

2001

Melvin Dale Peterson, Darlene Peterson v. Nick J. Nikols, 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 : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Melvin Dale Peterson, Darlene Peterson v. Nick J. Nikols, 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*, No. 20010403 (Utah Court of Appeals, 2001).

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IN THE UTAH COURT OF APPEALS

MELVIN DALE PETERSON and)	Priority No.: 15
DARLENE PETERSON,)	
	)	Case No. 20010403 - CA
Plaintiffs/Appellees,)	
	)	Dist. Ct. No: 990000069
v.)	
)	
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/Appellants.)	

BRIEF OF APPELLEES

Appeal from the Eighth Judicial District Court of
Duchesne County, State of Utah
The Honorable John R. Anderson, District Judge

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Utah Code Ann. §78-2a-3(2)(j) 1

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this case pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the Appellant's brief comply with Rule 24 of the Utah Rules of Civil Procedure and is the Appellant required to marshal the evidence when challenging the court's findings?

2. Did the Appellant, the moving party on his counterclaim seeking reimbursement of monies, have the burden to prove the amount, if any, that should be reimbursed? The standard of review on this issue of law is one of correctness. Campbell v State Farm Mutual Auto Ins. Co. 2001 Ut. 89, __ P.3d __ (Utah 2001), Provo City V Willden 768 P.2d 455, 456 (Utah 1989).

3. Do the facts support the amount that the court determined for damages as of the date of Appellant's breach of the agreement? The standard of review is whether the trial court's findings are clearly erroneous. Macris v Sculptured Software Inc. 24 P.3d 984, ¶14 (Utah 2001).

4. Is Appellant entitled to interest on any monies the court determines should be reimbursed to him? The standard of review on this issue of law is one of correctness. Campbell v State Farm Mutual Auto Ins. Co. 2001 Ut. 89, ___ P.3d ___ (Utah 2001), Provo City V Willden 768 P.2d 455, 456 (Utah 1989).

STATEMENT OF THE CASE

a. Nature of the case.

Appellees, Melvin Dale Peterson and Darlene Peterson (hereinafter referred to as Petersons), as sellers, and Appellant, Nick J. Nikols (hereinafter referred to as Nikols) as buyer, entered into a Uniform Real Estate Contract regarding the sale of real property located in Duchesne County Utah at a price of \$65,000.00. The contract was dated September 10, 1981. Addendum 1. Nikols defaulted on the contract, and Petersons, pursuant to paragraph 16A of the contract, terminated the contract, gave notice to quit and retook possession of the property on June 1, 1983. T. 28 At the time of entering into the contract, Nikols had recorded a Notice of Contract in the Duchesne County Recorder's Office. R. 132 In approximately March 1999, Petersons were informed

by the Duchesne County Recorder that the Notice of Contract had not been released. R. 34 When Nikols refused to release the Notice of Contract at Peterson's request, Peterson's filed this action to quiet title. R. 10 The complaint was filed on April 2, 1999. R. 10 Nikols filed a counterclaim claiming a novation or an accord and satisfaction and seeking reimbursement of the monies he paid on the contract. The counterclaim was filed on May 14, 1999. R. 18

b. Course of proceedings

The trial court partially granted Petersons' Motion for Summary Judgement finding that Nikols failed to make his payments owed on the contract, that Nikols vacated the property in 1983, that there was damage to the property when Nikols vacated, that the contract had been terminated, that Nikols' claims of novation, accord and satisfaction and statutes of limitation failed as a matter of law but that a hearing needed to be held to determine if Petersons' damages, as a result of Nikols' breach, reasonably approximated the amount forfeited when the contract was terminated. Addendum 2 R. 152. No one appealed that ruling. The trial court set for trial

Nikols' counterclaim to determine whether Nikols was entitled to reimbursement of the payments made on the contract and to determine if the amount forfeited was "grossly excessive and disproportionate to any possible loss so as to shock the conscience", Johnson v Carman 572 P.2d 371, 373 (Utah 1977). If the Court concluded that the amount forfeited was "grossly excessive and disproportionate to any loss", then it needed to determine what amount should be repaid to Nikols.

c. Disposition in the lower court.

