1991

Allen R. Grahn and Josephine M. Grahn v. Herold L. Gregory, Dean Bradshaw, Christi Bradshaw : Brief in Opposition to Certiorari

Utah Supreme Court

Robert M. Taylor, John S. Adams; Taylor, Ennegnga, Adams & Lowe; attorneys for appellees.
Jeffrey K. Woodbury; Russell S. Walker; Woodbury, Jensen, Kesler & Swinton; attorneys for appellants.

IN THE SUPREME COURT FOR THE STATE OF UTAH

----------oooOooo----------

ALLEN R. GRAHN and JOSEPHINE M. GRAHN, husband and wife, Plaintiffs/Appellees, v. HEROLD L. GREGORY, Trustee for and on behalf of the Marital and Family Trusts of the Albert Eccles Family Trust; and DEAN BRADSHAW and CHRISTI BRADSHAW, husband and wife, Defendants/Appellants.	Supreme Court Case No. 910015 Court of Appeals No. 89-0340 CA Third District Court No. C-86-8833

----------oooOooo----------

BRIEF IN OPPOSITION TO JOINT PETITION FOR WRIT OF CERTIORARI

----------oooOooo----------

Jeffrey K. Woodbury, #4172
WOODBURY, JENSEN, KESLER & SWINTON, P.C.
Attorneys for Defendant/Appellant
265 East 100 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 364-1100

Russell S. Walker, #3363
WOODBURY, JENSEN, KESLER & SWINTON, P.C.
Attorneys for Defendant/Appellant
265 East 100 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 364-1100

Robert M. Taylor, #3208
John S. Adams, #A0017
TAYLOR, ENNENGA, ADAMS & LOWE
Attorneys for Plaintiffs/Appellees
5525 South 900 East, Suite 200
Salt Lake City, Utah 84117
Telephone: (801) 263-1112

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Plaintiffs/Appellees Grahns submit that the questions for review are:

1. Have the petitioners raised an important or special reason which would warrant review of the decision of the Court of Appeals where the standards of Rule 46 of the Utah Rules of Appellate Procedure have not been met?

2. Is the holding, by the Court of Appeals and the Trial Court that the co-petitioners, Bradshaws, were not bona fide purchasers of certain adjacent property, in conflict with prior decisions by Utah appellate courts?

3. Do the petitioners, by presenting their contrary position in regard to what the evidence showed, point up a departure by the Court of Appeals from the accepted and usual course of judicial proceedings and, if so, does that departure call for an exercise of the Supreme Court's power of supervision?

4. Is the petition of the Defendants/Appellants in the above-referenced matter frivolous as defined in Rule 33 of the Utah Rules of Appellate Procedure, and, accordingly, should sanctions such as attorneys' fees be granted in favor of Plaintiffs?

CITATION TO THE OPINION OF THE COURT OF APPEALS

The unanimous opinion of the Court of Appeals was filed on October 24, 1990, and was published at 146 Utah Adv. Rep. 47. A copy is attached hereto in Appendix 1. A Petition for Rehearing was filed by Defendants, and denied by the Court of Appeals.

STATEMENT OF THE JURISDICTION OF THE SUPREME COURT

The Respondents accept the statements regarding the jurisdiction of the Supreme Court which are set forth in the Petition for Writ of Certiorari, but for the self-serving conclusions therein.

NO CONTROLLING PROVISIONS

There are no controlling provisions of constitutions, statutes, ordinances or regulations that are involved in the case.

STATEMENT OF THE CASE

This is an action which involves reformation of a legal description concerning a boundary to a certain unique parcel of real estate in Salt Lake County. (The parcel is an estate, and not part of a commercial subdivision plat.) The action also involved the rescission of a subsequent sale of an adjacent parcel of real estate, which sale had been made between the Co-Petitioners.

The remedy of reformation was sought and awarded to conform the deed to the intention of the parties and repair a mistake which had been made by the drafter of the legal description. The Trial Court and, thereafter, the Court of Appeals, by unanimous decision, ruled in favor of the Respondents (the "Grahns").

The Petitioners and the Respondents have disagreed throughout this matter in regard to what facts were established by the evidence. In essence, the Trial Court and the Court of Appeals found that the evidence supported the Grahns' position. The Statement of the Facts in the Joint Petition for Writ of Certiorari (the "Petition") which sets forth the Petitioners' viewpoint is frustratingly inaccurate. A full review of the Record supports the facts as recited by the Court of Appeals (146 Utah Adv. Rep. 47, at 47-48, see Appendix 1, hereto) and the Trial Court's Findings of Fact and Conclusions of Law (Appendix 2, hereto).

Through an exhaustive effort in the Respondents' Brief to the Court of Appeals, the Grahns thoroughly demonstrated the

inaccuracies advanced by Petitioners (then, the Appellants), and the facts which were revealed by the preponderant evidence, all with detailed citations to the Record. (Respondents' Brief, pages 4 through 24, as supplemented by Addendum 1, thereof, pages 1 through 13.) To repeat that task in this Brief would be inappropriate, as those factual issues are beyond the scope of review now before the Supreme Court. It is significant that the courts below have unanimously found that the Petitioners failed to establish their case.

However, it is necessary to recite certain facts which are relevant to the argument by Petitioners that Co-Petitioners Bradshaws were bona fide purchasers.

1. Bradshaws were aware, as they considered a purchase of the parcel adjacent to the Grahn parcel, that the south and east border of the Grahns' private drive served as the boundary between the two parcels. (Transcript: N. Taylor, page 14, lines 6 through 11; page 42, lines 23 through 25; Mrs. Bradshaw, page 390, lines 4 to 9.)

2. Bradshaws had been advised and were aware that the Grahns had purchased the improved portion of the property including the home thereon, and that the Grahns had been told, and therefore believed, that they were the owners of the private drive. Bradshaws were further aware of the aesthetic and geologic easement in favor of the Grahns along the south and east side of the private drive. (Transcript: Mr. Bradshaw, page 214, lines 4 through 23; Mrs. Gregory, page 184, lines 24 to 25, page 185, lines 1 through 12; Mrs. Bradshaw, page 367, lines 17 to 19; page 374, lines 14 to 17, page 385, line 9; and pages 388 to 389.)

3. Then, on October 11, 1986, some forty (40) days prior to their closing, Bradshaws learned of facts that indicated that a mistake had been made in drafting the legal description. Within a few days, they and Gregory came to understand the ramifications thereof and they were given numerous opportunities prior to closing, by Co-Petitioner Gregory, to avoid their earnest money agreement to purchase

the adjacent parcel. At all times prior to closing, Bradshaws were well aware that the Grahns had not been advised of the discovery of a mistake. (Transcript: Mr. Gregory, pages 312 to 313; Mr. Bradshaw, page 399, lines 14 to 22; page 407, lines 2 through 8.)

