

2001

# Melvin Dale Peterson, Darlene Peterson v. Nick J. Nikols : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MELVIN DALE PETERSON and  
DARLENE PETERSON,

Plaintiffs and Appellees,

vs.

NICK J. NIKOLS, et al.,

Defendants and Appellants.

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;

DISTRICT COURT CASE  
NO. 990000069

COURT OF APPEALS CASE  
NO. 20010403-CA

PRIORITY 15

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REPLY BRIEF OF THE APPELLANT

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APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

DUCHESNE COUNTY, STATE OF UTAH

ROOSEVELT DEPARTMENT

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HONORABLE JOHN R. ANDERSON

PRESIDING

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**FILED**  
Utah Court of Appeals

DEC 19 2001

Paulette Stagg  
Clerk of the Court

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## ARGUMENT ONE

### APPELLANT IS NOT REQUIRED TO MARSHAL THE EVIDENCE WHEN CHALLENGING A CONCLUSION OF LAW

Argument One of the Appellees states to this Court that the Appellant must marshal the evidence when challenging a Finding of Fact.

The first paragraph of Argument One of the Appellees states:

“Nikols 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 Nikol’s arguments and sustaining the decision by the trial or court (sic). Smith vs. 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. California 746 P.2d 1182, 1184 (Utah App. 1987).”

Appellant agrees that the standard of review at the Appellate level requires one to marshal the evidence when challenging a Finding of Fact, however the Appellant is not required to marshal the evidence when challenging a Conclusion of Law.

As set forth in the Appellant’s arguments he is not challenging a Finding of Fact.

Argument One of Appellant’s Brief challenges the legal procedure of determining damages some seventeen years after Plaintiffs retook the property.

This is not a challenge to a Finding of Fact, this is a challenge to the correctness of the legal analysis. Appellant submits that the law requires the Court to determine the damages at the time that the Plaintiffs took the property, not some seventeen years after the fact.

Hence, Argument One of the Appellant’s Brief is not a challenge to a Finding of Fact, and therefore there is no requirement that the Appellant marshal the evidence in support of the same.

Argument two in the Appellant’s Brief states that it was an error in law to determine the

value of the property at the time of trial when there was no evidence to support the same.

Perhaps one can argue that here the Appellant must marshal the evidence to support the position taken by the Lower Court and then show that there was insufficient basis for the said Finding.

However, Appellant claims that there is no evidence, and therefore the burden would shift to the Appellee to show where that was not true.

Not only is it true that there was not a shred of evidence to support the determination of the value in its present state, and hence nothing to marshal, but this claim by Appellant is confirmed in the response by the Appellees as they make no claim that there was such evidence, and they surely have not pointed out to this Court where any was considered by the Lower Court.

Argument Three of the Appellant's brief states that it was a legal error for the Lower Court to grant to the Appellees an offset because they had to wait to get marketable title.

Appellees were required to show the Lower Court where they were legally entitled to any offset because they had to wait to get marketable title.

Appellees did not put on any evidence of any such damages and they did not even claim this as a damage.

Hence, the Appellant is not required to show this Court through marshalling the evidence in support, because there again was no evidence of the same, and furthermore, there was not so much as a claim for the same by the Appellees at the trial level.

Hence, in the Lower Court it was a legal error, not a Finding of Fact, therefore no requirement on the part of the Appellant to marshal any evidence.

Argument Four of the Appellant's brief states that it was a legal error for the Lower Court to award any damages for the Notice of Contract being filed with the County Recorder at the

time of the transaction.

Nikols was entitled to have the Notice of Contract filed, which of course was signed by the Plaintiffs/Appellees and recorded at the time of the contract to benefit both the Plaintiffs and the Defendant. Nikols was entitled to have that Notice remain of record to secure his interest until his interest was extinguished by the Court.

Hence, it was an error at law for the Lower Court to grant damages to the Appellees because there was no damage and furthermore the Appellant was rightfully secured against the property until he was compensated for his interest.

It was a legal error for the Court to do so, not an insufficient Finding.

Therefore there was no requirement that the Appellant marshal evidence to support a non-existing Finding, and then show this Court the insufficient evidence regarding the same.

Hence, the Argument by the Appellees that the Appellant was required to marshal evidence in support of a challenged Finding, and then show the Appellate Court where there was insufficient evidence to support the same, is wholly without merit.

