

1992

# Larry L. Mostrong and Jennifer G. Mostrong v. Lee Roy Jackson and Margaret R. Jackson : Brief of Appellee

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. 920578 IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

**92-0578-00**

LARRY L. MOSTRONG and  
JENNIFER G. MOSTRONG,  
Plaintiffs-Appellants,

vs.

LEE ROY JACKSON and MARGARET  
R. JACKSON,  
Defendants-Appellees.

Case No. ~~920578~~

Oral Argument  
Priority 16

**BRIEF OF APPELLEE**

Appeal from a Judgment of the Fourth Judicial District Court  
of Millard County, State of Utah  
The Honorable Cullen Y. Christensen, District Judge,  
Presiding

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LINDA J. BARCLAY (4967)  
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APPELLEES

**FILED**

OCT 15 1992

**COURT OF APPEALS**

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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LARRY L. MOSTRONG and	:	
JENNIFER G. MOSTRONG,	:	
Plaintiffs-Appellants,	:	Case No. 920089
vs.	:	
	:	Oral Argument
LEE ROY JACKSON and MARGARET	:	Priority 16
R. JACKSON,	:	
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## STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Annotated §78-2-2(3)(j) and Rule 3(a) of the Utah Rules of Appellate Procedure. The Utah Supreme Court, acting pursuant to Rule 42 of the Utah Rules of Appellate Procedure, and Utah Code Annotated § 78-2-2(4) transferred this appeal to this Court by order dated August 31, 1992.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

The issues presented in this appeal are as follows:

1. Whether the District Court correctly determined that title to the property conveyed by Jacksons by Warranty Deed to Mostrongs on or about September 1, 1987, was marketable?

Standard of Review: This issue presents a mixed question of fact and law. As Mostrongs have challenged all of the District Court's findings of fact and conclusions of law, those findings supported by the record that title to the property conveyed by Jacksons to Mostrongs was marketable is reviewable under the clearly erroneous standard. Utah R. Civ. P. 52(a); Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). Whether the District Court properly concluded that title to the property conveyed by Jacksons by Warranty Deed to Mostrongs was marketable is reviewable under the correction of error standard. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989).

2. Whether the District Court correctly determined that legal access from the property to a public road was represented by the Jacksons to be along the lane running north from said property and whether Mostrongs have failed to sustain their

burden of proof to support their claim that Jacksons represented that there was legal access over the lane running south of the property?

Standard of Review: This issue presents a question of fact and is reviewable under the clearly erroneous standard. Utah R. Civ. P. 52(a); Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

3. Whether the District Court correctly determined that Jacksons did not make any fraudulent or negligent misrepresentations to Mostrongs regarding access to the property?

Standard of Review: This issue presents a mixed question of fact and law. Those findings supported by the record that Jacksons did not make any fraudulent or negligent misrepresentations regarding access to the property is reviewable under a clearly erroneous standard. Utah R. Civ. P. 52(a); Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). Whether the District Court properly concluded that Jacksons did not make any fraudulent or negligent misrepresentations regarding access to the property is reviewable under a correctness of error standard. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989).

4. Whether the District Court correctly determined that Jacksons did not make any fraudulent or negligent misrepresentations regarding the condition of the home?

Standard of Review: This issue presents a mixed question of fact and law. Those findings supported by the record that Jacksons did not make any fraudulent or negligent misrepresentations regarding the condition of the home is reviewable under a clearly erroneous standard. Utah R. Civ. P. 52(a);

Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). Whether the District Court properly concluded that Jacksons did not make any fraudulent or negligent misrepresentations regarding the condition of the home is reviewable under a correctness of error standard. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989).

5. Whether the District Court correctly determined that there was no material mutual mistake of the parties or that there was no material unilateral mistake on the part of Mostrongs regarding access to the property or construction of the home?

Standard of Review: This issue presents a mixed question of fact and law. Those findings supported by the record that there was no material mutual mistake of the parties or material unilateral mistake on the part of Mostrongs is reviewable under a clearly erroneous standard. Utah R. Civ. P. 52(a); Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). Whether the District Court properly concluded that there was no material mutual mistake of the parties or material unilateral mistake on the part of Mostrongs is reviewable under a correctness of error standard. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989).

6. Whether the District Court correctly determined that bank refinancing for the money owed to Jacksons under the Note and Trust Deed was reasonably available to Mostrongs had they pursued the matter further, particularly in view of Jacksons' willingness to pay for the construction deficiencies noted by the Millard county Building Official and the lending institution appraisers?

Standard of Review: This issue presents a question of fact and is reviewable under a clearly erroneous standard. Utah R. Civ. P. 52(a); Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

7. Whether the District Court correctly determined that any rights which Mostrongs may have had to rescission under any stated facts were waived by Mostrongs' failure to promptly notify Jacksons of Mostrongs' intention to rescind the contract and by Mostrongs' failure to tender back the property upon Mostrongs learning of the lack of legal access over the south lane and upon learning of alleged deficiencies in the construction of the house located on the property?

Standard of Review: This issue presents a mixed question of fact and law. Those findings supported by the record that Mostrongs waived their right to rescission is reviewable under a clearly erroneous standard. Utah R. Civ. P. 52(a); Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). To the extent that the trial court properly concluded that Mostrongs waived any rights they may have had to rescission is reviewable under a correctness of error standard. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989).

#### **DISPOSITIVE STATUTES**

There are no constitutional provisions, statutes, ordinances or regulations whose interpretations are dispositive of the issues presented in this appeal.

#### **STATEMENT OF THE CASE**

##### **Nature of the Case, Course of Proceedings, and Disposition in the Court Below**

Mostrongs (Appellants) commenced this action in the Fourth Judicial District Court of Millard County, State of Utah, on September 17, 1990, (R. 1-9), alleging fraud, misrepresentation, negligent misrepresentation, breach of contract and mistake in the purchase of real property located in Millard County, Utah. Jacksons (Respondents) filed a counter claim for damages and attorneys' fees.

A bench trial was held October 28 and 29, 1991, and December 9, 1991, with the Honorable Cullen Y. Christensen, District Judge, presiding. Judgment was entered on January 23, 1992, (R. 542) dismissing all claims of Mostrongs' complaint "no cause of action." Jacksons' counter-claim was also dismissed "no cause of action." Mostrongs and Jacksons were each ordered to assume their own costs of Court and attorneys' fees. Mostrongs filed this appeal.

#### **Statement of the Facts**

1. On or about October 26, 1978, LeeRoy Jackson and his brother, William Jackson, purchased real property ("property") located near Fillmore, Utah from a Mrs. Geraldine Kessler. At the time of their purchase, Jacksons obtained title insurance on the property from Security Title Company of Fillmore, Utah. (T.276:25;T.277:1-7<sup>1</sup>; Ex. 38, Finding No. 2, R. 534).

2. Mrs. Kessler originally owned a large, undivided tract of land that included the property sold to William and LeeRoy

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<sup>1</sup>References to the Transcript of the trial shall be designated T. : . The number preceding the colon indicates the page being referenced and the number or numbers following the colon indicate the line or lines being cited.

Jackson. The property LeeRoy and William Jackson purchased from Mrs. Kessler represents the first lot conveyed from said tract.

3. The property lies approximately 3/4 of a mile south of a public highway. (T.348:22-25,T.349:1-9; Ex. 51). The lane running from the highway to the property was the only available access when Jacksons purchased the Property. (T.277:8-25,T.278:1-2,7-13). After purchasing the Property, Jacksons continuously used the north lane for access as an easement. (T.278:7-12,T.382:19-25,T.383:1-7).

4. Mrs. Kessler subsequently conveyed tracts located north of the Jacksons' property, with language contained in each deed, stating: "TOGETHER WITH AND SUBJECT TO a 33 foot easement over and across the East 33 feet of said property for road and utility purposes." (emphasis in original)(T.350:6-24; Ex. 51).

5. On November 4, 1979, a Warranty Deed was recorded conveying the property from William Jackson and LeeRoy Jackson to LeeRoy Jackson and Margaret Jackson (Ex. 39). At that time, the north lane provided the only access to the property. (T.277: 8-25,T.278:1-5). No one ever contested the right of Jacksons or Mostrongs to use the north lane for access to the property. (T.335:16-24; Finding No. 3, R. 534).

6. In approximately July, 1979, Jacksons constructed a home on the property. (T.278:22-24). When Jacksons constructed the home, there were no building codes in effect in Millard County. The Uniform Building Code ("UBC") was not adopted by Millard County until March, 1981 (Ex. 42). Millard County nonetheless issued Jacksons a building permit on July 18, 1979 that provided that construction must conform "to all ordinances

in Millard County, laws for the State of Utah, the Uniform Building Code and all rules and decisions of the Building Inspector"(emphasis added). No final occupancy permit was sought by Jacksons upon completion of the home due to the fact that there was no Building Inspector employed by Millard County at that time.(T.225:2-17,T.244:9-15; Finding Nos. 4, 5, R. 533-534).

7. In 1979 Jacksons obtained verbal permission from Hal Burdick, the owner of land adjoining the property on the south, to construct a lane across the Burdick land to a county road, a distance of approximately 1/4 of a mile. (T.237:6-13,T.278:17-21). Jacksons graded this south lane and applied a cinder base. Mr. Burdick subsequently sold his land to Ralph G. Tuckfield. Jacksons never discussed this lane with Mr. Tuckfield but continued to use the same without objection. (T.238:3-17, T.278:14-16). Jacksons used the south lane as their primary access, but also used the north lane for access to the property. (T.246:6-16; Finding No. 6, R. 533).

8. Larry Mostrong offered LeeRoy Jackson \$55,000.00 for the property, but LeeRoy Jackson specifically said he would not sell the property for less than \$65,000.00. Mostrongs agreed to pay \$65,000.00 for the property. (T.63:12-20,T.112:7-22; Finding Nos. 7, 8, R. 532-533).

9. Prior to signing the Earnest Money Agreement (Ex. 1) Larry Mostrong inspected the property on several occasions. The parties agree that the north lane and south lane were discussed on these occasions. (T.133:7-15). Mostrongs testified that Jacksons represented that the north lane was available, but the south lane was the primary access, that such lane would be there



"always" and that the south lane was a private road which Mostrongs would have to maintain. Jacksons testified that Mostrongs were told that the north lane was the legal access to the property and that the south lane was for convenience only and was only a permissive use. (T.280:22-25,T.281:1-3, Finding No. 9, R. 532).

10. Mostrongs and Jacksons signed an integrated Earnest Money Agreement on or about July 15, 1987 for a total purchase price of \$65,000.00. (T.63:24-25,T.64:1-2; Ex. 1; Finding No. 10, R. 532).

11. Two appraisals were performed on the property after the Earnest Money Agreement was signed but before the September 1, 1987 closing. Neither appraisal identified any problems concerning access to the property or the condition of the property. (Ex. 2A, 2B; Finding No. 11, R. 532).

12. At approximately the same time the parties signed the Earnest Money Agreement, Mostrongs applied for a conventional loan through Zions First National Bank. (T.64:3-12; Ex. 2). Mostrongs could not pay the required down payment for a conventional loan through Zions First National Bank, so on or about August 4, 1987 they made application through Zions First National Bank for FHA Financing.(T.29:1-4; Ex. 2; Finding No. 12, R. 531).

13. On August 28, 1987, Zions First National Bank, the parent company of Zions Mortgage Company, denied Mostrongs' application for credit due to insufficient verification of income and because Mr. Mostrong was self-employed and had not resided in Utah for a sufficient time to establish his income. (T.28:8-20; Ex. 2). However, Zions First National Bank specifically informed

Mostrongs that the bank would be willing to loan Mostrongs money to purchase the property after they established a stable income over a two-year period. (Finding No. 13, R. 531). Specifically, Mr. Mostrom had to establish a two-year income requirement in Utah to receive financing. (T.153:2-19).

14. Both parties still wanted to complete the sale, Jacksons stated they would carry the financing for two years to allow Mostrongs to establish a sufficient income history and residency in Utah. (T.32:7-12). The parties closed the sale of the property on September 1, 1987 as memorialized by a Warranty Deed from Jacksons to Mostrongs and a Trust Deed Note and a Deed of Trust in favor of Jacksons (Ex. 4). Mostrongs took possession of the property. (Finding No. 14, R. 530-531).

15. At the closing, Jacksons conveyed by Warranty Deed and Mostrongs accepted only the property described in said Warranty Deed. The Warranty Deed did not specifically include any easement for access from the north or the south. (Ex. 4; Finding No. 15, R. 530). Larry Mostrom testified that he repeatedly asked LeeRoy Jackson about access to the property, showing his concern regarding the access issue. (T.133:10-15). Nevertheless, Larry Mostrom testified that he had read legal descriptions in the past and that he had the opportunity to read the legal description on the Warranty Deed he received from Jacksons at closing. When asked if it bothered him that it did not specifically call out the easements, he replied, "I didn't read it in detail". (T.161:1-9). Furthermore, Jennifer Mostrom testified that she either saw or signed the documents at closing. (T.33:4-12).

16. Upon purchasing the property, Mostrongs obtained a policy of title insurance on the property from Security Title Company of Millard County ("Security Title"). The policy insured access to the property (Ex. 14; Finding No. 16, R. 530). The policy also specifically insured against unmarketability of title (Ex. 14). The manager of Security Title, Mostrongs' agent, testified that he knew there was no "recorded easement", but felt there was an implied easement due to the work he had done on the property and the intention that there was an implied easement to the north. (A.[Abstract of Transcript] 7:18-25,A.8:1-11).

17. All parties reasonably believed at closing that the only apparent obstacle to bank financing was the two-year residency for verification of Mostrongs' income. (T.30:9-17). When asked why he agreed to seller financing with the Mostrongs, LeeRoy Jackson's un rebutted testimony was that Larry Mostrong said he had sufficient money in a California bank and may cash Jacksons out in six months, that he would be receiving a sizeable amount of money on an upcoming construction job, and that he would pay off the debt within six months to a year. (T.282:23-25,T.283:1-8). The parties therefore agreed to seller financing to give Mostrongs time to accomplish the intended FHA or other financing as an interim measure.(Finding No. 17, R. 529).

18. From September 1, 1987, the date Mostrongs signed said Trust Deed Note, until shortly before such Note became due on September 1, 1989, Mostrongs never made further application for financing. (T.72:7-13). At various times during this two-year period, Larry Mostrong worked and lived in California. (T.73:21-25,T.74:1-7,T.149:13-25,T.150:1-17; Finding No. 18, R. 529).

19. On or about September 1, 1989, Jennifer Mostrong informed Jacksons that she had made application for an FHA Loan through First Security Bank, which loan was expected to be finalized within four (4) to six (6) weeks. As a result, Jacksons granted Mostrongs an additional three (3) months in which to get the FHA financing. (T.284:6-19; Finding No. 19, R. 529).

20. Mostrongs thereafter informed Jacksons that FHA had denied their loan request because of a question regarding an easement to the property. Mostrongs said they needed a "recorded easement" to the property. (T.285:3-15, A.[Abstract of Transcript]10:5-11; Finding No. 20, R. 529).

21. Security Title secured a Warranty Deed for the said north lane from Geraldine Kessler (prior owner of the servient property) to Jacksons, Jacksons in turn deeded the easement to Mostrongs. (T. 285:3-15). Both deeds were recorded on January 4, 1990. (Exs. 37, 38; Finding No. 21, R. 528-529). Mostrongs accepted the easement and remained in possession of the property until approximately September 25, 1990.

22. On December 1, 1989, Jacksons filed a Notice of Default on the Trust Deed because Mostrongs had failed to make the balloon payment due on September 1, 1989. (Ex. 10; Finding No. 22, R. 528).

23. Mostrongs continued their efforts to obtain bank financing. On or about February 12, 1990 Jacksons offered to carry the financing until March 1, 1990 upon certain conditions (Ex. 36). Mostrongs declined to accept such conditions. (T.286:7-17; Finding No. 23, R. 528).

24. A Trustee's Sale under the Trust Deed was scheduled for April 4, 1990. On or about March 28, 1990, Mostrongs attempted to procure a temporary restraining order against said sale. On or about April 4, 1990, the parties, through their respective counsel, negotiated an extension of said Trustee's Sale to May 18, 1990. (T.78:9-14). On or about May 17, 1990, Mostrongs paid to Jacksons the sum of \$5,257.37 for back monthly payments agreed upon for Mostrongs to have continued possession of the property and for attorneys' fees, costs and trustee's fees and Jacksons extended the time for the Trustee's Sale for an additional sixty days. (Ex. 27, 28; Finding No. 24, R. 528). All of the continuations of the Trustee's Sales, were made at the request of Mostrongs or Mostrongs' legal counsel. (T.271:12-24).

