 plus the agreed upon interest from time of breach to the time of payment.

“6. Pursuant to paragraph 16(a) of the contract between the parties, Plaintiffs gave written notice of Defendant on or about November 11, 1982 that the Defendant must remedy his default within 5 days of said written notice or Plaintiffs would be released from any obligation in law or equity to convey said property to Defendants and that all sums paid would be forfeited to Plaintiffs. A copy of the said written notice is attached hereto.”

Hence, it was Plaintiff that did nothing from November 11, 1982 to the time of April 2, 1999 to clear their title.

Plaintiff had the right all along to bring an action to clear the title, assuming that they were entitled to the same, (Note Argument Four herein). Yet they sat on their rights for some seventeen years.

Additionally on page 8 of the Record, the Plaintiffs claimed that,

“7. Defendant, thereafter, failed to cure said default, and Plaintiffs served upon Defendant personally a written “Notice to Quit” on or about May 6, 1983, requiring Defendant to cure the aforesaid default or quit said premises and advising the Defendant that in the event of Defendant’s failure to so cure, Plaintiffs would be released from any obligation in law or equity to convey said property and all payments previously made would be forfeited to Plaintiffs. Said written notice along with the Affidavit of Personal Service upon Defendant are attached hereto and by this reference made a part hereof.”

Appellant submits that according to Plaintiffs’ pleadings it is undisputed that on November 11, 1982 some seventeen or so years before bringing the current action to Quiet Title, Plaintiffs served their Notice of Default, and then some sixteen and a half years plus, i.e.: May 6, 1983, Plaintiffs served a Notice to Quit before bringing the present action to Quiet Title. Hence, some sixteen years (June 28, 1983 to April 2, 1999) Plaintiffs sat on their rights to clear the Notice of Interest in this action.

As noted on page 7 of the Record, the original lawsuit was dismissed because the Plaintiffs failed to prosecute the matter.

however, seller has had to wait to get marketable title. It is the Court's opinion that the amount retained is not inequitable or exorbitant in view of the Petersons' actual damages, i.e.: \$35,507. The Court is of the opinion that \$3,385 should be refunded by Petersons, and no additional amounts paid by Nikols. For reasons heretofore stated on the record, attorneys fees will not be allowed. No costs awarded. The plaintiff is to prepare findings and judgment." (emphasis added)

Appellant respectfully submits that penalizing Nikols because "seller has had to wait to get marketable title" was manifest error.

First, it should be noted that any delay in getting marketable title was the doings of the Plaintiffs, not the Defendant.

On page 7 of the record, in the Plaintiffs' COMPLAINT TO QUIET TITLE, they assert that:

"10. On June 1, 1983, Plaintiffs commenced an action in this matter, in Duchesne County Court, matter no. 7950. On or around June 28, 1983, Plaintiff was contacted by Defendant and believed a settlement had been negotiated. No additional monies ever exchanged hands and Defendant once again failed to perform. The Court dismissed the matter for lack of prosecution on April 15, 1985.

Thereafter the Plaintiffs sat on their rights and did nothing, until the County Recorder notified them of the Notice of Interest on the property in 1999.

On page 42 and 43 of the record is the following in the Plaintiffs' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY:

"Petersons had heard no word from Nikols in sixteen years and did not realize that Nikols still claimed an interest until they were advised by the Duchesne County Recorder's office that Nikols' Notice of Contract had never been released. (See Melvin Peterson's affidavit)."

Hence, it was Petersons who sat on the matter and failed to pursue the matter of clearing their own title.

On page 8 of the record, Plaintiffs claimed in their COMPLAINT TO QUIET TITLE, that :



vs. Guild, 121, P.2d 401 (Utah); Jensen vs. Nielsen, 485 P.2d 673 (Utah, 1971); Strand vs. Mayne 384 P.2d 396 (Utah, 1981); Madsen vs. Anderson, 667 P.2d 44 (Utah, 1983); and Adair vs. Bracken 745 P.2d 849, (Utah App. 1987).

Typically the Plaintiff would have to come before the Court and show where he had resold his property and took a specific loss in the said transaction, or to bring an appraiser before the Court and establish the value of the property at the time of breach.

Here neither of the foregoing occurred.

At trial the Plaintiff did not put on any evidence of value except the amount that the Defendant agreed to pay for it, and hence the Court was left to speculate as to the loss of bargain, if any, sustained by the Plaintiff.

Without the critical evidence to determine the loss of bargain, the Plaintiffs failed in their proof.

Since the Defendant made a timely Motion for a Directed Verdict this Court should reverse the Trial Court, and enter a judgment in behalf of the Defendant in the sum of \$39,886.00 plus interest.

### ARGUMENT THREE

IT WAS MANIFEST ERROR FOR THE TRIAL COURT TO DETERMINE THAT  
THE PLAINTIFFS WERE ENTITLED TO ANY DAMAGES BECAUSE  
THEY HAD TO WAIT TO GET MARKETABLE TITLE

In this action the Trial Court determined that the Plaintiffs had sustained damages in the sum of \$35,507.00 (thirty five thousand five hundred seven and no/100 dollars) Note Page 231 of the record as follows:

“Applying the formula from the evidence before the Court the Court finds the property in its present state could be sold for \$30,000. On that basis, the loss of bargain, or the loss of the benefit of the bargain under the contract is \$35,000, plus the total of taxes and water assessments. The seller has had the use and benefit of \$38,886 from the dates paid,

to admit it on page 232, when he ruled that there was no evidence different than the \$65,000.00 to determine loss of bargain.