The Second Paragraph of Argument One of the Appellees also lacks merit.

The second paragraph of Argument One, states as follows:

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.

Appellant takes issue with everything in this paragraph.

First, all four of the Appellant's arguments involve a challenge to Conclusions of Law.

This is expressly stated on pages 5 and 6 of his Blue Brief.

In addition, the same is outlined in Argument One beginning at page 9 and concluding on page 21 of the Blue Brief.

Argument Two outlines the challenge to the Conclusion of Law beginning on page 21 and concluding on page 29.

Argument Three outlines the challenge to the Conclusion of Law beginning on page 29 and concluding on page 29.

Argument Four outlines the challenge to the Conclusion of Law beginning at page 33 and concludes on page 38.

Hence, it is wholly without merit for the Appellees to suggest to this Court that Appellant never mentions the Conclusions of Law, as the whole of his brief involves the same expressly.

Second, the Appellant takes real issue with the claim that Nikols failed in his evidence on his Counterclaim and that somehow Nikols failed in his burden of proof

Appellant submits that the entire trial involved solely the issue of damages claimed by the Plaintiffs, and whether the same was so divergent from the amounts paid by Nikols as to be an unconscionable windfall to Petersons.

The Counterclaim filed by Nikols asserted claims based on novation accord and satisfaction, and the Statute of Limitations.

These claims were resolved by way of Summary Judgment.

It is a bad faith argument to suggest to this Court that Appellant failed on his Counterclaim, and therefore has no basis to challenge the determination of the alleged damages of the Appellees.

This is absolutely confirmed in the following undisputed facts:

(1) The trial Court did not allow a shred of evidence at the time of trial on the issue of



novation, the record is absolutely clear that the trial Court did not allow any exhibit nor any witness to be presented to the court on the issue of novation.

(2) The trial Court did not allow a shred of evidence at the time of trial on the issue of accord and satisfaction. The record is absolutely clear that the trial Court did not allow a single exhibit in reference to the same nor allow a single witness to take the stand regarding the same.

(3) The trial Court did not allow a shred of evidence nor argument regarding the running of the Statute of Limitations.

(4) Perhaps the easiest and best way for this Court to see who had the burden of going forward with the evidence and the burden of persuasion is merely looking at who was allowed to go first with their evidence. Here the Plaintiffs were allowed to go first with their evidence.

Plaintiffs were also allowed to go last regarding rebuttal.

Plaintiffs were first to make closing arguments and were allowed to have the last word after Nikol's Counsel had just one opportunity to address the Court.

Hence, it is misleading to this Court to suggest that Nikols "had the burden to establish his claims in his counterclaims and Nikols presented no evidence to the Court to support his counterclaim."

At page 1, of the record, the proceedings began as follows:

"ROOSEVELT, UTAH

HONORABLE JOHN R. ANDERSON, PRESIDING

P R O C E E D I N G S

THE COURT: We're on the record. Peterson vs. Nikols and others. The record will indicate that the parties are present, their Counsel are present.  
Are you ready to proceed?

MS TROTTER: Yes, Your Honer.

THE COURT: Okay, are you ready to proceed, counsel?

MR. WALSH: We are, Your Honor. John Walsh appearing on behalf of the defendants this afternoon.

THE COURT: Okay, thank you.

MS. TROTTER: Your Honor, the Plaintiffs will call Melvin Peterson.

THE COURT: Okay. Would you raise your right hand please and be sworn.

MELVIN DALE PETERSON

Having been duly sworn testified upon his oath as follows:

THE COURT: Have a seat up here if you will.

DIRECT EXAMINATION

MS. TROTTER:

Q. Would you please state your name for the Court?

A. My name is Melvin Dale Peterson.

.....

Appellant submits that it is absolutely without question which party before this Court had the burden of going forward with the evidence and the burden of persuasion, and it absolutely was not the Appellant herein.

The Order signed by the Honorable John R. Anderson, at page 234 of the Record which is the first page of the addendum to the Blue Brief reads:

“The above captioned matter came on regularly for trial September 21, 2001, 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 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 . . .”

Identical language was prepared by Counsel for the Appellees in the AMENDED ORDER PER RULING DATE 25<sup>TH</sup> DAY OF JANUARY, 2001, which is at page 278 of the record.

In this Order, the Trial Court gave its analysis of the evidence, which bears conclusively on who had the burden of going forward and who had the burden of persuasion:

“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 and inequitable as being exorbitant.

