

2015

**Rjw M Edia, Inc., Plaintiff and Appellant, v. Chock H Eath and
Timbers Investments I, LLC Defendant and a Ppellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RJW MEDIA, INC.,
Plaintiff and Appellant,

v.

CHUCK HEATH AND TIMBERS INVESTMENTS I, LLC
Defendant and Appellee

APPELLEE'S BRIEF

On appeal from the Third Judicial District Court, Summit County, Honorable Ryan
M. Harris, District Court No. 130500240

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INTRODUCTION

The trial court did not come close to abusing its discretion by allowing Sean Lewis to testify. His anticipated testimony was adequately disclosed and timely supplemented. And even if the supplement was untimely, RJW was not prejudiced. Heath's supplemental disclosure explained that Lewis would testify that "a dwelling requires cooking facilities and more particularly, the structure needs to be plumbed with a 220V outlet for a stove." (R.2612.) Heath had staked out this exact position six months earlier in the report of his retained expert, Eric Hoff. (R.2580-84.) And Heath's architect was deposed and testified that the "county defines accessory dwelling units" to require "a range that would require a 220 outlet or a gas line." (R.1808.) Thus, RJW cannot plausibly claim that it was surprised by anything Lewis testified about. Indeed, this is precisely why RJW objected that Lewis's testimony was "cumulative and duplicative." (R.2562.)

But even if RJW could prove that the trial court abused its discretion in allowing Lewis to testify, RJW cannot meet its additional burden: proving that the error was harmful, *i.e.*, that it changed the outcome. RJW ignores the fact that it had the ultimate burden of proving that Heath breached the CC&Rs. As a result, RJW's brief inadvertently demonstrates that the alleged error was harmless. RJW accepts the trial court's conclusion that the "practice and policy" of Summit County was applicable to this question. (Appt. Br. at 44.) And RJW

argues that Lewis was the only witness to testify “regarding Summit County’s practice and procedure for determining whether a structure was residential.” (Aplt. Br. at 43, 45.) RJW then concludes: “*Without Lewis’s testimony, the district court lacked evidence to determine whether the carriage house was a residence.*” (Aplt. Br. at 44 (emphasis added).)

That gets it backwards. To RJW, this means the allegedly erroneous admission of Lewis’s testimony was ultimately prejudicial; but in fact it shows just the opposite. Because RJW had the burden of proving that the carriage house was a residence, RJW’s assertion that, absent Lewis’s testimony, “the district court lacked evidence to determine whether the carriage house was a residence” is fatal to RJW’s second-residence claim. Nowhere in its brief does RJW even argue that, absent Lewis’s testimony, RJW affirmatively proved its case. And for good reason: Lewis’s testimony did not change the outcome.

Besides that, RJW’s assertion that Lewis was the only witness to testify about the “residence” issue is incorrect. As noted, RJW moved to exclude Lewis’s testimony because it was “cumulative and duplicative.” (R.2562.) And indeed it was. Two architects—Hoff and Michael Upwall—also testified that, in their experience with the policy and practice of Summit County, Heath’s carriage house did not qualify as a residence. (R.2809:53; 2810:39-40.) That conclusion fully comports with the ordinary meaning of “residence” and “single family

dwelling,” which ultimately governs the interpretation of the CC&Rs. Thus, RJW is correct that the trial court lacked evidence that the carriage house *was* a residence; but there was ample evidence, even absent Lewis’s testimony, that the carriage house *was not* a residence. For this reason also, any error in admitting Lewis’s testimony was harmless.

Likewise, at trial RJW had the burden of proving that under the CC&Rs Heath did not get proper approval for his project. On appeal, RJW has the additional burden of proving that the trial court’s decision on this issue was clearly erroneous. But instead of showing clear error, RJW asserts that the “record evidences extreme confusion regarding the plans at issue in this case and when and to whom various sets of plans were submitted.” (Aplt. Br. at 47.) Alleged evidentiary “confusion” does not equal clear error, much less prove a party’s affirmative case. And contrary to RJW’s arguments, the record is, in fact, quite clear that Heath submitted “complete plans” that were approved by the HOA. Three witnesses, Heath, Upwall, and Michael Stoker, all testified that complete plans were submitted and approved.

RJW’s effort to undermine this testimony only undermines its own case. RJW argues that the approved plans were not *complete* plans because there is some suggestion in the record that the plans changed after Heath received approval. RJW argues that the “record is thin as to what took place following the

[approval].” (Aplt. Br. at 18.) But that doesn’t support its appeal because RJW can’t actually prove that the plans changed — the record is too “thin.”

RJW also acknowledges that “there is no evidence in the record that the plans approved by Stoker and the AC [*i.e.*, the HOA’s Architectural Committee] are the plans that Heath ultimately had submitted to the county and for which Heath received a building permit.” (Aplt. Br. at 48.) This might be persuasive if Heath had the burden of proving that the plans were the same. But again, because *RJW* bears the burden, the lack of evidence of any difference between the plans approved by the AC and the plans approved by the county defeats its case. Tellingly, *RJW* offered no evidence that the residence Heath actually built differs in any material way from what the AC approved. *RJW*’s speculation about the possibility that the plans changed is not a basis for reversal.

