

2015

**Dennis Cheek, Plaintiff/Appellant, v. Clay Bullock Construction, Inc., Ad Utah Corporation; And Cly Bullock, an Individual, Defendants/Appellees : Brief of Appellant**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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DENNIS CHEEK,

Plaintiff and Appellant,

v.

CLAY BULLOCH CONSTRUCTION,  
INC., a Utah Corporation, and CLAY B.  
BULLOCH, an individual,

Defendants and Appellees.

**BRIEF OF THE APPELLEES**

Appeal No. 20150177-CA

Civil No. 030500447

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Appeal from the Fifth District Court, Iron County,  
Judge Paul D. Lyman

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## **PARTIES**

The case caption lists the names of all parties. Appellee Clay B. Bulloch and his entity, Clay Bulloch Construction, Inc., are referred to in this brief together as “Bulloch.” Appellant Dennis Cheek is referred to as “Cheek.”



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## STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Ann. §§ 78A-3-102(3)(j), 78A-3-102(4) and 78A-4-103(2)(j). The Utah Supreme Court transferred this appeal to the Utah Court of Appeals.

## ISSUES PRESENTED

**ISSUE 1:** May Cheek accuse the trial court judge of bias or prejudice where (1) Cheek did not file any Rule 63 motion to disqualify and (2) where Cheek fails to establish that Judge Paul Lyman had a relationship with Clay Bulloch's wife sufficient to require disqualification?

**STANDARD OF REVIEW FOR ISSUE 1:** The standard of review for this issue is correctness. Lunt v. Lance, 2008 UT App 192, ¶ 7, 186 P.3d 978.

**PRESERVATION:** Cheek did not preserve this issue.

**ISSUE 2:** Did Judge Lyman make a clearly erroneous factual finding after a five-day trial regarding the parties' oral construction agreements?

**STANDARD OF REVIEW FOR ISSUE 2:** "The factual findings of a trial court sitting without a jury are reviewed for clear error." Lunt v. Lance, 2008 UT App 192, ¶ 11, 186 P.3d 978. This review is "highly deferential." State v. Jones, 2015 UT 19, ¶ 68, 345 P.3d 1195; see also In re United Effort Plan Trust, 2013 UT 5, ¶ 17, 296 P.3d 742 (reasoning that "factual determinations are entitled to the most deference"). A reviewing court will hold that factual findings are clearly erroneous "only if they are in conflict with the clear weight of the evidence, or if this court has a definite and firm conviction that a mistake has been made." Nebeker v.



Summit Cty., 2014 UT App 244, ¶ 46, 338 P.3d 203. “If there is a reasonable basis in the evidence to support the finding, the finding will not be overturned unless it is clearly erroneous.” Coll. Irr. Co. v. Logan River & Blacksmith Fork Irr. Co., 780 P.2d 1241, 1244 (Utah 1989); Jefferies v. Jefferies, 752 P.2d 909, 911 (Utah Ct. App. 1988).

### **DETERMINATIVE RULES**

None.

### **STATEMENT OF THE CASE**

This case is about a cinder-block-walled, metal-roofed building in Cedar City, Utah (referred to as the “Building” or “Sears Building”). T.III:79:17.<sup>1</sup> Bulloch constructed the Building in 1999 and added onto it in 2001, see T.III:68:13; T.III.92:10–11, based on preliminary drawings and nearly daily verbal directions from Cheek during construction. R560, ¶7; R562, ¶ 19. The parties had no written construction contract for either project. T.III:72:19. A substantial leak in Cheek’s sprinkler system saturated the soils underlying the Building with water, T.IV:61:2–9, causing Building movement and damage. T.IV:159:13. As a result, Cheek brought this action against Bulloch in 2003, alleging that Cheek had an oral construction agreement with Bulloch and that Bulloch was to blame for the Building movement. R3.

In 2010, Judge Lyman dismissed Cheek’s complaint for failure to prosecute, R225, and this Court reversed and remanded in Cheek v. Clay Bulloch Construction, Inc.,

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<sup>1</sup> Trial transcript citations (“T”) include the volume, page, and line of the matters cited.

2011 UT App 418, ¶ 19, 269 P.3d 964. On remand, Cheek filed a “Motion to Determine Application of Existing Order,” which asked Judge Lyman to determine whether an earlier judge’s voluntary recusal necessitated Judge Lyman’s recusal. R384–7. Judge Lyman determined that it did not. R428–30. Judge Lyman denied Cheek’s request for reconsideration. R431; R470.

After a five-day bench trial, the court ruled in favor of Bulloch in its Findings of Fact and Conclusions of Law and Order. R542–55. Cheek appealed.

## **STATEMENT OF FACTS**

### ***A. The Sears Building***

Cheek approached Bulloch in 1999 with a sketch of a generic Sears store and asked if Bulloch could build it in Cedar City, Utah. T.III.68:10–13; T.III.69:11. Bulloch told him he could, and Bulloch Brothers Engineering (no relation to Bulloch) prepared a site plan. T.III:152:21–25; see Trial Exhibit 5, attached as Exhibit H-4(a)-(b) to Cheek’s brief. Bulloch created a cost breakdown for the Building and provided it to Cheek, who accepted it. T.III: 72:13. GEO Consultants prepared a geotechnical report for the site (“GEO Report”). T.III:75:2 (Trial Exhibit 4). The parties never entered into a formal construction contract. T.III:72:19; T.III:72:19. Among other important details, the site plan lacked electrical drawings or plumbing plans, T.III:80:14; T.III:22:16–23:16, and Cheek indicated early on that he would be present during construction to direct the details. T.III:80:15-23. Bulloch began construction in May of 1999 after receiving Cheek’s verbal instruction to proceed. T.III:73:11–20; T.III:74:12.

Cheek declined to hire a geotechnical engineer to supervise or observe the site preparation, T.III:79:11, even though Bulloch discussed the importance and necessity of doing so, T.III:77:4, and even though the GEO Report called for it. See, e.g., Trial Exhibit 4, p. 5 (requiring that excavations be observed by the geotechnical engineer before placing fill). Notwithstanding Cheek's refusal to hire a geotechnical engineer to supervise the site preparation, Bulloch excavated the exterior, load-bearing walls, placed compatible structural fill, and compacted the structural fill. T.III:82:1–14. Bulloch Brothers Engineering staked the location of the intended building, T.III:87:5, and Bulloch constructed the Building on the staked area. T.III:87:16.

When Bulloch was ready to install the building air conditioning units, Cheek told Bulloch to place them on concrete pads that encroached on the adjoining property because it was less expensive than mounting them on the roof. T.III:89–90. Cheek said that the air conditioners could be removed later and put on the roof if necessary. T.III:90:3–4. To facilitate Cheek's request for financing from the U.S. Small Business Administration, and at the request of Cheek's lawyer, T.III:90:15, Bulloch signed a Certificate of Completion, Trial Exhibit (attached to the Appellant's Brief as Exhibit H-5).

### ***B. The Sears Building Addition***

In 2001, Cheek contacted Bulloch about building an add-on to the Building, T.III:92:21, and Bulloch indicated his interest in building it. T.III:93:11. Cheek and Bulloch met and produced rough sketches of the building addition (the "Addition"), T.III:95:20, and Cheek told Bulloch that he wanted it to be built in the same manner that

the original Building was constructed. T.III:96:9. Bulloch understood this to mean that the foundation preparation and installation would be exactly as he had performed on the original Building. T.III:97:25. Based on his understanding, T.III 98:5, and based on the rough sketches of the proposed Addition, Bulloch produced a rough cost breakdown for the Addition construction. T.III:95:20. Cheek approved the cost breakdown and told Bulloch to proceed. T.III:96:18.

Later, Bulloch Brothers Engineering prepared a drawing of the front elevations for the addition and the grading/site plan and the foundation plan. T.III:94:16. These documents were not complete construction plans, T.III:100:14, and as with the original Building, Cheek indicated that he would direct the construction details as needed. T.III:102:16. Bulloch did not have these drawings when he and Cheek agreed on his cost breakdown, and the parties never entered into a formal construction contract. T.III:97:5.

Before commencing construction, Bulloch and Cheek discussed an issue with the elevation drawings (Trial Exhibit 7) because the design did not properly connect the Addition with the original Building. T.III:104:7. Cheek asked Bulloch to design a solution, T.III:105:10, and they agreed to use a different truss system, with flat roofs, rather than the pitched-roof design depicted in the drawings. T.III:105:4–22. As a result of this change from a pitched roof to a flat roof, the interior walls in the Addition became non-load-bearing walls, T.III:105:23–107:3, and they were constructed on footings suitable for that purpose. T.III:107:13. The site preparation for the Addition was performed in the same manner it was performed for the Sears Building. T.III:108:1.