4. Bradshaws understood the risks involved, for them, in their proposed purchase of the adjacent parcel. (Transcript: Mr. Bradshaw, page 399, lines 14 to 22; Mrs. Gregory, page 196, lines 16 to 22.)

5. Bradshaws chose to accept those risks and to purchase the adjacent parcel; but only with the benefit of a side agreement which would allow them to avoid the purchase if they could not have the land which encroached across the private drive of the Grahns. Pursuant to the side agreement, that land was only quit-claimed to Bradshaws. (Exhibit 13-P; Transcript: Mrs. Gregory, pages 178-179, lines 12 to 25, 1 to 11; Mrs. Bradshaw, page 384, lines 4 to 13, page 387, lines 15 to 25.)

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR LACK OF AN IMPORTANT OR SPECIAL REASON FOR REVIEW.

Rule 49(a)(9) of the Utah Rules of Appellate Procedure ("URAP") provides that, in a petition for Writ of Certiorari, the petitioner shall submit:

> [w]ith respect to each question presented, a direct and concise argument explaining the special and important reasons as provided in Rule 46 for the issuance of the Writ.

Rule 46, URAP, refers to the types of issues which present special and important reasons appropriate for Supreme Court consideration. The Justices of the Court are certainly familiar with the standards. Appropriate reasons include: inconsistencies between decisions of different panels of the Court of Appeals on the same issue of law; inconsistencies between the decision of the Court of

Appeals and a decision of the Supreme Court, on state or federal law; or departures from the accepted and usual course of judicial proceedings.

The Petitioners fail to set forth and establish any such important or special reason. No question of municipal, state or federal law has been presented in this matter. The Petitioners fail to demonstrate that the Court of Appeals decision in this matter was inconsistent with any other Utah ruling. Instead, the Petitioners categorically claim departures have been made from the accepted and usual course of judicial proceedings, and then, without describing the claimed departure, essentially reargue the case as it was argued both at the trial level and again at the level of the Court of Appeals.

The Petitioners attempt to reargue their position, citing the Grahns, the Trial Court and the Court of Appeals as their opposition. Without citations to the Record, they set forth statements "of fact" to support their theory. (As noted above, the factual arguments are not well grounded in the Record.)

Mindful that the issue before this Court is whether to grant certiorari, the Grahns will refrain from following the Petitioners into a reargument of the case below. It should suffice to note that both the Trial Court and the Court of Appeals concluded differently than the Petitioners would like them to have concluded, and that the decisions were consistent with both the evidence and the applicable law.

In conclusion, the arguments of the Petitioners are merely reargruments of those points which were raised at trial level and then at the Court of Appeals' level, without success. No special or important reason is advanced by Petitioners for review by the Supreme Court. Instead, the Petitioners boldly march on to make their arguments as if Certiorari had already been granted. A Writ of Certiorari is not warranted in this case.

II. THE TRIAL COURT'S AFFIRMED HOLDING THAT THE BRADSHAWS WERE NOT BONA FIDE PURCHASERS IS CONSISTENT WITH UTAH CASE LAW.

In their third argument, the Petitioners readdress and reargue their claim that the Bradshaws were bona fide purchasers, and that, as a result, reformation could not be made. Petitioners indicated that the Trial Court and the Court of Appeals contradicted previous law in Utah on the subject. Yet, Petitioners cite no previous law which is inconsistent with that decision. Their argument is on the facts.

The decision of the Court of Appeals on this point was consistent with law. As indicated in the opinion of the Court of Appeals, it was clear from the evidence that Bradshaws could not have been bona fide purchasers.

Petitioners, at trial and on appeal, based their bona fide purchaser claim on the argument that the sale took place at the time that the Bradshaw/Gregory earnest money agreement was entered into, and not the closing thereon. The Court of Appeals

relied in its decision upon Utah case law to the effect that the essential time to measure the knowledge of a purchaser is the time at which he takes a deed. (See the analysis in Grahn v. Gregory, 146 Utah Adv. Rep 47, 50 (1990).)

In an interesting twist, and for the first time, the Petitioners apparently concede the prior argument and attempt to argue in the Petition that Bradshaws had no notice, even at closing, of a prior conveyance of the "same land" that they were purchasing. In order to make this factual argument, the Petitioners rely strictly upon the mistaken legal descriptions and the fact that the Grahns did not secure an order of reformation until after the closing. The inequity in this position is obvious. As indicated by the evidence, see pages 3-4, above, while the Grahns were not made aware of the mistake until after the Bradshaw closing, for forty (40) days prior to that closing, both Bradshaws and Gregory had notice of the mistake and of the Grahns' equitable claim of ownership of the private drive.[1] Petitioners argue, in effect, that Bradshaws could ignore that particular knowledge and rely blindly upon the mistaken deed.

---

[1] Bradshaws learned of the mistake in the property description, and of its effect, forty (40) days prior to closing on the property. They knew that the Grahns were unaware of the mistake. They understood the effect of the mistake, but chose to press forward to see if they could take advantage of the situation. They refused opportunities to rescind the deal, which were granted to them by Co-Petitioner Gregory. They went ahead to close, taking the title to the property in question by Quit Claim Deed only; but, even then, not before a side agreement was entered into which would allow them to avoid the purchase if they could not have the land which encroached across the private drive. As Bradshaws well knew, the Grahns reasonably believed that the private drive was on Grahn land. Bradshaws also knew that Gregory intended and believed, prior to learning of the mistake, that he had already conveyed that private drive to the Grahns. (Citations to the Record in regard to each of these facts are indicated in the Statement of the Case, above.)

The ruling of the Court of Appeals was consistent with Utah case law, and not contradictory thereto as claimed by Petitioners. That Court and Petitioners both cite the Utah case of Hottinger v. Jensen, 684 P.2d 1271 (Utah 1984). In fact, in their argument's introductory sentence, Petitioners quote as follows:

> The right of reformation of a deed can be cut off by purchase of the property by a bona fide purchaser for value **without notice of the mistake.** (Id., at 1273, emphasis supplied)

Clearly, that statement by the Court resolves the question raised by Petitioners. The conveyance to be reformed, that to the Grahns, was prior in time to that conveyance to the Bradshaws. Before the Bradshaw closing, Bradshaw had notice of the mistake.

There is no reason, special, important or otherwise, for the Supreme Court to grant certiorari to review this issue. The Petitioners' argument is frivolous.

III. THERE HAS BEEN NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND THERE IS NO REASON FOR THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The Petitioners allege in their first and second arguments that the Trial Court and the Court of Appeals, in a nutshell, failed to get the point. By cross reference between the Statement of Questions Presented for Review in the Petition (page 1 thereof) and their first two arguments, it is apparent that the Petitioners allege for purposes of certiorari that the Court of Appeals departed from the accepted and usual course, by altering

the Findings of Fact to support reformation, and by its reliance upon facts which Petitioners believe to be contrary to the Record. A review of the arguments, however, reveals a reargument of the evidentiary claims and theory of the Petitioners.