Heath asks this Court to affirm the trial court on both issues raised on appeal. On the first issue, allowing Lewis to testify was well within the trial court’s discretion and, by *RJW*’s own admission, any error was harmless. On the second issue, the decision of the trial court, as the factfinder, is not against the clear weight of the evidence.

STATEMENT OF JURISDICTION

Jurisdiction exists under Utah Code § 78A-4-103(2)(i).

ISSUES PRESENTED

1. Sean Lewis was one of three credible witnesses to testify about the policy and practice of Summit County in determining whether a structure is a residence. As RJW noted, Lewis's testimony was "cumulative and duplicative." And RJW offered no contrary evidence. Assuming arguendo that the trial court erred in allowing Lewis to testify, the first issue is whether that error was harmless.¹

Standard of Review: An error is harmless "if, upon a review of the record, there is clear evidence to support the trial court's ultimate conclusion." LePet, Inc. v. Mower, 872 P.2d 470, 473 (Utah App. 1994) (quotation marks omitted).

2. Heath disclosed Lewis as a nonretained expert six months before trial and gave a brief description of his anticipated testimony. Heath supplemented that disclosure after interviewing Lewis. Lewis's testimony did not introduce any new issues. And RJW did not move to strike Lewis's testimony until four days before trial. The second issue is whether the trial court abused its discretion by allowing Lewis to testify.

Standard of Review: "The trial court is afforded broad discretion to admit or exclude evidence, and we will disturb its ruling only for abuse of discretion." Lawrence v. Mountainstar Healthcare, 2014 UT App 40, ¶ 16. In reviewing for

¹ If the answer is yes, then the Court need not address the second issue.

abuse of discretion, the court “will not reverse a trial court’s ruling on evidence unless the ruling was beyond the limits of reasonability.” Id.

3. Three witnesses testified that “complete plans” were submitted to and approved by the HOA. RJW submitted no evidence that what Heath actually built differs in any way from the plans that were approved. The third issue is whether the trial court’s finding that plans were appropriately submitted and approved was against the clear weight of the evidence.

Standard of Review: “When reviewing a bench trial for sufficiency of evidence, we must sustain the trial court’s judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made.” Spanish Fork City v. Bryan, 1999 UT App 61, ¶ 5 (quotation marks omitted).

STATEMENT OF THE CASE

Nature of the Case. RJW Media, Inc. contends that the carriage house Chuck Heath constructed violated the CC&Rs. RJW sued Heath for breach of contract and nuisance, and sought declaratory judgment and an injunction. (R.1-13.)

Course of Proceedings and Disposition Below. RJW’s complaint alleged sixteen violations of the CC&Rs. The trial court granted summary judgment on 13 of the 16 claims. (R.2727-45.) RJW has not appealed that ruling.

A bench trial was held on the three remaining claims: (1) whether the HOA approved the carriage house as required by Article II, Section 2 of the CC&Rs; (2) whether the carriage house exceeded the height limitations in Article IV, Section 5 of the CC&Rs; and (3) whether the carriage house violated the one-residence limitation in Article IV, Section 1 of the CC&Rs. (R.3018-20.) Over RJW's objection, Sean Lewis, the Summit County planner, was allowed to testify as a nonretained expert on the third issue. (R.2808:15-17.)

The court ruled in Heath's favor on all three issues, finding that RJW had not proven by a preponderance of the evidence that Heath breached the CC&Rs. (R.3017-35.) RJW appeals two of the three issues: (1) whether the carriage house was a second residence, and (2) whether Heath received the required approval from the HOA.

STATEMENT OF FACTS

Facts Related to the Disclosure of Sean Lewis. Heath disclosed Lewis as a non-retained expert on September 27, 2013—almost six months before trial. (Aplt. Br. Add. B.) Lewis was listed along with several others with the following description of their anticipated testimony:

Defendants/Counterclaimants identify the following “non-retained” experts as they provided architectural, planning, construction, and or design services for the Heath project. Additionally, these witnesses may be asked to provide specific architectural design,

construction, or general building opinions regarding the Heath carriage house

(Aplt. Br. Add. B.) RJW did not object or ask for additional information.

Lewis was known to the parties because he was involved in the approval process for the construction on Heath's lot. (R.190.) In fact, on October 25, 2013, RJW disclosed Lewis as a possible fact witness. (R.806-08.)

After an amended scheduling order, on December 20, 2013, Heath again disclosed Lewis as a nonretained expert, with the same description that was previously given. (R.955-65.) RJW again did not object or ask for additional information.