Appellant respectfully submits that it was manifest error for the Court to (1) Use the date of trial as the date to determine damages and (2) Hold that the value of the property was only \$30,000.00 as the Trial Court admitted there was no evidence of the same.

Agreements for forfeitures which amount to penalties rather than a fair attempt to determine future damages are not favored in the law. Malmberg vs. Baugh, 218 P.2d 975, (Utah), Croft vs. Jenson 40 P.2d 198 (Utah), Young vs. Hansen, 218 P.2d 666 (Utah) and Perkins vs. Spencer, 243 P.2d 446 (Utah).

Appellant submits that there is certain amount of symmetry in the problem before this Court in that typically it is very difficult to determine damages into the future as it amounts to speculation and conjecture.

By the same token, the Court has to reach back to the time of the breach to determine the damages long since passed.

Here the Court compared the value of the property at the time of purchase with the value of the property at the time of trial, rather than at the time of the breach.

This works a penalty to the Defendant as it holds him liable for any diminution in value during the seventeen year period. A time in which the plaintiff let the cabin be destroyed, had also had the power and the water removed from the premises.

The Supreme Court has ruled many times that damages which are in the nature of a penalty, are not allowed, under similar conditions. Note Cole vs. Parker, 300 P.2d 623 (Utah, 1956); Dopp vs. Richards, 135 P. 98 (Utah); Cooley vs. Call 211 P. 977 (Utah), Western Macaroni Mfg. Co. vs. Fiore, 151 P. 984 (Utah); Croft vs. Jensen, 40 P.2d 198 (Utah), Christy

Plaintiffs failed to put on a shred of evidence of the value “in its present state” as well, however, that determination is not relevant, as the actual damages would need to be assessed at the time of the alleged breach, not September 2000. Plaintiffs had exclusive use and possession of the property almost eighteen years, and there is no basis to suggest that Nikols should bear any loss during that time frame, i.e.: lost cabin Plaintiff testified was worth \$20,000.00, also the water being removed and the electrical being removed from the property.

Hence, the record is absolutely clear that the Plaintiff failed in his critical element of proof, i.e.: actual value of the property in June, 1983, which is the date the Court held Plaintiff retook the subject property.

Also the transcript is absolutely clear that the Plaintiff failed in his critical element of proof, i.e.: actual value of the property in June, 1983.

Lastly, the Honorable John R. Anderson held that “The only evidence the Court has as to the value of this unique piece of property was the price which Nikols was willing to pay, to wit, \$65,000.”

The bottomline is, Plaintiffs failed to show the Court that the value was any different than the purchase price.

Plaintiffs would have to show the Court the loss of the benefit of their bargain. That is, Petitioner agreed to sell it to Nikols for \$65,000.00 and now Petitioner can only sell it for “X”.

However, there is no “X”.

It should be noted that Appellant made a Motion for Directed Verdict in this matter at page 73 of the Transcript and following.

Appellant argued that the Court would have to speculate as to the value of the property.

This is exactly what the Trial Court did and Judge John R. Anderson was candid enough

The Trial Court specifically found that this loan did not require any kind of insurance on the “buildings” and hence, the actual amount of value in the premises in June of 1979 (Note Record at page 232), was more like \$41,000 for the land and \$20,000 for the building, hence a total in 1979 of a value of \$61,000.00 plus.

This \$61,000.00 plus value in 1979, could not support a conclusion by the Court that the value in September of 2000, was only \$30,000.00 as the value had “possibly” gone up, rather and any downward movement as testified by Melvin Peterson at page 53 of the Transcript.

The measure of damages is the difference between what was owed and the value of the subject premises, and the Court said it best when the Trial Court stated on page 232:

“The only evidence the Court has as to the value of this unique piece of property was the price which Nikols was willing to pay, to wit, \$65,000.” (Emphasis added)

The Court further stated well, the state of the Record and the evidence at the time of the Ruling by the Court on the same page 232, when the Court stated:

“While having no direct bearing on the actual value of the land, the Duchesne County Assessor had listed the property as having a value of about \$25,000 in 1982.” (emphasis added)

Appellant could not agree more. The assessed value in 1982 has no evidentiary value in determining actual value of the property in September 2000.

It is not a play on words to say that the only evidence that the Court had on the value of the property at the time of the alleged breach was \$65,000.00, as that was what Nikols paid for the same.

What this amounts to is the bottomline problem with the Plaintiffs’ case. They failed to provide the Court with the actual value of the property at the time of the alleged breach of contract.

the value of the cabin was never presented to the Court.

Surely, the Plaintiff was bright enough to know that it would not be cost effective to spend \$10,000 of cash from a loan, to only improve the premises to the tune of \$5,000.00 as that would obviously be a loss of return.

Furthermore, Plaintiff was bright enough to know that putting in \$10,000 only to improve the premises \$10,000 is also not cost effective as this money was borrowed, and at an interest rate of 14.75. Note Transcript at page 69.

Hence, the \$10,000 worth of improvements must have improved the subject premises significantly more than the \$10,000.00 put into it.

However, such evidence was not presented the Trial Court.

Yet the Trial Court overlooked this factor when the Trial Court held that the Bank loaned \$25,000, therefore the value in September of 2000, is \$30,000.00 as the Bank loan actually changed the value of the subject property.

Appellant submits that the most important problem with the Trial Court using the \$25,000.00 bank loan in 1979, to determine the value of the property in September of 2000, is the fact that the loan in fact was not \$25,000.00 but rather was \$41,072.64 (forty one thousand seventy two and 64/100 dollars)

As noted on page 123 of the Record is the Report on the Title of the subject property, which states:

“ITEM 5: Subject to a Trust Deed dated June 27<sup>th</sup>, 1979, given to secure the amount of \$41,072.64, executed by Melvin Dale Peterson and Darlene Peterson, husband and wife, in favor of Commercial Security Bank, a corporation as Trustee and Beneficiary, recorded August 6<sup>th</sup>, 1979, Entry No. 203418, in Book ‘A-68’ of Records, pages 438-440.”