Trial was held to the court on September 21, 2000, following which the trial court determined that Nikols had paid \$39,856.00 on the \$65,000.00 purchase price agreed to in the contract and that Petersons' damages were \$35,507.00. The court found the difference was not grossly excessive or disproportionate, but still ordered the Petersons to pay Nikols the sum of \$4,385.00. Findings of Fact and Conclusions of Law R. 243, Addendum 3, Corrected Judgment R. 298, Addendum 4, Amended Order, R. 278 Addendum 5. Petersons tendered that amount to Nikols, which Nikols refused and then Nikols filed this appeal.

STATEMENT OF FACTS

Petersons own approximately 40 acres of recreational property along the Duchesne River in Duchesne County, Utah. T. 2. Petersons paid \$35,000 for the property in 1972. T. 4 Located on the property was a cabin. Petersons borrowed \$25,474.81 from Commercial Security Bank in 1978 and used at least \$10,000.00 of that loan to renovate the cabin in 1979 - 1980. T. 4, 5, and 71. Prior to renovating the cabin the property rented for \$250.00 per month or \$3,000.00 per year. T. 5, 6.

In 1981 Petersons had medical expenses that needed to be paid. Therefore, they listed the property for sale. T.55 Nikols, on behalf of his father, decided to purchase the property for recreational purposes. T. 96 Nikols' intent was to build a nice cabin and put in a bridge. T. 98 The parties agreed on a purchase price of \$65,000.00 to be financed by Petersons. Nikols also agreed to pay the water assessments and taxes, keep the property in good repair and keep the property insured. A Uniform Real Estate Contract was signed by the parties which provided for installment payments of the purchase price and the assumption of the mortgage Petersons had

with Commercial Security Bank. Addendum 1, Exhibit 2. Nikols paid part of the amount owed to Petersons and part of the payments to Commercial Security Bank. The total paid by Nikols was \$39,856.00. Of that amount \$34,000.00 was paid to Petersons and the remainder to Commercial Security Bank. T. 7-8, 48, 61-61, Exhibit 3. Nikols failed to pay the taxes in the amount of \$362.27 and the water assessments in the amount of \$84.21. T.44-45. Nikols also failed to keep the property in good repair and failed to insure the property. T. 16, 87.

In 1982, while visiting the property Nikols determined that the cabin located thereon had been vandalized. T.17 The cabin was no longer habitable. T. 19 Nikols then became concerned that the property was located too far from other inhabitants and if he built a new cabin on the property it would also be vandalized. T.111 Nikols then ceased making the payments on the contract.

When Petersons received notice from Commercial Security Bank that Nikols was not making the payments, Petersons exercised their rights under paragraph 16A of the Uniform Real Estate Contract and in May 1983 gave

notice to quit and retook possession of the property.

T.28 At that time the cabin was uninhabitable and would require at least \$20,000.00 to repair. T. 23, 59

Many years passed. In 1999, Petersons were informed by the Duchesne County Recorder that the Notice of Contract filed by Nikols in the Duchesne Recorder's office had not been released. R. 34 When Nikols refused to release that document, Petersons filed this action to quiet title. R. 3 Nikols counter claimed asking that all the monies that he paid on the contract be reimbursed based on theories of novation and accord and satisfaction.

Neither party presented appraisal evidence as to the value of the property in May 1983 when Petersons retook possession of the property and after the cabin was vandalized. Evidence was provided as to the amount of the unpaid taxes and water assessments, Exhibits 7 and 8, that the cost to repair the cabin would have been \$20,000.00, T. 23, 33-34 but Nikols had not obtained insurance on the property so there were no monies available to make the repairs and therefore it had not been repaired T. 87, and that the property, prior to the

renovation of the cabin, rented for \$250.00 per month. T. 5 Other evidence presented as to value was the 1982 tax notice that valued the property at \$25,000.00, (page 2 of Exhibit 7) and the fact that Commercial Security Bank had loaned \$25,000.00 on the property prior to the cabin being renovated. T. 2-4, 65, 71. Finally, according to the express terms of the contract, Nikols had himself agreed to pay \$65,000.00 for the property in 1981.