The Court must analyze the seller’s actual damages,  
...”

Appellant submits that it is not a good faith argument to suggest that Appellant failed in his burden of proof regarding his Counterclaims.

The Counterclaims were dismissed by Summary Judgment and the only issue reserved was a determination of the Plaintiffs’ actual damages.

Plaintiffs were therefore required to go forward with their evidence and to present the same consistent with their burden of persuasion.

Defendants were not required to establish Plaintiffs damages, rather they were to challenge the same at the Trial Court level and now here on Appeal.

Clearly, the second paragraph of Argument One is without merit.

However, if this Court should agree with the Appellees that Appellant’s claim is really a

challenge to a FINDING OF FACT, then Appellant submits that he addressed the same on page 21-29 of the Blue Brief.

Once again, the Appellant marshaled all of the evidence submitted to the Trial Court on the determination that the value of the property was \$30,000.00.

The Court can be assured that all of the evidence regarding the same is found marshaled herein, as the Trial Court stated its total basis for the determination that the value of the property was \$30,000.00 at page 232 in the record.

Here the Trial Court stated on page 3 and 4 of its order 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.

Furthermore 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 . . . (Emphasis added)

Hence, Appellant has marshaled all of the evidence that the Lower Court had before it, in its determination as a matter of law, that the value of the property in its present state was \$30,000.

Appellant submits that the Judge said it best when he said,

“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.”

Hence, the Trial Court stated as a matter of law, that the only evidence of value was the

price which Nikols was willing to pay.

Hence, on Appeal, the Appellees raise a red herring when they state that the Appellant failed to marshal the evidence in support of the challenged Finding of Fact, when the Trial Court stated that the only evidence that the trier of fact had to go on was the single piece of evidence, which was what Nikols agreed to pay.

Hence, the argument by Appellees boils down to the notion, that Nikols must marshal the single piece of evidence.

Hence, should the Court agree with Appellee that the claim of the Appellant is a challenge to a Finding of Fact, Appellant has met that burden by showing this Court the single piece of evidence, as expressly stated by the Trial Court.

However, the difficulty that the Appellees have on appeal is the critical fact that Appellees were required to show the trier of fact what the actual value of the property was at the time of the alleged breach.

The Appellees failed in their proof, and so it was a clear abuse of discretion for the Trial Court to hold first that there was no evidence to support its Finding, and then to make a Finding without any evidence.

Hence, there can be no question, that the Appellant has marshaled all of the evidence in support of the challenged Findings and that there was clearly insufficient evidence to support the same.

## ARGUMENT TWO

### IT WAS NOT NIKOLS BURDEN OF PROOF TO SHOW THE TRIAL COURT PETERSONS' ALLEGED DAMAGES

In this action, the Appellees argue in Argument Two, that it was Nikol's burden to go

forward with the evidence and also to carry the burden of persuasion, on the damages that Petersons allegedly sustained.

Appellant submits that this claim is without merit, as Petersons were required to show their damages and to establish before the Trial Court that they had in fact sustained the damages claimed.

The Appellant on the other hand was required to meet that evidence and show the Trial Court that the damages were not compensable for whatever reasons Appellant could establish.

Here, Petersons argue that it was Nikols responsibility to show Petersons' damages.

Paragraph #1 of the Appellees' argument states:

Petersons filed the complaint seeking to quiet title. Nichols (sic) 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 Statute of Limitations. The court then set for trial Nikol's 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).

Appellant submits that this is a misstatement of the facts as well as a misstatement of the law.

As a matter of fact, Petersons went first with their evidence to show their damages. They made the first closing argument and the final closing argument.

In all respects the Trial Court not only treated the Petersons as the ones who were required to go forward with their evidence, the Trial Court expressly so stated in the Order, found at page 234 of the record.

As noted in Argument One above, it is not a good faith argument to suggest on appeal,

that the Court went forward on the Defendant/Appellant's counterclaim.

Appellants raised three issues in their Counterclaim: (1) novation (2) accord and satisfaction and (3) Statute of Limitations.

The Trial Court disposed of every one of the Appellant's claims by way of Summary Judgment, and reserved for trial a determination of the Appellees' actual damages.

The Trial Court took the correct view that it was required to compare the actual damages sustained by the Appellees to the amounts paid by the Appellant.