Hence, the actual amount loaned was \$41,072.64 in June of 1979.

reliable basis to determine value in September of 2000, for another very important reason in that the loan was used to upgrade the property.

According to Melvin Peterson as much as \$10,000.00 was spent to upgrade the property.

On page 5 of the Transcript Melvin Peterson testified as follows:

“(BY MS. TROTTER) When did you make the improvements, Mr. Peterson?”

A. The improvements were made between the time I borrowed the money and about 1979, the later part, right after I borrowed it, up until the time that I advertised it for sale.

Q. And when did you advertise it for sale, approximately?

A. In 1981 I believe. I renovated it or remodeled it in 1980, the last part of 1979 and '80, whenever I borrowed the money from the bank.

Q. Okay. So you renovated it in between 1979 and 1981.

A. That's true.

Q. And do you have recollection of approximately how much money you spent renovating the cabin?

A. In the area of \$10,000.”

Hence, the Trial Court used the value of \$25,000.00, which was the amount that the Bank was willing to loan, in 1979, to arrive at the value of the subject property in September of 2000.

However, between the time of the loan and the time of trial according to Plaintiffs as much as \$10,000.00 (ten thousand dollars) went into improving the cabin.

The glaring piece of evidence which was not presented to the Trial Court, was evidence of how much the \$10,000.00 spent actually increased the value of the cabin.

For example, putting in new cabinets, floor coverings, etc., can improve the value of a home significantly more than the costs for those items.

Here, there was \$10,000 worth of improvements and how much that actually increased

Counsel submits that the Trial Court was very candid when it held that, “The only evidence the Court has as to the value of this unique piece of property was the price which Nikols was willing to pay, to wit, \$65,000.”

In addition to the 1982 assessed value of “about \$25,000” the Trial Court referred to a loan by Commercial Security Bank as the only other basis for determining the value of this real property in September of 2000, as noted on page 232 of the Record.

“Further from the evidence adduced at trial, Commercial Security Bank was willing to lend \$25,000 as against the value of the real estate without insisting on having the improvements or the building insured.”

Appellant respectfully submits that this evidence regarding the subject loan is even more unreliable than the assessed value in 1982 by the Duchesne County Assessor, as this loan is much older than the 1982 assessed value.

On page 5 of the Transcript, Melvin Peterson testified, in response to his own Counsel’s questions, that the Commercial Security Loan was made in about 1979, as follows:

Q. (BY MS. TROTTER) When did you make the improvements, Mr. Peterson?

A. The improvements were made between the time I borrowed the money and about 1979, the later part, right after I borrowed it, up until the time I advertised it for sale.

Q. And when did you advertise it for sale, approximately?

A. In 1981 I believe. I renovated it or remodeled it in 1980, the last part of 1979 and ’80, whenever I borrowed the money from the bank.

If Mr. Peterson remodeled the cabin in 1979, “right after I borrowed “the money” then it was some twenty one years prior to Trial.

The Trial Court held that this was its basis for saying that the value of the subject property in September 2000, was only \$30,000 (thirty thousand dollars).

Appellant respectfully submits that the loan, some twenty-one or so years earlier is not a

follows:

“Applying the formula from the evidence before the Court, the Court finds the property in its present state could be sold for \$30,000.” (Emphasis added)

These same facts are found in the Findings of Fact beginning at page 243 of the Record, which states:

“13. Nikols agreed to pay \$65,000 for this property.

14. The property in its present state could be sold for \$30,000.”

Appellant respectfully submits that there is not a shred of evidence to support the idea that the value of the property at the time of trial was only \$30,000.00.

Appellant submits with all due respect to the Trial Court, that, “. . . the Duchesne County Assessor had listed the property as having a value of about \$25,000 in 1982.” can not support a ruling that the property on September 21<sup>st</sup>, 2000 had value of \$30,000.00 (thirty thousand dollars).

The Trial Court expressly held that this evidence was some eighteen or so years old, as there is that much time that lapsed from 1982 to the time of trial.

The Trial Court was careful to note that the only competent evidence on value of the property, which was an appraisal which was rejected by the Court where the Trial Court held, “The appraiser who prepared the report which was rejected as evidence by the Court was not present for Cross Examination.”

Hence, the Trial Court had no appraisal to assist the Court in arriving at the \$30,000.00 value in September of 2000.

In addition the Trial Court had no appraiser to assist the Court in arriving at the \$30,000.00 value in September of 2000.



at the time of trial in September, 2000.

Plaintiff put on no evidence of damages other than taxes and water assessments at the time of the breach and therefore failed in their proof of damage.

Defendants moved for a Directed Verdict at the close of the Plaintiffs' case, and so it would be appropriate for this Court to merely remand with instructions for the Trial Court to enter judgment for the Defendant in the amount of \$39,886.00 plus interest at fourteen and one-quarter percent, which was the agreed upon interest rate between the parties. Transcript at page 68.

In the alternative this Court should merely reverse the Trial Court's ruling and entered judgment for the Defendant Nick Nikols, in the amount of \$39,886.00 plus the agreed upon interest rate between the parties.

## ARGUMENT TWO

IT WAS MANIFEST ERROR FOR THE TRIAL COURT TO DETERMINE THE VALUE OF THE PROPERTY IN ITS PRESENT STATE TO BE \$30,000.00 WHEN THERE WAS NOT A SHRED OF EVIDENCE TO SUPPORT THE SAME.