The grading plan for the Addition indicates that a storm drain needed to be moved but does indicate where it should be moved. T.III:114:2. The cost of removing the drain was not calculated in Bulloch's original proposal for the Addition because he did not know it needed to be removed. T.III:114:19-21. The pipe could have been moved, but it would have required cooperation from a neighboring property owner, who reportedly had significant animosity toward Cheek. T.III:115:1-7. Cheek and Bulloch agreed to leave the storm drain where it was. T.III:117:20-25. The grading plan also indicated the need for an above-ground drain, T.III:115:10, but the parties elected to install a different type. T.III:119:3-11.

During construction, Cheek's wife indicated she wanted a grease trap, which Bulloch agreed to add at an additional cost, so that a restaurant could operate there. T.III:129:3-11. To install the grease trap, Bulloch's employees brought a backhoe to the west side of the Addition to prepare the site for the grease trap, but the ground was so saturated with water that the backhoe sank in the mud. T.IV:46:3. Because of the soil saturation, the grease trap installation was very difficult. Bulloch's employees determined that Cheek's sprinkler system had a leak in a valve, T.IV:46:3, which they immediately communicated to Cheek. T.III:48:10-13.

When the Addition was finished, Cheek had no complaint about the building construction, but he refused to pay for all of the extras he requested during construction. T.III:127:10-13. When Bulloch protested, Cheek told Bulloch that it would cost more money to take him to court and collect it, and that if he did not accept the inadequate sum

and forego legal action, he would drag Bulloch through court and it would cost “ten times” the amount. T.III:133:24.

Later, city personnel brought a cleaning truck to the manhole in the landscaping area adjacent to the Addition to clean the sewer. The soil in the landscaping area was so saturated with water that the cleaning truck sank into the mud to a degree that it required heavy machinery (loaders) to extricate it. T.IV:61:2-9; see also Trial Exhibit 69A (showing manhole in landscaping strip on the west side of the Building Addition). City staff had previously notified Cheek of the irrigation leak. T.IV:61:17–20. The water saturation originating from the landscaping area here also caused the sidewalk, gutter, and road next to the Addition to settle. T.IV:62:22-25; see also T.IV:160:2-15.

Most building movement in southern Utah is caused from water releases. T.131:9-11. The soils under the Building are “extremely collapsible,” T.IV:130:20, and because of that characteristic, there is a “tremendous amount of instantaneous movement when the soils become wet.” T.IV:131:2-3. A geotechnical expert familiar with the site and the Building concluded that the site preparation required by the Geo Report was insufficient to prevent Building movement where so much water had saturated the underlying soils. T.IV:135:5-6. The expert was concerned about water saturation in soil so close to the Building. T.IV:159:13; T.IV:163:25; T.IV:164:7.



## SUMMARY OF ARGUMENTS

*A. Cheek failed to preserve his claim about judicial bias or prejudice, and in any event, the claim must fail.*

This Court has held in several cases that a party may not accuse a trial court judge of bias or prejudice where that party did not first file a motion to disqualify under Rule 63. See, e.g., Campbell, Maack & Sessions v. Debry, 2001 UT App 397, ¶ 24, 38 P.3d 984. As Cheek noted in briefing in the trial court, R432, no party filed any Rule 63 motion to disqualify. Notwithstanding his failure to preserve the argument, Cheek asserts in this appeal that Judge Paul D. Lyman was biased and prejudiced. See Appellant's Brief at 30. Cheek's claim is not properly before this Court.

Even if Cheek's claim of judicial bias was properly preserved, it nevertheless fails. A reasonable person, knowing all the circumstances, would not conclude that Judge Lyman's impartiality could be questioned. See Fullmer v. Fullmer, 2015 UT App 60, ¶ 12, 347 P.3d 14. "The word 'reasonable' connotes the idea that judges are not subject to disqualification in every situation where their impartiality is questioned, particularly when the potential for bias is remote." West Jordan City v. Goodman, 2006 UT 27, ¶ 21, 135 P.3d 874.

Judge Lyman and Defendant Bulloch's wife, Carolyn Bulloch, do not have a relationship of a nature requiring a recusal. Mrs. Bulloch is the clerk of court for three counties, including Beaver County. Judge Lyman is the presiding judge of the Sixth District Juvenile Court, which does not include Beaver County. R429. In addition to that primary responsibility, Judge Lyman serves as a district judge in the Sixth District for

domestic and other matters as needed. Finally, Judge Lyman provides cross-jurisdictional assistance to three counties, including Beaver County. Id. The possibility for bias in this case is too speculative and remote to require disqualification. West Jordan City v. Goodman, 2006 UT 27 at ¶ 27 (rejecting claim of judicial bias against Chief Justice Durham because the possibility of bias was too speculative and remote to require disqualification even though an affiant in the case was an employee of the judicial council, over which Justice Durham then presided). Cheek has submitted no valid evidence supporting his claim, and it must fail.

*B. Cheek failed to meet his burden to challenge Judge Lyman's Factual Findings.*

The remainder of Cheek's brief must be rejected because he improperly attempts to re-try his case before this Court. See Gunn Hill Dairy Properties, LLC v. Los Angeles Dept. of Water & Power, 2015 UT App 261, ¶ 19, --- P.3d --- (rejecting challenge to factual finding where party did not specifically challenge findings but instead "reargue[d] their position on appeal"). Under Rule 24(a)(9), appellants challenging factual findings must marshal the evidence in support of the fact finder's findings. A party who does not marshal under this rule will never persuade an appellate court to reverse a factual finding. State v. Nielsen, 2014 UT 10, 326 P.3d 645. A party fails to challenge factual findings where the party picks and chooses documents or testimony from the record that seemingly undercut the findings of the fact finder. See R.B. v. L.B., 2014 UT App 270, ¶ 27, 339 P.3d 137, 147 (holding that a party failed to shoulder burden of challenging factual findings where he argued "in effect that a selected portion of the evidence supporting the court's findings provided inadequate support without addressing the

additional supporting evidence”). Cheek failed to marshal the evidence and therefore cannot persuade the Court to reverse under the deferential standard of review for factual findings. The Court should reject Cheek’s attempt to re-try his case to this Court.

## **ARGUMENT**

### **I. Cheek failed to preserve any claim regarding bias or prejudice, and even if he had, Cheek fails to establish that a recusal was required.**

#### *A. Procedural Deficiencies in Cheek’s Arguments*

Cheek failed to preserve his claims regarding judicial bias. No motion to disqualify under Rule 63 was filed in the trial court, which Cheek noted below. See Request for Reconsideration and to Confront Issues Not Addressed (noting “[t]he **absence** of a Rule 63(b) motion in the record”) (emphasis added), R432. A party who does not file a Rule 63 motion in the trial court cannot claim judicial bias or prejudice on appeal. See Utah Rules of Appellate Procedure 24(a)(5)(A) and (B) (requiring appellant to cite record where issue was preserved or to provide grounds for review of an issue that was not preserved); Harper v. Harper, 2013 UT App 258, ¶ 10, 314 P.3d 1075; Bowen v. Hart, 2012 UT App 351, ¶ 10, 294 P.3d 573 (“To preserve an issue for appeal, the matter must be presented to the trial court in such a manner that the trial court has the opportunity to rule on the issue.”); Salt Lake City Corp. v. Jordan River Restoration Network, 2012 UT 84, ¶ 108, 299 P.3d 990 (“Our preservation rule does not permit a party to waive an issue before the district court and later raise the issue on appeal.”).

Specifically, in Harper v. Harper, this Court rejected claims of judicial bias or prejudice that were raised for the first time on an appeal because they “must have been

raised by a timely motion to disqualify under rule 63 of the Utah Rules of Civil Procedure.” 2013 UT App 258 at ¶ 10; *see also* Roper v. Shovan, 2013 UT App 124, ¶ 8, 302 P.3d 483 (“A claim of judicial bias must be raised in a timely manner by a motion filed in the district court under rule 63 of the Utah Rules of Civil Procedure.”); State in Interest of E.S., 2013 UT App 222, 310 P.3d 744 (same); Liston v. Liston, 2011 UT App 433, 269 P.3d 169; Straley v. Halliday, 2008 UT App 38, ¶ 9, 997 P.2d 338; Kleinert v. Kimball Elevator Co., 905 P.2d 297 (Utah Ct. App. 1995). Under these precedents, Cheek’s claims of bias or prejudice are not properly before this Court.