If the difference between the same was so grossly excessive and disproportionate to the actual loss so as to shock the conscience of the Court, then the Court was required not to enforce the liquidated damages clause in the contract. Johnson vs. Carman, 572 P.2d 371, (Utah, 1977).

It were the Petersons then, as a matter of fact, who were required to go forward and establish their damages.

As a matter of law, it was Petersons' responsibility to show the Court their own damages and it was Nikols responsibility to show that the Petersons sustained little or no damages.

Hence, for the Appellees to suggest to this Court that Nikols failed in his burden of proof, is both a misstatement of the facts and a misstatement of the law.

As a result, it was Petersons' responsibility to show their loss of bargain, and that the value of the property at the time of the alleged breach was \$30,000.00.

They failed to show the Trial Court the same, and it was error for the Trial Court to make such a determination when there was not a shred of evidence to support the same.

With no evidence on the actual value of the property at the time of the alleged breach, the Trial Court was required to determine the damages of the Appellees without any consideration of loss of bargain.

The Trial Court had to speculate as to the actual value and the same was error and the subject of this Appeal.

On page 11 of the Appellees brief they state:

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 vs. 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 vs. 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 vs. Nielsen 485 P.2d 673, 674 (Utah 1971) (allowing reasonable rental, real estate commissions, taxes and water assessments); Clegg vs. Lee, 516 P.2d 348, 353 (Utah, 1973) (allowing legal fees as damages); and Perkins vs. 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 reference to this paragraph, the Appellant does not have trouble with anything therein stated, except that the Appellees had to submit evidence of the same to make a claim for the same.

Here for example, the Appellees made no claim for fair rental of the property (during the time that the Appellant had possession of the property). Note transcript at pages 117 and following.

Appellees claimed in closing argument loss rentals, it is true, at \$250.00 per month, however, this claim was not for the time that Appellant had possession of the subject property, rather, it was a claim that since Appellant damaged the property or allowed it to be damaged, the Petersons were not allowed to rent the subject property after they took possession of the same in



June of 1983.

This is expressly confirmed by the Trial Court at page 2, of its Order, found at page 233 of the Record, and attached to the Blue Brief, in Appellant's addendum:

"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 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 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 replaced 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.

Appellant submits that it is clear that the Trial Court was only requested to analyze the Appellees damages from the time that they took possession of the property, after June of 1983.

Appellees raise for the first time on appeal loss of rents when the Appellant had possession of the property for the fourteen or so months that Appellant had the same.

On page 12, of the Appellees' Brief they outlined their damages:

"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
<b>TOTAL</b>	<b>\$48,404.48</b>

Appellant concedes that the Appellees are entitled to damages for Water assessments of \$84.21 and Taxes for \$362.27.

However, Appellant challenges each of the other claimed damages as outlined below.

The claim for fair rental of \$3,500.00, first because fourteen months at \$250.00 per month does not add up to \$3,500.00, and second this claim is raised for the first time on appeal as noted above.

The legal fees are not compensable because the Appellees made no claim for attorneys fees for enforcing the contract, rather their claim for attorneys fees was for quieting the title.

Here, as noted in the Blue Brief, the Appellant was entitled to have his Notice of Interest filed against the property, as it was done by mutual agreement and for the benefit of all parties, as more fully set forth therein.

Appellees did not bring this action to enforce the contract between the parties, rather they brought this action to remove the Notice of Interest, and to clear the title of all adverse claims.

In an action to clear the title, the attorneys efforts are far different than in merely enforcing the contract.

In a Quiet Title Action, an attorney would be spending considerable time researching the title to the property and the various claims made not only of the Appellant but all of the other unknown claimants.

After the research of those who make claims, the Attorney would be involved in determining the titles of each of the claimants and the validity or lack thereof, of the different claimants.

Research then would be required to determine where they could be served with process, gathering the evidence regarding their claims, etc. etc. etc.

One bringing an action under Paragraph No. 16(a) is far different.

There the attorney would be looking merely at the four corners of the contract and the compliance of the same by the single Defendant.

The fees therefore generated in this action were not to enforce the contract between the parties, rather the fees were to clear the title of all claimants known and unknown.

There is no provision in the contract, and there is surely no provision in the law, that would require that the Appellant pay attorneys fees for this quiet title action.