SUMMARY OF ARGUMENT

1. Nikols brief fails to comply with Rule 24 of the Utah Rules of Civil Procedure. Nikols also fails to marshal the evidence in support of the trial court's decision. Nikols' brief should be disregarded and the trial court's decision affirmed.

2. Nikols had the burden of proof on his counterclaim and failed to present any evidence of the value of the property at the time of his default and Petersons retaking possession. He cannot now complain about the court making its decision based on the limited information provided by the parties.

3. The trial court correctly decided the loss of bargain damages as of the date of default by Nikols.

Nikols misconstrues the court's use of the term "present state".

4. Nikols is not entitled to interest on any monies that Petersons may be ordered to repay.

ARGUMENT

POINT I: NIKOLS FAILS TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S DECISION AND THEREFORE HIS APPEAL SHOULD BE DISMISSED.

Nikol's brief should comply with Rule 24 of the Utah Rules of Appellate Procedure. He should set forth legal analysis on the issues presented and he is required to marshal all the evidence that supports the court's findings and then demonstrate that the evidence is insufficient to support the findings in question. Failure to do so may result in this Court disregarding Nikols' arguments and sustaining the decision by the trial or court. Smith v. Smith 995 P.2d 14, 16 (Utah App. 1999); Lefavi v. Bertich, 994 P.2d 817, 821 (Utah App. 2000); Phillips v. Hatfield 904 P.2d 1108, 1109 (Utah App. 1995); and Koulis v Standard Oil Co. of California 746 P.2d 1182, 1184 (Utah App. 1987).

The trial court entered specific conclusions of law. Addendum 3. Nikols never mentions those conclusions of

law but rather goes into rambling arguments about whether the evidence supported the decision but never marshals the evidence he is challenging. The reason he fails to marshal the evidence is that he had the burden to establish his claims in his counterclaim and Nikols presented no evidence to the court to support his counterclaim.

POINT II: NIKOLS, WHO HAD THE BURDEN OF PROOF ON HIS COUNTER CLAIM, PRESENTED NO EVIDENCE TO SUPPORT HIS CLAIM THAT THE LIQUIDATED DAMAGES WAS A FORFEITURE. NIKOLS CANNOT NOW COMPLAIN ABOUT THE TRIAL COURT'S DECISION BASED ON THE EVIDENCE IT RECEIVED FROM THE PETERSONS.

Petersons filed the complaint seeking to quiet title. Nichols filed a counterclaim seeking return of the monies he had paid on the contract. The court, by summary judgment, found that Nikols had breached the agreement, that Petersons retook possession of the property as provided in the contract and the court denied Nikols' claims of novation, accord and satisfaction and statutes of limitations. The court then set for trial Nikols' request for reimbursement. Nikols therefore had the burden to show that the liquidated damage clause, paragraph 16a of the contract signed by the parties, should not be enforced because the amount forfeited was

grossly excessive and disproportionate to the actual loss so as to shock the conscience of the court. Johnson v. Carman 572 P.2d 371, 373 (Utah 1977).

The general rule is that parties may contract as to the amount of liquidated damages that should be paid in the case of a breach. The exception to the rule is stated in Johnson v. Carman supra as follows:

The provision in a contract for the sale of real property that all payments which have been made will be forfeited as liquidated damages will not be enforced if the forfeiture would be grossly excessive and disproportionate to the possible loss so as to shock the conscience.