It is submitted that, even if it could be demonstrated that the Record would support another conclusion, which the Grahns strongly deny, such a failure would not be a special or important reason which would warrant review by or supervision by the Supreme Court of the State of Utah.

The Court of Appeals reviewed the Record and the Briefs which were submitted on appeal. In their Briefs, each party drew attention to the evidence which they believed to support their claims and arguments on appeal. Unanimously, the Court of Appeals found that:

> 1. Petitioners had failed to marshall the evidence necessary to demonstrate that the Findings of Fact, Conclusions of Law and decision of the lower court were "clearly erroneous" (Grahn v. Gregory, Supra, pages 49, 50); and
>
> 2. In one respect, concerning an ambiguous finding that the parties "accepted" a figure of 1.11 acres as the size of the Grahn parcel, the Grahns had carried their burden and established that the questionable finding was clearly erroneous, and therefore that portion of the decision which relied upon that finding was reversed (Id., pages 50-51).

Petitioners allege "facts" in their arguments without citations to the Record, and then interpret and speculate regarding those facts and their meaning. The Petitioners fail, however, to demonstrate any departure from an accepted and usual course of judicial

proceedings. In fact, the Petitioners seem to draw the conclusion that there must have been a departure, because the courts did not see the evidence as they would have liked.

Because facts are argued in the Brief by Petitioners, as if certiorari had been granted, it is tempting to demonstrate in response the weakness of those arguments. However, again, the Grahns recognize that arguments concerning the Record are beyond the scope of the issue now before the Court. They will therefore refrain.

One argument is heavily relied upon by the Petitioners, maybe as a claimed demonstration of a departure from the usual course. The argument is that:

> * * * the legal description in the agreement and in the deed were exactly what the parties intended and were in essential terms identical. Thus there was no mistake made by a drafter of the deed. (Petition, page 11.)

This point is then compared with the cases of Chesapeake Homes, Inc. v McGraff 240 A.2d 245 (MD App. 1968) and Eiland v. Powell, 136 W.Va. 25, 65 SE2d 737, 742 (1951).

The assertion is not consistent with the Findings of Fact (Appendix 2), which were affirmed. Neither of the cases referred to represents Utah case law. Neither is demonstrated to be contradictory to Utah rulings. Neither is contradictory to the ruling in Grahn v. Gregory.[2]

---

[2] Those cases involved platted commercial subdivisions. In each case, a party entered into an agreement to purchase a lot by reference to a lot number. In each case, a mistake had allegedly been made by a sales agent in making representations in regard to the boundaries of the platted lot. The representations were not documented. The true facts were easily determinable by inquiry. Each court found that the parties had not had a meeting of the minds and that reformation would not be appropriate. The Grahn matter is easily distinguished.

It is therefore evident that there is no conflict even with the case law of other jurisdictions which is raised for consideration by this Court. There has been no departure from accepted and usual procedure. There is no special and important reason to justify the granting of the Petition for a Writ of Certiorari.

IV. THE PETITION FOR WRIT OF CERTIORARI IS FRIVOLOUS, AS DEFINED IN RULE 33(b) OF THE UTAH RULES OF APPELLATE PROCEDURE.

According to Rule 33(b), URAP, a petition to the Supreme Court which " * * * is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law" is frivolous. For reasons set forth in the foregoing arguments, the Grahns respectfully submit that the Petition is frivolous. It does not meet the said Rule 33(b) standards or those implied by Rule 46, URAP.

The good faith submission of the Petition is clearly in doubt.

1. As indicated above, and as might be established by painstaking resort to the Grahns' Brief to the Court of Appeals, and the Record cited therein, the Petitioners have advanced "facts" for consideration by this Court which are not established in the Record. They make no meaningful effort to cite the Court to the Record, as an investigation of their general citations to the transcript would make evident.

In this matter a single estate lot was privately divided into two parcels, along the edge of a private drive which was to separate the two. The subdivider (Gregory) directed and intended that the drive would be the boundary. He believed it was, and so advised the Grahns personally, and through his agents. Unfortunately, the scrivener of the metes and bounds description did not accurately describe that boundary location, even though he intended to, and thought he had done so. The earnest money agreement between Grahns and Gregory even documented that intent. The Trial Court, affirmed by the Court of Appeals, found that the parties had agreed as to what land was being purchased and ordered reformation of the deed accordingly.

2. Petitioners claim that existing law is inconsistent with the decision of the Court of Appeals, but fail to cite the law to which they refer. Petitioners fail, further to submit any argument to extend, modify or reverse existing law.

3. Petitioners claim that there were departures from the accepted and usual course of judicial proceedings, but fail to explain their claim.

4. Petitioners make an issue of a claim that the adjacent lot was unbuildable. The issue is moot. (See Suggestion of Mootness, filed on even date herewith.) It is suggested that an inquiry would reveal that Petitioners knew their arguments were practically unsupportable at the time submitted to the Supreme Court.

5. Finally, but certainly not least, Petitioners barge past the threshold of certiorari and make their arguments without first obtaining permission to do so.

It is also noted that the appendix to the Petition exceeds the authority granted under Rule 49(a)(10) of the URAP. Grahns object to the appendix in the Petition. The appendix, with its copy of a prior Statement of Facts and of a page from the transcript of the trial, is prejudicial if reviewed without a review of the remaining portions of the Record and the Grahns' Brief. Those portions of the Petition's appendix should be disregarded.

Rule 49(e), URAP, provides that:

> The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Grahns respectfully submit that Petitioners have failed in all three respects. For that reason, also, it is appropriate to deny the Petition.

Grahns submit that the Petition was therefore, frivolous. Under Rules 33 and 40, URAP, sanctions are appropriate. The Grahns should not have been required to incur attorneys' fees to respond to the Petition. The Grahns therefore respectfully request that they be awarded, at the least, their attorneys' fees incurred in connection with their opposition to the Petition.

CONCLUSION

The Petition for Writ of Certiorari fails to meet the requisite standards, and should be denied. No special and important reason is raised for consideration by the Supreme Court; and none exists.

The Petition fails to establish that there is an inconsistency between the decision of the Court of Appeals and other Utah case law. The Petition fails to demonstrate a departure from the accepted and usual course of judicial proceedings. It merely reargues that which did not convince the courts below.

The Petition is frivolous, as defined by the rules, and sanctions are therefore appropriate.

Respectfully submitted this 12 day of Feb, 1991.

TAYLOR, ENNENGA, ADAMS & LOWE

Robert M. Taylor
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of Feb, 1991, four true and correct copies of the foregoing BRIEF IN OPPOSITION TO JOINT PETITION FOR WRIT OF CERTIORARI were mailed, postage prepaid, to the following:

Jeffrey K. Woodbury, Esq.
WOODBURY, JENSEN, KESLER
& SWINTON, P.C.
Attorneys for
Defendant/Appellant
265 East 100 South, Suite 300
Salt Lake City, Utah 84111

Russell S. Walker, Esq.
WOODBURY, JENSEN, KESLER
& SWINTON, P.C.
Attorneys for
Defendant/Appellant
265 East 100 South, Suite 300
Salt Lake City, Utah 84111

Tab 1

defendant's credibility under Rule 609(a).