On March 3, 2014, after "several failed attempts," Heath's counsel was able to interview Lewis. (R.2666.) Heath supplemented his disclosures the next day by explaining more specifically that Lewis would testify about what a *dwelling* or *accessory dwelling* is under the Snyderville Basin Development Code ("SBDC"):

Sean [Lewis] was already included on our witness list and is expected to testify that a dwelling or accessory dwelling, under the [SBDC] and the County's interpretation thereof, the carriage house/garage is not a dwelling/accessory dwelling/residential unit. Mr. Lewis is expected to testify that a dwelling requires cooking facilities and more particularly, the structure needs to be plumbed with a 220V outlet for a stove.

(R.2612.)

Three days later, just four days before trial, RJW filed a motion to exclude Lewis. (R.2556-2618.) RJW argued that the initial description of Lewis's anticipated testimony was inadequate and the supplemental disclosure was untimely. (R.2561.) RJW said it would be "severely prejudiced" if Lewis was allowed to testify, but that Heath would not be prejudiced "because he has already designated Eric Hoff to testify about these very same matters" so that "the expected testimony of . . . Mr. Lewis is cumulative and duplicative of testimony that is already expected to be introduced at trial." (R.2562.)

Indeed, Lewis's proposed testimony was nothing new. On September 27, 2013, the same day Lewis was initially disclosed as a nonretained expert, Heath designated Eric Hoff as an expert. (R.2558, 2580-84.) Hoff's report explained that the carriage house was not a *Dwelling Unit* or *Dwelling Unit Accessory* under the SBDC—the exact issue Lewis would testify about. Hoff's report explained:

[Section] 10-11-1.103 of the [SBDC] defines *Dwelling Unit* as:

"A building or portion thereof containing living facilities, including provision for sleeping, eating, cooking, and sanitation, and is intended for occupancy by a family and its guests, independent of other families; may also be referred to as a dwelling."

The Heath Carriage House does not contain provisions for cooking, specifically wiring or plumbing for a cooking range, and therefore cannot be considered a *Dwelling Unit*. . . .

[Section] 10-11-1.104 of the [SBDC] defines *Dwelling Unit, Accessory* as:

"A structure or a portion of a structure which is used by the owner of the primary residency or primary tenant as a dwelling for the private use of the property owner's relatives, domestic help, caretakers, nursing staff, house guests, or similar users. An accessory dwelling unit shall contain cooking, sanitation, and sleeping facilities."

Once again, the Heath Carriage House does not contain provisions for cooking, specifically wiring or plumbing for a cooking range, and therefore cannot be considered an Accessory Dwelling Unit.

(R.2584.)

On November 11, 2013, RJW served the rebuttal report of its expert, Rick Brighton. (R.2586-94.) Brighton offered his contrary opinion that the carriage house was a *dwelling* under the SBDC:

The carriage house/garage contains habitable living space on its second level. Specifically, the second story includes electrical, mechanical and plumbing sufficient for sleeping, eating, cooking and sanitation. As such, under the [SBDC], it constitutes a dwelling or habitable living space. See Code §§ 10-11-1.103 and 10-11-1.104. In fact, the second level includes a wet bar and kitchen. For these reasons, the second story violates the CCRs because it is a second residential structure on one lot.

(R.2588.)

Heath filed a motion for summary judgment in January 2014 that raised this issue. (R.972, 997.) In support, Heath cited the deposition testimony of his architect, Michael Upwall. Upwall testified that the carriage house was not a residence because it did not have a stove:

You would not be able to install a—I believe the way the county defines accessory dwelling units is number of cooking—so if you did a range that would require a 220 outlet or a gas line, you cannot have that. Could you put a microwave in there and pop popcorn? Yes. . . . But . . . there is no range, which would imply cooking.

(R.1808.)

And in a declaration supporting his motion, Heath testified that the carriage house was not a residence because it “does not provide for sleeping,” there is “no bed,” it “does not contain a stove, nor does it have a gas line or 220 volt outlet for a stove,” and Heath had “no intent to use [it] for residential purposes, or as habitable living space, or as a dwelling.”² (R.1825.)

Thus, when Heath supplemented his description of Lewis’s anticipated testimony to explain that he would testify “that a dwelling requires cooking facilities and more particularly, the structure needs to be plumbed with a 220V outlet for a stove” (R.2612), RJW’s objection that this proposed testimony was “cumulative and duplicative” was not off base.³

² The trial court denied Heath’s motion for summary judgment on this issue because of “conflicting evidence concerning the features of the second level of the carriage house/garage, such as whether there is a kitchen or a bathroom.” (R.2739.)

³ There is, of course, nothing wrong with cumulative or duplicative testimony. Having four architects support your position is better than having three.

District Court Rules That Lewis Can Testify. The trial court heard RJW's motion to exclude Lewis on the first day of trial. RJW's counsel argued that Lewis was "going to be testifying about something that has never been on the horizon with respect to how the building code is interpreted." (R.2808:9-10.) The court ruled:

With regard to Mr. Lewis . . . that is a close call in this case. He was disclosed. The disclosure, probably, is a little too generic, but what's supposed to happen, at that point, I think, is we have a disclosure. We have these, sort of, generic disclosures that you've made as a matter of practice.