25. During the interim, Mostrongs negotiated with Valley Central Bank for a loan to pay off Jacksons' Trust Deed. Valley Central Bank approved the loan, conditioned upon dedication of the south lane as a Millard County road and correction of certain deficiencies in construction of the house on the property. (T.119: 9-21; Ex. 18, Finding No. 26, R. 527). The construction deficiencies were noted by Joseph Stott, an FHA fee appraiser, who testified that if the deficiencies listed in his appraisal were corrected, he could see no other problems with the house. (T.125:21-25, T.126:1-2).

26. On or about May 3, 1990, Mostrongs obtained a deed from the owner of the property on which the south access to the property is located, with delivery conditioned upon acceptance of said lane as a county road. (Ex. 22; Finding No. 26, R. 527; T.79:9-11).

27. On or about May 15, 1990, Mostrongs received a commitment from the Millard County Commission that Millard County would accept the south lane as a county road and would agree to maintain "this new and improved county road" (Exs. 32, 33). The Millard County Attorney took a position that such acceptance was conditioned upon the lane being brought to county standards, (Ex. 20, 21) but the said County Commission resolution did not so specifically state (Ex. 32, 33). The County Commission chose not to follow the County Attorney's advise. (T.252:5-13). Mostrongs' position that conditions were imposed upon them by the County Commission before acceptance of the road is contrary to the evidence (Ex. 32, 33) and contradicts the testimony of their former legal counsel who testified at trial. (T.272:16-25,T.273:11-20,T.274:1-10,15-24). The Millard County Superintendent of Roads, Lee Roper, testified that he was not contacted by Mostrongs (T.208: 1-9) to ascertain what, if any, improvements were necessary to bring the lane to county standards. The Jacksons refused to contribute in any amount towards such costs. Nevertheless, Mostrongs submitted the letter of commitment from Millard County to Valley Central Bank in support of their loan application. (T.83:19-20; Finding No. 27, R. 527).

28. Lee Roper further testified that he is not aware of any county "standards" for the road (T.205:25,T.206:1-10) and that Millard County had accepted and has quite a few unimproved roads in the area. (T.208:10-13).

29. At Jacksons' request, the Millard County Building Official, Jerry Reagan, made an inspection of the home to look at the structural integrity and give his overall impression of the

home. (T.228:2-11; Ex. 19). Mr. Reagan testified that he used the 1979 Uniform Building Code ("UBC") as a guide. He further testified that the home "looked good" with the exceptions he noted. However, the UBC had not been adopted by Millard County at the time the home was built. (T.228:21-25, T.229:1-2; Finding No. 28, R. 526, 527).

30. Carl Faulkner, a licensed contractor, called by Mostrongs testified that it would cost \$6,085.00 to correct the deficiencies as noted by Mr. Reagan's inspection, and that the same could be corrected within a couple of days. Butch Jensen, a licensed contractor, called by Jacksons, testified that it would cost \$3,212.00 to make the noted repairs (Ex. 47) and that the same could be done in less than a week. Jacksons twice offered to pay for the cost of fixing any such construction deficiencies (Exs. 34, 35;), but no affirmative response was received from the Mostrongs with respect thereto. (Finding No. 28, R. 526).

31. After the deed for easement over the south lane and the commitment from Millard County to accept the same as a county road were received, and after Jacksons' offers to pay for the noted deficiencies in the construction of the house, Mostrongs took no further steps to secure bank or FHA financing in order to pay off the Trust Deed Note. (Finding No. 29, R. 526). Jacksons delayed foreclosure for approximately thirteen months from the date the Note became due.

32. Mostrongs made no further payments on the said Trust Deed Note after May 17, 1990, but remained in possession of the property. (T.290:17-20). The property was sold at Trustee's Sale

on September 25, 1990; Jacksons entered a bid at said sale of \$42,000.00, which bid was accepted. A Trustee's Deed was issued to Jacksons on September 27, 1990. (Ex. 10D; Finding No. 31, R. 525).

33. Mostrongs vacated the property on September 25, 1990. (T.290:12-20). Mostrongs did not tender the property back to Jacksons prior to that date, nor did Mostrongs notify the Jacksons of any intent to repudiate or rescind the purchase of the property. (T.100:6-19, T.164:23-25, T.165:1-4; Finding No. 32, R. 525).

#### **SUMMARY OF ARGUMENTS**

**POINT I:** The terms of the Earnest Money Agreement required Jacksons to convey marketable title as evidenced by a current policy of title insurance in the amount of the purchase price or by an abstract of title brought current, with an attorneys' opinion. Security Title issued Mostrongs a policy of title insurance covering the purchase price of the property. Such policy of title insurance insured against lack of right-of-access to and from the property or unmarketability of title.

Under the facts presented and the Case Law in support thereof, the court properly concluded that the property conveyed by Jacksons to Mostrongs was marketable.

**POINT II:** Conveyance of financible property was not a condition precedent under the contract terms. The underlying premise of entering into the contract was that Mostrongs would establish a two-year residency and income verification in Utah. The fact that Zions First National Bank informed Mostrongs that



they would loan Mostrongs the money after the two-year residency/ income requirement shows that the property was financible.

The record is clear that financing was not denied based on the claims asserted by Mostrongs that there was "lack of access" to the property and violations of UBC standards regarding the home. Financing was initially denied by FHA due to the fact that the property was not on a public road and due to collection action. Financing was initially denied by Valley Central Bank due to inquiries made of four minor construction deficiencies and due to collection action.

**POINT III:** Jacksons always represented legal access to the property from the north lane. Jackson originally had an easement by implication from the property to said north lane and Security Title agreed. Mostrongs have not sustained their burden of proof to support their claim that Jacksons represented that there was legal access over the lane running south from the property. Furthermore, Mostrongs voluntarily obtained an easement on the south lane which was accepted unconditionally by the Millard County Commission as a public road.

**POINT IV:** Mostrongs have not established by "clear and convincing evidence" that Jacksons made fraudulent or negligent misrepresentations regarding access to the property and have failed to establish the elements of fraudulent or negligent misrepresentation. Furthermore, Mostrongs had actual and constructive notice that the south lane did not have an easement and Mostrongs were therefore chargeable with notice of all conditions, exceptions or reservations appearing in their chain of title.

POINT V: Mostrongs have not established by "clear and convincing evidence" that Jacksons made fraudulent or negligent misrepresentations regarding the condition of the home. At the time the home was built in 1979, Millard County had not yet adopted the UBC. No final occupancy permit was sought by Jacksons when they completed the home as there was no building inspector employed by Millard County at such time. Mostrongs lived in the home approximately three years without raising any concerns regarding structural deficiencies.

POINT VI: The District Court correctly determined that there was no material mutual mistake of the parties.

The evidence does not establish that both parties were aware of a clear *bona fide* mistake regarding material facts as to access or regarding material facts as to the construction of the home. Mostrongs have not proven the elements of mutual mistake.

POINT VII: The District Court correctly determined that there was no material unilateral mistake on the part of the Mostrongs to support a rescission of the contract of the parties. Mostrongs fail to carry their burden to establish that there was a material unilateral mistake on their part. Furthermore, Mostrongs have failed to establish the elements of unilateral mistake. Mostrongs have failed to marshal the evidence and establish that the trial court's determination was clearly erroneous.

POINT VIII: The District Court's determination that bank refinancing for the money owed to Jacksons under the Note and Trust Deed was reasonably available to the Mostrongs had they pursued the matter further, particularly in view of Jacksons'

willingness to pay for the construction deficiencies noted by the Millard County Building Official and the lending institution appraisers, was not clearly erroneous. The two problems that allegedly prohibited Mostrongs from obtaining financing on the property were 1) having the south lane dedicated as a county road and 2) correcting four or five minor construction deficiencies noted by the Valley Central Bank appraiser.

The Millard County Commission unconditionally accepted the south lane as a county road. The Jacksons, also unequivocally represented to the Mostrongs on two occasions that they would pay for any of the construction deficiencies impeding Mostrongs' ability to obtain financing from Valley Central Bank. Although both of these issues were resolved, Mostrongs never responded to Jacksons' request to help, nor did they apply for financing once the apparent impediments were removed.

**POINT IX:** The District Court correctly determined that any rights which Mostrongs may have had to rescission under any stated facts were waived by Mostrongs failure to promptly notify Jacksons of Mostrongs' intention to rescind the contract and by Mostrongs' failure to tender back the property upon Mostrongs learning of the lack of legal access over the south lane and upon learning of alleged deficiencies in the construction of the house located on the property.

Mostrongs retained possession of the property for approximately three years without issuing any complaints as to the structural integrity of the home, voluntarily procured an easement over the south lane, and requested several continuances of Trustee's Sales in order to proceed with financing. Mostrongs

never attempted to rescind the contract nor did they tender the property back to the Jacksons. Mostromgs' representations and conduct are inconsistent with their claim for rescission.

**POINT X:** The District Court correctly determined that neither party has shown a legal basis to support a claim for attorneys' fees.

#### **ARGUMENT**

**I. THE DISTRICT COURT CORRECTLY DETERMINED THAT TITLE TO THE PROPERTY CONVEYED BY JACKSONS BY WARRANTY DEED TO MOSTROMGS ON OR ABOUT SEPTEMBER 1, 1987, WAS MARKETABLE.**

Mostromgs' assertion that Jacksons did not convey marketable title is against the clear weight of evidence produced at trial.

The parties entered into an arms length transaction, whereby Mostromgs agreed to purchase the property for \$65,000.00. (T.63:15-20,T.64:23-25,T.65:1-12; Finding No. 8, R. 532). On July 15, 1987, the parties entered into an integrated Earnest Money Agreement reciting the \$65,000.00 purchase price.

Mostromgs were informed by Zions First National Bank that they could not obtain long-term financing on the basis that Larry Mostromg was self-employed and had not resided in Utah for a sufficient time to establish his income. Jacksons agreed to carry the financing on the property for two years to allow the Mostromgs to establish a sufficient income history and residency in Utah so as to satisfy the bank's lending requirements for financing. (T.32:7-12).

Therefore, the parties entered into an Earnest Money Agreement on July 15, 1987, for the sale and purchase of the property. On September 1, 1987, the parties held a closing memorialized by a Warranty Deed, a Trust Deed Note and a Trust

Deed. (Finding No. 14, R. 530, 531). Security Title conducted the closing. Jacksons conveyed by Warranty Deed and Mostrongs accepted only that property described as follows:

The South half of the Southwest quarter of the Northeast quarter of the Southeast quarter of Section 22, Township 21 South, Range 5 West, Salt Lake Base and Meridian.

Excepting therefrom  $\frac{1}{4}$  of all oil, gas and other minerals in on or under said land, together with the right of ingress and egress for the purpose of exploring and/or removing the same.

Together with that certain underground water well identified as: Water User's Claim No. 67-885, Application No. 5342, Certificate No. 12844.

Together with all improvements and appurtenances thereunto belonging.

Subject to covenants, conditions, restrictions, reservations, rights of way and easements in existence and/or of record.(emphasis added)

Said conveyance did not specifically include any easement for access from the north or the south. (Ex. 4; Finding No. 15, R. 530).

Paragraph 3 of the Earnest Money Agreement entitled "Condition and Conveyance of Title" states in pertinent part:

Seller agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein, evidenced by a current policy of title insurance in the amount of the purchase price [or]<sup>2</sup> an abstract of title brought current, with an attorney's opinion...(Addendum A)

Security Title issued to Mostrongs and Mostrongs accepted a policy of title insurance covering the purchase price of the

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<sup>2</sup>The Earnest Money Agreement contains a space with an accompanying box ☐ located prior to seller's choice of conveying marketable title, evidenced by a policy of title insurance or an abstract of title. Jacksons conveyed marketable title, evidenced by a policy of title insurance.

property. (Ex. 14; Addendum B). The cover sheet of the Policy of Title Insurance states in pertinent part:

...[F]irst American Title Insurance Company a California Corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the Insured by reason of:

1. Title to the Estate or Interest described in Schedule A being vested otherwise than is stated herein;
2. Any defect in or lien or encumbrance of such title;
3. Lack of a right-of-access to and from the land; or
4. Unmarketability of such title.  
(emphasis added)

It is well established that:

"...marketable title must be free from reasonable doubt...[T]he test is not whether title ultimately might be adjudged free of defects. Rather, it is "whether a reasonable prudent [person], familiar with the facts and apprised of the question of law involved, would accept the title in the ordinary course of business." Brown v. Yacht Club of Coeur D'Alene, Ltd., 111 Idaho 195, 722 P.2d 1062, 1065, (1986) and that "to render a title unmarketable, the defect must present a real and substantial probability of litigation or loss. Frank Towers Corp. v. Laviana, 97 A.2d 567, 571 (1953).

The trial court could determine that Jacksons conveyed marketable title to Mostrongs, based on the findings and the record that Mostrongs inspected the property on several occasions prior to entering into the Earnest Money Agreement (T.133:7-9); that Mostrongs accepted the property pursuant to the terms of the Earnest Money Agreement; that Mostrongs received a policy of title insurance that insured against "lack of a right-of-access to and from the land" and "unmarketability of title"; and that Larry Mostrong was familiar with legal descriptions and read the legal description on the Warranty Deed he received from Jacksons

at closing. (T.160:1-9). Furthermore, it is reasonable that a person who was told he could obtain bank financing on the property after establishing a two-year residency/income requirement would purchase the property.

Jurisdictions under similar facts as those presented to the trial court, have made a distinction as to the manner in which the seller's conveyance of marketable title is deemed sufficient.

In Holmby, Inc. v. Dino, 647 P.2d 392 (1982) the Supreme Court of Nevada considered whether the encumbrance on the property evidenced by a Trust Deed, which was made known to the buyer after execution of a sales document, disabled the seller from conveying marketable title. In refusing to grant the buyer specific performance, the Court stated that..."[T]here was undisputed evidence that Dino [seller] would have been able to tender marketable title. The sales agreement provided that a Title Insurance Policy would serve as evidence of marketable title." Holmby, Inc. v. Dino, 647 P.2d 392, 394 (1982)(emphasis added). Courts in other jurisdictions which have addressed this issue have also similarly held. See e.g., Love v. Fetters, 121 A. 607 Court of Errors and Appeals of New Jersey (1923); Korb v. Spray Beach Hotel Co., 24 N.J. Super. 151, 93 A.2d 578, 581 (1952).

Under these facts the trial court properly concluded that the property conveyed by Jacksons to Mostongs was marketable.

**II. CONVEYANCE OF "FINANCIBLE" PROPERTY WAS NOT A CONDITION PRECEDENT UNDER THE CONTRACT TERMS. NEVERTHELESS, THE EVIDENCE IS CLEAR THAT THE PROPERTY CONVEYED FROM JACKSONS TO MOSTONGS WAS "FINANCIBLE".**

**A. Conveyance Of Financible Property Was Not A Condition Precedent To The Contract.**

Mostrongs' allegations that the underlying premise of the parties' contract was that the property was financible and therefore was a condition precedent to Mostrongs' contractual obligations, is without merit. In fact, the trial court specifically found that:

[a]ll parties reasonably believed at the time of closing that the only apparent obstacle to bank financing was the two-year residency for verification of Plaintiffs' income. The parties therefore agreed in order to give Plaintiffs time to accomplish the intended FHA or other acceptable financing to enter into said Note and Trust Deed as an interim measure.(Finding No. 17, R. 529-530)

The underlying premise of entering into the contract was not that the property was financible, but that the Mostrongs would establish a two-year residency and income verification in the State of Utah. (Finding No. 13, R. 531). This is further established by the testimony given by the parties in this action. (T.28:8-20,T.30:9-17,T.313:9-15). Zions First National Bank would have financed the property but for Larry Mostrong's failure to establish a sufficient income history in Utah (T.71:8-19; Finding No. 13, R. 531) this shows the property was both marketable and financible.

Finally, neither the Earnest Money Agreement (Ex. 1; Addendum A), nor the Trust Deed Note (Ex. 4) impose any condition precedent regarding "financibility" of the property. This is further borne out by the testimony of LeeRoy Jackson. (T.282:7-15,T.283:1-8,T.312:13-25,T.313:1-8).