9. Defendant additionally complains that during crossexamination, the prosecutor questioned him concerning his unemployment. An appellate court has discretion as to the nature and extent of the opinions it renders and we need not "address in writing each and every argument, issue, or claim raised and properly before us on appeal." *State v. Carter*, 776 P.2d 886, 888 (Utah 1989); *see State v. Jones*, 783 P.2d 560, 565 (Utah Ct. App. 1989). Defendant did not object to this questioning and we decline to specifically address this claim because it is not a substantial issue.

Cite as
146 Utah Adv. Rep. 47

IN THE UTAH COURT OF APPEALS

Allen R. GRAHN and Josephine M. Grahn, husband and wife,
Plaintiffs and Appellees,
v.
Herold L. GREGORY, Trustee, for and on behalf of the Marital and Family Trusts of the Albert Eccles Family Trust; and Dean Bradshaw and Christi Bradshaw, husband and wife, individuals; and Scott McNeil, an individual,
Defendants and Appellants.

No. 890340-CA
FILED: October 24, 1990

Third District, Salt Lake County
The Honorable John A. Rokich

ATTORNEYS:

Russell S. Walker, Salt Lake City, for Appellants Bradshaw

Jeffrey K. Woodbury, Salt Lake City, for Appellant Gregory

Robert M. Taylor and John S. Adams, Salt Lake City, for Appellees Grahn

Before Judges Bench, Billings, and Greenwood.

OPINION

BILLINGS, JUDGE:

Appellant Herold L. Gregory ("Gregory"), Trustee for and on behalf of the Marital and Family Trusts of the Albert Eccles Family Trust ("Trusts"), appeals from a district court order entered after a four-day trial reforming a land sale contract with appellees, Allen R. and Josephine M. Grahn ("Grahns"), and rescinding the sale of a contiguous parcel of land to appellants Dean and Christi Bradshaw ("Bradshaws"). The Bradshaws also appeal the reformation of the Grahn/Gregory contract. The Grahns cross-appeal, claiming the trial court erred in (1) ordering them to pay for the additional acreage included after reformation, and (2) refusing to award attorney fees to them. We affirm in part and reverse in part.

We recite the facts in a light favorable to the decision of the fact finder. *See Security State Bank v. Broadhead*, 734 P.2d 469, 470-71 (Utah 1987); *Barnes v. Wood*, 750 P.2d 1226, 1227 (Utah Ct. App. 1988).

This dispute involves a parcel of land, owned by the Trusts, located at 2811 Brookburn Road in Salt Lake County. Before it was subdivided, the property was an estate consisting of a home with private drive access.

In 1984, the Trusts hired a surveyor to subdivide a one-half acre plot to be deeded to Barbara Danielson, a beneficiary of the Trusts. Danielson, with the knowledge of Gregory, instructed the surveyor to locate the one-half acre parcel in the southeast corner and to stake such a parcel "to the south and east off the road, us[ing] the road as the boundary." The larger remaining parcel was designated "parcel one" at trial, while the one-half acre parcel was designated "parcel two."

When the surveyor prepared the legal description of parcel two, he made a four-degree error in describing a turn. Thus, the legal description of parcel two mistakenly included a part of the private drive which the Trusts and the surveyor intended to be included in parcel one.

Danielson decided not to build on parcel two and deeded the property back to the Trusts. Gregory then listed both parcels with a broker. Gregory directed the broker to advise potential buyers the survey stakes placed along the east side of the private driveway formed the boundary between the two parcels and to assure potential buyers the private drive providing access to the existing home was part of parcel one.

The broker showed the property to the Grahns and advised them that either or both of the two parcels could be purchased. The broker removed snow from the survey stakes on the south and east side of the private drive to identify the boundary line between the two parcels and to confirm the private drive was part of parcel one.

The Grahns sought assurances as to the physical boundaries of the parcels on numerous occasions and explicitly stated they wanted the private drive as part of parcel one. The Grahns were not concerned about the acreage of parcel one, but with the physical boundaries of the property as identified by the survey stakes. The broker testified at trial that because of the unique nature of the estate, it would be unusual for the parties to be concerned with the acreage rather than the physical boundaries of the property.

Both the Grahns and Gregory understood and intended at the time the sale was negotiated that the private drive would be included

in the sale of parcel one to the Grahns.

After determining to purchase parcel one, the Grahns sought a legal description for the parcel to include in the Earnest Money Agreement. Josephine Grahn telephoned the Gregorys requesting a legal description and was referred to the tax notices. Josephine Grahn then went to the Salt Lake County Recorder's Office and obtained a legal description. Apparently, the Recorder's Office had used the Danielson deed on parcel two as a basis for the legal description for parcel one. Thus, the Recorder's Office subtracted the .56 acres in parcel two from the 1.67 acreage of the total property and included an 1.11 acre figure in the legal description of parcel one. As a result of the mistake on the original survey, the Recorder's legal description of parcel one was not in conformity with the physical staked boundaries of parcel one. Neither the Grahns nor Gregory were aware of the mistaken legal description at this time.

The Earnest Money Agreement recited the 1.11 acre figure and the mistaken legal description, but also provided for an easement for an aesthetic break between the properties which would extend into parcel two "from any point within fifteen (15) feet of the existing drive which separates the two lots ...."

The Grahns and Gregory closed the sale of parcel one on August 1, 1986. The legal description in the deed for the property did not include the 1.11 acre figure.[1] The Grahns also received a right of first refusal to purchase parcel two.

On September 1, 1986, Gregory entered into an Earnest Money Agreement with the Bradshaws for the purchase of parcel two. The agreement provided the sale would close by September 15, 1986. Also on September 1, Gregory informed the Grahns of his intention to sell the property and extended them the right of first refusal on parcel two in accordance with the option contained in the Grahn/Gregory Earnest Money Agreement on parcel one. Under the Earnest Money Agreement, the Grahns had seven days to exercise the option. In the event the Grahns did not exercise the option, the agreement provided that Gregory could sell parcel two within 90 days under the same terms and conditions offered to the Grahns under the option. If, however, those terms changed, Gregory was required to offer the Grahns another option term.

The Grahns did not exercise their right of first refusal and, when the option expired, told Gregory to proceed with the sale of parcel two to the Bradshaws.

On October 11, 1986, Dean Bradshaw discovered the private drive was apparently located within the legal description of parcel two. The Bradshaws informed Gregory. Gregory contacted the surveyor. The surveyor admitted his mistake and completed another survey which correctly placed the private drive within parcel one and yet still provided one-half acre for parcel two in accordance with his original instructions. However, Gregory rejected this survey because the Bradshaws could not construct the house they had designed on the re-drawn parcel. The surveyor was then instructed to draft a new survey without reference to the private drive as the boundary between the parcels.