[RJW's counsel] got to decide, based on that, whether he's going to depose these guys or not and it seems, to me, that there, probably, is some obligation on the part of [RJW], at that point, to say, hey, I don't have enough information. Please give me more information. Your disclosure is, in my view, insufficient and, if no response is forthcoming, I think at that point [RJW] would be well-positioned to say, hey, these folks shouldn't be allowed to testify.

On the other hand, I'm not sure it's fair to take a disclosure that is, sort of, borderline and not raise any objections to it until the eve of trial.

So I'm going to allow Mr. Lewis to go ahead and testify. He was disclosed. Even though the disclosure was borderline, I'm going to allow the testimony to come in.

(R.2808:15-17.) The court also expressly ruled that Heath's September and December 2013 disclosures satisfied the requirements of Rule 26(a)(4)(E). (R.2808:17.)

Evidence at Trial Regarding the Carriage House. The one-residence rule of Article IV, Section 1 of the CC&Rs governs the dispute over the carriage house:

Number and Location of Buildings. No buildings or structures shall be placed, erected, altered, or permitted to remain on any Lot other than one single family dwelling—together with related nonresidential structures and improvements.

(R.105.) The parties agree this provision limits construction to a single “residence,” but disagree on whether the carriage house constitutes a second residence.

“All four of the architects that testified at trial [Brighton, Upwall, Stoker, and Hoff] agreed that, to be a residence, the carriage house needed facilities for cooking, sleeping, and living—in other words, it needed a kitchen, bedroom, and a bathroom.” (Aplt. Br. at 42.) RJW’s expert, Rick Brighton, offered his opinion that the carriage house was “basically, a two-car garage with an office on top” and that the office contained “habitable space” because “it has electrical service. It has heat. It has plumbing. It has all the requirements—basically, passes all the requirements for occupancy.” (R.2808:85.) Brighton was then asked about the SBDC:

Q. Okay. For purposes of eating and cooking facilities, what are the requirements, as you understand them? In other words, does there have to be a stove? Does there have to be a particular—

A. Well, it's not overly defined in the code, other than it just says eating, cooking and sanitation, which is pretty broad, but eating. I mean, there's a table with chairs. I suppose you would need dishes as well. Once again, it's very capable of satisfying those requirements.

(R.2808:86-87.)

On cross-examination, Brighton testified that he did not know how Summit County interpreted the SBDC on the precise issue of cooking facilities: "I'm not sure what the county says. All they say is cooking. That's their definition. There isn't an elaboration on that term." (R.2808:107-08.) RJW presented no other evidence on this issue.

Michael Stoker, the independent architect hired to advise the HOA, offered his opinion that the carriage house was not a residence:

Q. And how do you reach that conclusion?

A. Well, for me, a residence is something that includes a sleeping area. So, you can't reside in a structure such as a garage or an office without cooking facilities and bathrooms and bedrooms. So, to me, the dwelling would mean the house, not the accessory building.

(R.2808:181.)⁴

⁴ Stoker was asked for his understanding of how Summit County applies the relevant provisions of the SBDC, but an objection to the question was sustained. (R.2808:181-82.) RJW is correct that Stoker did not specifically testify that a 220-volt outlet is required. This means there were three witnesses, not four, who testified about this requirement.

Heath's architect, Michael Upwall, also testified that the carriage house did not violate the CC&Rs: "It is a nonresidential structure." (R.2809:53.)

Q. Okay and what would make something a residential structure?

A. If it had the facilities to support life, to live there, to cook, to sleep, to—I believe the county holds it to the definition of is there a possibility for, or plumbed, or the intention for a range and either a 220 volt range or a gas range for cooking appliance.

Q. Okay and you know that based on your experience?

A. Yes.

(R.2809:53.)

The disputed witness, Sean Lewis, testified about how Summit County interprets the SBDC:

Q. What are the elements that you use in determining whether or not a particular room or couple of rooms are a residence?

A. Residence—we use the definitions as found in the [SBDC] In general, a residence will have three elements: cooking, sleeping, and living facilities. So, generally, it will have a kitchen, a bedroom and a bathroom.

Q. All right. Do you consider [a] microwave a kitchen or cooking facility?

A. It has been the practice of the department that a microwave, by itself, would not. It would require an oven or a stove, a refrigerator, a sink.

Q. And let's assume I brought you a project . . . and it didn't have a stove in it, but it had 220 electrical outlet in what might be considered the kitchen area or it was plumbed for natural gas in what might be considered the kitchen area, how do you look at it?

A. It depends on the situation and the plans. We would look at those as what the intent are and what is labeled on the plans. If it's labeled on the plans as storage areas, but there's, obviously, hook-ups that could be connected to kitchen appliances that are commonly found, we might consider that a kitchen but, in general, it all depends on what it's labeled on the plans and what the plans state.

Q. And if it's just a 110 outlet is all you have, would you consider that [a] hook-up for an oven or a stove, cooking facilities?

A. Generally, no.

(R.2809:248-49.)