On page 232 of the Record, the Honorable John R. Anderson ruled as follows:

"The appraiser who prepared the report which was rejected as evidence by the Court was not present for cross-examination. The only evidence the court has as to the value of this unique piece of property was the price which Nikols was willing to pay, to wit, \$65,000.

While having no direct bearing on the actual value of the land, the Duchesne County Assessor had listed the property as having a value of about \$25,000 in 1982.

Further from the evidence adduced at trial, Commercial Security Bank was willing to lend \$25,000 as against the value of the Real Estate without insisting on having the improvements or the buildings insured." (Emphasis added)

Then on page 231 of the Record, the Honorable John R. Anderson ruled that the value of the property in September of 2000, was \$30,000.00 (thirty thousand and no/100 dollars) as

A. If that's the actual time that he actually had it. I don't know when the taxes fall due exactly or what. That may be true.

Q. We do know though he bought it in September of '81, fair?

A. Uh-huh (Affirmative)

Q. And according to all your other analysis, he had it for 14 months, through November '82, fair?

A. Okay.

Q. Fourteen months.

A. Okay, go ahead.

Q. All I want to know is you hit him up for 14 months even though he only had it for 14, yes or no?

A. Yes.

Hence, there can be no question that the Plaintiffs took possession of the subject premises in the latter part of 1982.

Appellant submits that the case of Cole vs. Parker, 300 P.2d 623, (Utah, 1956) is dispositive on the issue of timing.

The criteria for determining whether a provision in a contract amounts to a penalty or a fair estimate of damages sustained by the vendor upon a breach of the contract was outlined in the case of Perkins vs. Spencer supra. It is there stated that at the time of the forfeiture the Court will consider the following elements in approximating the damages suffered by the vendor:

- "1. Loss of an advantageous bargain;
- "2. Any damage to or depreciation of the property;
- "3. Any decline in value due to change in market value of the property not allowed in item Nos 1 and 2;
- "4. For the fair rental value during the period of occupancy."

The specific elements of damage are discussed elsewhere, however Appellant submits that it was clearly a manifest error for the Trial Court to determine that the Plaintiffs retook the property on June 1, 1983, and then determined the damages to the property seventeen years later,

A. The later part of 1982.

Q. Okay. Would you have had to make these payments had Mr. Nikols performed on the contract?

A. Nope.

Q. So the contract you entered into with Mr. Nikols was in September of 1981; is that correct?

A. Uh-huh (affirmative) –

Q. And he stopped making the payments to Commercial Security you said in late '82, I believe you said?

A. Uh-huh (affirmative).

Hence, there can be no doubt that the Petersons were in exclusive use and possession of the subject property as of the latter part of 1982.

This is further confirmed on pages 25 and 26 of the Transcript wherein Peterson explains how he calculated his damages herein.

He claims lost rents for fourteen (14) months, September of 1981 through November of 1982. On page 25 and 26 of the Transcript is the following:

Q. Now, in your claim, you make a claim for lost rents, 14 months of lost rents, is that correct? You make a claim for lost rents, 14 months?

A. Uh-huh (Affirmative)

Q. And doesn't that suggest to you then that it was at least rentable up through November of 1982?

A. Possibly.

Again on pages 44 and 45, of the Transcript, Plaintiffs confirmed that they took the subject property in the Fall of 1982, wherein on page 44 is the following:

Q. So you hit him up for taxes for 24 months when he only had it for 14, isn't that a fair statement?

Assessor had listed the property as having a value of about \$25,000 in 1982.

Further from the evidence adduced at trial, Commercial Security Bank was willing to lend \$25,000 as against the value of the real estate without insisting on having the improvements or the buildings insured.”

In fact, Judge Anderson ruled in his written memorandum that the only competent evidence that he had as to what the value of the property was in 1982, was the purchase price Defendant agreed to pay at the time that he purchased the property.

As noted in the record at page 232, is the following:

“ . . . The only evidence the Court has as to the value of this unique piece of property was the price that Nikols was willing to pay, to wit, \$65,000.00.”

Appellant respectfully submits that the Court determined that the Plaintiffs retook the subject property in June of 1983, and then determined damages based upon the value of the subject property at the time of trial.

As noted above, the \$20,000.00 (twenty thousand dollar) cabin was gone at the time of trial and the water and the power were removed, which all occurred while Petersons were in exclusive control of the subject premises.

Plaintiffs confirmed that they took over the property in the latter part of 1982, on page 13 and 14 of the transcript as follows:

Q. Okay. How much did you originally borrow from Commercial Security Bank?

A. \$25,000 I believe.

Q. And how long before – and what date did you borrow that money from Commercial Security?

A. I borrowed it in September, 1979, I believe.

Q. And when did you resume payments to Commercial Security after the default of Mr. Nikols?

Isn't that a fair statement, as far as you know?

A. That's true.

The Lower Court assumed that the value of the property had dropped over double the price paid for it, during the time that the Plaintiffs had exclusive control of the same. (Compare Finding of Fact #9 at Record page 241, with Finding of Fact #13 at record page 241 along with Finding of Fact #14, at page 240 of the record.)

Plaintiff testified however, that the property value had not gone down at all during the time in question but "Possibly" went up.

On page 53 of the Transcript is the following:

Q. Has the value of the property gone up since 1982?

A. I don't know that. I haven't had it appraised and I haven't had anybody look at it.

Q. Is it your understanding it's gone up?

A. I don't think it's went very much.

Q. But it's gone up?

A. Possibly.

As noted in Argument Two of this Brief, the only evidence of value at the time that the Defendant is charged with breaching the contract, is the \$65,000.00 Defendant agreed to pay for it.