Prior to closing the sale of parcel two, Gregory gave the Bradshaws the opportunity to avoid their agreement, but they refused. On November 20, 1986, Gregory and the Bradshaws closed the sale of parcel two using the original mistaken legal description. At that time, Gregory and the Bradshaws entered into another agreement which provided: "In the event that buyer cannot obtain the full .56 acre according to the legal description, seller agrees to nullify sale and refund purchase price."

Gregory did not inform the Grahns of the mistaken legal description until after closing the sale of parcel two with the Bradshaws. Gregory then informed the Grahns of the mistake and offered to either rescind their agreement or to relocate the private drive within the boundaries of the new parcel.

The Grahns learned the Bradshaws planned to immediately begin construction on their new home on parcel two. The Grahns, therefore, obtained a temporary restraining order to block construction and commenced this lawsuit seeking reformation of their deed to include the private drive as part of parcel one. The temporary restraining order was converted to a preliminary injunction pending resolution of this dispute.

The trial court, after a five-day bench trial, ordered reformation of the Grahns' deed, finding the deed did not conform to the agreement between Gregory and the Grahns to include the private drive in parcel one. In addition, the trial court ordered the Grahns to pay $12,604.06 as the fair market value of the land in excess of 1.11 acres which would be included in the reformed parcel. The trial court also rescinded the agreement between Gregory and the Bradshaws for the sale of parcel two. The court awarded costs to the Grahns, but did not award them attorney fees.

Gregory appeals, claiming the trial court erred in ordering reformation rather than rescission of the sale of parcel one. The Bradshaws appeal, claiming the court erred in determining they were not bona fide purchasers, thus, cutting off the Grahns' reformation rights and, in addition, that the trial court erred in denying them damages for an unlawful injunction which caused them to lose the benefit of their bargain with a material supplier. The Grahns cross-appeal, claiming the trial court erred in ordering them to pay for the additional acreage and in its denial of their request for attorney fees.

MUTUAL MISTAKE--REFORMATION OR RESCISSION?

Gregory initially argues the trial court erred in reforming the sale of parcel one to include the private drive. Although he concedes the parties both mistakenly believed the private drive was included in parcel one, he contends that under the circumstances the proper remedy was rescission of the sale, not reformation of the contract. Gregory argues the parties never agreed to the contract as reformed because both parties understood that only 1.11 acres were included in parcel one and this was an essential term of the contract as it left parcel two with the .56 acre necessary for his sale of parcel two to the Bradshaws.

Under certain circumstances, courts may reform an agreement to reflect the intent of the parties. Restatement (Second) of Contracts §155 (1981)[2] states that "[w]here a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected."[3]

The Utah Supreme Court set out the criteria which must be met before reformation is permissible in *Hottinger v. Jensen*, 684 P.2d 1271 (Utah 1984), a case similar to the one before us. The court stated:

> Reformation of a deed is a proceeding in equity and is appropriate where the terms of the written instrument are mistaken in that they do not show the true intent of the agreement between the parties. There are two grounds for reformation of such an agreement: mutual mistake of the parties and ignorance or mistake by one party, coupled with fraud by the other party.
>
> This case is a clear case of mutual mistake by the parties. The defendant and all subsequent purchasers except plaintiff agreed that the understanding and the intent of the parties to the various deeds was that the fence line be the boundary. It was only due to a mistake made by the drafter of the deed as to the metes and bounds described that the deed did not conform to the intent of the parties. Reformation is clearly appropriate where there is a variance between the written deed and the true agreement of the parties caused by a draftsman.

Id. at 1273 (footnotes omitted). *See also Guardian State Bank v. Stangl*, 778 P.2d 1, 4-7 (Utah 1989); *Briggs v. Liddell*, 699 P.2d 770, 772 (Utah 1985).[4]

Reformation is appropriate where the written instrument is not in conformity with the parties' agreement, not where the parties have failed to agree. We will not make a contract for the parties which they did not make, only reform a contract to reflect the agreement they actually made.[5]

The trial court specifically found Gregory had told the Grahns that the private drive was included in parcel one. In addition, the court found that both parties understood the private drive was included in parcel one and the legal description did not conform to the parties' agreement. There is also evidence that the parties were not concerned with the size of parcel one, but only with the physical staked boundaries of the property.[6] We note that we review the trial judge's findings of fact under the standard set forth in Rule 52 of the Utah Rules of Civil Procedure: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a). This "clearly erroneous" standard applies whether the case is one in equity, as is this case, or one at law. *See Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989); *Barker v. Francis*, 741 P.2d 548, 551(Utah Ct. App. 1987). The trial court's findings are amply supported by the evidence.

Only Gregory's self-serving statements support his argument that the acreage included in parcel one was essential to the parties' agreement. The Utah Supreme Court has previously held that when a party requesting rescission offers only self-serving statements concerning the materiality of the mistake, that testimony is insufficient to support an order for rescission. *See Kiahtipes v. Mills*, 649 P.2d 9, 13-14 (Utah 1982).

We agree with the trial court that the parties intended the private drive to be included in parcel one and the legal description did not conform to those intentions and thus conclude the trial court correctly reformed the deed of parcel one to reflect the parties' actual agreement.

UNILATERAL MISTAKE

As a secondary claim, Gregory asserts that his unilateral mistake that there would be sufficient acreage for the Bradshaws to build on parcel two is grounds to rescind the sale of parcel one to the Grahns.

The standard for determining whether rescission is the proper remedy for a unilateral mistake is as follows:

> 1. The mistake must be of so grave a consequence that to enforce the contract as actually made would be

> unconscionable.
>
> 2. The matter as to which the mistake was made must relate to a material feature of the contract.
>
> 3. Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake.
>
> 4. It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him in status quo.

B & A Assocs. v. L.A. Young Sons Constr. Co., 139 Utah Adv. Rep. 10, 12 (Utah 1990) (quoting *John Call Eng'g v. Manti City Corp.*, 743 P.2d 1205, 1209-10 (Utah 1987)); *see also Ashworth v. Charlesworth*, 119 Utah 650, 231 P.2d 724, 727 (1951).

The appellant must marshal all the evidence which supports the trial court's findings and show that, in the light most favorable to the finding, it is against the "clear weight of the evidence," and is thus clearly erroneous when applied to the foregoing legal principles. *See Smith v. Linmar Energy Corp.*, 790 P.2d 1222, 1224 (Utah Ct. App. 1990); *see also Grayson Roper Ltd. Partnership v. Finlinson*, 782 P.2d 467, 470 (Utah 1989); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

Gregory has failed to marshal the evidence in support of the trial court's findings and then to demonstrate that the trial court's findings were clearly erroneous.[7] Thus, we will not disturb the trial court's reformation of the deed.[8]

BONA FIDE PURCHASERS

The Bradshaws contend they are bona fide purchasers of parcel two and thus cut off the Grahns' right to reform the deed on parcel one.[9] The Bradshaws admit they knew of the mistaken description before the sale of parcel two was completed, but argue they submitted their Earnest Money Agreement on parcel two without notice of the mistaken legal description and consequent problems and since the Earnest Money Agreement is a binding contract, *see Lach v. Deseret Bank*, 746 P.2d 802, 805 (Utah Ct. App. 1987), they are bona fide purchasers. The Grahns, on the other hand, argue the relevant time for determining bona fide purchaser status is at the time of "purchase," i.e., at the closing of the sale.