True, late in the proceedings below, eight years after Judge Lyman was assigned to the case, Cheek filed a *Motion to Determine Application of Existing Order* (the “Motion to Determine”) in which he asked Judge Lyman to determine whether an earlier judge’s voluntary recusal, R386, required him to recuse himself. R384–5. The earlier judge’s recusal indicated that “[t]he case will be referred to a judge outside of the Fifth District,” R386, which is when Judge Lyman was assigned to the case. Judge Lyman is the presiding judge of the juvenile court within the Sixth District, R428, which includes Sanpete, Sevier, Piute, Wayne, Garfield, and Kane Counties. In addition to that primary responsibility, Judge Lyman acts as a district court judge in various domestic or matters within the Sixth District, and on occasion, provides cross-district judicial assistance to Beaver County as of December of 2012. R429. In response to Cheek’s Motion to Determine, Judge Lyman determined that Judge Eves’s voluntary recusal did not require Judge Lyman’s recusal because the voluntary recusal was not an “order,” and even if it

were, Judge Lyman did not become a “fifth district judge” as a result of his cross-jurisdictional assistance to Beaver County. R428–9.

The trial court was not required to refer the Motion to Determine to a reviewing judge under Rule 63 because Cheek did not file a motion under that rule. The Motion to Determine included no supporting affidavit or certificate stating that the motion was filed in good faith, which are both required under Rule 63. Cheek apparently did not believe he was filing a Rule 63 motion through his Motion to Determine because his memoranda submitted to the trial court noted the “*absence* of a Rule 63(b) motion in the record.” R432 (emphasis added). This acknowledgement forecloses Cheek’s claims on appeal. See Advanced Forming Techs., LLC v. Permacast, LLC, 2015 UT App 7, 342 P.3d 808, cert. denied, 347 P.3d 405 (Utah 2015) (holding under the invited-error doctrine that a trial court judge did not err in refusing to grant a continuance despite party’s argument that it “substantively argued that it needed more time to present an expert witness even if it did not explicitly make a rule 56(f) motion”); see also In re Discipline of Corey, 2012 UT 21, 274 P.3d 972 (“When the complaining party invites the alleged error, we decline to engage in even plain error review.”) (quotations and citation removed). Cheek did not object to the trial court’s disposition of the Motion to Determine, and he cannot assert on appeal that the trial court should have decided the Motion to Determine under Rule 63 when, by his own acknowledgement to the trial court, no Rule 63 motion had been filed.

Even if this Court were to construe the Motion to Determine as being a motion to disqualify under Rule 63, it would fail to satisfy the requirements of that rule. A motion under Rule 63 must be “supported by an affidavit stating facts sufficient to show bias,

prejudice or conflict of interest.” U.R.C.P. 63(b)(1); Campbell, Maack & Sessions v. Debry, 2001 UT App 397, ¶ 24, 38 P.3d 984 (refusing to consider claim of bias or prejudice, “absent a claim of plain error or extraordinary circumstances,” where the claimant did not first file an affidavit to that effect in the trial court); Karren v. Karren, 2012 UT App 359, ¶ 4, 293 P.3d 1100 (rejecting claim of judicial bias where motion to disqualify was not supported by an affidavit); Kleinert v. Kimball Elevator Co., 905 P.2d 297, 301 (Utah Ct. App. 1995) (“This rule requires that a party alleging judicial bias or prejudice must first file an affidavit to that effect in the trial court.”); Sukin v. Sukin, 842 P.2d 922, 926-27 (Utah Ct. App. 1992) (same); Wade v. Stangl, 869 P.2d 9, 11 (Utah Ct. App. 1994) (noting that party failed to file affidavit in the trial court and holding that “[w]e will not, therefore, consider the issue of judicial bias or prejudice when it is raised, as in the present case, for the first time on appeal”). The absence of an affidavit precludes proper appellate review because the stated basis for disqualification must be “thoroughly examined, especially in cases such as this which are at an advanced stage of the litigation process.” Madsen v. Prudential Federal Savings & Loan Ass’n, 767 P.2d 538, 544 n. 5 (Utah 1988); see also In re Affidavit of Bias, 947 P.2d 1152, 1154 (Utah 1997) (scrutinizing facts alleged in an affidavit and denying the sufficiency of the affidavit because the allegations were too speculative); see also Campbell, Maack & Sessions v. Debry, 2001 UT App 397, ¶ 24, 38 P.3d 984 (“The affidavit must show that sufficient factual grounds exist to cause a reasonable, objective person, knowing all the relevant facts, to question the judge’s impartiality.”) (quotations and citation omitted). No



affidavit was ever filed, and therefore, the Motion to Determine fails to satisfy the requirements of Rule 63.

Further, the Motion to Determine was untimely under the standards of Rule 63. “Timeliness is essential in filing a motion to disqualify.” Madsen v. Prudential Savings & Loan Ass’n, 767 P.2d 538, 542 (Utah 1988). Judge Lyman was assigned to this case in January of 2005. R428. He began helping with cases in Beaver County in early December of 2012, and Cheek filed his Motion to Determine on July 29, 2013, over a year and a half later. Cheek cannot be considered to have exercised reasonable diligence in learning the grounds for the Motion because judicial appointments are matters of public record. See U.R.C.P. 63(b) (requiring party to file motion within 21 days of “the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based”). Cheek could have determined that was the case at any time. He failed to do that.

*B. Substantive Deficiencies in Cheek’s Arguments*

Even if Cheek’s claims of judicial bias or prejudice were properly before this Court, they are not supported by law. The standard of review is correctness. Lunt v. Lance, 2008 UT App 192, ¶ 7, 186 P.3d 978. Judges are presumed to be qualified, and a person who claims judicial bias has the burden to demonstrate that the judge is not qualified to act on the case. In re Affidavit of Bias, 947 P.2d 1152, 1153 (Utah 1997). To overcome the presumption of qualification, a party seeking disqualification must show that there was “actual bias or prejudice,” or alternatively, demonstrate that there was an “appearance of bias or prejudice,” see Lunt v. Lance, 2008 UT App 192 at ¶ 15; Madsen

767 P.2d 538 at n.5, such that the judge “had such a bias in favor of one party or prejudice against the other that he could not fairly and impartially determine the issues.” Poulsen v. Frear, 946 P.2d 738, 742 (Utah Ct. App. 1997). The question of a judge’s impartiality is considered “by viewing the question through the eyes of a reasonable person, knowing all the circumstances.” Fullmer v. Fullmer, 2015 UT App 60, ¶ 12, 347 P.3d 14. According to the Utah Supreme Court, “[t]he word ‘reasonable’ connotes the idea that judges are not subject to disqualification in every situation where their impartiality is questioned, particularly when the potential for bias is remote.” West Jordan City v. Goodman, 2006 UT 27, ¶ 21, 135 P.3d 874. For the reasons discussed below, Cheek’s claims fail under both alternative theories.

*i. Actual Bias or Prejudice*

Cheek failed to establish the existence of actual bias or prejudice. “Any allegation that a trial judge became biased against a defendant should be supported by copious facts and record evidence. And any such allegation should be made in a reserved, respectful tone, shunning hyperbole and name-calling.” State v. Santana-Ruiz, 2007 UT 59, ¶ 30, 167 P.3d 1038; see also Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998) (rejecting claim that was unsupported by record citations). Cheek makes the unsubstantiated, hyperbolical assertion that the record is “replete with examples” of judicial bias, see Appellant’s Brief at 30, but he fails to cite record support for that sweeping allegation. The claim should be disregarded under the holding of Santana-Ruiz.

To the extent that Cheek argues that the trial court demonstrated bias by ruling against him, that claim fails because adverse decisions may not be considered in

determining bias. Lunt v. Lance , 2008 UT App 192 at ¶ 15 n. 7; see also State v. Munguia, 2011 UT 5, ¶ 17, 253 P.3d 1082 (reasoning that “the bias or prejudice must usually stem from an **extrajudicial source**, not from occurrences in the proceedings before the judge”) (emphasis added); Poulsen v. Frear, 946 P.2d 738, 740 (Utah Ct. App. 1997) (rejecting bias claim where an affidavit supporting a disqualification motion asserted instances where the judge had ruled against the party); Maxine B. Nickel Trust v. Carlsen, 2008 UT App 185 (rejecting claim of judicial bias where the claimant asserted that the judge denied every one of claimant’s motions). Relatedly, Cheek cannot claim bias based on the trial court’s view that Bulloch was more credible than him. R564, ¶ 29; Poulsen v. Frear, 946 P.2d 738, 743 (Utah Ct. App. 1997).