**B. The Financial Institutions Did Not Deny Mostrongs Financing Due To "Lack Of Access" To The Property, Or For Failure to Comply With UBC Standards Regarding The Home's Construction.**



Mostrongs' assertion that the record is clear that Jacksons did not convey financible title [property] is without merit. Mostrongs failed to cite any part of the record in support of such assertion, but only suggest that financing was denied because of lack of access to the property and that the home's construction was substandard.

1. Access:

FHA's denial of Mostrongs' loan application (Ex. 7) does not say financing was denied because of "lack of access", it was denied due to the fact that it was not located on a "public maintained road". This was confirmed by both Linda Whiteman, First Security Bank Loan Officer and an FHA appraiser Steve Hatch. (A.29:24-25,A.33:12-16,A.34:4-7,T.213:21-25,T.214:1-3).

Furthermore, it is interesting to note that there is no similar requirement for a conventional loan.<sup>3</sup> This was made clear by Steve Hatch, who conducted two appraisals on the property. After referring to the requirement that the property must be located on a public road for FHA purposes, Steve Hatch testified that for conventional loan purposes "...it's not up to me to reject or not reject it as far as that conventional loan." (T.213:21-24,T.214:1-5).

That the alleged access problem was not even a consideration when Mostrongs applied for conventional financing through Valley Central Bank, is evidenced by the testimony of Judy Hardinger, Loan Officer of Valley Central Bank. (A.41:12-25,A.42:1-6).

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<sup>3</sup>Mostrongs' argument assumes FHA was the only financing available. This is contrary to the terms of the Earnest Money Agreement. The only other application made by Mostrongs to Valley Central Bank was a conventional loan.

## **2.    UBC Standards:**

Mostrongs second assertion that the property was "non-financible" is based on the allegation that the home's construction was not in compliance with UBC standards. Again, Mostrongs fail to cite to the record to support such allegation. In fact, no where in the entire record has it been established that Mostrongs were denied financing due to the home being constructed in violation of the UBC.

FHA denied Mostrongs' loan application for two reasons: 1) the property was not on a public road (A.33:12-16) and 2) for collection action (Ex. 7). Construction deficiencies were not even raised by FHA. In fact, Steve Hatch testified that he saw no structural problems with the house that would make FHA reject the loan application. (T.219:21-25,T.220:1-8).

Valley Central Bank also denied Mostrongs' loan application for two reasons: 1) inquiries made of four minor construction deficiencies (Ex. 18) and 2) collection action (Ex. 17).

Loan Officer Judy Hardinger testified that the only reason the loan application was denied was based on appraiser Joseph Stott's references to construction deficiencies. (A.41:6-18, A.49:5-11,A.47:21-25,A.48:1-4). Furthermore, Judy Hardinger testified that the question regarding access to the property was not an issue. (A.41:25,A.42:1-6).

Joseph Stott, who conducted an appraisal for Valley Central Bank, testified that he uses UBC standards and standards set by FHA when inspecting a home, and that he is familiar enough with those standards to make a judgment call as to the construction of a home. (T.124:12-15,T.122:7-16). When asked whether Jacksons or

Mostrongs would have to bring up the noted deficiencies to UBC standards, Stott testified:

What the lenders ask us to do is go out and to indicate any deficiencies or problems in the home, and we put that on the appraisal. And when that lender or underwriter reviews that, they can require that those be brought up to those standards, if they so desire. (emphasis added)(T.124:16-23).

Steve Hatch's testimony is consistent. When asked if every home he inspected had to meet building code inspection, Hatch testified:

No. If it's something obvious and merely deficient of course appraisers aren't inspectors per se, we are for value; but there's most houses in our county, community, whatever, financed somewhere and obviously the older ones may not meet the most up-to-date codes but still, if they are reasonably accepted market, they are in fact financed. (T.220:17-25).

It is also interesting to note that the collection matters raised by Valley Central Bank, were taken care of by Mostrongs approximately two months after Mostrongs' loan had been denied. (A.46:22-25,A.47:1-14; Ex. 29, 31). Mostrongs did not return to apply for financing with Valley Central Bank after correcting those concerns raised (A.48:2-4), even though a determination for financing could have been made in less than a month. (A.48:5-12).

Mostrongs have failed to marshal the evidence in support of their allegation that the property was not financible. Doelle v. Bradley, 124 Utah Adv. Rep. 20, 21 (1989), and that the findings of the trial court were "clearly erroneous". Utah R. Civ. P. 52(a).

**III. THE DISTRICT COURT CORRECTLY DETERMINED THAT LEGAL ACCESS FROM THE PROPERTY TO A PUBLIC ROAD WAS REPRESENTED BY THE JACKSONS TO BE ALONG THE LANE RUNNING NORTH FROM SAID PROPERTY AND MOSTRONGS HAVE NOT SUSTAINED THEIR BURDEN OF PROOF TO SUPPORT THEIR CLAIM THAT JACKSONS REPRESENTED THAT**

**THERE WAS LEGAL ACCESS OVER THE LANE RUNNING SOUTH FROM THE PROPERTY.**

The testimony clearly establishes that Jacksons represented legal access to the property to the lane running north to a public road, while consistently representing the south road to be built by permission and use for convenience only.<sup>4</sup> (T.281:2-7,T.245:4-9,T.239:2-9,T.240:12-25,T.241:1-2). At no time did Mostrongs testify that Jacksons represented to have an "easement" on the south road.

**A. At the Time Jacksons Purchased The Property, The Only Access To The Property Was Over The North Lane Connecting Jacksons' Property To A County Road; Jacksons Initially Had An Easement By Implication When They Purchased The Property, And Later Acquired A "Recorded Easement" To Said North Lane.**

Prior to Mrs. Geraldine Kessler selling LeeRoy and William Jackson the property at issue, Mrs. Kessler owned the entire tract of land including Jacksons' property, located approximately 3/4 of a mile north to a public road. (A.15:5-25). LeeRoy and

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<sup>4</sup>The District Court determined in Finding No. 9, R. 532, that the evidence did not preponderate in support of Mostrongs' claim with respect to the south lane. Mostrongs cite portions of the transcript to establish that LeeRoy Jackson's testimony was contradictory on this point; that Jackson testified that he told Larry Mostrong that he had a legal easement to the south road (T.245) and then denied that he told him that he had an easement on that road. (T.280-281). However, when reading the entire portion of the transcript cited by Mostrongs, LeeRoy Jackson immediately clarified his statement regarding an easement to the south lane. Jackson testifies that "I told them I had put the road in, I had permission to use the road for convenience". (See T.281:2-7;T.245:4-9) In at least five separate incidents LeeRoy Jackson testified that he built the south lane by permission of the previous landowner and used the property for "private use", or "personal use only" (emphasis added) (See T.239:2-9;T.240:12-19 Citing Jackson Deposition T.240: 23-25;T.241:1-2;T.245:4-9;T.281:2-7) Nowhere in the trial transcript have Mostrongs testified themselves that LeeRoy Jackson represented to them that he had an "easement" on the south road. The great weight of evidence supports the trial court's finding.

William Jackson were the first purchasers of a lot located within said tract of land.

In Ovard v. Cannon, 600 P.2d 1246 (1979), the Supreme Court set forth the elements of an easement by implication as follows:

1) A previous unity of title; 2) followed by a severance; 3) that at the time of the severance the servitude was so plainly apparent that any prudent observer should have been aware of it; 4) that the easement is reasonably necessary to the use and enjoyment of the dominant estate; and 5) it must have been continuous, at least in the sense that it is used by the possessor whenever he desires.

Such an easement would run to the benefit of Jacksons upon conveyance of the property.

It has been established that there was a previous unity of title by Mrs. Kessler (A.15:5-25); followed by a severance - Jacksons being the first to purchase a parcel of the undivided tract (Ex. 50). Furthermore, when Mrs. Kessler sold said property to Jacksons, the road was plainly apparent to anyone who would have observed or made an inspection of the property. As the road was the only access to the Jacksons' property, the easement was not only reasonably necessary, but was imperative to the use and enjoyment of the dominant estate and the use of said road was continuous by Jacksons, as it was the only access to their property.

The Vice-President and Manager of Security Title, Kent Dalton, testified that he felt that there was an easement at law or an implied easement to the property, based on work he had previously done on said property; and that "it was the intention that there was an implied easement to the north". (A.8:4-11). In any event, once Security Title recorded said Warranty Deeds for

an easement to the north lane (Exs. 37, 41), it effectively cured any question regarding the "recorded easement" requested by FHA.

Regardless of whether Jacksons had an easement by implication, it has been shown that Mrs. Kessler conveyed the property to the individual property owners "TOGETHER WITH AND SUBJECT TO a 33 foot easement over and across the east 33 feet of said property for road and utility purposes".(emphasis in the original)(Addendum C; Ex. 51). The law is well established in this State that "if a conveyance contains a reservation, the entire property or estate described passes to the grantee, subject to the right, estate or easement reserved...." (emphasis added) Burton v. United States, 29 Utah 2d 226, 507 P.2d 710, 712 (Utah 1973). Furthermore, Utah Courts have recognized the principle that "'In construing instruments creating easements in land, the Court will look to the circumstances attending the transaction, situation of the parties, the state of thing granted, and the object to be obtained, to ascertain and give effect to the intention of the parties'". Stevens v. Bird-Jex Co., 18 P.2d 292, 294 (Utah 1933)(Citing Kirkham v. Sharp, 1 Whart. (Pa.) 323, 29 an. dec. 59; Green v. Canny, 137 Mass. 64; Adney v. Twonbly, 39 R.I. 304, 97 A. 806; Thomson v. Germania L. Ins. Co., 97 Minn. 89, 106 N.W. 102).

The Stevens Court indicated that there was nothing in the language of the deed "...to indicate an intention that the grantee was to have the exclusive use of the property over which the easement was created".Stevens, Id.. In the Stevens case, the Court refused to consider the issue as to whether the rights of the servient owner would be subordinate to those of the dominant

owner, due to the fact that the owners of the dominant estate "...have not in any manner been hindered or obstructed in the enjoyment of the easement..." (Stevens, 292 at 295).

Mostrongs' argued that the District Court did not address the issue of whether the deeds purporting to grant an easement over the north lane successfully conveyed this easement. This is contrary to the testimony and evidence presented at trial.

After all of the deeds from Kessler to the various property owners north of the Jackson property were submitted, the trial court specifically asked Mostrongs expert witness, Wayne M. Pinder, Jr., owner and president of Provo Land Title Company, whether all the deeds contained the language "subject to a right-of-way". Mr. Pinder responded, "They do". (T.350:6-9). In clarification of this issue, the trial court a second time asked Mr. Pinder whether "all the deeds [are up the chain or] up the lane contain the language 'together with and subject to a right-of-way'". Again the witness testified, "Right." (T.350:22-25).

The Court also pointed out that no one had ever prevented the Jacksons or the Mostrongs from travelling over the north lane to get to the public road. (T.335:16-21). Finally, Mostrongs' argument regarding the insurability of the Warranty Deed easements (Ex. 37, 41) is misplaced. The District Court aptly points out that Security Title had already issued Mostrongs a policy of title insurance insuring against lack of access to the property. (T.334:10-25, T.335:1-7).

Again, Mostrongs have failed to marshal the evidence in support of the District Court's findings and demonstrate that the

evidence supporting the findings is "clearly erroneous". Utah R. Civ. P. 52(a).

**B. Mostronics Have Not Sustained Their Burden Of Proof To Support Their Claim That The Lane Running South Of The Property Was The Bargained-For Access.**

In support of its findings, the District Court determined that 1) Larry Mostronic inspected the property on at least three occasions prior to entering into the Earnest Money Agreement and that the parties agreed that the north lane and south lane were discussed on these occasions (Finding No. 9, R. 532); 2) the parties had further discussions on those occasions when they talked about the access road and maintenance of the access road (T.133:7-15); 3) Mostronics informed Jacksons that they [Mostronics] needed a "deeded" easement over the north lane (T.285:3-7); 4) when Mostronics made inquiry to Jacksons regarding a "recorded easement" to the north lane, Jacksons contacted Security Title Company, who secured a Warranty Deed easements for the north lane from Geraldine Kessler, (prior owner of the servient property) which deeds were recorded on January 4, 1990 in the Millard County Recorder's Office. (Finding No. 21, R. 528, 529; Ex. 37, 41); and 5) Jacksons testified that they informed Mostronics that the north lane was the legal access to the property and that the south lane was for convenience only and was only a permissive use. (T.280:22-25, T.281:1-3; Finding No. 9, R. 532).

Mostronics have failed to marshal the evidence in support of their assertion that the south lane was the bargained-for property. Such finding is not clearly erroneous. Utah R. Civ. P. 52(a).



**C. Mostrongs Voluntarily Obtained An Easement On The South Lane.**

A series of continuances of the pending Trustee's Sale on the property were made in order to give Mostrongs additional time to obtain an easement on the south lane in furtherance of financing. (T.85:8-22,T.78:9-17; Finding No. 24, R. 528). The record shows that such continuances were made at the request of Mostrongs. (T.275:4-16).

Accordingly, Mostrongs obtained an easement on the south lane at no cost. (T.79:4-11). The easement given by a Mr. Tuckfield to the Mostrongs was accompanied by a letter making conveyance of the easement conditional on Millard County's acceptance of the south lane as a public road (Ex. 22). Millard County accepted the road outright, without attaching any conditions to such acceptance (Exs. 32, 33). Thereafter, Mostrongs' previous attorney gave the easement to the Millard County Attorney, who held the deed awaiting instructions to record same. (T.250:12-17). When Mostrongs failed to request recordation of the deed, it was returned to Mostrongs' current attorney. At this particular point in time, Mostrongs could easily have obtained financing through FHA.

**1. Mostrongs Allegations That The Cost Associated With Millard County Accepting Said South Lane Was Prohibitive, Is Against the Credible Weight Of Evidence.**

Mostrongs make allegations, unsupported by the record, and against the great weight of evidence, that the Millard County Commission imposed "conditions" in accepting the south lane as a county road.

Jennifer Mostrong testified that Millard County would only accept the south lane if brought up to county standards. (T.79:12-25,T.80:1-5). This is contrary to the testimony of Mostromgs' former attorney, who testified that no conditions were imposed. (T.272:16-25,T.273:1-25,T.274:1-25). It is also contrary to the County Commission Resolution (Finding No. 27, R. 527; Ex. 42) and contrary to an official letter delivered to Mostromgs by the Millard County Commission, whereby Millard County agreed to accept and maintain the road to the property as a county road. (T.81:19-25,T.82:1-25,T.83:1-9; Ex. 32).

Jennifer Mostrong further testified that she contacted Lee Roper, Millard County Road Supervisor, to determine county specifications for the south lane (T.80:13-24) and that she thereafter contacted Reed Penney, general contractor, for a quote. (T.80:25,T.81:1-2).<sup>5</sup> Larry Mostrong further testified that he had to install a cattle guard and culvert at an exorbitant expense, in order to meet the county road standards. However, when asked who told him that county standards warranted the installation of a cattle guard and culvert, Larry Mostrong testified that "[n]obody told me to do it." (T.165:12-16).

Millard County Road Supervisor, Lee Roper, emphatically denied ever talking to Jennifer Mostrong or Reed Penney. (T.208:1-9). Furthermore, Lee Roper's testimony was un rebutted that he has no documentation that shows "standards" for a county road that the Millard County Commission would accept (T.205:25,

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<sup>5</sup>Reed Penney testified that he could not remember who he talked to to obtain the specs from the County as it was "three or four years ago". (T.204:20-25) He further testified that he did not inspect the road prior to entering his bid. (T.205:1-4)

T.206:1-9) and that Millard County has accepted and has quite a few similar unimproved roads in the area. (T.208:10-13). Finally, Lee Roper testified that he does not know anything about having to install cattle guards. (T.209:8-10).

Mostrongs' allegations that the south lane was the "bargained-for" access to the property is inconsistent with their conduct in obtaining an easement over the south property.

Mostrongs never testified that Jacksons represented to them that they had an "easement" on the south road. Furthermore, Jacksons never retracted their position that the south road was built by permission for their use and convenience and that they were not obligated to seek an easement on the south road (Ex.15).

The evidence is un rebutted that Jacksons made several continuances of the Trustee's Sale at Mostrongs' request to allow the Mostrongs the opportunity to obtain said easement to the south lane. (T.78:9-12,T.271:12-24,T.286:18-22).

**IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT JACKSONS DID NOT MAKE ANY FRAUDULENT OR NEGLIGENT MISREPRESENTATIONS TO MOSTRONGS REGARDING ACCESS TO THE PROPERTY, AND SUCH FINDING IS NOT CLEARLY ERRONEOUS.**

The District Court correctly determined that Jacksons did not make fraudulent or negligent misrepresentations to Mostrongs regarding access to the property. Mostrongs have not met their burden, either before the trial court or on appeal that Jacksons made fraudulent or negligent misrepresentations. Such proof is to be established by "clear and convincing evidence". Modern Air Conditioning, Inc. v. Cinderella Homes, Inc., 226 Kan. 70, 596 P.2d 816, 824 (1979).

**A. Mostrongs Have Not Established the Elements of Fraudulent Or Negligent Misrepresentation Regarding Access To The Property.**

Mostrongs have failed to marshal the evidence to establish that Jacksons made fraudulent or negligent misrepresentations regarding access to the property.

This Court has defined the elements of fraud as follows:

- (1) That a representation was made;
- (2) Concerning a presently existing material fact;
- (3) Which was false;
- (4) Which the representor either
  - a) Knew to be false, or
  - b) Made recklessly, knowing that he had insufficient knowledge upon which to base such representation;
- (5) For the purpose of inducing the other party to act upon it;
- (6) That the other party, acting reasonably and in ignorance of its falsity,
- (7) Did in fact rely upon it;
- (8) And was thereby induced to act;
- (9) To his injury or damage.

Wright v. Westside Nursery, 787 P.2d 508, 512 (Utah Ct. App. 1990)(Citing Pace v. Parrish, 122 Utah 141, 144-145, 247 P.2d 273 (1952)).

In arguing against the findings of the trial court and attempting to show that the elements of fraudulent and negligent misrepresentation exist, Mostrongs fail to cite to the record to support their claims against the trial court's findings. Mostrongs reargue the facts most favorable to their position and ignore the District Court's findings supported by the record.

In their Brief, Mostrongs fail to address elements 2, 3, 7 and 8 in the aforementioned definition of fraud.

The only arguments advanced by Mostrongs are 1) that the factual findings of the trial court indicate that Jacksons represented to Mostrongs that the north lane was the legal access

to the property and the south lane was a private road which was permissibly used and which would be there always. In addition, Mostrongs state that LeeRoy Jackson told Larry Mostrong that he had a legal easement to the south road (See fn.4) and that the construction of the house was FHA approved.

Larry Mostrong testified that LeeRoy Jackson stated that the construction of the home was "FHA approvable" and then contradicted himself stating that LeeRoy Jackson represented construction of the house was "FHA approved". (T.151:6-12). LeeRoy Jackson testified that he represented to Mostrongs that he had built the home himself and that he made no other representations regarding the construction of the home. (T.280:15-20).

In response to Mostrongs' argument that Jacksons induced the Mostrongs to purchase the property, the trial court found that Larry Mostrong initially offered LeeRoy Jackson \$55,000.00 for the property but that LeeRoy Jackson specifically informed Larry Mostrong that he would not sell the property for less than \$65,000.00 and that Mostrongs thereafter agreed to pay the \$65,000.00 purchase price. (Finding No. 8, R. 532).

All other arguments made by Mostrongs as to Jacksons' alleged fraudulent or negligent misrepresentations were addressed and disposed of earlier, with the exception of the issue regarding the condition of the home which will be addressed hereafter.

Finally, in response to Mostrongs' assertion that the court's reliance on certain testimony proffered by Jacksons to support their [Jacksons'] contention that they made no material misrepresentation of fact is misplaced (Appellants' Brief P. 37).

Mostrongs, not Jacksons, must prove such fraud or negligent misrepresentation by "clear and convincing evidence". Modern Air Conditioning, Inc., at 816, 824.

**B. Mostrongs Had Actual and Constructive Notice That The South Lane Did Not Have An Easement And Were Therefore Chargeable With Notice Of All Conditions, Exceptions or Reservations Appearing In Their Chain Of Title.**

The record establishes that Mostrongs had previously purchased other properties besides the property in issue. (T.157:6-11,T.34:7-19). When asked if he had previous opportunities to read legal descriptions, Larry Mostrong answered "Yes." (T.161:1-3) Apparently, Larry Mostrong was extremely concerned regarding the access to the property (T.133:7-15) and testified that on the day of closing he had opportunity to read the description on the warranty deed he received from the Jacksons.

In light of the aforementioned facts, Mostrongs took no further action to ascertain the status of an easement to the south road.

The law is well established that "[a] purchaser is not only charged with notice of the contents of the deeds of his chain of title but, if the same contain anything that would put a prudent man upon inquiry, he is chargeable with notice of whatever an inquiry would reveal.'" Hayes v. Gibbs, 169 P.2d 781, 784 (Utah 1946)(Citing Wilkerson v. Ward, Tex. Civ. App., 137 S.W. 158).

Mostrongs knew from the language of the Warranty Deed, which they claim to have read at closing (T.161:1-6,T.33:4-12), that the Warranty Deed did not specifically call out an easement to the south lane. Mostrongs are charged with notice of "the contents" of the deeds of their chain of title, and as such,

Mostrongs could have ascertained that there was not a legal easement south of the property.

**V. THE DISTRICT COURT PROPERLY DETERMINED THAT JACKSONS DID NOT MAKE ANY FRAUDULENT OR NEGLIGENT MISREPRESENTATIONS TO MOSTRONGS REGARDING THE CONDITION OF THE HOME AND SUCH FINDING IS NOT CLEARLY ERRONEOUS.**

Mostrongs only allegations that Jacksons fraudulently or negligently misrepresented the condition of the home were based on Larry Mostrong's testimony that LeeRoy Jackson represented that the house construction was FHA approved and that since LeeRoy Jackson built the home he knew or should have known that the house did not conform to UBC standards.

As with Mostrongs previous argument that Jacksons fraudulently and negligently misrepresented the issue regarding access to the property, Mostrongs have failed to marshal the evidence and cite the record supporting their claims.

When Jacksons constructed the home on said property in 1979, the UBC was not in effect in Millard County. The UBC was not adopted by Millard County until March of 1981 (Ex. 42). On July 18, 1979, a building permit was issued by Millard County to Jacksons. No final occupancy permit was sought by the Jacksons upon completion of the home as there was no building inspector employed by Millard County at such time. (T.225:1-25,T.244:9-15; Finding No. 5, R. 533).

Jacksons construction of the home could not have conformed to the UBC for the simple fact that the UBC requires a final inspection and issuance of a final occupancy permit. As established at trial, Jacksons could get neither, as Millard

County had not as of that date employed a building inspector. (T.225:2-25).

As further pointed out above, Larry Mostrong's testimony that LeeRoy Jackson represented the home to be FHA approvable (T.151:6-10) is antithetical to LeeRoy Jackson's testimony that the only representation he made was that he had actually constructed the house. (T.280:15-20).

Larry Mostrong testified that he inspected the home prior to purchase (T.151:4-5); that he signed an Earnest Money Agreement accepting the home in its present physical condition (T.151:21-25, T.152:1-5); and that he did not enlist the help of a building inspector prior to purchase. (T.152:6-9).

Nevertheless, Mostromgs resided in the home for approximately three years without any apparent difficulties with the structure or improvements.

The cases cited by Appellants in support of this argument are inapposite. (Appellants' Brief P. 30). In each such case the prospective buyer was denied financing for "insufficient income".

Mostromgs have not established fraudulent or negligent misrepresentation by "clear and convincing evidence". Modern Air Conditioning, Inc., at 816, 824.

**VI. MOSTROMGS HAVE FAILED TO ESTABLISH THAT THERE WAS A MATERIAL MUTUAL MISTAKE OF THE PARTIES REGARDING ACCESS TO THE PROPERTY OR CONSTRUCTION OF THE HOME.**

Mutual mistake requires that "...there is a clear *bona fide* mistake regarding material facts, without culpable negligence on the part of the person complaining...." Davie v. Brownson, 3 Wash. App. 820, 478 P.2d 258, 260 (1970)(Citing Lindberg v. Murray, 177 Wash. 43, 201 P.2d 759, 763 (1921)).



A party claiming mutual mistake must show that the mistake involved a "material fact" and "without culpable negligence" on the part of the person complaining. Davie, at 260.

The trial court determined that "[N]o material mutual mistake of the parties has been shown by the evidence adduced by [Mostrongs]." (Conclusion No. 8, R. 523)

Mostrongs suggest that there were clear *bona fide* mistakes regarding material facts as they related to access to the property and construction of the property. The issue regarding access has been addressed. The District Court found sufficient evidence to establish that there was proper legal access to the north lane. Furthermore, Mostrongs had possession of the property for approximately three years and obtained an easement to the south lane.

Mostrongs assertion that there were mutual mistakes of fact regarding construction of the home, has no merit. Financing was never denied because the home did not comply with UBC standards, it was denied because the FHA appraiser, Joseph Stott, was concerned about three or four construction items on the property. (T.119:5-16; Ex. 18). Mr. Stott testified that in jurisdictions that had not adopted building codes, FHA has its own standards. Mr. Stott further testified that had the items he checked on his appraisal been corrected, there was nothing else he saw that would have been a problem. (T.125:2-25, T.126:1-2).

There was no material mutual mistake of the parties that the home was built strictly in accordance with the UBC, due to the fact that such alleged noncompliance with the UBC had absolutely no bearing on Mostrongs' ability to obtain financing. In June of

1991, Mostrongs hired a building inspector, Charles V. Hugo, and a contractor, Carl Faulkner, to inspect the property and estimate costs of construction problems.<sup>6</sup> (T.177:17-23). When asked which UBC manual he used during his inspection of the home, Mr. Hugo testified, "I didn't have a manual in my hand. I was going by past experience as an inspector and looking for, not necessarily code violations, but problems." (T.181:2-10). Mostrongs raised the issue regarding the UBC, after the fact, only in furtherance of their lawsuit.

It may be expected that homes that are constructed in a jurisdiction that have not adopted the UBC may well have some construction deficiencies. However, Steve Hatch, a real estate appraiser with 22 years experience (T.211:4-18), when asked whether all homes he inspects would have to meet the UBC, testified, "No...obviously the older ones may not meet the most up-to-date codes but still, if they are reasonably accepted market, they are in fact financed."(emphasis added)(T.220:17-25).

Mostrongs did not meet their burden in trial court that there was a material mutual mistake of the parties, nor have they marshaled the evidence on this appeal to challenge the Court's determination. It is well established that:

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<sup>6</sup>Timely objection (T.186:9-12) was made on the grounds of relevancy on Mr Hugo's and Mr. Faulkner's testimony based on the fact that financing was not denied on account of the UBC violations and that the cost of correcting the items set forth in such inspection exceeded the cost of those items addressed by Valley Central Bank as listed in the Stott Appraisal. (Ex. 18) Furthermore, Faulkner's estimate of corrections was approximately twice the amount testified to by Butch Jensen. Faulkner testified that he did not have experience as a building inspector, but that he took a "punch list" evaluating what he felt were inadequacies with regard to the home. (T.195:10-23)

[t]he 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.

Grahn v. Gregory, 800 P.2d 320, 327 (Utah Ct. App. 1990).

**VII. THE DISTRICT COURT PROPERLY DETERMINED THAT MOSTRONGS HAVE FAILED TO ESTABLISH THAT THERE WAS A MATERIAL UNILATERAL MISTAKE ON THEIR PART TO SUPPORT A RESCISSION OF THE CONTRACT BETWEEN THE PARTIES.**

Utah Courts have defined unilateral mistake as consisting of the following elements:

- 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*.

Mostrongs have not established that there was a mistake of "so grave a consequence" that to enforce the contract as actually made would be unconscionable, nor have Mostrongs established that there was a mistake of a "material" feature of the contract.

The contract entered into by the parties was that Mostrongs would receive financing to pay off the Note at the end of two years. Financing was never denied because of "lack of legal access" and "structural defects of the house", as alleged by Mostrongs.

The evidence has been established that there was legal access to the north lane and that the Mostrongs were on notice as to legal access to the south lane. It has also been shown that

the construction of the home had no bearing on Mostrongs' ability to obtain financing.

Finally, Jacksons would be seriously prejudiced by a rescission of the contract, based on the extended time they gave Mostrongs to obtain financing, Mostrongs' continuous occupation of the property, Jacksons' lost rent and subsequent expenses in restoring the property.

It is evident from the arguments made above, that there was not a material mistake regarding financing, lack of access or material structural defects of the home.

Mostrongs do nothing more than re-argue the case as presented at the trial court. It is not Jacksons' place to marshal the evidence to support the Court's finding and conclusion that there was no material unilateral mistake on the part of Mostrongs sufficient to support a rescission.

VIII. THE DISTRICT COURT CORRECTLY DETERMINED THAT BANK REFINANCING FOR MONEY OWED TO JACKSONS UNDER THE NOTE AND TRUST DEED WAS REASONABLY AVAILABLE TO MOSTRONGS HAD THEY PURSUED THE MATTER FURTHER, PARTICULARLY IN VIEW OF JACKSONS' WILLINGNESS TO PAY FOR THE CONSTRUCTION DEFICIENCIES NOTED BY THE MILLARD COUNTY BUILDING OFFICIAL AND THE LENDING INSTITUTION APPRAISERS.

A. Mostrongs' Acquisition Of An Easement Over The South Lane Of The Property And Jacksons' Willingness To Correct The Construction Deficiencies, Guaranteed Mostrongs Financing.

The trial court found that the Mostrongs submitted the Millard County commitment to Valley Central Bank in support of their loan application and testimony is un rebutted that access was no longer an issue to financing. (T.41:25,T.42:1-11).

It has been shown that Valley Central Bank's refusal to accept the loan application was due to those construction

deficiencies noted on Joseph Stott's appraisal. It has been established that the UBC was not in existence in Millard County when Jacksons constructed the home and that neither Mostrongs or Jacksons were required to conform the home to UBC standards. (T.220:17-25). Nevertheless, in a show of good faith, Jacksons offered to correct any construction deficiencies associated with the home at Jacksons' cost. (Exs. 34, 35;). Furthermore, Jacksons left the door open by stating that even though they were going forward with the Trustee's Sale, they would correct the construction deficiencies if they could get a commitment from Mostrongs for financing by the date of the sale. (T.288:5-18; Ex. 34, 35; Addendums D, E; Finding No. 28, 29, R. 525, 526).

Jacksons never received a reply from Mostrongs to said offers, (T.288:5-18) nor did Mostrongs tender the property back to Jacksons or request a rescission of the contract. (T.289:8-14, T.290:17-23, T.100:12-19)

**B. Mostrongs' Efforts To Obtain Financing Were Not Reasonable.**

The trial court's findings show that 1) Zions First National Bank was willing to loan the necessary financing after Larry Mostrong established residency and verification of income in Utah for two years (T.71:8-17, T.153:1-19); Mostrongs made no application for financing from September 1, 1987 until approximately the time the Note became due on September 1, 1989 (T.72:7-13); Jacksons offered to carry financing for Mostrongs for an additional year upon certain conditions—Mostrongs refused. (T. 286:7-17). After all apparent impediments to financing were removed, Mostrongs took no further steps to obtain bank or FHA

financing in order to pay off the Note. (The aforementioned facts support Finding No. 13, R. 531; Finding No. 18, R. 529; Finding No. 24, R. 528; and Findings No. 29 and 30, R. 526).

Mostrongs argue that it would have been an exercise in futility to attempt financing before September 1, 1989, because of the two-year waiting period required to establish Larry Mostromg's residency and income verification in Utah.

The irony in Mostrongs' argument and perhaps some of the most damaging evidence as to Mostrongs' position in this case, is that if Larry Mostromg was required to establish a two-year residency in Utah for verification of income, under no possible circumstances could Mostrongs ever have qualified for financing. The record is clear that Larry Mostromg resided in California during much of the time the contract was in effect and that he could not have established the required proof of residency and income in Utah at the time the Note became due. (T.73:21-25,T.74:1-7,T.98:16-22,T.149:13-25,T.150:1-17,T.153:2-27; Finding No. 18, R. 529).