When the Court assumes a value in September 2000, it used a Duchesne County Assessor notice that was eighteen years old and a loan by Commercial Security Bank, that was twenty-one years old.

Note the Record at page 232, for the following:

"While having no direct bearing on the actual value of the land the Duchesne County

A. No.

Q. When is the first time you ever had anybody look at what it would take to restore the building? When's the first time you ever did that?

A. To actually replace it and get bids on it, not too long ago.

Q. Meaning what?

A. Probably within the last couple of months.

Q. For purposes of this trial?

A. That's true, and the potential of putting a cabin on the property."

Appellant submits that while it should be reaffirmed that the Plaintiff was inconsistent in his testimony as to when the cabin was damaged, his actions are totally consistent with the Defendants testimony that it was after Peterson took possession of the premises in the latter part of 1982, as noted in the Record at page 34, wherein Mr. Peterson testified:

"11. Petersons reentered the property and have been in possession of the property since Nikol's default in late 1982 . . . ."

Hence, according to Mr. Peterson, the value of the property between the time that Peterson took possession of the property diminished \$20,000.00 just in the loss of the premises.

In addition to the foregoing, there were other losses to the subject property, during the time that Peterson had exclusive control of the same, as the water and the power were removed from the same.

On page 60 of the Transcript is the following:

Q. Mr. Peterson, if you'd have kept the cabin, it would still have water and power today, wouldn't it?

A. Probably would.

Q. I mean, the only reason the power is removed is because no one's using the power.

the lost building would not be a personal claim against Nikols but would be for insurance proceeds.

Hence there should have been no reluctance to approach Nikols for the lost building because it was not his problem it would be the insurance company's problem.

However, there never was such a claim which conclusively establishes that whatever damage was done to the cabin, it was done after Peterson took exclusive control of the same.

7. In each of the lawsuits that the Plaintiffs have filed involving the same property and the same contract, one in 1983 and the other in the current lawsuit, Plaintiffs never made a claim for lost rents of the cabin.

At page 39 of the Transcript is the following:

Q. When you filed the lawsuit Mr. Carr, back in 1983, didn't make a claim for lost rent then, did you, sir?

A. Probably not.

Q. When you filed the lawsuit here before Judge Anderson, you didn't ask for any lost rents there either, did you?

A. No.

8. Lastly, Mr. Peterson testified that he did not even get anyone to give him an estimate on fixing the cabin, until long after the lawsuit was filed in the Trial Court, and then only in preparation for trial.

Beginning on page 42 of the Transcript is the following:

Q. Did you have anybody look at the premises anytime after December 1, 1982, to give you an estimate of what it would take to fix it? That 's a yes or no question?

A. I believe so.

Q. Did you have anybody look at the premises anytime after December 1, 1982, to give you an estimate of what it would take to fix it? That's a yes or no question?

notice of interest on the title so you have clear title, fair?

Beginning on page 32

A. Okay.

Q. Did you also say I want my money because I've lost my building?

A. I didn't but I should have.

5. According to Plaintiffs they have never made any kind of demand ever, for the loss of the \$20,000.00 building, by way of letter or other request of the Defendant.

Beginning on page 32 of the Transcript:

Q. It's fair to say, Mr. Peterson, that you never even sent any kind of letter or demand or request of Mr. Nikols to pay you dime one for that building, isn't that a fair statement?

A. After Mr. Nikols quit paying, I started making the payments and assumed that it was going to be my property and I would have to do whatever I had to do.

Q. I understand that. My question to you is did you ever send a letter to Mr. Nikols to say, "What are you going to do about my building? I'm out 20 grand"? That's my question.

A. No, nor did he send me anything that he was out 20 grand (inaudible)."

According to Mr. Peterson there was never any kind of message sent to Defendant that the Plaintiffs were out a \$20,000.00 building.

On page 33 of the Transcript, is the following:

Q. And if I understand your testimony, you never sent a letter, made a phone call, sent an E-mail or a carrier pigeon

Page 34

To Mr. Nikols saying you owe me 20 grand for this building?

A. I didn't, but I lost approximately that much money."

Appellant submits that the building was supposed to be insured and so making a claim for



again there is no mention of a loss of a \$20,000.00 home.

Beginning on page 28 of the Transcript is the following:

Q. When you served Mr. Nikols in May of the following year – it's May 11<sup>th</sup> if I'm not mistaken, May the 6<sup>th</sup>, Notice to Quit, under paragraph 16 you've got to give him five days to cure. Did you give him a notice to quit with Mr. Carr and

Page 29

say to Mr. Nikols, you owe certain payments. Do you remember having gone through that with your prior counsel?

A. No, that was a long time ago.

Q. Well, you say you were up there in maybe February, maybe January of 1983. Come May 1983 you surely know if the building aint there, wouldn't you?

A. Maybe I should have told Taylor Carr about that. Obviously, I should have because Mr. Nikols knew it. That's why he quit paying.

Q. Well maybe you should have if it did exist, but did you?

A. If it did exist?

Q. Yes. Didn't you tell Mr. Carr, there's a \$20,000.00 building that's missing here. Didn't you tell him that?

A. No, but I should have it sounds like."

4. When Plaintiffs brought their original action against the Defendant in June of 1983, long after Plaintiffs had viewed the property according to his own testimony, he did not request one dime for a lost building.

At page 31 of the transcript is the following:

Q. Now, when you filed this lawsuit with Mr. Carr back in June the 8<sup>th</sup>, 1983, you didn't sue Mr. Nikols for a \$20,000 lost building, did you?