Johnson v. Carman, 572 P.2d at 373. In determining the possible loss, the court includes loss of benefit of the bargain, attorney's fees, costs to restore the premises, real estate commissions paid, rent or interest, and the damage or depreciation to the property. Id.(allowing interest, loss of benefit of bargain, attorney's fees and costs to restore); Jensen v. Nielsen 485 P.2d 673, 674 (Utah 1971) (allowing reasonable rental, real estate commissions, taxes and water assessments); Clegg v. Lee, 516 P.2d 348, 353 (Utah 1973) (allowing legal fees as damages); and Perkins v. Spencer, 243 P.2d 446, 451 (Utah 1952)(allowing loss of benefit of bargain, damages or

depreciation to the property, decline in value and fair rental value).

In this case the amount forfeited, \$39,856.00, is easily offset by the loss sustained by Petersons. Petersons' loss is as follows:

Fair rental (14 months at \$250.00 per month):	3,500.00
Water assessments:	84.21
Taxes:	362.27
Legal fees: (R. 183)	5,558.00
Loss of Bargain:	\$35,000.00
Real Estate Commission (Addendum 1, R. 129)	3,900.00
Total: ¹	\$48,404.48

Nikols main complaint appears to be about the amount determined by the court for the decline in value of the property. Nikols, the moving party on his counterclaim

¹

The trial court refused to include legal fees and fair rental in its calculation which is error. The trial court also ordered the return of \$4,385.00 to Nikols while concluding that the amount forfeited was not excessive or unconscionable. That also was error. Petersons, however, are willing to live with the court's decision and therefore elected not to file a counter appeal. In the event this case is remanded Petersons would like the opportunity to again claim those losses and not be required to repay any monies since the amount forfeited is not grossly excessive and does not shock the conscience.

however, put on no evidence to show that the amount forfeited was grossly excessive or disproportionate to the possible loss incurred by Petersons. Nor did Nikols put on any evidence of the possible losses incurred by Petersons. Nikols did admit that there was a cabin on the property that had been vandalized during the time he was in possession. "It is the wrongdoer, rather than the injured party, who should bear the burden of some uncertainty in the amount of damages, ... the standard for determining the amount of damages is not so exacting as the standard for proving the fact of damages. Pro Max Development Corp v Mattson 943 P.2d 247, (Utah App. 1997) citing Atkin, Wright and Miles v Mountain State Tel.& Tel. Co. 709 P.2d 330, 334 (Utah 1985).

Nikols furnished no appraisal or other proof as to the value of the property in May 1983 when the contract was forfeited. The court had the fact that Duchesne County appraised it at \$25,000.00 for its 1982 tax notice, that Commercial Security Bank after an appraisal loaned \$25,000.00 against the property, that Petersons had paid \$35,000.00 and spent another \$10,000.00 on the cabin which had then been vandalized while in the

possession of Nikols and would cost \$20,000.00 to repair and that it rented for \$250.00 per month.² All that evidence would support a value as of May 1983 of \$25,000.00. If anything Nikols received the benefit of the lack of evidence by the \$30,000.00 value set by the court.

With respect to the loss of bargain, the evidence was that Nikols purchased the property as a recreational property and that it had a unique appeal to him. Nikols agreed to purchase the property for \$65,000.00, in part, based on the appeal this piece of property had to him. It is unclear from the court's order whether the basis for the reduction of the value was the damage to the cabin, or simply that other purchasers did not value the property the same as Nikols. Irrespective of the reason for the decrease in value, Petersons suffered a loss of bargain damage of \$35,000.00. The trial court was very aware that this loss of bargain damage was a relevant factor in determining whether the forfeiture was grossly

²

A general rule of thumb is that property should rent for 1% per month of its value. Johnson v Carman, 372 P.2d 371, 374 (Utah 1977) (dissenting opinion). That rule of thumb would set the value of the property at \$25,000.00.

excessive and disproportionate. Indeed, the trial court correctly noted that it was not for the court to determine whether Nikols made a mistake when he concluded at the time of the contracting that the property was worth \$65,000.00. "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." Trial Court's Order, p. 3, Addendum 5. Based on this legal principal, and the evidence of the value of the property at the time that Petersons took it back in 1983, the Court found that the loss of bargain from the breach of contract was \$35,000.00, plus the total of the taxes and water assessments. Because the amount paid and forfeited and the amount of the loss of the bargain were roughly equivalent, the court correctly determined that the forfeiture was not grossly excessive.