**IX. THE DISTRICT COURT CORRECTLY DETERMINED THAT ANY RIGHTS WHICH MOSTROMGS MAY HAVE HAD TO RESCISSION UNDER ANY STATED FACTS WERE WAIVED BY THE FAILURE OF MOSTROMGS TO PROMPTLY NOTIFY JACKSONS OF MOSTROMGS INTENTION TO RESCIND THE CONTRACT AND BY MOSTROMGS FAILURE TO TENDER BACK THE PROPERTY UPON MOSTROMGS LEARNING OF THE LACK OF LEGAL ACCESS OVER THE SOUTH LANE AND UPON LEARNING OF ALLEGED DEFICIENCIES IN THE CONSTRUCTION OF THE HOUSE LOCATED ON THE PROPERTY.**

Utah law is well established as to the responsibilities of the party who elects to rescind a contract. In Parry v. Woodall, 438 P.2d 813, (1968) the Utah Supreme Court announced the responsibility of a party who elects rescission as a remedy. In ruling that a party had waived his right to rescission of the

contract, the Court stated: "...one who claims he has been deceived and elects to rescind his contract by reason of fraud or misrepresentation of the other contracting party must act promptly and unequivocally in announcing his intention". (emphasis added) Id., at 815.

The Court further stated:

The law is well settled that one electing to rescind a contract must tender back to the other contracting party whatever property of value he has received. Woodall elected to retain possession of the corporate assets and to carry on the business until it was taken over in the receivership proceedings. We are of the opinion that Woodall waited too long, and that he cannot now rescind the contract.

Id., at 815.

Waiver has been defined as "the voluntary and intentional relinquishment of a known right" and may be either express or implied. 5 Williston on Contracts, § 678 (3rd Ed. 1961). Express waiver, when supported by reliance thereon, excuses non-performance of the waived condition. 5 Williston on Contracts, § 679 (3rd Ed. 1961); Restatement (2d) of Contract, § 84(1)(1981).

In considering waiver of a breach of a contract condition, the Idaho Supreme Court stated in C.I.T. Corporation v. Hess, 395 P.2d 471 (1964) that:

Assuming plaintiff's breach was of a nature sufficient to discharge defendant's obligation to perform, it is well recognized that the obligation of a party under a bilateral contract may be recreated by the rendition of further performance, with knowledge of the fact entitling him to be discharged.

Id., at 475. (See Clover Park School District #400 v. Consolidated Dairy Products, Co., 15 Wash. App. 429, 550 P.2d 47 (1976), where the court stated, "[w]hen a party fails to take steps to rescind within a reasonable time and instead follows a course of

conduct inconsistent therewith, the conclusion follows that he has waived his right of rescission and chosen to continue the contract". Id., at 50.

The trial court's finding that Mostrongs did not vacate the property until on or about September 25, 1990 (date of Trustee's Sale); and that Mostrongs did not tender the property back to Jacksons or notify Jacksons of any intent to repudiate or rescind the agreement, is supported by the record. (Finding No. 32, R. 525)

Furthermore, that Mostrongs waived any right they may have had to rescission was established by their conduct, which was inconsistent with their current claims.

The evidence shows that Mostrongs had both actual and constructive notice of the state of affairs regarding the legal access to the property. Even had Mostrongs testified that they were not concerned with access to the property, which is contrary to the evidence established at trial, Mostrongs were on constructive notice regarding the chain of title to the property and as such were required to ascertain the record. After learning of the construction deficiencies noted in Joseph Stott's appraisal, Mostrongs nevertheless continued to remain in possession of the property, effectively ratifying the agreement. For approximately one year prior to the Trustee's Sale, Mostrongs made outward representations that they would accept the property under the agreement. Jacksons initially extended the final balloon payment under the Note for three months based on Jennifer Mostrongs representation that she was seeking financing (T.284:6-19). Mostrongs actively sought continuations of the Trustee's Sale for



purposes of seeking an easement to the south lane (T.85:8-22, T.78:9-17) and Jacksons accommodated them.

After receiving the letter from the Millard County Commission accepting the south lane as a public road, Mostrongs represented to the appraiser, Joseph Stott, that the easement problem had been taken care of (T.119:17-22) and utilized said Millard County Commission letter of acceptance, for bank financing. (T.268:12-23). When Mostrongs were advised that financing could not be obtained through Valley Central Bank due to an inquiry regarding four construction deficiencies, Mostrongs took no further action. Even though Jacksons, in good faith, offered to pay for such structural deficiencies on two separate occasions, Mostrongs refused to respond. Nevertheless, Mostrongs remained in possession of the property until the Trustee's Sale. Mostrongs never made contact with Jacksons to inform them as to why they suddenly ceased all efforts to obtain financing, once all apparent impediments had been removed.

It has been established that Mostrongs never tendered the property back to Jacksons or requested their money. (T.289:9-14) Jennifer Mostrong herself testified that she never attempted to rescind the contract. (T.100:6-19)

Mostrongs exhibited conduct inconsistent with rescission demonstrating their intent to let the contract stand. As a result, Jacksons continuously granted Mostrongs additional time in which to perform the terms of the contract (approximately thirteen months from the date the balloon payment became due). Nevertheless, once all alleged impediments to financing had been cured, Mostrongs elected to wait until approximately the same

time as the Trustee's Sale to file a lawsuit, while still in possession of the property.

When Jacksons finally did take possession of the property several days after the Trustee's Sale, they noticed excessive waste and damage to the property. Jacksons thereafter spent thousands of dollars in order to restore the property as it was prior to the sale. (Finding No. 33, R. 525; Ex. 48).

**X. ATTORNEYS' FEES AND COURT COSTS ARE NOT WARRANTED IN THIS ACTION - THE PREVAILING PARTY IS ENTITLED TO COSTS ON APPEAL.**

The District Court correctly determined that neither party has shown a legal basis to support a claim for attorneys' fees.

In Utah, attorneys' fees are not recoverable unless provided for by contract or by statute. Mountain States Broadcasting Co. v. Neal, 776 P.2d 643, 648 (Utah Ct. App. 1989).

Mostrongs have not established that they would be entitled to attorneys' fees under any of the theories they claim (Mostrongs have failed to establish that there was fraudulent or negligent misrepresentation). Furthermore, the Jacksons having purchased the property at the Trustee's Sale, the provisions for attorneys' fees in the Note and Trust Deed were extinguished. The Court so properly concluded.

**CONCLUSION**

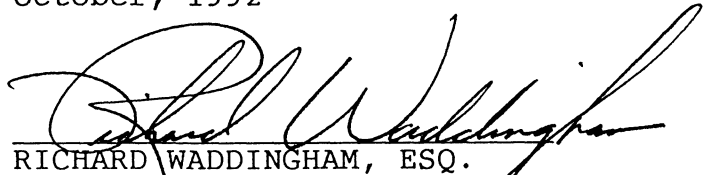
Mostrongs have failed to marshal the evidence in support of the trial court's findings to demonstrate that: "Even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings". Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989). The findings should not be set aside unless clearly erroneous, with due regard

given to the opportunity of the trial court to judge the credibility of witnesses. Utah R. Civ. P. 52(a).

The District Court's findings and conclusions are greatly supported by the record.

Based upon the authorities and arguments set forth herein, Appellee respectfully requests that the Court affirm the judgment entered by the District Court.

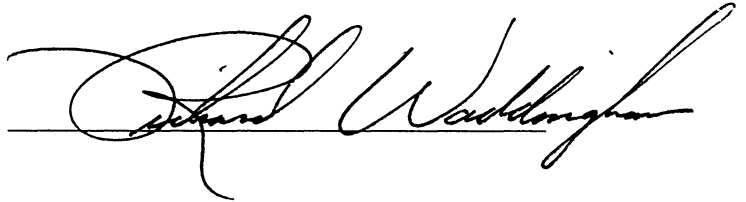
DATED this 13<sup>th</sup> day of October, 1992

  
RICHARD WADDINGHAM, ESQ.  
WADDINGHAM & PETERSON, P.C.  
Attorney for Defendant/Appellee

CERTIFICATE OF SERVICE

I, RICHARD WADDINGHAM, hereby certify that on the 13<sup>th</sup> day of October, 1992 I served upon Plaintiffs/Appellants four (4) true and correct copies of the foregoing Brief of Appellee by causing the same to be mailed, postage pre-paid, to the following:

D. David Lambert  
Linda J. Barclay  
HOWARD, LEWIS & PETERSON  
120 East 300 North  
Provo, Utah 84601

A handwritten signature in black ink, appearing to read "Richard Waddingham", is written over a horizontal line.

## **ADDENDUM**

**EARNEST MONEY SALES AGREEMENT  
EARNEST MONEY RECEIPT**

*Addendum A-1  
("A")*

Send Yes(X) No(O)

DATE July 15, 1987

The undersigned Buyer Terry Vostrong, 1655 Ocotillo Drive, El Centro, CA 92243 hereby deposits with Brokerage  
EARNEST MONEY the amount of Five Hundred Dollars (\$ 500.00 )  
in the form of personal check which shall be deposited in accordance with applicable State Law  
Earnest money check to be deposited Friday July 17, 1987  
Davies & Co. Realty 743-6875 Received by Frank R. Davies  
Brokerage Phone Number

**OFFER TO PURCHASE**

**PROPERTY DESCRIPTION** The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at East  
Flowell in the City of \_\_\_\_\_ County of Millard Utah  
subject to any restrictive covenants zoning regulations utility or other easements or rights of way government patents or state deeds of record approved by Buyer  
in accordance with Section G Said property is more particularly described as South one half of Southwest 1/4 of Northeast 1/4  
Southeast 1/4 of Sec. 22, T. 21 S., R. 5 W., S.L.M. containing 5 Acres.

**HECK APPLICABLE BOXES**

**UNIMPROVED REAL PROPERTY** ☐ Vacant Lot ☐ Vacant Acreage ☐ Other \_\_\_\_\_

**IMPROVED REAL PROPERTY** ☐ Commercial ☐ Residential ☐ Condo ☐ Other Ranchette

(a) **Included items.** Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property  
The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title Carpets, drapes  
Kitchen Stove & Refrigerator & Wood Stove.

(b) **Excluded items** The following items are specifically excluded from this sale Gas bottle, Telephones, Microwave oven.

(c) **CONNECTIONS, UTILITIES AND OTHER RIGHTS** Seller represents that the property includes the following improvements in the purchase price  
Public sewer ☐ connected ☒ well ☒ connected ☐ other ☒ electricity ☒ connected  
Septic tank ☒ connected ☐ irrigation water / secondary system ☐ ingress & egress by private easement  
Other sanitary system \_\_\_\_\_ # of shares \_\_\_\_\_ Company \_\_\_\_\_ ☐ dedicated road ☐ paved  
Public water ☐ connected ☐ TV antenna ☐ master antenna ☐ prewired ☐ curb and gutter  
Private water ☐ connected ☐ natural gas ☐ connected ☐ other rights \_\_\_\_\_

(d) **Survey** A certified survey ☐ shall be furnished at the expense of \_\_\_\_\_ prior to closing ☒ shall not be furnished

(e) **Buyer Inspection** Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below accepts it in its present physical  
condition, except No exceptions

**PURCHASE PRICE AND FINANCING.** The total purchase price for the property is Sixty Five thousand  
Dollars (\$ 65,000.00 ) which shall be paid as follows

500.00 which represents the aforescribed EARNEST MONEY DEPOSIT  
\_\_\_\_\_ representing the approximate balance of CASH DOWN PAYMENT at closing  
\_\_\_\_\_ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed  
by buyer which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_  
which include ☐ principal, ☐ interest ☐ taxes ☐ insurance, ☐ condo fees ☐ other \_\_\_\_\_  
\_\_\_\_\_ representing the approximate balance of an additional existing mortgage, trust deed note real estate contract or other encumbrances to be  
assumed by Buyer which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_  
which include ☐ principal, ☐ interest ☐ taxes, ☐ insurance, ☐ condo fees ☐ other \_\_\_\_\_  
\_\_\_\_\_ representing balance if any, including proceeds from a new \_\_\_\_\_ loan to be paid as follows \_\_\_\_\_

500.00 Other From Proceeds of a loan to be made by Zions bank, (F.M.A. or other  
Government Agency

1,000.00 TOTAL PURCHASE PRICE

Buyer is required to assume an underlying obligation and/or obtain outside financing. Buyer agrees to use best efforts to assume and/or procure same and this  
made subject to Buyer qualifying for and lending institution granting said assumption and/or financing Buyer agrees to make application within 5  
after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed \_\_\_\_\_ %  
If Buyer does not qualify for the assumption and/or financing within 15 days after Seller's acceptance of this Agreement this Agreement shall be voidable  
at the option of the Buyer or Seller upon written notice  
Buyer agrees to pay \$ 15,000.00 towards Buyer's total financing and closing costs including but not limited to loan discount points

# EARNEST MONEY SALES AGREEMENT

Legend    Yes (X)        No (O)

**This is a legally binding contract. Read the entire document carefully before signing.**

## GENERAL PROVISIONS

• • (Sections)

**A. INCLUDED ITEMS.** Unless excluded herein, this sale shall *include* all fixtures and any of the following items if presently attached to the property: plumbing fixtures, heating, air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies, window rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs.

**B. - INSPECTION.** Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of any representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income potential or as to its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, said inspection shall be allowed by Seller but arranged for and paid by Buyer.

**C. SELLER WARRANTIES.** Seller warrants that (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which is not or will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing, and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances, shall all be sound or in satisfactory working condition at closing.

**D. - CONDITION OF WELL.** Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

**E. CONDITION OF SEPTIC TANK.** Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

**F. ACCELERATION CLAUSE.** No later than fifteen (15) days after Seller's acceptance of this Agreement, but not less than three (3) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, then within three (3) days after notice of nonwaiver or disapproval or on the date of closing, whichever is earlier, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent. In such case, all earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions of said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

**G. TITLE INSPECTION.** No later than fifteen (15) days after Seller's acceptance of this Agreement, but not less than three (3) days prior to closing, Buyer shall have the opportunity to inspect either an abstract of title brought current with an attorney's opinion, or a preliminary title report on the subject property. Buyer shall have a period of three (3) days after receipt thereof to examine and accept. If Buyer does not accept, Buyer shall give written notice thereof to Seller or Seller's agent, within the prescribed time period specifying objections to title. Thereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

**H. TITLE INSURANCE.** If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a standard form ALTA title policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

**I. EXISTING TENANT LEASES.** If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer no later than fifteen (15) days after Seller's acceptance of this Agreement, but not less than three (3) days prior to closing, a copy of all existing leases (and any amendments thereto) affecting the property. Unless written objection is given by Buyer to Seller or Seller's agent within three (3) working days thereafter, Buyer shall take title subject to such leases. If objection is not remedied within the stated time, this Agreement shall be null and void.

**J. CHANGES DURING TRANSACTION.** During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

AND CONVEYANCE OF TITLE. Seller represents that Seller ☐ holds title to the property in fee simple ☐ is purchasing the property under a contract. Transfer of Seller's ownership interest shall be made as set forth in Section S. Seller agrees to furnish good and marketable title to the Buyer subject to encumbrances and exceptions noted herein, evidenced by ☐ a current policy of title insurance in the amount of purchase price ☐ an abstract brought current, with an attorney's opinion (See Section H).

4. **INSPECTION OF TITLE.** In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☐ has not reviewed any condominium CC & R's prior to signing this Agreement.

5. **VESTING OF TITLE.** Title shall vest in Buyer as follows Larry L. Mostrong and Jenifer G. Mostrong  
as Joint tenants

6. **SELLER WARRANTIES.** In addition to warranties contained in Section C, the following items are also warranted \_\_\_\_\_

Exceptions to the above and Section C shall be limited to the following \_\_\_\_\_

7. **SPECIAL CONSIDERATIONS AND CONTINGENCIES.** This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing Sellers to pay closing costs, points and appraisal fees.

8. **CLOSING OF SALE.** This Agreement shall be closed on or before 15 August 19 87 at a reasonable location to be designated by Seller, subject to Section Q. Upon demand, Buyer shall deposit with the Escrow Closing Office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Section R, shall be made as of ☒ date of possession ☐ date of closing ☐ other \_\_\_\_\_

9. **POSSESSION.** Seller shall deliver possession to Buyer on \_\_\_\_\_ unless extended by written agreement of parties.

10. **GENERAL PROVISIONS.** Unless otherwise indicated above, the General Provision Sections on the reverse side hereof are incorporated into this Agreement by reference.

11. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Seller shall have until 4.00 (AM/PM) July 20 19 87 to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the earnest money to the Buyer.

Signature of Buyer Larry L. Mostrong 7-15-87 Signature of Buyer \_\_\_\_\_ Date \_\_\_\_\_

CHECK ONE

**ACCEPTANCE OF OFFER TO PURCHASE.** Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

**REJECTION.** Seller hereby REJECTS the foregoing offer \_\_\_\_\_ (Seller's Initials)

**COUNTER OFFER.** Seller hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until \_\_\_\_\_ (AM / PM) \_\_\_\_\_, 19 \_\_\_\_\_ to accept the terms specified below.