Further, there is no legal authority supporting Cheek’s claim that a presumption of bias or prejudice arose when the trial court did not refer the Motion to Determine to a presiding judge as would be required when a motion is filed under Rule 63. The legal authorities cited in that section of Cheek’s brief do not support that proposition. As established above, and has been noted by Cheek, no Rule 63 motion was filed below, and no objection was raised regarding the trial court’s disposition of the Motion to Determine, and even if there were any error in not disposing of the Motion to Determine under the requirements of Rule 63, Cheek invited the error by electing to file the Motion to Determine rather than one under Rule 63, and by noting the absence of any Rule 63 motion in the record. See Advanced Forming Techs., LLC v. Permacast, LLC, 2015 UT App 7, 342 P.3d 808, cert. denied, 347 P.3d 405 (Utah 2015).

ii. *Appearance of Bias or Prejudice*

Cheek likewise failed to establish the appearance of bias or prejudice. “An appearance of bias or prejudice is sufficient for disqualification, but even disqualification because of appearance must have some basis in fact and be grounded on more than mere conjecture and speculation.” Madsen v. Prudential Federal Savings & Loan Ass’n, 767 P.2d 538, n. 5 (Utah 1988).

In West Jordan City v. Goodman, for example, the Utah Supreme Court held that Chief Justice Durham, then the presiding officer of the Judicial Council, was not required to recuse herself in a case where an employee of the Judicial Council had submitted an affidavit in the case. 2006 UT 27, ¶ 21, 135 P.3d 874. Rejecting the claim, the court reasoned that “judges are not subject to disqualification in *every* situation where their impartiality is questioned, particularly when the potential for bias is remote.” Id.; see also Kearl v. Okelberry, 2010 UT App 197 at 5 (holding that disqualification is necessary only if the judge has a *close* social or professional relationship with a party or attorney). The court further reasoned that the allegation that then-Chief Justice Durham was biased was “too speculative and remote to require disqualification” where she had broad supervisory authority over many staff members. West Jordan City v. Goodman, 2006 UT 27 at ¶ 23. Finally, the court reasoned that “[n]o reasonable person would expect the Chief Justice to be biased under these circumstances, especially given the lack of any evidence that the Chief Justice has ever exercised any direct administrative oversight over the employee submitting the affidavit.” Id.

Similar to West Jordan City v. Goodman, no reasonable person would expect Judge Lyman to be biased under the circumstances of the case. Cheek's primary claim, though there is no valid supporting evidence in the record, appears to be that Judge Lyman's cross-jurisdictional assistance to Beaver County creates an appearance of bias or prejudice because Carolyn Bulloch, who is Defendant Clay Bulloch's wife and the registered agent for Defendant Clay Bulloch Construction Inc., is the clerk of court for three Utah counties including Beaver County. Cheek's claim is speculative and remote because Judge Lyman's primary responsibilities are in a different district and there is no evidence establishing even that he has had any interaction with Carolyn Bulloch. Judge Lyman presides over the Sixth District Juvenile Court, R428, which includes Sanpete, Sevier, Piute, Wayne, Garfield, and Kane Counties. In addition, Judge Lyman acts as a district court judge in various domestic or other matters within the Sixth District. Starting in December of 2012, Judge Lyman began providing cross-district judicial assistance to Beaver County, R429, one of the three counties in which Mrs. Bulloch is clerk of the court. Judge Lyman's cross-district judicial assistance to Beaver County represents only a fraction of his judicial responsibilities.

The Utah Code of Judicial Conduct (the "Code") does not state or even imply that Judge Lyman should have recused himself in these circumstances. Under the Code, a judge must "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Code § 2.11. Under the Ethics Advisory Committee's informal opinions interpreting the Code, Judge Lyman acted appropriately. In informal Opinion 06-1, for example, the committee considered "whether

disqualification is necessary in a proceeding involving a court clerk's spouse appearing as counsel of record." According to the committee, disqualification in that scenario would be necessary only if "the court clerk has a close relationship with the judge." Further, "Judges in the district with whom the court clerk does not have a *close* working relationship may preside over such a proceeding." (emphasis added). Judge Lyman is not even in the same district as Carolyn Bulloch. There is no evidence in the record suggesting that Mrs. Bulloch had a close relationship with or even has interacted with Judge Lyman. It is insufficient for a party to demonstrate only a *potential* relationship. West Jordan City v. Goodman, 2006 UT 27, ¶ 21, 135 P.3d 874; Dahl v. Dahl, 2015 UT 79, ¶ 55 (rejecting judicial bias claim because claimant identified only a potential professional relationship and not an actual professional relationship). Here, there is no evidence in the record suggesting that Judge Lyman had a close working relationship or a professional relationship with Mrs. Bulloch. Under these circumstances, a reasonable person would not have cause to question Judge Lyman's impartiality. Cheek's claim must be rejected.

## **II. The trial court did not err in its interpretation of the parties' oral agreements.**

### *A. Integration*

Cheek asserts that the trial court erred in not finding an integrated agreement between the parties, but that argument fails for at least three reasons. First, Cheek failed to preserve the integration argument below. An issue is considered *preserved* only if it was timely and specifically raised with supporting evidence or legal authority. Utah



Rules of Appellate Procedure 24(a)(5)(A); Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998). No integration argument was raised below, and it must fail.

Second, the integration argument is inadequately briefed because it does not clearly articulate the relief requested or the grounds for any relief, which makes it difficult to respond and unfair to adjudicate. The Court should therefore decline to consider it. See Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998).

Third, Cheek's integration argument is inconsistent with controlling law and the facts in the record. "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement." Bennett v. Huish, 2007 UT App 19, ¶ 15, 155 P.3d 917; City of Grantsville v. Redevelopment Agency of Tooele City, 2010 UT 38, ¶ 24, 233 P.3d 461 (defining integrated agreement as a written, "final expression" of an agreement). The parties never entered into any written construction contract, T.III:72:19, and Cheek has not cited any evidence suggesting otherwise. See Bailey-Allen Co., Inc. v. Kurzet, 876 P.2d 421 (Utah Ct. App. 1994) (holding that the parties had an integrated contract where the parties had a contract stating that "it was the entire understanding of the parties").

This Court can fairly assume that the trial court found that the parties' agreements were not integrated because the trial court found that they were partially based on oral and documentary evidence. R560, ¶ 7; R562, ¶ 19. The trial court found that the parties "spoke almost daily about the construction project and how it should go." R562. Cheek has not challenged these findings. Accordingly, this Court should uphold the trial court's conclusions regarding the parties' oral agreements.

*B. Cheek's Arguments Regarding Implied Contract Terms*

Cheek asserts that the trial court erred by not finding an implied term in the parties' oral contract regarding the location of the original Building. See Appellant's Brief at 34. The argument is inadequately briefed, and the Court should therefore decline to consider it. See Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998). Further, this argument was not preserved below.

Even if the Court elects to consider the argument, the Court should reject it. Cheek's request that this Court find an "implied" term acknowledges that the parties had no agreement about the siting of the Building. The parties did not have such an agreement, and this Court will not invent one. See, e.g., Utah Transit Authority v. Salt Lake City Southern R.R. Co., Inc., 2006 UT App 46, ¶ 8, 131 P.3d 288 (reasoning that the Utah Court of Appeals "will not make a better contract for the parties than they have made for themselves"). Here, the trial court found specifically that "Bulloch Brothers Engineering, Inc. [no relation to Bulloch] had the original Sears Building properly staked so that Defendants would know where to build the building. The Defendants built the original Sears Building where it was staked." R561, ¶¶ 11-12. Cheek does not attempt to challenge these findings.