POINT III: NIKOLS MISSTATES THE COURT'S RULING AS OF THE DATE THE COURT VALUED THE LOSS OF BARGAIN. THE TERM "PRESENT STATE" USED BY THE COURT REFERS TO THE CONDITION OF THE PROPERTY NOT THE DATE OF VALUATION.

Nikols claims the court valued the property as of the date of trial, not as of the date of default. In making that argument Nikols misstates the court's decision. The court clearly valued the property as of the date of default which is consistent with the decisions of the Court. Bellon v Malnar, 808 P.2d 1089, 1094 (Utah 1991). The trial court used the rental value, the tax notice, the repair costs and the amount loaned on the property, all of which facts were at or near the time of the default, to determine the value of the property at the time of default. Nikols hangs his argument on the court's use of the term "present state" in its ruling as to the value of the property. The court when using that term was referring to the condition of the property not the date the court was calculating damages. The present state of the property had not changed since the date of default as the cabin that was vandalized prior to default had not been repaired and remained in the same condition. To claim that "present

state" really means "present time", as Nikols' does, would require the Court to ignore all of the evidence received by the Court to determine the value, which evidence all occurred in the early 1980's and not the late 1990's.

POINT IV: NIKOLS IS NOT ENTITLED TO PREJUDGMENT INTEREST ON ANY MONIES PETERSONS MAY BE REQUIRED TO PAY TO NIKOLS.

Nikols also claims that he is entitled to prejudgment interest on any monies Petersons are required to repay him. He makes this claim even though he waited over 17 years to make any claim for reimbursement. Nikols argument has been previously rejected by the Utah Supreme Court in Bellon v. Malnar, 808 P.2d 1089 (Utah 1991). In Bellon v. Malnar the Defendants had been ordered to repay \$26,058.33 to Bellon. Bellon argued that he was entitled to prejudgment interest on that amount. The Court rejected that claim stating:

No case has been cited to us where we have allowed prejudgment interest in an action such as the instant case, which is for equitable relief. "A suit of this nature involving the invocation of a forfeiture and/or the enforcement of a purchase contract invokes consideration of the principles of equity which address themselves to the conscience and discretion of the trial court." Fuller v. Blood, 546 P.2d at 610. In view of the highly

equitable nature of this action where the court has discretion in determining the amount, if any, to be returned to the defaulting vendee, we find no error in the denial of prejudgment interest.

Bellon v. Malnar, 808 P.2d at 1097. Thus, the holding of Bellon precludes the Court from awarding prejudgment interest in this case.

CONCLUSION

It is requested that the trial court's decision be affirmed.


Dated this 20 day of November, 2001.

McKEACHNIE, ALLRED,
McCLELLAN & TROTTER P.C.
Attorneys for
Appellees/Plaintiffs

By:


Donna M. Trotter

By:


Clark B. Allred

ADDENDUM I

UNIFORM REAL ESTATE CONTRACT

UNIFORM REAL ESTATE CONTRACT

"This is a legally binding form, if not understood, seek competent advice." T-79110

1. THIS AGREEMENT, made in duplicate this 10th day of September, A.D., 1981,
by and between MELVIN DALE PETERSON and DARLENE PETERSON, his wife,
hereinafter designated as the Seller, and NICK J. NIKOLS

hereinafter designated as the Buyer, of Salt Lake City, Utah

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of DUCHESNE, State of Utah, to-wit: Myton, Utah (See legal description)
More particularly described as follows: ADDRESS

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

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

Together with 5 shares of Ute Indian Water Shares, AND all oil, gas & mineral rights