The final witness at trial was Heath's retained expert, Eric Hoff. He also testified that the carriage house was a nonresidential structure. (R.2810:39.) He reached this conclusion by looking at several different things, including the SBDC. (R.2810:39.) He testified specifically that it wasn't a *dwelling unit* as that term is defined in the SBDC:

Q. Okay and how do you reach that conclusion?

A. One, it doesn't have what is, in my opinion, a cooking facility. . . . It's lacking a stove or the facilities to put a stove in, whether it would be a natural gas plumbed into that counter area or a 220 outlet in there, which is typically required, and that's been my experience in all the different jurisdictions where I've designed these type of structures. . . .

(R.2810:40.)

Ruling That the Carriage House Was Not a Residence. The trial court interpreted Article IV, Section 1 of the CC&Rs as follows: "The Court interprets

the intent of this provision is to restrict the number of residential structures on a Lot.” (R.3031.) The court then explained that the relevant definitions require looking at the intent and content of the structure to determine whether it was a residence. (R.3031-32.) RJW does not claim this interpretive framework is erroneous.

Regarding intent, the court concluded: “No evidence has been presented that the Carriage House was designed and intended for use and occupancy as a residence or dwelling by Mr. Heath or any other person.” (R.3032.)

Regarding content, the court concluded that “Summit County does not consider a building to be a dwelling if it does not contain a full kitchen, including a 220-volt wiring or natural gas plumbing for a stove.” (R.3033.) The court relied on testimony from four witnesses. The court found that Upwall testified that “under the applicable provisions of the [SBDC] and the County’s policies and practice, a structure is not considered a dwelling unless it contains cooking facilities that require a 220-volt electrical system, or natural gas system sufficient for a stove or range, and that a microwave oven is not considered cooking facilities.” (R.3025.) The court found that Eric Hoff testified that “[b]ased on his experience and review of the applicable codes,” the carriage house “is not a ‘dwelling’ or residence as defined under the CC&Rs or [SBDC]” because it does not contain “a full kitchen that includes a stove and the wiring or plumbing for a

stove, in particular a 220 volt wiring or other natural gas plumbing for a stove.” (R.3026-27.) The court found that Michael Stoker testified that the carriage house “is not a single family dwelling or residence.”⁵ (R.3026.) Finally, the court pointed to the testimony of Sean Lewis:

Mr. Lewis testified that it is Summit County’s policy and practice that cooking requires a full kitchen, including provision for a stove that requires 220 volt wiring or natural gas plumbing for a stove or range, and that a microwave oven does not qualify as a cooking facilities [sic] sufficient to meet the definition of a dwelling.

(R.3027.)

After reciting the testimony from these four witnesses, the trial court concluded: “The Court considers the policy and practice of Summit County to be applicable in this instance and since the Carriage House does not contain (and was not designed to contain) a full kitchen it does not meet the criteria to be considered a ‘single family dwelling.’” (R.3033.) Finally, pointing back to both intent and content, the court concluded: “Thus, the Carriage House does not meet the ‘intended use’ or ‘design’ requirements to be considered a ‘single family dwelling.’” (R.3033.)

Evidence Regarding Approval of “Complete Plans.” In early September 2012, Heath submitted his first set of plans to the HOA and its independent

⁵ As noted above, the court mistakenly found that Stoker specifically testified that a 220-volt outlet was required. Stoker did not mention this precise requirement, but did offer his opinion that the carriage house was not residence.

architect, Stoker. (R.2808:144; Pl. Exhs. 4 & 5.) In those plans, the garage and office were attached to the house. (R.2808:155; 2809:115.) Heath's architect redesigned the plans with a detached carriage house. (R.2809:14, 90-91, 106-09, 113.) Heath submitted this second set of plans to Stoker and the HOA in early October 2012. (R.2809:40; Def. Exh. R.)

Heath testified that these were "full plans, complete plans." (R.2809:127-28.) Upwall testified that Heath "could not begin any construction until we had the plat amendment" from the County and that he couldn't get the plat amendment approved without approval from the HOA. (R.2809:40.) "So, we went in with the full package to the HOA to get their approval." (R.2809:40.) Stoker also testified that these were "complete plans" even if they were not the final, approved plans: "Well, they, certainly, they weren't finished to go to the building department for a building permit, but they were far enough along for the HOA and the architectural committee to do a review on it." (R.2808:161-62.)

Stoker reviewed these plans and, on October 9th, sent a letter to Joseph Tabacco, President of the HOA and chair of the AC, recommending that Heath's plans be approved, contingent on the County's approval of the plat amendment. (Def. Exh. R; Pl. Exh. 9; R.2808:157.) Stoker testified that his letter was intended to recommend final approval under the CC&Rs, not just contingent approval so that Heath could seek the plat amendment. (R.2808:179.)