Regarding the location of the air conditioning units and pads, a factual finding indicates that Cheek told Bulloch to construct the air conditioning units on the east side of the Sears Building, "which would clearly be a trespass." R561, ¶15; T.III:89-90. Cheek fails to meet the substantial burden to overcome this finding. "[A]n appellant who seeks to prevail in challenging the sufficiency of the evidence to support a factual finding

or a verdict on appeal should follow the dictates of rule 24(a)(9), as a party who fails to identify and deal with supporting evidence will never persuade an appellate court to reverse under the deferential standard of review that applies to such issues.” State v. Nielsen, 2014 UT 10, ¶ 40, 326 P.3d 645. This analysis asks “whether the appellant has established a basis for overcoming the healthy dose of deference owed to factual findings.” Id. ¶ 41. Cheek has failed to establish any basis for overcoming the deference owed to the trial court’s factual findings.

At trial, Bulloch’s testimony established that he installed the air conditioning units where Cheek instructed him to do so. T.III:89–90. The trial court found his testimony to be more credible than Cheek’s, and that determination is entitled to deference. In past cases, this Court has reasoned that “we may not substitute our judgment for that of the trial court as trial courts are in a better position to weigh conflicting evidence and evaluate the credibility of witness testimony.” Lunt v. Lance, ¶ 19; R.B. v. L.B., 2014 UT App 270, ¶ 26, 339 P.3d 137; Dahl v. Dahl, 2015 UT 79, ¶ 150, --- P.3d --- (“[I]t is the district court’s role to judge the credibility of witnesses and to weigh their testimony.”). Since the parties agreed and consented to the location of the air conditioning units, Cheek cannot claim any breach based on their location.

### **III. Cheek’s arguments regarding quantum meruit are in error.**

#### *A. Quantum Meruit*

Quantum meruit is inapplicable in this case. “When a party, for some reason, is not entitled by the express terms of a contract to recover payment for services rendered, he or she might nonetheless be entitled to recover in quantum meruit.” Scheller v. Dixie

Six Corp., 753 P.2d 971 (Utah Ct. App. 1988). “Recovery under *quantum meruit* presupposes that no enforceable written or oral contract exists.” Davies v. Olson, 746 P.2d 264, 268 (Utah Ct. App. 1987); Karapanos v. Boardwalk Fries, Inc., 837 P.2d 576, 579 (Utah Ct. App. 1992); Bailey-Allen Co., Inc. v. Kurzet, 876 P.2d 421 (Utah Ct. App. 1994). Here, the trial court found the existence of two agreements, see R560, ¶ 7; R562, ¶ 19, which Cheek has not challenged. See Appellant’s Brief at 38 (“The essential elements of contract formation exist in the present case . . .”). For that reason, Cheek’s discussion of Urhahn is not relevant. There, this Court held that a bid proposal for home construction was an enforceable contract. Urhahn Const. & Design, Inc. v. Hopkins, 2008 UT App 41, ¶ 2, 179 P.3d 808. This Court held in addition that the owners waived their rights under a provision of the proposal that required a written change order for any deviation from the plans. Id. ¶ 17. Where the owners had requested and accepted work orally and paid for some of the work, this Court upheld the trial court’s determination that an implied-in-fact contract was established through the parties’ conduct. Id. ¶ 18. The case has no bearing here since it is not disputed that the parties had oral agreements, though it is exceedingly unclear what, if anything, those agreements required of the parties.

#### *B. Workmanship*

Cheek argues that the trial court incorrectly treated the action as “one of workmanship rather than breach of contract.” Brief at 38. The trial court’s conclusions of law are appropriate points of analysis for breach of contract. To prevail on a breach of contract claim, a party must establish damages. See Campbell, Maack & Sessions v.

Debry, 2001 UT App 397, ¶ 21, 38 P.3d 984. The trial court’s findings establish that to the extent that Bulloch did not comply with the parties’ agreements, the noncompliance did not damage Cheek. A plaintiff in a breach of contract action fails to establish a breach of contract claim if he or she fails to show damages. Id. Cheek has failed to do so here.

### *C. Remaining Claims*

As for the remainder of the material presented at pages 39–43 of Cheek’s brief, Bulloch strongly objects under Rule 24(a)(9) (requiring appellant to support argument with “citations to the authorities, statutes, and parts of the record relied on”) and applicable case law because Cheek’s arguments are inadequately briefed. “Appellants have the burden to clearly set forth the issues they are appealing and to provide reasoned argument and legal authority.” ASC Utah, Inc. v. Wolf Mountain Resorts, L.C., 2013 UT 24, ¶ 16, 309 P.3d 201. “An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.” State v. Sloan, 2003 UT App 170, ¶ 13, 72 P.3d 138. After all, appellate courts are “not a depository in which [a party] may dump the burden of argument and research.” ASC Utah, Inc., 2013 UT 24 at ¶ 16 (quoting Allen v. Friel, 2008 UT 56, ¶ 9, 194 P.3d 903); see also Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998); see also Dahl v. Dahl, 2015 UT 79, ¶ 67, --- P.3d --- (declining to undertake the “gargantuan task” of poring over thousands of pages in the record to make party’s argument for her). This Court may disregard briefs that do not comply with the briefing requirements. Van Den Eikhof v. Vista Sch., 2012 UT App 125, ¶ 5, 278 P.3d 622 (declining to consider merits of brief where, among other deficiencies, it failed to include adequate record citations);

State v. Sloan, 2003 UT App 170, ¶ 13, 72 P.3d 138. Cheek’s briefing is fatally deficient because it does not cite the record or cite or discuss controlling case law. A fair adjudication of the claims would require a full review of the trial transcript and applicable laws, which are not adequately cited. The material is inadequately briefed such that fair adjudication is not possible.

In addition to being inadequately briefed, the material at pages 39–43, to the extent it challenges the trial court’s factual findings, fails to carry Cheek’s burden of persuasion. “[A]n appellant who seeks to prevail in challenging the sufficiency of the evidence to support a factual finding or a verdict on appeal should follow the dictates of rule 24(a)(9), as a party who fails to identify and deal with supporting evidence will never persuade an appellate court to reverse under the deferential standard of review that applies to such issues.” State v. Nielsen, 2014 UT 10, ¶ 40, 326 P.3d 645; see also Dillon v. S. Mgmt. Corp. Ret. Trust, 2014 UT 14, ¶ 59, 326 P.3d 656, 672 (“An appellant cannot demonstrate that the evidence supporting a factual finding falls short without giving a candid account of that evidence.”); Wachocki v. Luna, 2014 UT App 139, 330 P.3d 717 (holding that a party failed to carry its burden of persuasion on appeal because it did not marshal the supporting evidence presented at the parties’ two-day trial).

Specifically, an appellant “cannot merely present carefully selected facts and excerpts from the record in support of [his or her] position” and “[n]or can [he or she] simply restate or review the evidence that points to an alternative finding or a finding contrary to the trial court’s finding of fact.” Austin v. Bingham, 2014 UT App 15, ¶ 12, 319 P.3d 738 (quoting Chen v. Stewart, 2004 UT 82, ¶ 76, 100 P.3d 1177); see also Gunn



Hill Dairy Properties, LLC v. Los Angeles Dept. of Water & Power, 2015 UT App 261, ¶ 19, --- P.3d --- (rejecting challenge to factual finding where party did not specifically challenge findings but instead “reargue[d] their position on appeal”); see also Bell v. Bell, 2013 UT App 248, 312 P.3d 951 (rejecting party’s challenge to trial court’s factual findings because party merely reargued the evidence supporting her position); Hodgson v. Farmington City, 2014 UT App 188, ¶ 13, 334 P.3d 484 (rejecting challenge to municipal board’s findings because party did not marshal and instead pointed to contrary evidence in the record); R.B. v. L.B., 2014 UT App 270, ¶ 27, 339 P.3d 137, 147 (holding that party failed to shoulder burden of challenging factual findings where he argued “in effect that a selected portion of the evidence supporting the court’s findings provided inadequate support without addressing the additional supporting evidence”).

The proper standard for a challenge to the sufficiency of the evidence is “whether the appellant has established a basis for overcoming the healthy dose of deference owed to factual findings.” State v. Nielsen, 2014 UT 10 at ¶ 41. In these matters, a trial court’s factual findings are considered presumptively correct, and the evidence is viewed in the light most favorable to the findings. Coll. Irr. Co. v. Logan River & Blacksmith Fork Irr. Co., 780 P.2d 1241, 1244 (Utah 1989); see also State v. Nielsen, 2014 UT 10, ¶ 30, 326 P.3d 645 (evidence and all reasonably drawn inferences viewed in the light most favorable to the verdict); Grahn v. Gregory, 800 P.2d 320, 327 (Utah Ct. App. 1990).