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of SIXTY FIVE THOUSAND AND NO/100 Dollars (\$65,000.00) payable at the office of Seller, his assigns or order as directed by Seller strictly within the following times, to-wit: TWENTY THOUSAND AND NO/100 (\$20,000.00) cash, the receipt of which is hereby acknowledged, and the balance of \$45,000.00 shall be paid as follows: \$10,000.00 applied to principal only on or before October 25, 1981. \$10,000.00 applied to principal only, on or before September 10, 1982. \$3,156.81 applied to principal only, on or before March 10, 1983. In addition to the foregoing principal payments, Buyer agrees to pay \$488.00 principal and interest each month, commencing on the 10th day of October, 1981 and on the 10th day of each and every month thereafter until the entire remaining principal balance, together with accrued interest, is paid in full.

Buyer agrees to pay general property taxes and fire insurance premiums as they become due. Possession of said premises shall be delivered to buyer on the 10th day of September, 1981.

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from September 10, 1981 on all unpaid portions of the purchase price at the rate of fourteen & 1/4 per cent (14-1/4 %) per annum. The Buyer, at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of Commercial Security Bank with an unpaid balance of \$21,843.19, as of September 10, 1981.

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following None.

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed fourteen & 1/4 percent (14-1/4 %) per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises except the following:

None

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.

12 The Buyer agrees to pay the general taxes after September 10, 1981. 1981 Taxes
pro-rated at closing.

13. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in the amount of not less than the unpaid balance on this contract, or \$ _____ and to assign said insurance to the Seller as his interests may appear and to deliver the insurance policy to him.

14. In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of 1/2 of one percent per month until paid.

15 Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within thirty (30) days thereafter, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages. For the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land and become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B The Seller may bring suit and recover judgement for all delinquent installments, including costs and attorneys fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgement for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

17. It is agreed that time is the essence of this agreement.

18. In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Seller, then the Buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may, at the option of the Buyer, be suspended until such a time as such suspended payments shall equal any sums advanced as aforesaid

19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of deed, at the option of Buyer.

20 It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto _____
No Exceptions

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

22 It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties to this agreement have hereunto signed their names, the day and year first above written.

Signed in the presence of

[Signature]

[Signature] Melvin Dale Peterson

[Signature] Seller Darlene Peterson

[Signature] NICK J. NIKOLS

Buyer

Uniform Real Estate Contract

No.

To

Re. Rev. sh at Myton, N. 1

- 20,000 at close
 - 10,000 in 45 days
30,000

- 10,000 in 1 yr.
40,000

- 20,000 Assume Bal of loan at term Acc. B.
10,000 21,543.19
 488 per mo. @ 1 1/2%

- 5,000 in 1 1/2 yr from close.
65,000

5,000
 1,843.19
3,156.81

REMITTANCE ADVICE		UTAH TITLE & ABSTRACT CO., SALT LAKE CITY, UTAH		DETACH BEFORE DEPOSITING	
DATE	INVOICE NO.	DESCRIPTION	GROSS AMOUNT	DISCT OR DEDUCT.	NET AMOU
9-15-81	T-79110	Proceeds of sale on property located at Myton, Utah Buyer: Nikols			\$15,720.7
		4,115.71		4,115.71	
		10,111.11		10,111.11	
		15,720.71		15,720.71	
		SL/bg			

ADDENDUM II

RULING - R152

**EIGHTH DISTRICT COURT, STATE OF UTAH
DUCHESNE COUNTY, ROOSEVELT DEPARTMENT**

MELVIN DALE PETERSON and DARLENE PETERSON, <div style="text-align: right;">PLAINTIFF,</div> vs. NICK J NIKOLS, <div style="text-align: right;">DEFENDANT.</div>	RULING Case No. 990000069 JUDGE: JOHN R ANDERSON
--	---

The Court has before it plaintiff's motion for summary judgement and defendant's request for oral argument. The defendant requested oral argument on the motion and the matter was argued before the Court on April 6th, 2000. Donna M. Trotter appearing for the plaintiffs and John Walsh appearing and arguing the matter for the defendant.