A. No, I sued him for the property, that would include the building.

Q. Well, you sued to Quiet Title, did you not, sir? You sued to clear off his plat on the title but you didn't ask for dime one for the building, did you? And were clearing off his

Noted above on page 34 of the Record, Melvin Peterson testified that “Petersons reentered the property and have been in possession of the property since Nikol’s default in late 1982.”

2. Sometime after the Nikols stopped making payments, Mr. Peterson engaged a Mr. Carr to file a Notice of Default and serve the same on Defendant Nikols.

In this Notice of Default there is no claim that there is a loss of a \$20,000.00 cabin.

At page 27 of the Transcript is the following.

“Q When you had Mr. Carr help you back in the early, I mean early on. I mean way back at the time you served the notice, I guess we call it a notice of default, and you make a claim that he hasn’t made certain payments. Do you remember when that was done sir? I’ll represent to you it was in November, 1982. Do you remember that?

Page 28

A. I can remember contacting Mr. Carr. I don’t know the dates.

Q. Okay. In that notice, you tell Mr. Nikols that he’s supposed to make certain payments to bring the contract current to fulfill his terms of the contract, isn’t that fair to say?

A. I did seen for the first time that Mr. Carr, whatever he delivered to Mr. Nikols for the first time a few minutes ago like I stated.

Q. Didn’t you give that information to Mr. Carr?

A. I suppose so.

Q. Did you at any time tell Mr. Carr, “Wait a minute, there’s more than just three payments here. We’re missing a \$20,000 home. Did you ever tell that to Mr. Carr so when he sends the notice to Mr. Nikols, you not only need to make three payments, you’ve got to restore the house. Did you ever say that to Mr. Carr?

A. Probably not, maybe I didn’t know that it was vandalized at that time.

Q. Maybe not. Do you know for sure you didn’t tell Mr. Carr that, correct:

A. That’s probably true.”

3. When the Plaintiffs engaged Mr. Carr to serve the Defendants with a Notice to Quit,

in value during this time frame.

According to the testimony of Mr. Peterson, the value of the property dropped over twenty thousand dollars (\$20,000.00).

It was sometime after Defendant Nikols stopped paying on the subject contract that Peterson learned that the cabin was vandalized.

At page 17 of the Transcript, Melvin Peterson testified in response to questions from his own Counsel:

“Q. (BY MS. TROTTER) Did you learn of any damage to the structure that was on the property?

A. After Mr. Nikols quit paying, some time later than that I realized it, yes. It had been vandalized.”

While it is fair to say, that Melvin Peterson testified inconsistently regarding when the cabin was damaged, his actions are conclusive, that the damage was actually done to the cabin, while he had exclusive control of the same, for the following reasons:

1. At page 26 of the Transcript, Melvin Peterson testified that the cabin was rentable through November of 1982:

(Beginning on page 25 of the transcript)

“Q. Now, in your claim, you make a claim for lost rents 14 months of last rents; is that correct? You make a claim for lost rents, 14 months?

A. Uh-huh (affirmative).

Q. And doesn't that suggest to you then that it was at least rentable up through November of 1982?

A. Possibly.

Q. You don't know differently, do you?

A. No. I don't.”

These determinations by the Trial Court are also found in Finding of Fact #9, at page 241 of the Record, which states:

“9. Peterson elected to terminate the Real Estate Contract under paragraph 16(a) and took possession of the premises about June 1, 1983.”

Also in Finding of Fact #14, at page 240 of the Record:

“14. The property in its present state could be sold for \$30,000.00.”

This matter came on for trial on September 21<sup>st</sup>, 2000, before the Honorable John R. Anderson.

According to the Trial Court, the Plaintiffs have had possession of the subject property from June 1, 1983 to and including September 21<sup>st</sup>, 2000, some seventeen years, three months and twenty days.

During this seventeen plus year term, the Plaintiffs had exclusive care, control and possession of the subject property.

At page 34 of the Record, Melvin Dale Peterson, testified in his Affidavit dated July 19, 1999 as follows:

“11. Petersons reentered the property and have been in possession of the property since Nikols’ default in late 1982. Petersons have paid the taxes on this property since 1972 when they purchased it. Petersons have also paid all the water assessment charges by the Ute Tribe.

12. In the last sixteen years, Petersons have had no contact from Nikols and believed he no longer claimed an interest in this property until the Duchesne County Recorder advised Petersons that the Notice of Contract filed by Nikols relating to the Contract had never been released.”

Hence, at the time of trial it was undisputed that the Petersons had this property exclusively for seventeen plus years.

However, the ruling of the Court holds Defendant Nikols responsible for any diminution

4. The Trial Court concluded that the Plaintiffs were damaged in the sum of \$35,000.00.  
Record at page 240.

### SUMMARY OF THE ARGUMENT

Appellant submits that this is an Appeal regarding the single issue of damages. Appellant claims that it was error for the Trial Court to compare the present value of the property to the price agreed upon by the parties in 1981, to determine the alleged damages of the Plaintiffs. Appellant submits that it was error for the Trial Court to award damages because of the Notice of Contract placed on the title to the property for the mutual benefit of the parties.