Stoker's letter noted six issues that needed to be addressed. (Pl. Exh. 9.) Tabacco testified that "Mr. Upwall addressed the issues that Mr. Stoker had raised in his letter and he did so point-by-point and I was satisfied." (R.2809:221.) Tabacco then "specifically communicated [to the AC] that we had received responses to Stoker's issues and that Mr. Stoker's recommendation was that the plans, as presented, were good to go for final approval." (R.2809:221.) Tabacco received approval from the other members of the AC and then sent an approval letter to Heath, dated October 10, 2012. (R.2809:222-24.) Tabacco testified that "the intent" of his October 10th letter "was to say that the HOA signs off on the final plans and on the amendments for the plat. The HOA, we're good to go. I was just communicating that to the county." (R.2809:225.)

On October 11, 2012, Tabacco emailed Heath and told him again that the HOA had approved his project. (Def. Exh. R.) Summing up, at trial Tabacco was asked, "Did the architectural review committee or the HOA approve Mr. Heath's [plans] for development on lot 17?" He responded, "Yes." (R.2809:226.)

Ruling that Complete Plans Were Approved. The trial court concluded: "The preponderance of the evidence indicates that Mr. Heath submitted his plans to the HOA and that the HOA approved Mr. Heath's proposed construction project." (R.3028.) "Mr. Heath was entitled to rely upon the HOA's approval," the court concluded, "and move forward with the construction on the Heath

Property.” (R.3028.) The court noted that there were questions about whether the HOA fulfilled its responsibility, but said that was not Heath’s problem:

Whether the HOA (as opposed to Mr. Heath) fulfilled its obligations under CC&Rs Article II and Design Guidelines Article II is not at issue here and, indeed, is the subject of separate litigation. The Court by these findings does not intend to, and does not, make any determination as to whether, and to what extent, the HOA complied with its obligations in this regard.

(R.3029.) What mattered to the court was that “Mr. Heath fulfilled his obligations” by obtaining approval before commencing construction. (R.3029.)

SUMMARY OF ARGUMENTS

Two legal claims are at issue on appeal. First, RJW claims that the “carriage house” is an unlawful second residence under the CC&Rs. Second, RJW claims that Heath violated the CC&Rs by failing to obtain the HOA’s approval of “complete plans” before commencing construction. RJW bore the burden on both issues at trial, and on appeal it has the burden of demonstrating that the factfinder’s conclusions were against the clear weight of the evidence.

I. Any error in allowing Sean Lewis to testify was harmless.

Even if the trial court erred by allowing Lewis to testify, that error was harmless. The trial court ruled – and RJW does not disagree – that two factors determine whether the carriage house was a residence: intent and content. The trial court correctly found that there was “no evidence” that Heath intended to

use the carriage house as a residence. And three other witnesses, besides Lewis, testified that the carriage house in fact was not a second residence. RJW's argument that "the [trial] court lacked evidence to determine whether the carriage house was a residence" (Aplt. Br. at 44) — as if lack of such evidence means RJW prevails — ignores the fact that RJW had the burden of proving its claim that the carriage house was an improper residence. Excluding Lewis's testimony would not have supplied RJW's missing evidence. Any error in admitting such testimony was thus harmless.

Alternatively, the trial court's ruling comports with the ordinary meaning of the terms "single family dwelling" and "residence" and thus satisfies the CC&Rs. A mere room over a garage — especially of the sort at issue here — is not generally understood to be a separate "dwelling" or "residence."

II. The trial court did not abuse its discretion by allowing Lewis to testify.

In any event, there are four reasons the trial court did not abuse its discretion in allowing Lewis to testify.

First, before moving to exclude Lewis based on incomplete disclosure, RJW was required to make "an effort to secure the disclosure . . . without court action." Utah R. Civ. P. 37(a)(3) (2011).⁶ Heath disclosed Lewis as a nonretained

⁶ Rule 37 was amended in 2015. All citations to Rule 37 in this brief are to the 2011 version.

expert six months before trial. RJW made no attempt to get additional information “without court action.” Instead, RJW waited until four days before trial and then moved to exclude Lewis. The trial court did not abuse its discretion by denying this motion because it was untimely and failed to comply with Rule 37.

Second, the trial court did not abuse its discretion by finding that the description of Lewis’s testimony was adequate under the circumstances. See Utah R. Civ. P. 26 advisory committee notes. Heath made several attempts to meet with Lewis but was unable to do so until shortly before trial. Under these circumstances, the initial description of Lewis’s anticipated testimony was consistent with Rule 26.

Third, there was no abuse of discretion because the supplemental description of Lewis’s testimony was timely. Heath provided a fuller description of Lewis’s anticipated testimony the day after he was able to interview Lewis. See id. 26(d)(1), 26(d)(5).

Fourth, if the supplemental disclosure was untimely, there was “good cause” for this failure and the untimeliness was “harmless.” See Utah R. Civ. P. 26(d)(4), 37(h). Good cause exists because Heath’s counsel made “several failed attempts” to meet with Lewis and supplemented the day after he was able to do so. There is no harm because Heath’s position on this issue was established

through several other witnesses long before the supplemental disclosure. Again, there was no abuse of discretion.

III. The trial court's conclusion that complete plans were submitted and approved is not against the clear weight of the evidence.