Date 7-15-87  
Time 5:29 (AM-PM) Signature of Seller Lee Roy Jackson Signature of Seller Jennifer Jackson

CHECK ONE

Buyer accepts the counter offer

Buyer accepts with modifications on attached addendum

Date \_\_\_\_\_ (AM-PM) Signature of Buyer \_\_\_\_\_ Signature of Buyer \_\_\_\_\_

**COMMISSION.** The undersigned hereby agrees to pay to Davies & Co. Realty (Brokerage commission of Five (%5%) as consideration for the efforts in procuring a buyer.

Signature of Seller Lee Roy Jackson 7-15-87 Signature of Seller Jennifer Jackson 7-15-  
Date Date Date

#### DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures (One of the following alternatives must therefore be completed)

A ☐ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures

SIGNATURE OF SELLER Lee Roy Jackson 7-15-87 SIGNATURE OF BUYER Larry L. Mostrong 7-15-87  
Date Date Date  
Date Date Date

B ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on \_\_\_\_\_, 19 \_\_\_\_\_ by \_\_\_\_\_



**K. AUTHORITY OF SIGNATORS.** If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on behalf warrants his or her authority to do so and to bind Buyer or Seller.

**L. COMPLETE AGREEMENT — NO VERBAL AGREEMENTS.** This instrument constitutes the entire Agreement between the parties and supersedes all previous and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no verbal agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

**M. COUNTER OFFERS.** Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement not expressly modified or excluded therein.

**N. — DEFAULT/INTERPLEADER AND ATTORNEY'S FEES.** In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. 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 attorney's 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. In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action.

**O. ABROGATION.** Execution of a final real estate contract, if any, shall abrogate this Agreement.

**P. RISK OF LOSS.** All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may, at his option, either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing, or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed.

**Q. TIME IS OF ESSENCE—UNAVOIDABLE DELAY.** In the event that this sale cannot be closed by the date provided herein due to interruption of transportation, strikes, fire, flood, extreme weather, governmental regulations, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than thirty (30) days beyond the closing date provided herein. Thereafter, time is of the essence. This provision relates only to the extension of closing date. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

**R. CLOSING COSTS.** Seller and Buyer shall each pay one half (1/2) of the escrow closing fee, unless otherwise required by the lending institution. Costs for providing title insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, and interest on assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

**S. REAL PROPERTY CONVEYANCING.** If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those excepted herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, containing Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the existing real estate contract therein.

**T. AGENCY DISCLOSURE.** Selling Brokerage may have entered into an agreement to represent the Seller.

**U. BROKERAGE.** For purposes of this Agreement, any references to the term "Brokerage" shall mean the respective listing or selling real estate office.

**V. DAYS.** For purposes of this Agreement, any references to the term "days" shall mean business or working days exclusive of legal holidays.

Form No 1402 (1/70)  
ALTA Owner's Policy  
Form B — 1970  
(Amended 10-17-70)  
(Standard Coverage)



(("B"))  
OWNER'S  
POLICY

COPY

## POLICY OF TITLE INSURANCE

ISSUED THROUGH THE OFFICE OF



180 SOUTH MAIN • P.O. BOX 658 • FILLMORE, UTAH 84631  
(801) 743-6213

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, FIRST AMERICAN TITLE INSURANCE COMPANY a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of

- 1 title to the estate or interest described in Schedule A being vested otherwise than as stated therein,
- 2 any defect in or lien or encumbrance on such title,
- 3 lack of a right of access to and from the land, or
- 4 unmarketability of such title

IN WITNESS WHEREOF, First American Title Insurance Company has caused this policy to be signed and sealed by its duly authorized officers as of Date of Policy shown in Schedule A

*First American Title Insurance Company*



BY

*[Signature]*  
PRESIDENT

ATTEST

*[Signature]*  
SECRETARY

COUNTERSIGNED

*[Signature]*  
ASSISTANT SECRETARY

## SCHEDULE OF EXCLUSIONS FROM COVERAGE

THE FOLLOWING MATTERS ARE EXPRESSLY EXCLUDED FROM THE COVERAGE OF THIS POLICY

1. ANY LAW, ORDINANCE OR GOVERNMENTAL REGULATION (INCLUDING BUT NOT LIMITED TO BUILDING AND ZONING ORDINANCES) RESTRICTING OR REGULATING OR PROHIBITING THE OCCUPANCY, USE OR ENJOYMENT OF THE LAND, OR REGULATING THE CHARACTER, DIMENSIONS OR LOCATION OF ANY IMPROVEMENT NOW OR HEREAFTER ERECTED ON THE LAND, OR PROHIBITING SEPARATION IN OWNERSHIP OR A REDUCTION IN THE DIMENSIONS OR AREA OF THE LAND, OR THE EFFECT OF ANY VIOLATION OF ANY SUCH LAW, ORDINANCE OR GOVERNMENTAL REGULATION.
2. RIGHTS OF EMINENT DOMAIN OR GOVERNMENTAL RIGHTS OF POLICE POWER UNLESS NOTICE OF THE EXERCISE OF SUCH RIGHTS APPEARS IN THE PUBLIC RECORDS AT DATE OF POLICY.
3. DEFECTS, LIENS, ENCUMBRANCES, ADVERSE CLAIMS, OR OTHER MATTERS (a) CREATED, SUFFERED, ASSUMED OR AGREED TO BY THE INSURED CLAIMANT, (b) NOT KNOWN TO THE COMPANY AND NOT SHOWN BY THE PUBLIC RECORDS BUT KNOWN TO THE INSURED CLAIMANT EITHER AT DATE OF POLICY OR AT THE DATE SUCH CLAIMANT ACQUIRED AN ESTATE OR INTEREST INSURED BY THIS POLICY AND NOT DISCLOSED IN WRITING BY THE INSURED CLAIMANT TO THE COMPANY PRIOR TO THE DATE SUCH INSURED CLAIMANT BECAME AN INSURED HEREUNDER; (c) RESULTING IN NO LOSS OR DAMAGE TO THE INSURED CLAIMANT; (d) ATTACHING OR CREATED SUBSEQUENT TO DATE OF POLICY; OR (e) RESULTING IN LOSS OR DAMAGE WHICH WOULD NOT HAVE BEEN SUSTAINED IF THE INSURED CLAIMANT HAD PAID VALUE FOR THE ESTATE OR INTEREST INSURED BY THIS POLICY.

## CONDITIONS AND STIPULATIONS

### 1. DEFINITION OF TERMS

The following terms when used in this policy mean

(a) "insured" the insured named in Schedule A, and subject to any rights or defenses the Company may have had against the named insured, those who succeed to the interest of such insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors personal representatives, next of kin, or corporate or fiduciary successors

(b) "insured claimant" an insured claiming loss or damage hereunder

(c) "knowledge" actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records

(d) "land" the land described, specifically or by reference in Schedule C, and improvements affixed thereto which by law constitute real property, provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule C, nor any right, title, interest estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy

(e) "mortgage" mortgage, deed of trust, trust deed, or other security instrument

(f) "public records" those records which by law impart constructive notice of matters relating to said land

### 2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured so long as such insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance of such estate or interest, provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured

### 3. DEFENSE AND PROSECUTION OF ACTION - NOTICE OF CLAIM TO BE GIVEN BY AN INSURED CLAIMANT

(a) The Company at its own cost and without undue delay shall provide for the defense of an

insured in all litigation consisting of actions or proceedings commenced against such insured, or a defense interposed against an insured in an action to enforce a contract for a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy

(b) The insured shall notify the Company promptly in writing (i) in case any action or proceeding is begun or defense is interposed as set forth in (a) above, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If such prompt notice shall not be given to the Company, then as to such insured all liability of the Company shall cease and terminate in regard to the matter or matters for which such prompt notice is required, provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice

(c) The Company shall have the right at its own cost to institute and without undue delay prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest as insured, and the Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provision of this policy

(d) Whenever the Company shall have brought any action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any such litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order

(e) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured hereunder shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for such purpose. Whenever requested by the Company, such insured shall give the Company all reasonable aid in any such action or proceeding in effecting settlement, securing evidence, obtaining witnesses, or prosecuting or defending such action or proceeding, and the Company shall reimburse such insured for any expense so incurred

### 4. NOTICE OF LOSS - LIMITATION OF ACTION

In addition to the notices required by paragraph 3(b) of these Conditions and Stipulations, a statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within 90 days after such loss or damage shall have been determined and no right of action shall accrue to an insured claimant until 30 days after such statement shall have been furnished. Failure to furnish such statement of loss or damage shall terminate any liability of the Company under this policy as to such loss or damage

### 5. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS

The Company shall have the option to pay or otherwise settle for or in the name of an insured claimant any claim insured against or to terminate all liability and obligations of the Company under by paying or tendering payment of the full amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred up to the time of such payment or tender of payment, by the insured claimant and authorized by the Company

### 6. DETERMINATION AND PAYMENT OF LOSS

(a) The liability of the Company under this policy shall in no case exceed the least of

- (i) the actual loss of the insured claimant, or
- (ii) the amount of insurance stated in Schedule A

(b) The Company will pay, in addition to any loss insured against by this policy, all costs proposed upon an insured in litigation carried on by the Company for such insured, and all attorneys' fees and expenses in litigation carried on by such insured with the written authorization of the Company

(c) When liability has been definitely established in accordance with the conditions of this policy, the loss or damage shall be payable within 30 days thereafter

(Continued on inside back cover)

Form No. 1402 - A  
ALTA Owner's Policy  
Form 1402 - 1970

Or Form No. 26423-M

SCHEDULE A

COPY

Total Fee for Title Search, Examination  
and Title Insurance \$347.50

Amount of Insurance: \$65,000.00

Policy No. 5198-12M

Date of Policy: September 1, 1987 at 11:04 A.M.

1. Name of Insured:

LARRY L. MOSTRONG and JENNIFER C. MOSTRONG

2. The estate or interest referred to herein is at Date of Policy vested in:

LARRY L. MOSTRONG and JENNIFER C. MOSTRONG,  
his wife as joint tenants

3. The estate or interest in the land described in Schedule C and which is covered by this policy is:

FEE SIMPLE

COPY

SCHEDULE B

This policy does not insure against loss or damage by reason of the matters shown in parts one and two following:

PART ONE:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.
3. Easements, claims of easement or encumbrances which are not shown by the public records.
4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by public records.
5. Unpatented mining claims; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.
6. Any lien, or right to a lien, for services, labor or material theretofore or hereafter furnished, imposed by law and not shown by the public records.

PART TWO:

1. Taxes for the year 1987 now a lien, not yet due.
2. Easement for Road and Utility purposes over the East 33 feet of said property as recited in aasne instruments of record.
3. A Deed of Trust dated September 1, 1987, executed by LARRY L. MOSTRONG and JENNIFER C. MOSTRONG, his wife, as Trustor, to secure payment of a note bearing even date thereof in the sum of \$45,000.00 with interest thereon, payable as therein provided, to SECURITY TITLE COMPANY OF SOUTHERN UTAH as Trustee, in favor of LEE ROY JACKSON and MARGARET R. JACKSON, his wife as joint tenants, as Beneficiary, recorded September 1, 1987 as Entry No. 65995 in Book 211 at Page 670 of Official Records.
4. Oil and Gas Lease dated November 15, 1977 from RESORT PROPERTIES, INC., a Nevada corporation, as Lessor, to PLACID OIL COMPANY, a Delaware corporation, as Lessee for a term of 10 years from November 15, 1977, and so long thereafter as oil and gas, or either of them, is produced from the land, upon the terms, conditions and covenants therein provided; recorded December 20, 1977 as Entry No. 23299 in Book 125 at Page 174 of Official Records.

COPY 5193-12M

An undivided interest of PLACID OIL COMPANY in said Oil and Gas Lease was assigned to LOUISIANA-HUNT PETROLEUM CORPORATION an undivided 16.80672% and to ROSEWOOD RESOURCES INC. an undivided 18.90756% by Assignment, Conveyance and Bill of Sale dated June 13, 1983, recorded February 6, 1984 as Entry No. 51269 in Book 179 at Page 271 of Official Records.

The interest of PLACID OIL COMPANY, LOUISIANA-HUNT PETROLEUM CORPORATION and ROSEWOOD RESOURCES (POC), INC. in said Lease was assigned to SOHIO PETROLEUM COMPANY by Assignment of Leases dated April 2, 1984 and recorded November 23, 1984 as Entry No. 54306 in Book 186 at Page 237 of Official Records.

\* \* \*

#### SCHEDULE C

The land referred to in this policy is situated in the State of Utah, County of Millard and is described as follows:

The South half of the Southwest quarter of the Northeast quarter of the Southeast quarter of Section 22, Township 21 South, Range 5 West, Salt Lake Base and Meridian.

EXCEPTING THEREFROM 1/4 of all oil, gas and other minerals in, on or under said land, together with the right of ingress and egress for the purpose of exploring and/or removing the same.

\* \* \*

COPY

## CONDITIONS AND STIPULATIONS

(Continued from inside front cover)

### 7. LIMITATION OF LIABILITY

No claim shall arise or be maintainable under this policy (a) if the Company, after having received notice of an alleged defect, lien or encumbrance insured against hereunder, by litigation or otherwise, removes such defect, lien or encumbrance or establishes the title, as insured, within a reasonable time after receipt of such notice; (b) in the event of litigation until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, as insured, as provided in paragraph 3 hereof; or (c) for liability voluntarily assumed by an insured in settling any claim or suit without prior written consent of the Company.

### 8. REDUCTION OF LIABILITY

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. No payment shall be made without producing this policy for endorsement of such payment unless the policy be lost or destroyed, in which case proof of such loss or destruction shall be furnished to the satisfaction of the Company.

### 9. LIABILITY NONCUMULATIVE

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring either (a) a mortgage shown or referred to in Schedule B hereof which is a lien on the estate or interest covered by this policy, or (b) a mortgage hereafter executed by an insured which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy. The Company shall have the option to apply to the payment of any such mortgages any amount that otherwise would be payable hereunder to the insured owner of the estate or interest covered by this policy and the amount so paid shall be deemed a payment under this policy to said insured owner.

### 10. APPORTIONMENT

If the land described in Schedule C consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of said parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each such parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement herein or by an endorsement attached hereto.

### 11. SUBROGATION UPON PAYMENT OR SETTLEMENT

Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant. The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued, and if requested by the Company, such insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation and shall permit the Company to use the name of such insured claimant in any transaction or litigation involving such rights or remedies. If the payment does not cover the loss of such insured claimant, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss. If loss should result from any act of such insured claimant, such act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation.

### 12. LIABILITY LIMITED TO THIS POLICY

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy, contract between the insured and the Company.

Any claim of loss or damage, whether or not based on negligence, and which arises out of status of the title to the estate or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy.

No amendment of or endorsement to this policy can be made except by writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

### 13. NOTICES, WHERE SENT

All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to its main office at 421 North Main Street, Santa Ana, California, or to the office which issued this policy.

("C")

Record at Request of \_\_\_\_\_  
 at \_\_\_\_\_ M Fee Paid \$ \_\_\_\_\_  
 by \_\_\_\_\_ Dep. Book \_\_\_\_\_ Page \_\_\_\_\_ Ref.: \_\_\_\_\_  
 Mail tax notice to \_\_\_\_\_ Address \_\_\_\_\_

STC 12797-M

## WARRANTY DEED

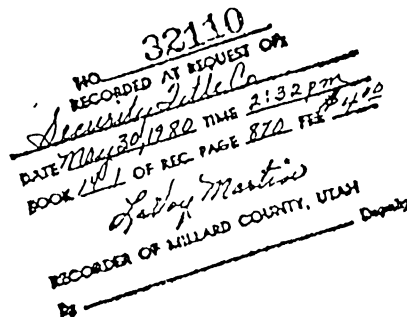
GLAULDINE KESSLER, a woman grantor  
 of Castle Dale, County of Emery, State of Utah, hereby  
 CONVEY and WARRANT to

WILLIAM R. JACKSON and ROY JACKSON

for the sum of  
 TEN and no/100 Dollars and other good and valuable consideration-----DOLLARS,  
 the following described tract of land in Millard County,  
 State of Utah.