This is especially so, where the Appellant has his Notice of Interest filed by the parties jointly, for the mutual benefit of both the Buyer and the Sellers, and when the Trial Court held that the Buyer was entitled to his \$4,385.00 payment before the Notice of Contract was to be released against the property.

As a result, attorneys fees are not compensable here as a matter of law, and as a matter of fact, the fees were generated for services that had nothing to do with the Appellant, i.e.: research claims of other claimants, researching the validity of their claims and gathering the evidence against the other claimants, etc.

Hence, the claim for Attorneys fees here is invalid.

The claim for loss of bargain, is totally speculative as outlined in the Blue Brief.

To determine the loss of bargain the Trial Court would have to determine the actual value

of the property at the time of the alleged breach, and then subtract that amount from the amounts paid.

When the Appellees put on no evidence of the actual value at the time of the alleged breach, the Trial Court was left to speculate as to the actual value.

This is confirmed in Johnson vs. Carmen, 572 P.2d 371, (Utah, 1977), at page 373 and following. The Court was discussing the difficulties in determining damages before the alleged breach, however the Court reinforced the requirement that damages must be determined at the time of the alleged breach, as the measure:

“ . . . The primary reason for the requirement that damages be difficult to estimate is that when they are ascertainable, exact damages determined at the time of breach will nearly always be more fair than those guessed at by the parties at the time of contracting. Such is certainly the situation here.”

The claim for a real estate commission of \$3,900.00 is raised for the first time on appeal. As noted on page 215 of the Record, the Appellees made no claim before the Trial Court for any real estate commission.

In fact, Peterson testified at the time of trial at page 22 that he did not even attempt to sell the subject property:

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.

Hence, there was no real estate commission at all, and more importantly to this Court is the fact that no claim was ever raised before the Trial Court.

The Commission claimed by the Petersons on page 12 of their Red Brief, is a Commission that was for the transaction of selling the property to Nikols, not for any Commission claimed by an alleged breach by Nikols.

The former was a legitimate expense in finding Nikols as a potential Buyer, but is surely not compensable as a damage for Nikols alleged breach.

Hence, the total damages allowed by law, would be the Water Assessment of \$84.21, and the Taxes of \$362.27, and nothing more.

Therefore the claim for lost rents was not compensable, the claim for legal fees was not compensable, the claim for loss of bargain was not compensable and the claim for a real estate commission was not compensable.

As a result, the only damages established at the time of trial that were legally compensable were \$84.21 for the Water Assessment and taxes of \$362.27. The sum of these, \$446.48, should be subtracted from the \$39,856.00 paid, and the difference of \$39,409.52 should be refunded to the Appellant, along with the interest on the same at the agreed upon rate of 14 and one-fourth per cent.

On page 12 and 13 of the Appellees' Red Brief, they make the following claim:

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 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 vs. Mattson, 943, P.2d 247, (Utah App. 1999) citing Atkin, Wright and Miles vs. Mountain State Tel. & Tel. Co. 709 P.2d 330, 334 (Utah, 1985).

First, it should be noted that Nikols does not complain because of the decline in the value of the property.

In fact there was no decline in the value of the property, as testified by Peterson on page 53:

Q. (BY MR. WALSH): 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 that it's gone up?

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

Second, the claim that Nikols was the moving party on the counterclaim is without merit as noted above. The trial was not had on the counterclaim, but was only on the claims that the Plaintiffs/Appellees could keep all of the monies paid.

It was Peterson that had to prove their damages, not Nikols.

It was Nikols burden to prove that Petersons were not damaged or that they were not damaged as they claimed.

Nikols did exactly that. Nikols has challenged from the very beginning the claim of loss of bargain by the Petersons. The Trial Court, by its own admission had no evidence of actual value, and hence there was no way for the trial Court to arrive at the \$35,000.00 loss of bargain.

The formula for determining the damages of the Petersons and to determine the loss of bargain was by taking the actual value at the time of breach and subtracting the same from the amounts paid.

When Petersons failed to put on any evidence as to the actual value at the time of the alleged breach, the Court could not determine the difference, and it was Petersons who therefore

failed in their proof, not Nikols.

Petersons not only failed to put on any evidence as to the actual value at the time of trial, Peterson himself testified that he did not even engage an appraiser to make the subject determination, as noted above, "I haven't had it appraised and I haven't had anybody look at it." (Note page 53 of the Transcript).

The case law referred to by the Appellees is law regarding exactness in determining damages and how the tortfeasor should bear the loss when damages can not be determined with exactness.