### **ARGUMENT**

#### **ARGUMENT ONE**

#### **IT WAS ERROR FOR THE TRIAL COURT TO HOLD THAT THE PLAINTIFFS RETOOK THE SUBJECT PROPERTY ON JUNE 1, 1983 AND THEN DETERMINED ALLEGED DAMAGES TO THE PROPERTY AS OF THE DATE OF THE TRIAL**

At page 234 of the Record, the Honorable John R. Anderson, stated the following in his Order:

“The Court has heretofore entered a ruling considering the motions for summary judgment on the elements of law the Court felt were applicable to the case. Reference is made to that ruling dated April 7, 2000. Plaintiffs elected to terminate the contract under paragraph 16(a) and took possession of the property about June 1, 1983. On the basis of that ruling, the only issue reserved for trial was the determination as to whether or not the money paid into the contract should be allowed as a forfeiture (whether it reasonably approximated the seller’s actual damages) or whether to allow the plaintiffs to retain the amounts paid would be unconscionable and unreasonable.” (Emphasis added).

Then on page 231 of the Record, the Trial Court held as follows:

“Applying the formula from the evidence before the Court the Court finds the property in its present state could be sold for \$30,000 . . .” (Emphasis Added)

that it was an error at law, for the Court to use the time of trial instead of the time of the alleged breach, as the determining factors. The Trial Court took the matter under advisement and entered its ORDER on or about September 28, 2000. (Record at page 234). The Trial Court entered its Findings of Fact, Conclusions of Law, and Judgment on or about November 30, 2000. (Record at page 248) On December 7, 2000, Appellant filed his Motion to Alter or Amend Judgment (Record at page 250). The Trial Court entered its RULING on the Appellant's Motion to Alter or Amend Judgment on January 25, 2001. The Trial Court then entered its AMENDED ORDER PER RULING DATED 25<sup>TH</sup> DAY OF JANUARY, 2001, on February 23, 2001 (Record at page 278). The Notice of Appeal was filed on March 16, 2001 (Record at page 280.)

#### DISPOSITION AT TRIAL COURT

The Honorable John Anderson concluded that the Plaintiffs were entitled to keep \$35,000.00 (thirty five thousand dollars) of monies paid by the Defendant, and in addition to the foregoing Plaintiffs were allowed to keep the subject property as well.

#### STATEMENT OF THE FACTS

1. Sellers (Plaintiffs) entered into a Uniform Real Estate Contract on September 10, 1981, to sell their interests in the subject property to the Defendant, Nick J. Nikols, for \$65,000.00 (sixty five thousand dollars) Findings of Fact at page 241 and 242 of the Record.
2. Nikols paid \$39,856.00 towards the subject purchase price and then Plaintiffs retook possession of the subject property on or about June 1, 1983. Findings of Fact at page 241.
3. Plaintiffs put on no evidence of the value of the property at the time of the alleged breach. Record at 232.

1997). Under Utah Case Law “correctness” means that the Appellate Court does not defer in any degree to the trial Court’s determination of the law. Jeffs vs. Stubbs, 970 P.2d 1234, (Utah, 1998). Thus, the broadest scope of judicial review involves Conclusions of Law. Mariemont Corp. vs. White City Water Improvement District, 958 P.2d 222, (Utah, 1998). This matter is raised in the Conclusions of Law, at the Trial Court in its Ruling at page 238 and following and which is the subject of the Notice of Appeal in this matter. Appellant challenged the same in his Motion to Alter or Amend found at page 250 of the Record.

#### DETERMINATIVE LAW

Appellant submits that the case of Perkins vs. Spencer, 243 P.2d 446 (Utah) along with the case of Cole vs. Parker, 300 P.3d 628, (Utah, 1956) are determinative.

#### STATEMENT OF THE CASE

This is an Appeal to the Utah Court of Appeals from the District Court of the Eighth Judicial District Court in and for Duchesne County, State of Utah, Roosevelt Department, wherein the Trial Court made Conclusions of Law, which Appellant claims are in error.

#### NATURE OF THE CASE

This is an Appeal by the Appellant challenging the Conclusions of Law, entered by the Trial Court regarding how as a matter of law damages are determined.

#### COURSE OF PROCEEDINGS

Trial in this matter occurred on September 21, 2000, before the Honorable John R. Anderson. Judge Anderson compared the value of the property at the time of trial to the amount in the contract between the parties, to determine the damages of the Plaintiffs. Appellant submits

any degree to the trial Court's determination of the law. Jeffs vs. Stubbs, 970 P.2d 1234, (Utah, 1998). Thus, the broadest scope of judicial review involves Conclusions of Law. Mariemont Corp. vs. White City Water Improvement District, 958 P.2d 222, (Utah, 1998). This matter is raised in the Conclusions of Law, at the Trial Court in its Ruling at page 238 and following and which is the subject of the Notice of Appeal in this matter. Appellant challenged the same in his Motion to Alter or Amend found at page 250 of the Record.

ARGUMENT 3:

IT WAS MANIFEST ERROR FOR THE TRIAL COURT TO DETERMINE THAT THE PLAINTIFFS WERE ENTITLED TO ANY DAMAGES BECAUSE THEY HAD TO WAIT TO GET MARKETABLE TITLE.

STANDARD OF REVIEW: The Appellate Court decides an issue involving a Conclusion of Law for correctness. Drake vs. Industrial Commission, 939 P.2d 177, (Utah, 1997). Under Utah Case Law "correctness" means that the Appellate Court does not defer in any degree to the trial Court's determination of the law. Jeffs vs. Stubbs, 970 P.2d 1234, (Utah, 1998). Thus, the broadest scope of judicial review involves Conclusions of Law. Mariemont Corp. vs. White City Water Improvement District, 958 P.2d 222, (Utah, 1998). This matter is raised in the Conclusions of Law, at the Trial Court in its Ruling at page 238 and following and which is the subject of the Notice of Appeal in this matter. Appellant challenged the same in his Motion to Alter or Amend found at page 250 of the Record.