The factual record supports the trial court's conclusion that "Mr. Heath fulfilled his obligations" under Article II, Section 2 of the CC&Rs. (R.3029.) There was testimony from Heath, Upwall, and Stoker that the plans submitted to the HOA's AC were "complete." There is no dispute that those plans were approved. And RJW failed to submit any evidence that what Heath actually built differed in any way from the plans approved by the HOA. Further, harm is an essential element of a claim for breach of contract. Even if complete plans were not approved, RJW cannot prove any harm justifying the relief it seeks.

ARGUMENT

I. Lewis's testimony did not affect the outcome of the trial and, thus, any error in admitting his testimony was harmless.

RJW "bears two burdens on appeal: first, to demonstrate that the [trial] court erred by admitting [Lewis's] testimony . . . , and second, to show that there is a reasonable likelihood that a different result would have been reached absent the error." R.B. v. L.B., 2014 UT App 270, ¶ 39 (internal quotation marks omitted). See also Covey v. Covey, 2003 UT App 380, ¶ 21 ("On appeal, the appellant has the burden of demonstrating an error was prejudicial--that there is

a reasonable likelihood that the error affected the outcome of the proceedings.”) (quotation marks omitted). An error is harmless “if, upon a review of the record, there is clear evidence to support the trial court’s ultimate conclusion.” LePet, Inc., 872 P.2d at 473 (quotation marks omitted). “Even when the trial court has erred in its evidentiary decision, reversal is appropriate only in those cases where, after review of all the evidence presented at trial, it appears that absent the error, there is a reasonable likelihood that a different result would have been reached.” Lawrence, 2014 UT App 40, ¶ 16 (internal quotation marks omitted). This court will not “assume that allowing the testimony changed the result.” R.B., 2014 UT App 270, ¶ 40.

To be clear, as explained below, the trial court did not abuse its discretion by allowing Lewis to testify. But we start with harmlessness because it is the simplest way for the Court to dispose of RJW’s attack on the evidentiary ruling. First, there was ample evidence, even absent Lewis’s testimony, to support Heath’s position that the carriage house was *not* a residence. Second, RJW bore the burden of proof and now admits that without Lewis’s testimony, the trial court “lacked evidence to determine whether the carriage house was a residence.” (Aplt. Br. at 44.)

A. Even without Lewis's testimony, there was ample evidence that the carriage house was not a residence.

The trial court found that both the "intended use" and the "design" of the carriage house mattered when determining whether it was a residence. In its findings of fact, the trial court noted that "Heath testified that he does not nor does anyone else use the Carriage House as a residence or dwelling and that he does not intend it to be used for such," and that his architect, Upwall, "also testified that the Carriage House was not designed nor intended for use as a single-family dwelling." (R.3025.)

In its conclusions of law, the court says: "No evidence has been presented that the Carriage House was designed and intended for use and occupancy as a residence or dwelling by Mr. Heath or any other person." (R.3032.) In other words, on one of the two factors for determining whether the carriage house was a residence (i.e., intended use), the undisputed evidence supports Heath's position. The exclusion of Lewis would have made no difference on this point.⁷

As for the second factor (i.e., design), Lewis's testimony provided an additional layer of support, but it was, as RJW noted, "cumulative and duplicative." (R.2562.) The "cumulative" nature of erroneously admitted evidence is a frequent feature of harmless error. See Sandy City v. Salt Lake

⁷ RJW relegates this issue to a single footnote in its brief and does not seriously challenge the trial court's conclusion. (Appt. Br. at 44-45 n.20.)

County, 794 P.2d 482, 487 (Utah App. 1990) (“[A]ny error in admitting the administrative record . . . was harmless because it was essentially cumulative with respect to the evidence already before the court.”), rev’d on other grounds 827 P.2d 212 (Utah 1992).⁸

And Lewis’s testimony was, in fact, cumulative. RJW acknowledges that “[a]ll four of the architects that testified at trial agreed that, to be a residence the carriage house needed facilities for cooking, sleeping, and living.” (Aplt. Br. at 42.) RJW further concedes that two of the architects, besides Lewis, testified that a microwave does not constitute a kitchen and that a 220-volt outlet or a gas hook-up for a stove is required. (Aplt. Br. at 43.)

Yet RJW still argues that “Lewis’s testimony was the sole basis of the [trial] court’s decision that the carriage house is a ‘related nonresidential structure.’” (Aplt. Br. at 45.) RJW points to the trial court’s conclusion that “the policy and practice of Summit County [is] applicable in this instance” and argues that “none of the architects testified directly regarding Summit County’s practice and

⁸ See also State v. Bundy, 684 P.2d 58, 61 (Utah 1984) (“At best, her testimony was cumulative. If error was committed, it was harmless.”); State v. Thomas, 777 P.2d 445, 450 (Utah 1989) (“In view of the fact, however, that the officer’s testimony was merely cumulative to that already testified to by the victim, the error was harmless”); State v. Wilson, 771 P.2d 1077, 1085 (Utah Ct. App. 1989) (“Although the trial court improperly allowed Ms. Wilson to testify, we find the error harmless because Ms. Wilson’s testimony was either cumulative or not critical.”).

procedure for determining whether a structure was residential. Only Sean Lewis so testified.” (Aplt. Br. at 43.)