This analysis does not apply here, because Appellant does not make a claim that Appellees failed to establish their damages with exactness, Appellant rather, claims that the Appellees did not put on the requisite evidence regarding damages at all, in reference to their loss of bargain claim.

On page 13 of the Red Brief, the Appellees make the following claim:

Nikols furnished no appraisal or 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 costs \$20,000.00 to repair and that it rented for \$250.00 per month. 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.

Appellant submits that the problem with this whole analysis is that the Appellees are taking issue with the Trial Judge, when Judge Anderson ruled that he had no evidence of the value of the property at the time of the alleged breach, other than the purchase price of \$65,000.00 set by the parties herein.

On page 232 of the Record, Judge Anderson in his written Order states:

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.

Furthermore, as to the Assessment, the Court found that that was of no value in determining the actual value of the land, as noted on page 232 of the Record, 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.”

In addition, the Court discounted the loan of Commercial Security Bank, of \$25,000.00, which was much earlier than the date of the subject transaction. Note page 232 of the Record.

The purchase price of \$35,000.00 by the Petersons many years before the subject transaction was not even mentioned by the Trial Court as any relevant evidence of the value at the time of the transaction with Nikols.

Lastly, there was no competent evidence that it would take \$20,000.00 to repair the premises as the trial judge stated on page 233 of the record in his written Order:

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 \$350.00.

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.

Therefore, this Court must reverse on the issue of the \$35,000.00 for loss of bargain, and award Appellant the \$39,409.52, which is based upon the \$39,856.00 amount paid by Nikols less the \$84.21 for Water Assessments and \$362.27 for Taxes. This figure should be augmented by the interest that the parties agreed to in the contract at fourteen and one fourth percent.



### ARGUMENT THREE

#### THE TRIAL COURT USED THE DATE OF TRIAL TO DETERMINE THE VALUE OF THE PROPERTY

Appellees argue that the term “present state” means the “current condition” of the property, when used by the Trial Court.

However, this argument lacks merit because the Court did not find the condition of the property relevant at all.

At page 233 of the record is the following:

“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 (sic) 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.”

Hence, the condition of the property was irrelevant to the trial Court, so the term “present state” did not mean “current condition” as alleged by the Appellees.

Perhaps the most compelling argument against the claims by the Appellees that “present state” did not mean “current condition” is the whole sentence, which shows not only present state, but a time frame in which the same would be sold.

The actual language is found on page 231 of the Record:

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

The term “present state” must be read with the other language i.e.: “could be sold for \$30,000.”

Here the Court did not say, “and would have sold in 1983 for \$30,000.00”

Rather the Trial Court stated that it could be sold, meaning at the time of trial could have sold for, \$30,000.00.

Hence, the term “present state” did not go to “current condition” but rather to the timing of the subject sale, i.e.: the date of trial.

#### ARGUMENT FOUR

##### APPELLANT IS ENTITLED TO PREJUDGMENT INTEREST

Appellees refer this Court to the case of Bellon vs. Malnar, 808 P.2d 1089 (Utah 1991) as controlling.

Appellant submits that the case is distinguishable on the facts.

In the Bellon case there was serious questions as to what would be compensable and what would not be compensable to the Buyers, as offsets against amounts claimed.

Here such is not the case, as Petersons knew that they were not going to resell the property. Hence, no costs of sale as they now claim. (Transcript at 22). Petersons were not going to develop the property or otherwise try to market the property thereby requiring any kind of appraisal. So no appraisal was necessary or otherwise pursued by Petersons (Transcript at 53).

Petersons knew that they had only the water assessments and the taxes that they paid, and there was nothing speculative about that.

Hence, here the amount due from Nikols was easily ascertainable and it was a mere \$442.65 as determined by the Court at page 232 of the Record.

As a result, it is absolutely clear that the Petersons were dealing with no unknowns.

They were going to keep the property and they were going to keep the money. They had no other costs or damages.

## CONCLUSION

This matter was tried to the Court with the Plaintiffs/Appellees going first, as they had both the burden of going forward with the evidence and the burden of persuasion.

They were required to establish their damages before the Trial Court and failed to produce any evidence whatsoever of the value of the property at the time of the alleged breach.

Plaintiffs/Appellees failed to meet their burden of proof, and so the Trial Court was left to speculate as to the loss of bargain claimed by the Plaintiffs/Appellees.