For these reasons, the standard for reviewing factual findings is “highly deferential.” State v. Jones, 2015 UT 19, ¶ 68, 345 P.3d 1195; see also In re United Effort Plan Trust, 2013 UT 5, ¶ 17, 296 P.3d 742, 748 (reasoning that “factual determinations

are entitled to the most deference”). “If there is a reasonable basis in the evidence to support the finding, the finding will not be overturned unless it is clearly erroneous.”

Coll. Irr. Co. v. Logan River & Blacksmith Fork Irr. Co., 780 P.2d 1241, 1244 (Utah Ct. App. 1989); Jefferies v. Jefferies, 752 P.2d 909, 911 (Utah Ct. App. 1988) (reasoning that the court defers to factual findings unless they are clearly erroneous).

This Court has held that a party fails at the outset to meet its burden of persuasion on appeal by omitting several crucial facts that are harmful to the party’s position.

Simmons Media Group, LLC v. Waykar, LLC, 2014 UT App 145, ¶ 43, 335 P.3d 885 (agreeing with the appellee that party failed to marshal and rejecting challenge to factual findings); R.B. v. L.B., 2014 UT App 270, ¶ 27, 339 P.3d 137 (rejecting party’s challenge to the trial court’s findings regarding a child’s misbehavior because challenging party omitted the custody evaluator’s positive assessment of the mother’s psychological health, the custody evaluator’s admission that she did not speak with the mother’s psychiatrist, and the evaluator’s testimony that divorce in general is traumatic for children). Cheek’s claims fail at the outset because he omits several crucial facts that are harmful to his position, one of which being the water saturation of the soils, referenced above.

Cheek first argues—erroneously—that the trial court failed to refer to Trial Exhibit 4 in its findings. Compare Appellant’s Brief at 40; with Findings of Fact and Conclusions of law, R. 559, ¶¶ 30–31 (referring twice specifically to Exhibit 4). Cheek ignores the fact that the parties had no written construction contract obligating the parties to construct the Building or the Addition in accordance with any specifications.

T.III:72:19. Complicating matters, the few available drawings were not adopted by the parties, with one example being their agreement to change the truss system from a pitched-roof design that was called for in the drawings to a flat-roof design. T.III:105:4-22. With respect to that change, the trial court found that “[t]he change in plan from a pitched roof to a flat roof reduced the over-excavation required on internal, non-load bearing walls and the Defendants’ construction of those non-load bearing walls was undisputably adequate.” R564, ¶ 33. Cheek fails to cite any evidence suggesting that the parties agreed to consult with a structural engineer for any changes to the Building design. Even if they had such an agreement, Cheek obviously waived that term by directing the construction of the Building and Addition without consulting with an engineer. See, e.g., Urhahn Const. & Design, Inc. v. Hopkins, 2008 UT App 41, 179 P.3d 808.

With respect to the documents referenced for compaction and over excavation, Cheek fails to establish or argue what difference these documents would have made had they been cited in the trial court’s decision. To the extent that Cheek is asserting that Bulloch failed to comply with those documents, Cheek omits crucial details regarding the sprinkler leak at the Sears Addition that was substantial enough that the recommendations of the documents cited would have been inadequate in any event to prevent building movement. T.IV:135:5–6.

With respect to the certificate of completion issued by Bulloch, Cheek omitted crucial facts regarding the purpose for that certificate. Cheek requested that document in connection with Cheek’s request for financing from the U.S. Small Business

Administration, at the request of Cheek's lawyer. T.III:90:13; See Trial Exhibit 6. That document indicates that construction was completed in accordance with the "final plans" but, as is discussed above, the parties had no "final plans" for the Building or Addition. T.III:80:14. Under the precedents cited above, Cheek fails to meet the appellant's burden on appeal to challenge the trial court's factual findings.

#### **IV. The trial court did not err with respect to Section D of Cheek's brief.**

Section D of Cheek's brief appears to be a re-argument of earlier sections of his brief. Bulloch strongly objects under Rule 24(a)(9) (requiring appellant to support argument with "citations to the authorities, statutes, and parts of the record relied on") and applicable case law because Cheek's arguments under this Section are inadequately briefed, and Bulloch incorporates arguments set forth above regarding inadequate briefing. Bulloch further incorporates arguments set forth above regarding standards applicable to challenges to factual findings.

Cheek cites no law supporting his position that a trial court judge must give consideration or even read a non-prevailing party's proposed findings of fact and conclusions of law. Bulloch is aware of no such law. The argument should be rejected.

Furthermore, Cheek's discussion of Quagliene v. Exquisite Home Bldrs., Inc., 538 P.2d 301 (Utah 1975) is unhelpful to Cheek. While it is true that a party who fails to perform a duty under a contract is liable for breach, this statement of law is unhelpful in this case because the parties had only oral agreements that are not well defined. See, e.g., Findings of Fact and Conclusions of law, R565 ("The Plaintiff has failed to establish how much over-excavation truly needed to be done on the Sears building addition."). Cheek

fails to cite any agreement term he believes he had with Bulloch and fails to show that any such term was breached. Accordingly, Quagliene is unhelpful to Cheek.

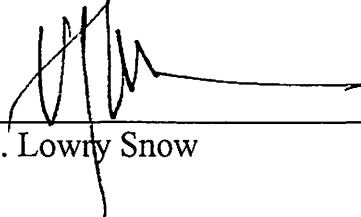
Finally, to the extent that Cheek argues in Section D that the trial court's ruling is proof of bias or prejudice, this claim fails. Adverse decisions may not be considered in determining the existence of bias. Lunt v. Lance, 2008 UT App 192, ¶ 15 n. 7, 186 P.3d 978; see also State v. Munguia, 2011 UT 5, ¶ 17, 253 P.3d 1082 (reasoning that "the bias or prejudice must usually stem from an extrajudicial source, not from occurrences in the proceedings before the judge").

### CONCLUSION

Bulloch respectfully requests that the Court affirm the decision of the trial court.

DATED this 30th day of November, 2015.

SNOW JENSEN & REECE, P.C.

  
\_\_\_\_\_  
V. Lowry Snow  
\_\_\_\_\_  
W. Devin Snow

**CERTIFICATE OF MAILING**

I hereby certify that on the 30th day of November 2015, I caused eight true and correct copies of the BRIEF OF THE APPELLEES to be delivered via U.S. Mail, postage prepaid, with a copy via email, to the following:

The Utah Court of Appeals  
450 South State Street  
PO Box 140210  
Salt Lake City, UT 84114-0210

*courtofappeals@utcourts.gov*

I hereby certify that on the 30th day of November 2015, I caused two true and correct copies of the BRIEF OF THE APPELLEES to be delivered via U.S. Mail, postage prepaid, with a copy via email, to the following:

J. BRYAN JACKSON, P.C.  
J. Bryan Jackson  
95 North Main Street, Ste. 25  
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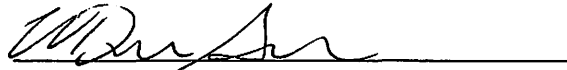


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V. Lowry Snow  
W. Devin Snow

## CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this Brief of Appellees complies with the type-volume limitation of Utah Rules of Appellate Procedure 24(f)(1)(A). The total number of words used in this brief is 9,699.

A handwritten signature in black ink, appearing to read 'V. Lowry Snow', is written over a horizontal line.

V. Lowry Snow

W. Devin Snow

## **ADDENDUM**

1. Findings of Fact and Conclusions of Law
2. Ethics Advisory Committee's Informal Opinion 06-1



FILED

FEB - 2 2015

5th DISTRICT COURT  
IRON COUNTY  
DEPUTY CLERK   D  

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
IRON COUNTY, STATE OF UTAH

DENNIS CHEEK,

Plaintiff,

vs.