The Court has carefully reviewed the file and relevant pleadings; the Court has also carefully reviewed the memoranda in support of the motion and all affidavits memoranda in opposition to the motion for summary judgement.

The material facts necessary to decide this matter as a matter of law are not in dispute.

The defendant initially made thirty four thousand dollars (\$ 34,000.00) of payments toward principal and some monthly payments on an outstanding mortgage pursuant to uniform real estate contract which the parties entered into on or about September 10th, 1981.

Contract provided for a total purchase price of sixty five thousand dollars (\$65,000.00) with a down payment of twenty thousand dollars (\$ 20,000.00), two ten thousand dollar (\$ 10,000.00) annual payments and the balance of three thousand one hundred fifty six and eighty one (\$ 3156.81) in monthly payments thereafter to amortize the contract.

There was damage to and destruction of the real estate or the improvements on the real estate and the defendant terminated making payments on the contract September of 1982 and has made no further payments.

The defendant vacated the property sometime in 1983, apparently plaintiff's elected to proceed under 16(a) of the contract and took possession of the property.

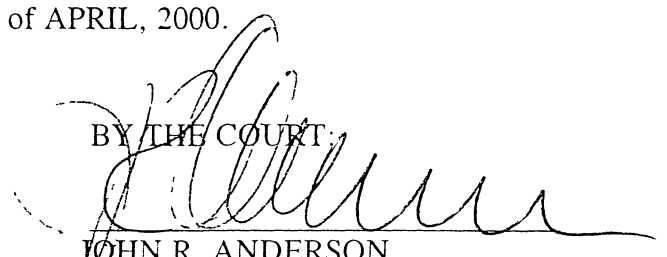
Based upon existing Utah case law a forfeiture under paragraph 16(a) of uniform real estate contract will be allowed, only if the equities are such that the amount of money paid toward the property as forfeited reasonably approximate the sellers damages or would not be unconscionable to allow the seller to both retain the property and the payments made as

liquidated damages.

The Court after reviewing the case law in the matter will find as a matter of law that the plaintiff's motion for summary judgment regarding the issues raised defendant's counterclaim regarding novation and accord and satisfaction do not present issues of fact and plaintiff's motion for summary judgment is granted on those issues for the reasons set forth in plaintiff's memorandum. The Court will find as a matter of law that the statute of limitations would not run on an action to clear title to real estate and although the forfeiture under 16(a) entitles the seller to regain possession of the property there are issues of fact remaining regarding damages. This Court will set the matter for trial for determination solely on the issue of plaintiff's damages.

DATED this 7th day of APRIL, 2000.

BY THE COURT:


JOHN R. ANDERSON
DISTRICT COURT JUDGE

ADDENDUM III

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
R243

NOV 17 2000

PA-

DONNA M. TROTTER - 8084
GAYLE F. McKEACHNIE - 2200
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Attorneys for Plaintiff
855 East 200 North (112-10)
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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 21st 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.

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

\$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.

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.

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.

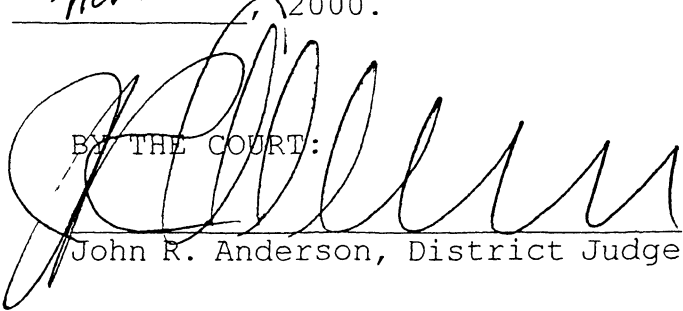
5. Ownership of the property described herein is hereby quieted to the Plaintiffs, Melvin Dale Peterson and Darlene Peterson:

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 30th day of Nov., 2000.