The Southwest quarter of the Northeast quarter of the Southeast quarter of  
 Section 22, Township 21 South, Range 5 West, Salt Lake Base and Meridian,  
 (containing 10 acres more or less)

TOGETHER WITH and SUBJECT TO a 33 foot Easement over and across the East  
 33 feet of said property for road and utility purposes.



WITNESS, the hand of said grantor, this 29th day of  
 September, A. D. 1978

Signed in the Presence of

X Geraldine Kessler  
 Geraldine Kessler

STATE OF UTAH,

County of Emery

ss

On the 26 day of October, A. D. 1978  
 personally appeared before me Geraldine Kessler, a woman

the signer of the within instrument, who duly acknowledged to me that she executed the  
 same.

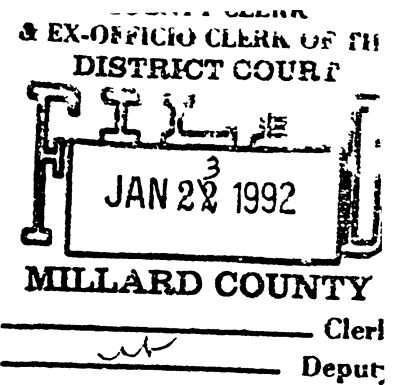
Margaret L. Magnuson  
 Notary Public

My commission expires March 5, 1980 Residing in Castle Dale, Utah



("D")

RICHARD WADDINGHAM #4766  
WADDINGHAM & PETERSON  
Attorneys for Defendants  
362 West Main  
Delta, UT 84624  
(801) 864-2748



IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

MILLARD COUNTY, STATE OF UTAH

-----oo0oo-----

LARRY L. MOSTRONG and JENNIFER	:	
G. MOSTRONG,	:	
	:	
Plaintiffs,	:	
	:	FINDINGS OF FACT AND
-vs-	:	CONCLUSIONS OF LAW
	:	
LEEROY JACKSON and MARGARET R.	:	
JACKSON,	:	Civil No. 8616
	:	
Defendants.	:	Honorable Cullen Y. Christensen

-----oo0oo-----

This matter came on duly and regularly for trial before the Court, the Honorable Cullen Y. Christensen presiding. The plaintiff appeared and was represented by counsel D. David Lambert, Esq. The defendant appeared and was represented by counsel Richard Waddingham, Esq. The Court thereupon heard the evidence adduced by the parties in support of their respective positions, reviewed the memoranda of counsel, entertained argument of counsel, considered the pleadings and exhibits in this matter and the Court having entered its Memorandum Decision dated January 2, 1992, the Court now enters its Findings of Fact and Conclusions of Law as follows:

### FINDINGS OF FACT

1. Plaintiffs and defendants were residents of Millard County, State of Utah, at the time this controversy arose.

2. On or about October 26, 1978, defendant Lee Roy Jackson and his brother, William Jackson, purchased certain property located at approximately 400 South 2588 West, Fillmore, Utah (hereinafter referred to as "property") from a Mrs. Geraldine Kessler. At the time of said purchase, defendant Lee Roy Jackson obtained a policy of title insurance on said property from Security Title Company of Fillmore, Utah.

3. On or about November 4, 1979, a warranty deed was recorded in the Millard County Recorder's office whereby William Jackson and Lee Roy Jackson conveyed said property to Lee Roy Jackson and Margaret Jackson (hereinafter referred to jointly as "defendants"); that at said time, the only access to said property from a public road was to the north over a private lane approximately three-fourths of a mile in length; that said lane was unimproved and during inclement weather said lane was difficult to travel; that no one ever contested the right of defendants or plaintiffs to use said lane for access to the property.

4. In approximately July, 1979, defendants constructed a home on said property.

5. At the time defendants constructed the home on said property, there was no building code in effect in Millard County. The Uniform Building Code was not adopted by Millard County until

March, 1981; however, the building permit issued by Millard County to the defendants on July 18, 1979 provided that the construction must conform "to all ordinances of Millard County, laws per State of Utah, the Uniform Building Code, and all rules and decisions of the Building Inspector."; that no final occupancy permit was sought by the defendants upon completion of the home; that at the time there was no building inspector employed by Millard County.

6. That in 1979 defendants obtained oral permission from a Mr. Burdock, the owner of the land to the south of the subject property, to construct a lane south from the subject property across the Burdock land to a public road, a distance of approximately one-fourth of a mile; that defendant graded this lane and applied a cinder base thereto; that Burdock subsequently sold his land to Ralph G. Tuckfield; that defendants never discussed this lane with Tuckfield and continued to use the same without objection; that defendants used this south lane as a primary access to the subject property, but they also used the north lane for egress and ingress to the subject property from time to time.

7. In July, 1987, Mostrongs (hereinafter referred to as "plaintiffs") entered into negotiations with defendants for the purchase of defendants' property.

8. During the initial discussion between plaintiff Larry Mostrong and defendant Lee Roy Jackson, plaintiff offered defendant \$55,000.00 for the property. However, defendant specifically informed plaintiff that he would not sell the property for

less than \$65,000.00. Plaintiffs thereafter agreed to pay defendant \$65,000.00 for said property.

9. Prior to entering into an Earnest Money Agreement for the purchase of said property, defendant Larry Mostrong inspected the subject property on at least three occasions; the parties are in agreement that the north lane and the south lane were discussed on these occasions. However, plaintiffs testified that it was represented by defendants that while the north lane was available, the south lane was the primary access, that such lane would be there "always" and that the south lane was a private road which plaintiffs would have to maintain. On the other hand, the defendants testified that plaintiffs were informed that the north lane was the legal access to the subject property and that the south lane was for convenience only and was only a permissive use. The Court finds that the evidence does not preponderate in support of the plaintiffs' position with respect to such south lane.

10. Plaintiffs and defendants entered into an integrated Earnest Money Agreement on or about July 15, 1987 for a total purchase price of \$65,000.00. (Ex. 1.)

11. Two appraisals were performed on the subject property after the Earnest Money Agreement was signed but before the September 1, 1987 closing. Neither appraisal identified any problems concerning access to the subject property or the condition of the property. (Exhibits 2A and 2B)

12. At approximately the same time that the parties executed said Earnest Money Agreement, plaintiffs applied for a conventional loan through Zions First National Bank. Plaintiffs were unable to produce the required down payment for a conventional loan through Zions First National Bank and, therefore, on or about August 4, 1987 made application through Zions First National Bank for FHA financing.

13. On August 28, 1987, Zions First National Bank, the parent company of Zions Mortgage Company, notified plaintiffs that it had turned down their application for credit on the basis of insufficient verification of income because Mr. Mostrom was self-employed and had not resided in Utah for a sufficient time to establish his income. (Exhibit 2) However, Zions First National Bank specifically informed the plaintiffs that the bank would be willing to loan plaintiffs the necessary financing for the property after plaintiffs established stability of income over a two-year period.

14. Both parties were still interested in completing the sale and the defendants stated that they would carry the financing on the house for two years to allow the plaintiffs to establish a sufficient income history and residency in Utah so as to satisfy such bank lending requirements for financing. Thereafter the parties held a closing for the sale of the property memorialized by a Warranty Deed, a Trust Deed Note and a Deed of Trust on September

1, 1987, (Exhibit 4), and plaintiffs took possession of the subject property.

15. At the time of said closing, defendants conveyed by Warranty Deed and plaintiffs accepted only that property described as follows:

The South half of the Southwest quarter of the Northeast quarter of the Southeast quarter of Section 22, Township 21 South, Range 5 West, Salt Lake Base and Meridian.

Excepting therefrom  $\frac{1}{4}$  of all oil, gas and other minerals in on or under said land, together with the right of ingress and egress for the purpose of exploring and/or removing the same.

Together with that certain underground water well identified as: Water User's Claim No. 67-885, Application No. 53542, Certificate No. 12844.

Together with all improvements and appurtenances thereunto belonging.

Subject to covenants, conditions, restrictions, reservations, rights of way and easements in existence and/or of record.

Said conveyance did not specifically include any easement for access from the north or the south. (Exhibit 4)

16. Upon purchasing said property, plaintiffs obtained a policy of title insurance on said property from Security Title Company of Millard County, which policy insured against lack of a right of access to the property.

17. All parties reasonably believed at the time of closing that the only apparent obstacle to bank financing was the.

two-year residency for verification of plaintiffs' income. The parties therefore agreed in order to give plaintiffs time to accomplish the intended FHA or other acceptable financing to enter into said Note and Trust Deed as an interim measure.

18. From the date plaintiffs signed said Trust Deed Note on September 1, 1987, until shortly before such Note became due in full on September 1, 1989, plaintiffs never made further application for financing. At various times during this two-year period, plaintiff Larry Mostrong worked and lived in California.

19. On or about September 1, 1989 plaintiff Jennifer Mostrong informed defendants that she had made application for an FHA loan through First Security Bank, which loan was expected to be finalized within four (4) to six (6) weeks. As a result, defendants granted plaintiffs an additional three (3) months in which to get the FHA financing.

20. Plaintiffs thereafter informed defendants that FHA had denied their loan request because of a question regarding an easement to the property. Plaintiffs further stated that they needed a "recorded easement" to the property.

21. When plaintiffs made inquiry to defendants regarding a "recorded easement" to the property, defendants contacted Security Title Company to ascertain the status of an easement to the property. Security Title thereupon secured a Warranty Deed for the said north lane from Geraldine Kessler (prior owner of the servient property) to defendants and defendants conveyed said Deed

for Easement to the plaintiffs, which deeds were recorded on January 4, 1990 in the Millard County Recorder's Office. (Plaintiffs' Exhibit No. 37 and Defendants' Exhibit No. 41)

22. On December 1, 1989 the defendants recorded a Notice of Default with respect to said Trust Deed because plaintiffs had failed to make the balloon payment due on September 1, 1989.

23. Plaintiffs continued their efforts to obtain bank financing and on or about February 12, 1990 defendants offered to carry the financing until March 1, 1991 upon certain conditions (Plaintiffs' Exhibit No. 36). Plaintiffs declined to accept such conditions.

24. A Trustee's Sale under said Trust Deed was thereupon scheduled April 4, 1990. On or about March 28, 1990, plaintiffs obtained a temporary restraining order against said sale. On or about April 4, 1990 the parties, through their respective counsel, negotiated an extension of said Trustee's Sale to May 18, 1990. On or about May 17, 1990 the plaintiffs paid to defendants the sum of \$5,257.37 for back monthly payments agreed upon for plaintiffs' continued possession of the property and for attorney fees, costs and trustee fees, and defendants extended the time for the Trustee's Sale for an additional 60 days. (Plaintiffs' Exhibit No. 27; Plaintiffs' Exhibit No. 28)

25. During the interim the plaintiffs had been negotiating with Valley Central Bank to secure a loan with which to pay off defendants' Trust Deed. Such a loan was conditioned upon the



dedication of the said Tuckfield lane as a Millard County road and upon correction of certain perceived deficiencies in the construction of the house on the subject property.

26. On or about May 3, 1990 plaintiffs obtained a deed from Tuckfield for the south access to the subject property, delivery of which was conditioned upon acceptance of said lane as a county road. (Plaintiffs' Exhibit No. 22)

27. On or about May 15, 1990, the plaintiffs received a commitment from the Millard County Commission to the effect that the County would accept said road as a county road and would agree to maintain "this new and improved county road." (Exhibits Nos. 32 and 33). The Millard County Attorney took a position that such acceptance was conditioned upon the lane being brought to county standards (Exhibits 20 and 21) but the said County Commission resolution did not so specifically state. The only bid for improving said lane was made by Reed Penny who estimated the cost to be from \$2,200 to \$2,500. Millard County Superintendent of Roads, Lee Roper, testified that he was not contacted by plaintiffs to ascertain what, if any, improvements were necessary to bring the lane to County standards. The defendants refused to contribute in any amount toward such costs. Said improvements were never made. Nevertheless, plaintiffs submitted the Millard County commitment to Valley Central Bank in support of their loan application.

28. At the request of defendants, the Millard County Building official, Jerry Reagan, on or about June 27, 1990, made an

inspection of the house on the subject property and noted several deficiencies, as set forth in Plaintiffs' Exhibit No. 19; Carl Faulkner, a licensed contractor, called by plaintiffs testified that it would cost \$6,085 to correct such deficiencies and that the same could be done within a couple of days; Butch Jensen, a licensed contractor, called by defendants, testified that it would cost \$3,212 to make such repairs (Defendants' Exhibit No. 47) and that the same could be done in less than a week; defendants twice offered to pay for the cost of such repairs (Defendants' Exhibit Nos. 34 and 35), but no affirmative response was received from the plaintiffs with respect thereto.

29. After the Deed for Easement over the Tuckfield property to the south was obtained, the commitment from Millard County to accept the same as a county road and maintain the same was received, and after defendants' offer to plaintiffs on two separate occasions to pay for the noted deficiencies in the construction of the house on the premises, the plaintiffs took no further steps to secure bank or FHA financing in order to pay off the said promissory note to defendants.

30. After the said initial application for financing to Zions First National Bank on August 4, 1987, the plaintiffs made no further efforts to secure financing from that institution.

31. Plaintiffs made no further payments on the said Trust Deed Note after May 17, 1990; that the substituted Trustee under said Deed of Trust did notice a Trustee's Sale of said

property for September 25, 1990 at which sale the defendants entered a bid of \$42,000, which bid was accepted and a Trustee's Deed was issued to defendants for the subject property dated September 27, 1990. (Plaintiffs' Exhibit No. 10D)

32. Plaintiffs did not vacate the property until on or about September 25, 1990; that plaintiffs did not prior to said date tender the subject property back to the defendants nor did plaintiffs notify the defendants of any intent to repudiate or rescind the purchase of said property.

33. That upon retaking possession of said property on or about October 4, 1990, the defendants noted various items of damage to the subject property which defendants attributed to the plaintiffs (Defendants' Exhibit No. 48) The plaintiffs testified that they left the said property in as good or better condition than when plaintiffs took possession in 1987.

34. Plaintiffs claim attorney fees in the sum of \$13,736 based upon 205.9 hours at rates varying from \$75-\$100 per hour. Counsel for plaintiff testified without contradiction that such rates were reasonable and consistent with charges made in this area for like services and that the services performed were reasonably necessary in the presentation of plaintiffs' case.

Testimony was also proffered that a prior counsel for plaintiffs had charged plaintiffs \$2,987.44 for legal services performed in connection with this case. No testimony was proffered as to the rate at which prior counsel charged for his services, nor

was testimony proffered as to the reasonableness of such fee or the necessity therefor.

35. Defendants claim attorney fees in the sum of \$8,391.00, as shown by affidavit submitted by counsel for defendants without objection.

#### CONCLUSIONS OF LAW

Based upon the foregoing, the court concludes as follows:

1. Title to the property conveyed by defendants by Warranty Deed to plaintiffs on or about September 1, 1987 was marketable. However, no easement for access was mentioned therein.

2. Legal access from the subject property to a public road was represented by the defendants to be along the lane running north from said property. Plaintiffs have not sustained their burden of proof to support their claim that defendants represented that there was a legal access over the lane running south from the subject property.

3. Defendants did not misrepresent the condition of the house on said premises, plaintiffs having had adequate opportunity to inspect the same and having lived in the home for at least two years before raising any questions regarding any deficiencies in the construction thereof.

4. Defendants did not make any fraudulent or negligent misrepresentations to the plaintiffs regarding access to said property or regarding the condition of the home thereon.

5. Access to the property from the north was insured by the policy of title insurance obtained by the plaintiffs.

6. Defendants were not obligated to pursue legal access to the property from the south over the Tuckfield property.

7. Bank refinancing for the money owed to defendants under the Note and Trust Deed was reasonably available to plaintiffs had they pursued the matter further, particularly in view of defendants' willingness to pay for the construction deficiencies noted by the Millard County Building official and the lending institution appraisers.

8. No material mutual mistake of the parties has been shown by the evidence adduced by plaintiffs.

9. No material unilateral mistake on the part of plaintiffs has been demonstrated sufficient to support a rescission of the contract between the parties.

10. In any event, any rights which plaintiffs may have had to rescission under any state of facts was waived by the failure of plaintiffs to promptly notify defendants of plaintiffs' intention to rescind the contract and by plaintiffs' failure to tender back the subject property upon plaintiffs learning of the lack of legal access over the Tuckfield property and upon learning of alleged deficiencies in the construction of the house located on the subject property.