In Utah, it is clear that a bona fide purchaser can cut off the right of reformation. *See Hottinger v. Jensen*, 684 P.2d 1271, 1273 (Utah 1984) ("the right of reformation of a deed can be cut off by purchase of the property by a bona fide purchaser for value without notice of the mistake").

The case law implies the essential time to measure knowledge is at the time of the actual sale. A bona fide purchaser is "one who *takes* without actual or constructive knowledge of facts sufficient to put him on notice of the complainant's equity." *Blodgett v. Marsh*, 590 P.2d 298, 303 (Utah 1978) (emphasis added). Further, the Utah Supreme Court, in defining notice, has stated that

> [a]ctual or constructive notice defeats a *subsequent purchaser's* interest. A subsequent purchaser must therefore, show that he had no actual notice, i.e., no personal knowledge, of a prior conveyance or that the prior conveyance did not impart constructive notice, i.e., was not recorded before *his conveyance in the same land was recorded.*

Utah Farm Prod. Credit Ass'n v. Wasatch Bank, 734 P.2d 904, 906 n.2 (Utah 1986) (per curiam) (emphasis added). *See also Diversified Equities, Inc. v. American Sav. & Loan Ass'n*, 739 P.2d 1133, 1136 (Utah 1987) (if a subsequent purchaser has information or facts which would put a prudent person upon inquiry which, if pursued, would lead to actual knowledge, an unrecorded conveyance is not void as against that subsequent purchaser).

The Bradshaws discovered the mistake in the legal description more than one month before they closed on the sale of parcel two with Gregory. Gregory and the Bradshaws further agreed in writing that the sale would be nullified if the conveyance could not be as planned. We agree with the trial court that the Bradshaws were not bona fide purchasers of parcel two.[10]

PAYMENT FOR ADDITIONAL ACREAGE

The Grahns appeal the trial court's order requiring them to pay for the additional acreage in the reformed deed, claiming the acreage included in parcel one was not a basis for the bargain between the Grahns and Gregory. They claim the agreement was that parcel one as circumscribed by the staked boundaries was to be sold for the agreed price. We agree.

The Earnest Money Agreement drafted by the Grahns recited the 1.11 acre figure, but also stated that the private drive divided the two parcels. The deed to parcel one did not recite the size of the property. We do not find that this mistaken designation of the size of parcel one was central to the parties' bargain.

The trial court stated in Finding 13: "The description to Parcel One was obtained by plaintiffs Grahn from the Salt Lake County Recorder[']s Office. The description designated Parcel One as being 1.11 acres and accepted by the trustee and defendants Grahn as acreage to be sold and purchased."

This finding conflicts with the trial court's Finding of Fact 14 which states Gregory and the Grahns understood the private drive to be

the boundary and that the technical description did not conform to the intents of the parties. We therefore conclude that Finding of Fact 13 is clearly erroneous in light of the evidence and its inconsistency with the court's other findings and conclusions. The trial court's order requiring the Grahns to pay for the additional acreage included is therefore reversed.

ATTORNEY FEES

The Grahns also appeal the trial court's denial of their request for attorney fees, claiming they should be awarded attorney fees because the evidence demonstrated that Gregory breached the option agreement, and but for that breach, this lawsuit would not have resulted.

In Utah, parties may recover attorney fees only if provided for by contract or authorized by statute. *See Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988); *see also Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 965 (Utah Ct. App. 1989). Further, "[i]f provided for by contract, the award of attorney fees is allowed only in accordance with the terms of the contract." *Bracken*, 764 P.2d at 988.

The contractual language in the Earnest Money Agreement which provides for attorney fees states:

> Both parties agree that, should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorneys' fee, which may arise or accrue from enforcing or terminating this agreement, or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.

The Earnest Money Agreement between the Grahns and Gregory included a first right of refusal option on parcel two. The contractual language of that option provided:

> Should Buyer fail to exercise Buyers' option under this provision, then Seller shall have the right to sell the property within ninety (90) days of the date of the expiration of Sellers' said option on terms and conditions no more favorable than those originally offered under this paragraph to Buyer. Should the offer be amended making the terms more favorable, or should the said offer fail and a new offer be received, then the said amendment or offer shall be, once again, subject to the terms of this provision. The terms of this provision shall survive the closing of the purchase of the property which is the subject of the main Agreement.

The Grahns contend that after they declined to exercise their option to purchase parcel two, Gregory offered the Bradshaws more favorable terms and therefore Gregory breached the option agreement when he did not offer the option to the Grahns again. The Grahns assert that the more favorable terms are the extension of the closing date past September 15 and the additional agreement providing that if Gregory could not convey the entire .56 acres, the agreement was void.

The trial court did not make a specific finding concerning the cause of action for breach of the option. The court did find, however, that the "[t]rustee thereafter offered plaintiffs a first right of refusal to purchase Parcel Two which was not exercised by plaintiff." While not stating so directly, we conclude the trial court inferentially found no breach of the option agreement. Furthermore, the issue of this lawsuit concerns the amount of property the parties intended to convey by the sale of parcel one and is not the result of any breach of the option to purchase parcel two. Thus, we find that there was no default of the option agreement and the trial court correctly concluded that attorney fees should not be awarded.

CONCLUSION

We hold the trial court correctly reformed the land sale contract on parcel one because a mistake in the legal description included in the deed did not reflect the parties' agreement. We conclude the trial court was correct in finding the Bradshaws were not bona fide purchasers of parcel two and thus could not cut off the Grahns' right to reformation. Additionally, we affirm the trial court's conclusion that the Grahns were not entitled to attorney fees as this dispute did not result from a breach of the option agreement.

However, we reverse the trial court's order requiring the Grahns to pay for the additional acreage included in the reformed deed as the facts clearly support a finding that the parties agreed to purchase and sell parcel one based on the physical boundaries of the parcel and decided on a price for that parcel without regard to the acreage of parcel one.

Judith M. Billings, Judge

WE CONCUR:

Russell W. Bench, Judge

Pamela T. Greenwood, Judge

---

1. In fact, the Warranty Deed from Gregory to the Grahns included a legal description different from that in the Earnest Money Agreement. The source of this legal description is unknown. The legal description in the Trust Deed from the Grahns to Gregory was identical to the one in the Warranty Deed. Neither instrument recited the 1.11 acre figure.