ARGUMENT 4:

IT WAS ERROR FOR THE TRIAL COURT TO AWARD ANY DAMAGES BY VIRTUE OF THE NOTICE OF CONTRACT.

STANDARD OF REVIEW: The Appellate Court decides an issue involving a Conclusion of Law for correctness. Drake vs. Industrial Commission, 939 P.2d 177, (Utah,



### STATEMENT SHOWING JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to 78-2a-3(2) of the Utah Code Annotated as amended in 2001.

### STATEMENT OF THE ISSUES

#### ARGUMENT 1:

IT WAS ERROR FOR THE TRIAL COURT TO HOLD THAT THE PLAINTIFFS RETOOK POSSESSION OF THE SUBJECT PROPERTY ON JUNE 1, 1983, AND THEN DETERMINED ALLEGED DAMAGES TO THE SUBJECT PROPERTY AS OF THE DATE OF TRIAL

STANDARD OF REVIEW: The Appellate Court decides an issue involving a Conclusion of Law for correctness. Drake vs. Industrial Commission, 939 P.2d 177, (Utah, 1997). Under Utah Case Law “correctness” means that the Appellate Court does not defer in any degree to the trial Court’s determination of the law. Jeffs vs. Stubbs, 970 P.2d 1234, (Utah, 1998). Thus, the broadest scope of judicial review involves Conclusions of Law. Mariemont Corp. vs. White City Water Improvement District, 958 P.2d 222, (Utah, 1998). This matter is raised in the Conclusions of Law, at the Trial Court in its Ruling at page 238 which is the subject of the Notice of Appeal in this matter. Appellant challenged the same in his Motion to Alter or Amend found at page 250 of the Record.

#### ARGUMENT 2:

IT WAS MANIFEST ERROR FOR THE TRIAL COURT TO DETERMINE THE VALUE OF THE PROPERTY IN ITS PRESENT STATE TO BE \$30,000.00 WHEN THERE WAS NOT A SHRED OF EVIDENCE TO SUPPORT THE SAME.

STANDARD OF REVIEW: The Appellate Court decides an issue involving a Conclusion of Law for correctness. Drake vs. Industrial Commission, 939 P.2d 177, (Utah, 1997). Under Utah Case Law “correctness” means that the Appellate Court does not defer in

## TABLE OF AUTHORITIES

<u>Adair vs. Bracken</u> 745 P.2d 849, (Utah App. 1987) . . . . .	29
<u>Child vs. Gonda</u> , 972 P.2d 425 (Utah, 1998) . . . . .	39
<u>Christy vs. Guild</u> , 121, P.2d 401 (Utah) . . . . .	28
<u>Cole vs. Parker</u> , 300 P.3d 628, (Utah, 1956) . . . . .	7, 20, 28
<u>Cooley vs. Call</u> 211 P. 977 (Utah) . . . . .	28
<u>Croft vs. Jensen</u> , 40 P.2d 198 (Utah) . . . . .	28
<u>Dopp vs. Richards</u> , 135 P. 98 (Utah) . . . . .	28
<u>Drake vs. Industrial Commission</u> , 939 P.2d 177, (Utah, 1997) . . . . .	5, 6
<u>Jacobsen vs. Swan</u> , 278 P.2d 294, (Utah, 1954) . . . . .	32
<u>Jeffs vs. Stubbs</u> , 970 P.2d 1234, (Utah, 1998) . . . . .	5, 6
<u>Jensen vs. Nielsen</u> , 485 P.2d 673 (Utah, 1971) . . . . .	29
<u>Madsen vs. Anderson</u> , 667 P.2d 44 (Utah, 1983) . . . . .	29
<u>Malmberg vs. Baugh</u> , 218 P.2d 975, (Utah) . . . . .	28
<u>Mariemont Corp. vs. White City Water Improvement District</u> , 958 P.2d 222, (Utah, 1998) . . . . .	5, 6
<u>Perkins vs. Spencer</u> , 243 P.2d 446 (Utah) . . . . .	7, 20, 28, 38
<u>Strand vs. Mayne</u> 384 P.2d 396 (Utah, 1981) . . . . .	29
<u>Western Macaroni Mfg. Co. vs. Fiore</u> , 151 P. 984 (Utah) . . . . .	28
<u>White vs. Gary L. Deeselhorst, N.P. Ski Corp</u> 879 P.2d 1371, (Utah, 1994) . . . . .	40
<u>Young vs. Hansen</u> , 218 P.2d 666 (Utah) . . . . .	28, 38

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	4
STATEMENT SHOWING JURISDICTION. . . . .	5
STATEMENT OF THE ISSUES. . . . .	5
DETERMINATIVE LAW. . . . .	7
STATEMENT OF THE CASE. . . . .	7
NATURE OF THE CASE. . . . .	7
COURSE OF PROCEEDINGS. . . . .	7
DISPOSITION AT TRIAL COURT. . . . .	8
STATEMENT OF THE FACTS. . . . .	8
SUMMARY OF THE ARGUMENT. . . . .	9
ARGUMENT. . . . .	9
ARGUMENT ONE . . . . .	9
ARGUMENT TWO. . . . .	21
ARGUMENT THREE. . . . .	29
ARGUMENT FOUR . . . . .	33
CONCLUSION. . . . .	38
RELIEF SOUGHT. . . . .	44
CERTIFICATE OF MAILING. . . . .	45
ADDENDUM. . . . .	46

## **NAMES OF THE PARTIES**

**MELVIN DALE PATERESON**

**DARLENE PETERSON**

**NICK J. NIKOLS**

**JOHN NIKOLS**