11. Plaintiffs have not produced evidence to support any award for punitive damages against the defendants.

12. Neither party has shown any legal basis to support their respective claims for attorney fees. The plaintiffs have not shown sufficient evidence to support their claims, and the defendants having purchased the property at the said Trustee's Sale, the provisions for attorney fees in the Note and Trust Deed were thereby extinguished.

13. Plaintiffs' complaint and all causes of action alleged therein should be dismissed "no cause of action."

14. Defendants' counterclaim should be dismissed "no cause of action," such claims having been obviated by the Trustee's Sale.

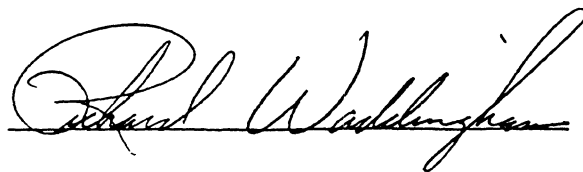
15. Each party should assume their own costs of court and attorney fees.

DATED this 22 day of January, 1992.

  
CULLEN Y. CHRISTENSEN  
DISTRICT COURT JUDGE

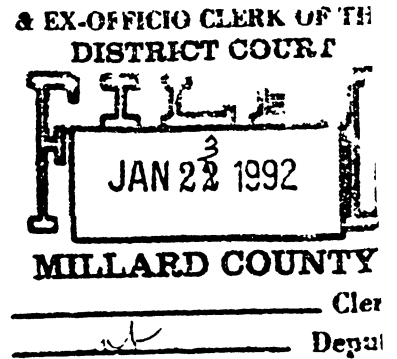
#### CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Defendants' Findings of Fact and Conclusions of Law to David Lambert, attorney for plaintiffs, Howard, Lewis & Petersen, P.O. Box 778, Provo, UT 84603, postage prepaid, this 8<sup>th</sup> day of January, 1992.



( "E" )

RICHARD WADDINGHAM #4766  
WADDINGHAM & PETERSON  
Attorneys for Defendants  
362 West Main  
Delta, UT 84624  
(801) 864-2748



IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
MILLARD COUNTY, STATE OF UTAH

-----oo0oo-----

LARRY L. MOSTRONG and JENNIFER	:	
G. MOSTRONG,	:	
	:	
Plaintiffs,	:	JUDGMENT
	:	
-vs-	:	
	:	
LEEROY JACKSON and MARGARET R.	:	
JACKSON,	:	Civil No. 8616
	:	
Defendants.	:	Honorable Cullen Y. Christensen

-----oo0oo-----

The above-entitled matter came on regularly for trial on October 28 and 29, 1991 before the Honorable Cullen Y. Christensen, District Judge, sitting at Fillmore, Millard County, Utah, and the trial not having been completed on that date, further evidence and closing arguments were heard on December 9, 1991 in Provo, Utah County, Utah.

The plaintiff appeared and was represented by counsel D. David Lambert, Esq. The defendant appeared and was represented by counsel Richard Waddingham, Esq. The Court having heard testimony and the evidence adduced by the parties in support of their respective positions; having reviewed the memoranda of counsel;

having reviewed the exhibits introduced into evidence at trial;  
having heard the arguments of counsel; and having entered its  
Findings of Fact and Conclusions of Law;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND  
DECREED:

1. Plaintiffs' complaint and all causes of action  
alleged therein are hereby dismissed "no cause of action".

2. Defendants' counterclaim is hereby dismissed "no  
cause of action".

3. Plaintiffs and defendants are each ordered to assume  
their own costs of court and attorneys' fees.

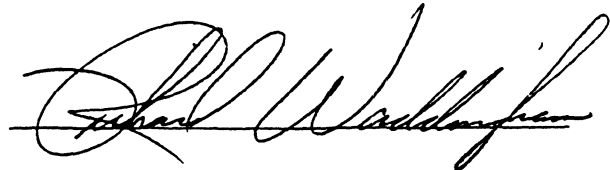
DATED this 22 day of January, 1992.

BY THE COURT:

  
CULLEN Y. CHRISTENSEN  
DISTRICT COURT JUDGE

#### CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of  
the foregoing Defendants' Judgment to David Lambert, attorney for  
plaintiffs, Howard, Lewis & Petersen, P.O. Box 778, Provo, UT  
84603, postage prepaid, this 8<sup>th</sup> day of January, 1992.





County had not as of that date employed a building inspector. (T.225:2-25).

As further pointed out above, Larry Mostrong's testimony that LeeRoy Jackson represented the home to be FHA approvable (T.151:6-10) is antithetical to LeeRoy Jackson's testimony that the only representation he made was that he had actually constructed the house. (T.280:15-20).

Larry Mostrong testified that he inspected the home prior to purchase (T.151:4-5); that he signed an Earnest Money Agreement accepting the home in its present physical condition (T.151:21-25, T.152:1-5); and that he did not enlist the help of a building inspector prior to purchase. (T.152:6-9).

Nevertheless, Mostronics resided in the home for approximately three years without any apparent difficulties with the structure or improvements.

Mostronics have not established fraudulent or negligent misrepresentation by "clear and convincing evidence". Modern Air Conditioning, Inc., at 816, 824.

**VI. MOSTRONICS HAVE FAILED TO ESTABLISH THAT THERE WAS A MATERIAL MUTUAL MISTAKE OF THE PARTIES REGARDING ACCESS TO THE PROPERTY OR CONSTRUCTION OF THE HOME.**

Mutual mistake requires that "...there is a clear *bona fide* mistake regarding material facts, without culpable negligence on the part of the person complaining...." Davie v. Brownson, 3 Wash. App. 820, 478 P.2d 258, 260 (1970) (Citing Lindberg v. Murray, 177 Wash. 43, 201 P.2d 759, 763 (1921)).

A party claiming mutual mistake must show that the mistake involved a "material fact" and "without culpable negligence" on the part of the person complaining. Davie, at 260.

The trial court determined that "[N]o material mutual mistake of the parties has been shown by the evidence adduced by [Mostrongs]." (Conclusion No. 8, R. 523)

Mostrongs suggest that there were clear *bona fide* mistakes regarding material facts as they related to access to the property and construction of the property. The issue regarding access has been addressed. The District Court found sufficient evidence to establish that there was proper legal access to the north lane. Furthermore, Mostrongs had possession of the property for approximately three years and obtained an easement to the south lane.

Mostrongs assertion that there were mutual mistakes of fact regarding construction of the home, has no merit. Financing was never denied because the home did not comply with UBC standards, it was denied because the FHA appraiser, Joseph Stott, was concerned about three or four minor construction items. (T.119:5-16; Ex. 18). Mr. Stott testified that in jurisdictions that had not adopted building codes, FHA has its own standards. Mr. Stott further testified that had the items he checked on his appraisal been corrected, there was nothing else he saw that would have been a problem. (T.125:2-25, T.126:1-2).

There was no material mutual mistake of the parties that the home was built strictly in accordance with the UBC, due to the fact that such alleged noncompliance with the UBC had absolutely no bearing on Mostrongs' ability to obtain financing. In June of 1991, Mostrongs hired a building inspector, Charles V. Hugo, and a contractor, Carl Faulkner, to inspect the property and estimate

costs of construction problems.<sup>6</sup> (T.177:17-23). When asked which UBC manual he used during his inspection of the home, Mr. Hugo testified, "I didn't have a manual in my hand. I was going by past experience as an inspector and looking for, not necessarily code violations, but problems." (T.181:2-10). Mostrongs raised the issue regarding the UBC, after the fact, only in furtherance of their lawsuit.

It may be expected that homes that are constructed in a jurisdiction that have not adopted the UBC may well have some construction deficiencies. However, Steve Hatch, a real estate appraiser with 22 years experience (T.211:4-18), when asked whether all homes he inspects would have to meet the UBC, testified, "No...obviously the older ones may not meet the most up-to-date codes but still, if they are reasonably accepted market, they are in fact financed." (emphasis added) (T.220:17-25).

Mostrongs did not meet their burden in trial court that there was a material mutual mistake of the parties, nor have they marshaled the evidence on this appeal to challenge the Court's determination. It is well established that:

[t]he 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

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<sup>6</sup>Timely objection (T.186:9-12) was made on the grounds of relevancy on Mr Hugo's and Mr. Faulkner's testimony based on the fact that financing was not denied on account of the UBC violations and that the cost of correcting the items set forth in such inspection exceeded the cost of those items addressed by Valley Central Bank as listed in the Stott Appraisal. (Ex. 18) Furthermore, Faulkner's estimate of corrections was approximately twice the amount testified to by Butch Jensen. Faulkner testified that he did not have experience as a building inspector, but that he took a "punch list" evaluating what he felt were inadequacies with regard to the home. (T.195:10-23)

against the "clear weight of the evidence", and is thus clearly erroneous when applied to the foregoing legal principles.

Grahn v. Gregory, 800 P.2d 320, 327 (Utah Ct. App. 1990).

**VII. THE DISTRICT COURT PROPERLY DETERMINED THAT MOSTRONGS HAVE FAILED TO ESTABLISH THAT THERE WAS A MATERIAL UNILATERAL MISTAKE ON THEIR PART TO SUPPORT A RESCISSION OF THE CONTRACT BETWEEN THE PARTIES.**

Utah Courts have defined unilateral mistake as consisting of the following elements:

- 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*.

Mostrongs have not established that there was a mistake of "so grave a consequence" that to enforce the contract as actually made would be unconscionable, nor have Mostrongs established that there was a mistake of a "material" feature of the contract.

It has been established that there was legal access from the property across the north lane to a public road. It has further been shown that Mostrongs cannot claim they exercised ordinary diligence in ascertaining the status of the south lane in determining whether a legal easement existed south of the property.

Valley Central denied financing due to four minor construction deficiencies. Such noted deficiencies were not "material" to the contract. Mostrongs' witness, Mr. Hugo, gave his general impression of the home as "nice looking" with "a few problems

that were correctable", and that could be fixed within a few days. (T.182:18-20, T.183:13-19). Millard County Building Inspector, Jerry Reagan, testified that he could not find any major construction problems with the home and what he did see as problems were minor. (T.230:9-18).<sup>7</sup>

Jacksons would be seriously prejudiced by a rescission of the contract, based on the extended time they gave Mostrongs to obtain financing, Mostrongs' continuous occupation of the property, Jacksons' lost rent and subsequent expenses in restoring the property.

It is evident from the arguments made above, that there was not a material mistake regarding financing, lack of access or material structural defects of the home.

Mostrongs fail to marshal the evidence to support the Court's finding and conclusion that there was no material unilateral mistake on the part of Mostrongs sufficient to support a rescission.

VIII. THE DISTRICT COURT CORRECTLY DETERMINED THAT BANK REFINANCING FOR MONEY OWED TO JACKSONS UNDER THE NOTE AND TRUST DEED WAS REASONABLY AVAILABLE TO MOSTRONGS HAD THEY PURSUED THE MATTER FURTHER, PARTICULARLY IN VIEW OF JACKSONS' WILLINGNESS TO PAY FOR THE CONSTRUCTION DEFICIENCIES NOTED BY THE MILLARD COUNTY BUILDING OFFICIAL AND THE LENDING INSTITUTION APPRAISERS.

A. Mostrongs' Acquisition Of An Easement Over The South Lane Of The Property And Jacksons' Willingness To Correct The Construction Deficiencies, Guaranteed Mostrongs Financing.

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<sup>7</sup>Wilford Jensen's testimony establishes that the cost of correcting those items noted on Joseph Stott's appraisal would be approximately \$1,348. (T.265:11-25, T.266:1-25, T.267:1-17). Furthermore, Mostrongs' expert witness, Mr. Faulkner, testified it would take approximately one to two days to correct such deficiencies. (T.199:5-7). This shows that such problems were not "material" to the construction of the home.

Mostrongs submitted to Valley Central Bank in support of their loan application the Millard County commitment to accept the south lane as a county road, and testimony is un rebutted that access was no longer an issue to financing. (T.41:25,T.42:1-11).

It has been shown that Valley Central Bank's refusal to accept the loan application was due to those minor construction deficiencies noted on Joseph Stott's appraisal. (T.220:17-25). Nevertheless, in a show of good faith, Jacksons offered to correct any construction deficiencies associated with the home at Jacksons' cost. (Exs. 34, 35;). Furthermore, Jacksons left the door open by stating that even though they were going forward with the Trustee's Sale, they would correct the construction deficiencies if they could get a commitment from Mostrongs for financing by the date of the sale. (T.288:5-18; Ex. 34, 35; Addendums D, E; Finding No. 28, 29, R. 525, 526).

Jacksons never received a reply from Mostrongs to said offers, (T.288:5-18) nor did Mostrongs tender the property back to Jacksons or request a rescission of the contract. (T.289:8-14,T.290:17-23,T.100:12-19)

**B. Mostrongs' Efforts To Obtain Financing Were Not Reasonable.**

The trial court's findings show that 1) Zions First National Bank was willing to loan the necessary financing after Larry Mostrong established residency and verification of income in Utah for two years (T.71:8-17,T.153:1-19); Mostrongs made no application for financing from September 1, 1987 until approximately the time the Note became due on September 1, 1989 (T.72;7-13); Jacksons offered to carry financing for Mostrongs for an

additional year upon certain conditions—Mostrongs refused. (T. 286:7-17). After all apparent impediments to financing were removed, Mostrongs took no further steps to obtain bank or FHA financing in order to pay off the Note. (The aforementioned facts support Finding No. 13, R. 531; Finding No. 18, R. 529; Finding No. 24, R. 528; and Findings No. 29 and 30, R. 526).

Mostrongs argue that it would have been an exercise in futility to attempt financing before September 1, 1989, because of the two-year waiting period required to establish Larry Mostrong's residency and income verification in Utah.

The irony in Mostrongs' argument is that, if Larry Mostrong was required to establish a two-year residency in Utah for verification of income, under no possible circumstances could Mostrongs ever have qualified for financing. The record is clear that Larry Mostrong resided in California during much of the time the contract was in effect and that he could not have established the required proof of residency and income in Utah at the time the Note became due. (T.73:21-25, T.74: 1-7, T.98:16-22, T.149:13-25, T.150:1-17, T.153:2-27; Finding No. 18, R. 529).

The cases cited by Appellants in support of this argument are inapposite. (Appellants' Brief P. 30). In each such case the prospective buyer was denied financing for "insufficient income".

**IX. THE DISTRICT COURT CORRECTLY DETERMINED THAT ANY RIGHTS WHICH MOSTRONGS MAY HAVE HAD TO RESCISSION UNDER ANY STATED FACTS WERE WAIVED BY THE FAILURE OF MOSTRONGS TO PROMPTLY NOTIFY JACKSONS OF MOSTRONGS INTENTION TO RESCIND THE CONTRACT AND BY MOSTRONGS FAILURE TO TENDER BACK THE PROPERTY UPON MOSTRONGS LEARNING OF THE LACK OF LEGAL ACCESS OVER THE SOUTH LANE AND UPON LEARNING OF ALLEGED DEFICIENCIES IN THE CONSTRUCTION OF THE HOUSE LOCATED ON THE PROPERTY.**

Utah law is well established as to the responsibilities of the party who elects to rescind a contract. In Parry v. Woodall, 438 P.2d 813, (1968) the Utah Supreme Court announced the responsibility of a party who elects rescission as a remedy. In ruling that a party had waived his right to rescission of the contract, the Court stated: "...one who claims he has been deceived and elects to rescind his contract by reason of fraud or misrepresentation of the other contracting party must act promptly and unequivocally in announcing his intention". (emphasis added) Id., at 815.

The Court further stated:

The law is well settled that one electing to rescind a contract must tender back to the other contracting party whatever property of value he has received. Woodall elected to retain possession of the corporate assets and to carry on the business until it was taken over in the receivership proceedings. We are of the opinion that Woodall waited too long, and that he cannot now rescind the contract.

Id., at 815.

Waiver has been defined as "the voluntary and intentional relinquishment of a known right" and may be either express or implied. 5 Williston on Contracts, § 678 (3rd Ed. 1961). Express waiver, when supported by reliance thereon, excuses non-performance of the waived condition. 5 Williston on Contracts, § 679 (3rd Ed. 1961); Restatement (2d) of Contract, § 84(1)(1981).

In considering waiver of a breach of a contract condition, the Idaho Supreme Court stated in C.I.T. Corporation v. Hess, 395 P.2d 471 (1964) that:

Assuming plaintiff's breach was of a nature sufficient to discharge defendant's obligation to perform, it is well recognized that the obligation of a party under a bilateral contract may be recreated by