CLAY BULLOCH CONSTRUCTION INC.,  
a Utah Corporation, and CLAY BULLOCH,  
an individual,,

Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND ORDER

Case No. 030500447

Assigned Judge: Paul D. Lyman

FINDINGS OF FACT

A five day trial was held in Iron County District Court ending on January 13, 2015. The parties were present and presented evidence. The following facts are found:

1. No evidence was presented on the Plaintiff's Second Cause of Action, for Loss of Income, and on the Plaintiff's Third Cause of Action, for Attorney's Fees.
2. No evidence was presented on the Defendant's First Cause of Action, for Mechanic's Lien Foreclosure, and on the Fourth Cause of Action, for Defamation.
3. Prior to the trial the Defendant's moved for Dismissal of the entire action, which motion was granted, and the Dismissal was appealed.
4. The Plaintiff, alone, appealed the Dismissal and the Court of Appeals granted the Plaintiff's appeal, which revived only the Plaintiff's claims.
5. There were two agreements to construct buildings between the parties, i.e., the original Sears building and the Sears building addition.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -2-**

**Original Sears Building**

6. The Plaintiff acquired a survey (Exhibit 3) and a site plan (Exhibit 5) from Bulloch Brothers Engineering, Inc. for the original Sears building. (Note: There is no relationship between the Defendant, Clay Bulloch, and Bulloch Brothers Engineering Inc.)
7. There was an agreement between the parties for the Defendants to construct the original Sears building, which agreement was partially evidenced by documents and partially oral.
8. Bulloch Brothers Engineering Inc. did a survey on the original site and they also prepared the survey and site plan for the Plaintiff. (Exhibits 3 and 5.)
9. Due to a claim that the original Sears building was not built solely on the Plaintiff's property, the Plaintiff hired Jay Adams to do a site survey in 2003 (Exhibit 20), which relied upon the Bulloch Brothers Engineering Inc. work.
10. Jay Adams identified the original Sears building's trespass on the adjoining land owners' properties as follows:
  - Northeast corner overlap      1.65 feet;
  - Southeast corner overlap      1.3 feet;
  - South side overlap              .21 feet; andthree trespassing air conditioning pads, with air conditioners, on the eastern property owner's property.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -3-**

11. Bulloch Brothers Engineering Inc. had the original Sears building property staked so that the Defendants would know where to build the building.
12. The Defendants built the original Sears Building where it was staked.
13. There were three air conditioning pads and air conditioners constructed on the property owner to the east's property.
14. Clay Bulloch testified that he approached the Plaintiff and asked whether he wanted the air conditioners placed on the roof of the building or to the east side, where they would trespass.
15. Clay Bulloch testified that the Plaintiff told him to construct them to the east side of the building, which would clearly be a trespass.
16. Dennis Cheek denied giving that approval to Clay Bulloch.
17. The Court observed both of these individual's actions and demeanor while testifying, and the Court finds Clay Bulloch's testimony to be more trustworthy and believable.
18. Given the facts that are cited above this Court finds that the Plaintiff has failed to meet his burden of proving the Defendants breached their agreement on either the constructed location of the building or on the placement of the trespassing air conditioners.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -4-**

**Sears Building Addition**

19. In June of 2001, there was an initial discussion and later an agreement between the parties for the Defendants to construct a Sears building addition, which agreement was partially evidenced by documents and partially oral.
20. During the construction of the original Sears building the Defendants had placed a six inch storm drain from the loading docks to the street, which storm drain ran across the property where the Plaintiff wanted his Sears building addition to be located.
21. The proposed grading plan of the Sears building addition indicated relocation of the six inch storm drain (Exhibit 8), but did not indicate where it should be relocated to.
22. The need to have the six inch storm drain pipe relocated was because it was allegedly not of sufficient strength to be placed under a building, although there was conflicting testimony regarding whether the pipe was adequate to be left under the addition.
23. The plans given to Clay Bulloch, lacked many things, including plumbing details, electrical details, HVAC details, and wall details (Exhibit 8); however, the parties spoke almost daily about the construction project and how it should go.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -5-**

24. Danny Bulloch testified that he thought the storm drain pipe could have gone between the building's foundation and its retaining wall on the north side, although it was not indicated on the schematic.
25. The construction of the Sears building addition was going to block the neighbor to the north's access to his building, an Arctic Circle, which caused very hard feelings by the neighbor to the north toward the Plaintiff and the neighbor would not allow the Plaintiff to trespass at all on the property to the north of the addition.
26. Section A-A of Exhibit 8 shows a cross-section of the north side of the building, which construction, if followed, would have caused the Defendant to trespass on the property to the north and required the cooperation by the neighbor to the north.
27. After the construction was under way, Clay Bulloch approached the Plaintiff about three major changes from the plans: first, changing the roof from the pitched roof shown on the plans to a flat roof; second, changing the Section A-A cross-section north side drainage; and third, changing the plans to not remove the six inch storm drain.
28. Clay Bulloch testified that Dennis Cheek agreed to these changes and Dennis Cheek stated that he agreed to the roof change and the Section A-A cross-section north side drainage, but that he did not agree to the plan to leave the six inch storm drain under the Sears building addition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -6-

29. The Court watched both men testify and in light of the way they acted and the fact that Dennis Cheek claims he only rejected the most minor change, the Court finds that Clay Bulloch's testimony is more believable and is in fact what happened, i.e., Dennis Cheek agreed to leave the six inch drain pipe in place.
30. During the construction of the original Sears building the Plaintiff provided the Defendants with a Geotechnical Investigation document (Exhibit 4), which detailed the amount of over-excavation that was recommended to be done in the subject area prior to construction.
31. It appears that the small portions of the Sears building addition footings and walls that were uncovered (to determine the amount of structural damage) indicate the Defendants may not have fully complied with the claimed Exhibit 4, over-excavation recommendations.
32. Notwithstanding the Geotechnical Investigation document the parties' expert witnesses disagreed on the required over-excavation, i.e., Timothy Watson acknowledged that his ten feet total in width was different than Christopher Volkson's four feet total in width, and Timothy Watson (the Plaintiff's expert) acknowledged there might even be a third standard, with no standard being ultimately better than any other standard.
33. The change in the plan from a pitched roof to a flat roof reduced the over-excavation required on internal, non-load bearing walls and the Defendants' construction of those non-load bearing walls was undisputably adequate.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -7-**

34. Due to the location of the building's north wall, i.e., only four feet from the northern property line, it was simply not possible for the Defendants to have over-excavated on the north wall to the degree the Geotechnical Investigation required.
35. The wall was built where the Plaintiff wanted it built, with as much over-excavation as was possible on the north side without trespassing on the neighboring land owner's property.
36. The Plaintiff has failed to establish how much over-excavation truly needed to be done on the Sears building addition.
37. The parties' original Sears building agreement called for very little compaction testing, as was evidenced by the August 26, 1999 , invoice (Exhibit 52), wherein compaction testing of only \$755.00 was acquired.
38. Clay Bulloch testified that he approached the Plaintiff regarding the need for and cost of compaction testing and that the Plaintiff did not want to pay for the cost of that testing.
39. The Plaintiff denies having reached such an agreement as described by Clay Bulloch and asserts now that he wanted testing.
40. Given the parties relationship and the Plaintiff's desire to not spend any more than he had to on the structures, along with watching their demeanors while testifying, the Court finds that Clay Bulloch's statements about compaction are more credible than the Plaintiff's.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -8-**

41. While excavating the grease trap for the Sears building addition, just to the west of the west end of the Sears building addition, there was a water leak discovered, which was resolved by shutting off the sprinkler system at the sprinkler box.
42. The water leak was not sufficient to delay the grease trap installation.
43. The Defendants started construction of the Sears building addition in late Fall of 2001 and completed it in early Spring of 2002.
44. Dennis Cheek refused to pay the Defendants for all of the charges billed by the Defendants. They claim they were owed an additional \$9,301.67.
45. After completion of the construction in early Spring of 2002 and before April of 2003, there was some settling of the west half of the Sears building addition.
46. To the Plaintiff, there was no immediately obvious reason for the settling, so the Plaintiff hired Watson Engineering in May 2003, to investigate the cause of the settling.
47. The Plaintiff also hired Don Lowe's Day & Night plumbing to test the six inch storm drain pipe for leakage in May of 2003.
48. Don Lowe's testing indicated that when the storm drain was completely full of water it leaked one gallon per minute, which indicated that some sort of leak existed in the storm drain line, even though the line would seldom, if ever, be completely full of water.



**FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -9-**

49. Don Lowe was then asked to video the inside of the storm drain in June of 2003, which he did and he found leaks in two different places and a sag in the line with standing water for the 10 feet of the sag. (Since there was standing water in the sag, it indicated that the sag was not related to any leak.)
50. Don Lowe testified that the only time the storm drain pipe would leak is when a storm occurred and water was in the line.
51. It was later discovered that there was a knife hole and a saw cut in the storm drain pipe that were not satisfactorily patched, but that the cuts were on top of the pipe and only 75% down both sides of the storm drain pipe, so that water could only leak if at least the bottom 25% of the storm drain was full of water.
52. Robert Platt, a civil engineer, testified that the six inch storm drain was adequate for the Cedar City area, being designed to handle 1 ½ inches of water per hour, which is considered a 100 year storm amount.
53. Robert Platt, testified if all of the water Cedar City receives in one year came at once, then it would take only a day to clear the storm drain.
54. Robert Platt was given several scenarios and asked to reconsider his conclusion that rarely would water leak from the storm drain and he didn't change his conclusion.
55. Allen Davis, a 30 plus year employee of Cedar City Water Department testified that the city sewer and water lines run in a planter strip just west of the west end of the Sears building addition.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -10-**

56. Until 2004 Cedar City had a contractor come clean out the city's sewer lines and on one occasion, after the Sears building addition was constructed and before 2004, that contractor's heavy clean out truck sunk to his axles while trying to get to the sewer manhole that is just west of the west end of the Sears building addition.
57. Allen Davis discovered a sprinkler leak in the planter strip that was causing the water leak and he spoke to the building owner, the Plaintiff about the leak.
58. The curb, gutter and sidewalk in the planter strip area likewise sunk at some point, and had to be replaced at a later date. (See Photos in Exhibit 69, and Exhibit 69A.)
59. Watson Engineering's investigation concluded that the cause of the settlement was moisture in the hydro-collapsible soils under the west wall.
60. Watson Engineering proposed five potential sources of moisture:
  - a. storm drain pipe leak;
  - b. sewer and water lines;
  - c. grease trap;
  - d. landscape watering; and
  - e. natural precipitation.
61. Watson Engineering asserted that a contributing factor might have been a failure to over-excavate and compact in a sufficient amount.
62. Christopher Volksen, the Defendant's expert witness, testified that the over-excavation recommended by Timothy Watson of Watson Engineering was excessive and that a total lateral width of four feet, i.e., two feet on each side of the walls, was adequate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -11-

63. Mr. Watson acknowledged that there were varying views on what was appropriate over-excavation, with no ultimate standard being necessarily better than any other standard.
64. Watson Engineering did testing in the West end of the Sears building addition to determine how much settlement had occurred (Exhibit 25, Plate 1 and Plate 1M); however, no test was ever done at the completion of construction, before there was a settlement claim, so it is impossible to know how much, if any, settlement occurred.
65. Watson Engineering recommended drastic, expensive measures even though the maximum estimated settlement was only .13 foot or about 1 ½ inches at only one location.
66. Mr. Volksen would have recommended further monitoring, because the settlement was so minimal, and the proposed corrective measures so expensive
67. Mr. Watson knew the Plaintiff was under pressure to get something done, in order to close a deal to sell the buildings, so Mr. Watson recommended the expensive action be taken.
68. Mr. Watson was not told about the water leak in the planter strip that had sunk the sewer cleaning truck to its axle.
69. Mr. Volksen testified that for the storm drain pipe to have leaked enough water to cause the settlement, then thousands and thousands of gallons of water would have had to leak from the saw cuts and hole.

-552

**FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -12-**

70. The Plaintiff has failed to provide sufficient evidence to establish that water from the storm drain pipe leaks was sufficient to cause the settlement.
71. The Plaintiff has failed to provide sufficient evidence to establish that his own sprinkler leak, prior to Spring of 2003, did not cause the sewer cleaning truck to sink to its axle; along with the curb, gutter and sidewalk to need to be replaced and the settlement of his own west wall.

**Conclusions of Law**

Based upon the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The Plaintiff's second and third causes of action should be dismissed because no evidence was presented on these claims.
2. The Defendants' first and fourth causes of action should be dismissed because no evidence was presented on these claims.
3. The Defendants' counterclaims were not revived when the Court of Appeals reversed this court's Dismissal of this action, because the Defendants did not appeal the grant of their own motion to dismiss the entire action.
4. The Plaintiff has failed to meet his burden of proving the original Sears building's trespass onto the neighbors' properties was the Defendants' responsibility.
5. The Defendants did not breach the agreement regarding the north side drainage plan change and the removal of the six inch storm drain, because Plaintiff agreed to both changes.

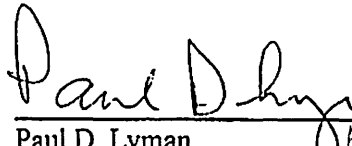
FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030500447, Page -13-

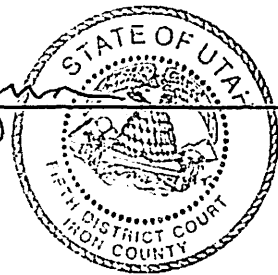
6. The Plaintiff has failed to meet his burden of proving how much over-excavation the Defendant needed to do on the Sears building addition.
7. The Plaintiff has not met his burden of proof regarding a requirement for compaction testing on the Sears building addition.
8. The Plaintiff has failed to meet his burden to prove what caused the west wall settlement and that the Defendants' actions contributed to any damage suffered by the Plaintiff.

Order

The Plaintiff has failed to meet his burden of proof as explained above. Consequently, his claims are dismissed. No further order of this court will be issued.

Signed on February 2, 2015

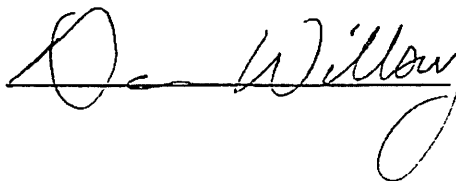
  
Paul D. Lyman  
District Court Judge



CERTIFICATE OF SERVICE

On February 2, 2015, a copy of the above Findings of Fact and Conclusions of Law and Order was mailed to each of the following by the method indicated:

<u>Addressee</u>	<u>Method (Mail, in Person, Fax)</u>	<u>Addressee</u>	<u>Method (Mail, in Person, Fax)</u>
K.L. McIff The McIff Firm, P.C. 225 N 100 E Richfield, UT 84701	[m]	Snow Jensen & Reece V. Lowry Snow Jonathan P. Wentz Tonaquint Business Park 912 W 1600 S Suite B-200 St. George, UT 84770	[m]



## Informal Opinion 06-1 February 17, 2006

**Question:** A district court judge has asked whether disqualification is necessary in a proceeding involving a court clerk's spouse appearing as counsel of record.

**Answer:** Disqualification is required if the court clerk has a close working relationship with the judge. Judges in the district with whom the court clerk does not have a close working relationship may preside over such a proceeding.

**Discussion:** According to the facts provided by the judge, a judge's clerk's spouse is a criminal defense attorney in the district. The clerk apparently does front-office and in-court work for a specific judge. The question posed by the judge is whether the judge for whom the clerk works is required to enter disqualification in cases involving the clerk's spouse.

Canon 3E requires a judge to enter disqualification when "the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding." In Informal Opinion 98-14, the committee construed this provision to require a judge to enter disqualification in cases involving a party who is a member of court employee's immediate family or household and the employee has a close working relationship with the judge presiding in the case. The committee stated that "this would include the judge's clerk, bailiff, and reporter; the clerk of the court; and the trial court executive." Informal Opinion 98-14 involved a party, and not an attorney, but the same principles will generally apply. Canon 3E discusses "a party or a party's lawyer" in the same sentence, and therefore the same disqualification standard is generally applicable. A judge cannot hear cases involving an employee's attorney spouse, if the employee has a close working relationship with the judge.

Disqualification in these situations would involve not only the judge, but the clerk. A clerk is generally disqualified from involvement in cases under the same principles that apply to the judge. See e.g. Informal Opinion 97-6 ("court employees must . . . observe all code provisions which require diligence and fidelity.") However, this does not mean that the remedy in such a situation is for the clerk to be removed from the case so that the judge can preside. If the clerk has a close working relationship with the judge, both are disqualified and another judge must hear the case, assisted by a different clerk. In some situations this may create difficulties for a district. For example, if a trial court executive's spouse were an attorney, all of the judges in the trial court executive's district could not hear any cases involving that attorney. However, in situations involving a judge's in-court or front-office clerk, a case can be assigned to another judge in the district.

In conclusion, the judge for whom the clerk directly works is disqualified from presiding over any cases involving the clerk's spouse. The requirement of disqualification does not extend to other judges in the district because, according to the facts provided by the requester, the clerk

does not have a close working relationship with the other judges in the district. Other judges in the district may hear cases involving the employee's spouse. If this situation were to change, such as the employee advancing to a different position and developing a closer working relationship with other judges, the status would need to be re-evaluated.