Defendant/Appellant made a timely Motion for a Directed Verdict freezing the evidence as left by the Plaintiffs/Appellees.

Plaintiffs/Appellees had their day in Court and failed to meet their burden.

Appellant submits that it should be noted that the Appellees do not dispute anything in Argument Three and Argument Four.

Argument Three takes issue with the Trial Court's award of damages on the basis that the Petersons allegedly had to wait to get marketable title, and therefore they are entitled to compensation for the same.

Appellant pointed out to the Court that the claim for damages in the sum of \$35,507.00 had to come from somewhere.

The Trial Judge noted in his ruling on page 231 that the Petersons "had to wait to get marketable title."

Appellant pointed out to this Court in his Blue Brief that the delay, if any, in getting marketable title was the result of the actions of the Appellees and not the actions of the Appellant.

This Court should note that in the Red Brief of the Appellees they do not even dispute the

same.

Appellant pointed out that the Appellees brought an action in 1983 to Quiet Title the subject property, and then Appellees did nothing regarding the same and it was dismissed in 1985 for failure to prosecute.

Then, according to Petersons, they waited until some sixteen plus years later to bring the current action.

Hence, the delay regarding marketable title was wholly the actions and inaction of the Appellees, however, the Trial Court awarded them damages against the Appellant for their own conduct.

Appelles apparently agree one hundred percent with the claim as there is not even a “one liner” in opposition to the same.

On page 34 of the Appellant’s brief, he points out that it was a conscious decision by Mr. Peterson to not prosecute the matter, which is found in the transcript at page 22.

All of the foregoing is undisputed before this Court, as the Appellees do not even dispute the said claim by the Appellant.

In Argument Four, the Appellant claims that it was error for the Trial Court to award any damages for the filing of the Notice of Contract.

Appellant pointed out that the Notice of Contract was so that the Petersons could immediately receive cash to pay a critical bill for hospitalization of their daughter.

Petersons joined with the Appellant to file the Notice of Contract, as it was mutually beneficial to all, and in fact was part of the transaction and agreement between the parties.

Appellant submits that penalizing him for his Notice of Contract, is tantamount to penalizing him for signing the agreement or for signing the \$20,000.00 check for the down

payment.

All of the foregoing were signed for the mutual benefit of all of the parties.

The Notice of Contract was then filed with the County Recorder with the consent, agreement and authorization of all parties to the contract.

Now to penalize the Appellant for filing the same is wholly inappropriate.

Appellant raised this issue in his Blue Brief, and the Appellees do not even take issue with the same, and do not even dispute the problem in any way.

Appellees do not dispute that they suffered no damage because of it as well.

Hence, there was no actionable wrong by the Appellant and there was no damage either, yet the Trial Court awarded substantial damages for the Appellees because of the same.

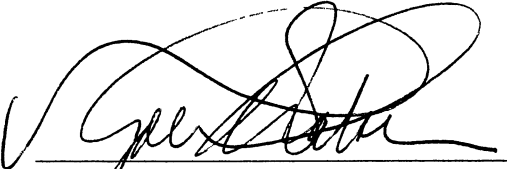
Defendant/Appellant is entitled to a refund of \$39,402.52 plus the interest.

RELIEF SOUGHT

Appellant submits that since he made a timely Motion for a Direct Verdict, that there is no need to appear again before the Trial Court in this matter. Appellees have had their day in Court and had a full and complete opportunity to produce their evidence both by way of testimony and exhibit. Therefore, there is no need for any kind of remand.

Appellant prays that the Appellate Court reverse the determination by the Trial Court and enter judgment for the Appellant in the sum of \$39,402.52, plus interest at the agreed upon contract rate.

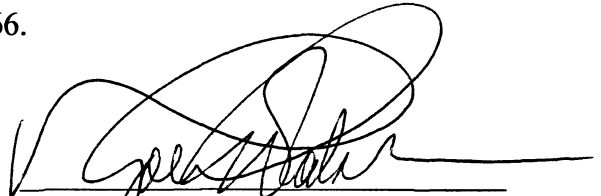
Dated this 18<sup>th</sup> day of December, 2001.

  
JOHN WALSH  
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two copies of the foregoing APPELLANTS  
REPLY 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 19<sup>th</sup> day of December, 2001.



JOHN WALSH  
ATTORNEY AT LAW