2. Gregory asserts the applicable Restatement section is section 152, which states that

> [w]here a mistake of both parties at the time the contract was made as to a basic assumption on which the contract was made and has a material affect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of mistake ....

Restatement (Second) of Contracts §152 (1981).

The Restatement notes, however, that

> [t]he mere fact that both parties are mistaken with respect to such an assumption does not, of itself, afford a reason for avoidance of the contract by the adversely affected party. Relief is only appropriate in situations where a mistake of both parties has such a material effect on the agreed exchange of performances as to upset the very basis for the contract.

Restatement (Second) of Contracts §152, comment a, at 386 (1981).

3. A commentator describes the type of mistake a court may correct through reformation:

> If, on account of a mistake common to both parties to a bilateral transaction the written instrument does not express the true agreement of the parties, equity will generally correct the instrument so as to conform to the actual bargain. Perhaps the most common instance is that of a conveyance which, because of a mistake of the scrivener not discovered by either party, describes too much or too little property ....

G. Clark, *Equity* §248, at 370-71 (1954).

4. *See, e.g., Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints*, 565 P.2d 63, 64-65 (Utah 1977) (the written instrument failed to conform with the intent of the parties and the court reformed the deed to increase the size of the parcel conveyed to include the boundaries on which the parties had agreed).

5. We distinguish on their facts several cases Gregory cites in support of his argument that rescission is the appropriate remedy. *Robert Langston, Ltd. v. McQuarrie*, 741 P.2d 554, 557 (Utah Ct. App. 1987) (The parties agreed to the sale of a ranching operation which included grazing permits, cattle and personal property. However, the parties were mistaken about the grazing permits, which had been cancelled; about the number of cattle; and also about the price and terms.); *Eiland v. Powell*, 136 W. Va. 25, 65 S.E.2d 737, 742 (1951) (the legal description in the deed was identical to the legal description in the contract, thus there was no mistake by a drafter, just in the representations made by the seller); *Chesapeake Homes, Inc. v. McGraff*, 249 Md. 480, 240 A.2d 245, 249 (Ct. App. 1968) (There was no mistake in the legal description of the property, the seller had misrepresented the boundaries. The court correctly concluded the parties did not come to an agreement in the first instance.); Our facts are much closer to the case of *Bartlett v. Department of Transp.*, 40 Md. App. 47, 388 A.2d 930 (1978). In *Bartlett*, the court dealt with the issue of reformation of a deed when the parties believed the parcel to be 2-1/2 acres smaller than it actually was. The *Bartlett* court reasoned that if a discrepancy in the size of the parcel would not have prevented the party from entering the contract, the mistake is immaterial and reformation is appropriate. *Id.* at 933.

6. Despite the trial court's findings, Gregory's primary argument in favor of rescission is that he would never have entered the agreement to sell parcel one if he had known there would not be a one-half acre parcel left in parcel two after the subdivision.

Gregory's position fails for several reasons. First, prior to the sale of parcel two to the Bradshaws, the surveyor drafted a revised survey using the private drive as a boundary, which left parcel two with one-half acre, but Gregory rejected that survey because the Bradshaws' house would not fit on it. If, in fact, Gregory's concern was only with parcel two containing one-half acre, the revised survey would have satisfied those concerns. Further, when Gregory originally entered into the sale of parcel one to the Grahns, the Grahns had an option to purchase parcel two, thus the subsequent fact that the Bradshaws' house plans would not fit on the property as agreed to or the fact that a variance would have to be obtained would not have been relevant at the time of the original sale of parcel one.

7. Even if Gregory had marshaled the evidence, however, we find from our independent review of the evidence that all elements for rescission based upon unilateral mistake were not met.

Gregory's unilateral mistake did not relate to a material feature of the contract because, as previously discussed, the size of parcel two was not a material element in negotiating the sale of parcel one.

Finally, Gregory's bald assertion that the Grahns can receive damages to put them back to the status quo is without support in the evidence. The evidence at trial established that the Grahns sold their prior home, invested at least $10,000 in improvements to parcel one and put over 1600 hours of time making the property livable and unique to their tastes.

8. Gregory also argues that under Utah law, a contract is merged into the deed and that when the deed refers to a metes and bounds description which differs from oral references to the private drive as the boundary, the description in the deed prevails. Mutual mistake is an exception to the general rule that parol evidence may not contradict, vary, or add to a deed. *Neeley v. Kelsch*, 600 P.2d 979, 981 (Utah 1979). The doctrine of merger is inapplicable where, as here, one of the parties demonstrates a mutual mistake in the drafting of the contractual documents has occurred.

9. The Grahns argue the Bradshaws are not proper appellants as they have not appealed the rescission of their agreement with Gregory for the sale of parcel two. We disagree. The argument in the Bradshaws' appeal, by inference, appeals the rescission of the Gregory/Bradshaw agreement. By asserting they are bona fide purchasers, thereby cutting off the Grahns' reformation rights, the Bradshaws are appealing the rescission of their contract which resulted from that reformation.

10. The Bradshaws argue they had an enforceable contract with Rocky Mountain Refractories and as a result of the wrongful injunction against building on parcel two, they are entitled to damages for the loss of that bargain.

Tab 2

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALLEN R. GRAHN and JOSEPHINE M. GRAHN, husband and wife,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiffs,	:	CIVIL NO. C-86-8833
vs.	:	
HEROLD GREGORY, Trustee, for and on behalf of the MARITAL AND FAMILY TRUSTS OF THE ALBERT ECCLES FAMILY TRUST, and DEAN BRADSHAW and CHRISTI BRADSHAW, his wife, and SCOTT McNEIL, an individual,	:	
Defendants.	:	

This matter came on for trial before the Honorable John A. Rokich on September 24, 1987. The plaintiffs were present, and represented by Robert M. Taylor and John S. Adams. Defendant Herold L. Gregory, Trustee, and on behalf of the Marital and Family Trusts of the Albert Eccles Family Trust, hereinafter referred to as "trustee" was present, and represented by Jeffrey K. Woodbury. Defendants Dean Bradshaw and Christi Bradshaw, his wife, were present, and represented by Russell S. Walker. Defendant Scott McNeil was present, and represented by his counsel Allen Sims.

The Court heard the testimony of witnesses, admitted documentary evidence, viewed the property which was the subject

matter of this litigation, read the Memoranda on file herein, heard oral arguments, and then took the matter under advisement pending the receipt of supplemental Memoranda. The Court received the supplemental Memoranda, reviewed the file, its notes, the Memoranda on file and the documentary evidence.

The Court made inquiries from time to time as to the status of this matter. The Court was advised that the parties were attempting to negotiate a settlement. The Court finally called plaintiffs' counsel and requested that this matter be noticed up for hearing and that their clients be present. The hearing was not held because of the illness of one of the attorneys. The Court was advised that the parties could not enter into a settlement agreement, nor agree upon Findings of Fact and Conclusions of Law. The Court advised counsel it could prepare Findings of Fact and Conclusions of Law so that this case can be concluded at least on the District Court level and the parties can take whatever action they deem appropriate.