BY THE COURT:


John R. Anderson, District Judge

APPROVED AS TO FORM:

John Walsh
Attorney for Nick J. Nikols

ADDENDUM IV

AMENDED ORDER PER RULING DATED
25TH DAY OF JANUARY 2001
R298

FILED
DISTRICT COURT
DUCHESE COUNTY

FEB 23 2001

JOHN R. ANDERSON
jm

GAYLE F. McKEACHNIE - 2200
CLARK A. McCLELLAN - 6113
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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 TH 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

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.

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.

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

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.

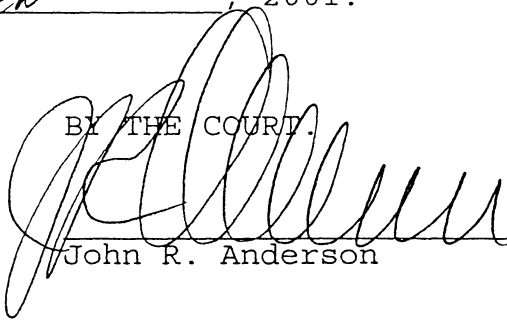
While having no direct bearing on the actual value of the land, the Duchesne County Assessor had listed the property as having a value of about \$25,000 in 1982.

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.

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

ADDENDUM V

CORRECTED JUDGMENT
R278

FILED
DISTRICT COURT
DUCHESS COUNTY UTAH

MAY 3 1991

JOANNE MOORE, CLERK
BY M DEPUTY

DONNA M. TROTTER - 8084
GAYLE F. McKEACHNIE - 2200
McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.
Attorneys for Plaintiff
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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.

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:

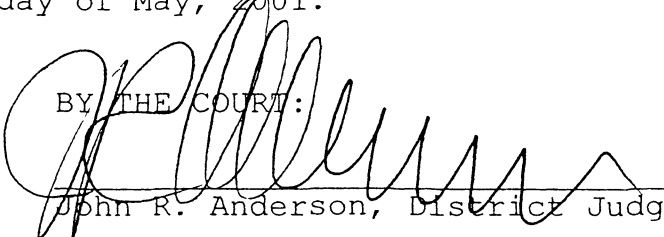
1. The defendants, Nick J. Nikols is awarded Judgment in the amount of \$4,385.00.

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:

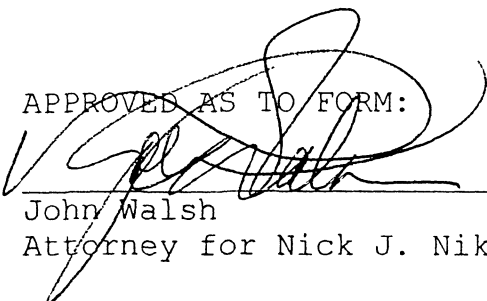
Township 3 South, Range 2 West, Uintah Special Meridian
Section 23: Lots 11 and 12 (SE 1/4 SE 1/4)

DATED this 31st day of May, 2001.

BY THE COURT:


John R. Anderson, District Judge

APPROVED AS TO FORM:


John Walsh
Attorney for Nick J. Nikols

MAILING CERTIFICATE

Donna M. Trotter, attorney for Plaintiffs/Appellees certifies that she served the attached BRIEF OF APPELLEE upon counsel by placing two true and correct copies thereon in an envelop addressed to:

MR 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 20th day of November, 2001.


Donna M. Trotter

MAILING CERTIFICATE

Donna M. Trotter, attorney for Plaintiffs/Appellees certifies that she served the attached BRIEF OF APPELLEE upon counsel by placing two true and correct copies thereon in an envelop addressed to:

MR JOHN WALSH
ATTORNEY AT LAW
2319 FOOTHILL DR SUITE 270
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Donna M. Trotter