The Court held a hearing on November 10, 1988 for the purpose of reviewing the status of this case with counsel and their clients. The Court explained to counsel and the litigants that the Court is not the reason for the delay in the resolution of this case. The delay is the result of settlement negotiations and the parties being unable to agree upon the Findings of Fact and Conclusions of Law. Since the parties could not agree, the

Court, upon its own initiative, prepared Findings of Fact and Conclusions of Law in accordance with its Memorandum Decision. The Court submitted its Findings of Fact and Conclusions of Law to counsel for review. Counsel have filed objections to the Findings of Fact and Conclusions of Law. The Court took notice of the objections and modified or corrected paragraph 20 of the Findings of Fact and paragraphs 2, 4 and 9 of the Conclusions of Law.

The Court now being fully advised in the premises and having rendered its oral decision and two written Memorandum Decisions, now makes the following final Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiffs are and were at all relevant times residents of Salt Lake County, State of Utah.

2. The defendant Marital and Family Trusts of the Albert Eccles Family Trust, Herold L. Gregory, Trustee, are owners of certain real property located at approximately 2811 East Brookburn Road, Salt Lake City, Salt Lake County, State of Utah.

3. Defendants Dean Bradshaw and Christi Bradshaw are individuals residing in Salt Lake County, State of Utah.

4. Defendant Scott McNeil is an individual residing in Salt Lake County, State of Utah.

5. The real property owned by the defendant trusts was listed for sale. The real property listed, after negotiation for the sale and purchase thereof was divided into two parcels. At the time of trial the Court designated for identification purposes the two parcels as Parcel One and Parcel Two.

6. Trustee represented to the plaintiffs that the southeasterly edge of the road was the boundary between Parcel One and Parcel Two, and that a 15 foot aesthetic easement along the southeasterly edge of the private road was to be included if and when trustee sold Parcel Two.

7. The private road provided ingress and egress to Parcel One.

8. Trustee did engage defendant McNeil to survey a one-half acre lot on the southeasterly side of the private roadway for a building lot for Barbara Danielson. The Court designated said lot as Parcel Two.

9. Plaintiffs and trustee entered into an Earnest Money Receipt and Offer to Purchase Agreement for Parcel One (including the private road) on March 18, 1986, which transaction was closed on August 1, 1986.

10. Defendants Bradshaws and trustee entered into an Earnest Money Receipt and Offer to Purchase Agreement for the purchase of Parcel Two. The legal description used for Parcel Two had been prepared by defendant McNeil.

11. The Earnest Money Agreement entered into by defendants Bradshaws and trustee provided, among other things, that plaintiffs Grahns had first right of refusal to purchase Parcel Two.

12. Trustee thereafter offered plaintiffs a first right of refusal to purchase Parcel Two which was not exercised by plaintiffs.

13. The description to Parcel One was obtained by plaintiffs Grahn from the Salt Lake County Recorders Office. The description designated Parcel One as being 1.11 acres and accepted by the trustee and defendants Grahn as acreage to be sold and purchased.

14. Plaintiffs Grahn and trustee understood that the southeasterly edge of the road was to be the boundary and the technical description did not conform to the intent of the plaintiffs Grahn and trustee.

15. Plaintiffs Grahn, by including the road in Parcel One received in excess of 1.11 acres of land.

16. At the time defendants Bradshaw executed the Earnest Money Receipt and Offer to Purchase Agreement for Parcel One, they did not rely upon the survey as describing the boundaries, but upon the physical boundary, the southeasterly side of the private roadway.

17. The defendants Bradshaw did rely upon the reference made by defendant McNeil that Parcel Two contained .5 acres.

18. The defendants Bradshaw needed .5 acres in order to obtain a building permit from the Salt Lake County Planning Commission.

19. If Parcel Two did not contain .5 acres, defendant Bradshaws could terminate the agreement and trustee refund the purchase price.

20. Prior to defendants Bradshaws closing on the purchase of Parcel Two, trustee discovered that the McNeil survey was in error and the remapping of the survey of Parcel Two by defendant McNeil showed that a portion of the private road was contained in Parcel Two.

21. Defendants Bradshaw did not have an enforceable agreement with Rocky Mountain Refractories.

22. The legal description contemplated to be used for Parcel Two was in error and did not conform with the intent of the parties, that Parcel Two has located on the southeasterly edge of the private road.

23. Plaintiffs did not rely upon defendant McNeil's survey of Parcel Two and were owed no duty by defendant McNeil.

24. The Court makes no finding as to the trustee's claim against McNeil at this time because counsel for trustee and

McNeil have advised the Court that this issue may be resolved by a stipulation between those parties.

Based upon the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

1. The deed between trustee and plaintiffs should be reformed to include the private roadway as Parcel One and plaintiffs should pay for the excess acreage.

2. Plaintiffs Grahn and trustee stipulate that $12,604.04 represents a fair value of the ground in excess of 1.11 acres. Interest shall be paid on the $12,604.06 commencing on a date determined by the Court.

3. The reformed deed shall also acknowledge that the fifteen (15) foot aesthetic and geologic easement shall remain as agreed in the surviving provisions of the March 18, 1986 Earnest Money Receipt and Offer to Purchase Agreement, which easement runs along the southeasterly side of the private road.

4. Defendant Bradshaws are not bona fide purchasers and therefore not entitled to specifically enforce the agreement for the purchase of Parcel Two, and except for the reformation referred to hereinabove, the parties shall be placed in the same position as before the Bradshaw transaction.

5. The transaction between trustee and defendants Bradshaw should be rescinded.

6. Bradshaws have no cause of action against plaintiffs for the alleged prevention by injunction of the building of their home on Parcel Two.

7. Plaintiffs have no cause of action against defendant McNeil for the erroneous first survey completed with respect to Parcel Two.

8. The defendant trustee's claims against defendant McNeil may be pursued in separate litigation in a future action as provided by stipulation between defendant trustee and defendant McNeil.

9. The Court does not award attorney's fees to any of the parties, but does award costs to the plaintiffs against all defendants except defendant McNeil. All other parties must bear their own costs and fees.

Dated this 2 day of December, 1988.

John A. Rokich

JOHN A. ROKICH
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk

By _____ Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, postage prepaid, to the following, this 2nd day of December, 1988:

Robert M. Taylor
John S. Adams
Attorneys for Plaintiff
5525 South 900 East, Suite 200
Salt Lake City, Utah 84117

Jeffrey K. Woodbury, Esq.
2677 E. Parley's Way
Salt Lake City, Utah 84109

Allen Sims, Esq.
#8 E. Broadway, Suite 510
Salt Lake City, Utah 84111

Russell S. Walker, Esq.
50 S. Main, Suite 2000
Salt Lake City, Utah 84144