With respect, that’s not true. Both Upwall and Hoff testified directly regarding Summit County’s practice. Upwall specifically testified that “the county holds it to the definition of is there a possibility for, or plumbed, or the intention for a range and either a 220 volt range or a gas range for cooking appliance” and explained that he knew this based on his experience. (R.2809:53.) Hoff testified that he had experience as an architect on projects in Summit County. (R.2810:9.) He testified that he had reviewed the SBDC. (R.2810:11, 39.) And he was asked specifically whether the carriage house was a dwelling “under this definition” in the SBDC. (R.2810:39-40.) His response was that it was “lacking a stove or the facilities to put a stove in, whether it would be natural gas plumbed . . . or a 220 outlet in there, which is typically required, and that’s been my experience in all the different jurisdictions where I’ve designed these type of structures.” (R.2810:40.)

The trial court’s written ruling specifically refers to this testimony. The court credited the testimony of Mr. Upwall:

that under the applicable provisions of the Snyderville Basin Development Code and the County’s policy and practice, a structure is not considered a ‘dwelling’ unless it contains cooking facilities that require a 220-volt electrical system or a natural gas system sufficient for a stove or range, and that a microwave is not considered cooking facilities.

(R.3025 (emphasis added).) The court also credits the testimony of Eric Hoff:

Based on Mr. Hoff's experience and review of the applicable codes and regulations, a structure is not considered a residence or dwelling unless it contains a full kitchen that includes a stove and the wiring or plumbing for a stove, in particular a 220-volt wiring or other natural gas plumbing for a stove.

(R.3026-27 (emphasis added).)

Plus, there was another piece of undisputed evidence regarding Summit County's policy and practice as it applies to this case—perhaps the most persuasive evidence of all: *the County approved Heath's application for a building permit*. The trial court pointed this out during the trial:

The Court: I mean, the county approved this, right?

Mr. Egan: Yes, it did. Yes, it did.

The Court: So, presumably, the county doesn't think it's an accessory dwelling unit . . . or it wouldn't have approved it.

(R.2809:49-51.) Summit County plainly did not consider the carriage house a dwelling or residence, or it would not have approved it.

But in all events, what ultimately governs the legal meaning of terms like "single family dwelling" and "residence" under the CC&Rs, as RJW helpfully reminds us in its brief (Aplt. Br. at 46.), is their "ordinary and generally understood and popular sense." Holladay Duplex Mgmt. Co. v. Howells, 2002 UT App 125, ¶ 2, (quotation marks omitted). In this context, the ordinary sense of those terms is "the place where one actually lives" and "a building used as a

home.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 996 (10th ed. 1993). It was by no stretch “against the clear weight of the evidence,” Bryan, 1999 UT App, ¶ 5, for the trial court to conclude, after hearing the evidence and inspecting the site, that a mere room over Heath’s garage was not a second “single family dwelling” or “residence” in any ordinary sense of those words despite the existence of a toilet, fridge, and microwave.

In sum, there was ample evidence to support the trial court’s conclusion that the carriage house *was not* a dwelling or residence.

B. RJW admits it did not submit sufficient evidence to meet its burden of proof.

It was not Heath’s burden to prove that the carriage house was not a residence; rather, it was RJW’s burden to prove that it was. “The plaintiff has the burden of showing the contract breach” John Call Eng’g, Inc. v. Manti City Corp., 795 P.2d 678, 680 (Utah App. 1990) (quotation marks omitted).

RJW’s appeal rests on the premise that the “policy and practice of Summit County” was determinative, and that Lewis was the only witness to address this issue. (Aplt. Br. at 43-44.) Indeed, RJW argues that besides Lewis “none of the architects,” including its own, “were qualified to testify about Summit County’s practice.” (Aplt. Br. at 45.) And then RJW makes this damning concession: “Without Lewis’s testimony, the [trial] court lacked evidence to determine whether the carriage house was a residence.” (Aplt. Br. at 44.) Because it was

RJW's burden to prove that the carriage house was a residence, this lack of evidence is fatal to RJW's appeal.

And it is true that RJW offered no evidence regarding the policy and practice of Summit County. RJW's expert, Rick Brighton, testified that he did not know what Summit County's policy and practice was: "I'm not certain what the county says. All they say is cooking. That's their definition. There isn't an elaboration on that term." (R.2808:107-08.) Thus, any error in allowing Lewis to testify is patently harmless because RJW failed to prove its case regardless of what evidence Heath did or did not present. In other words, the absence of Lewis's testimony, which *disproves* RJW's position, still leaves RJW without any evidence to *prove* its position. Hence, the alleged error in allowing Lewis to testify was harmless. This Court should affirm because any error in admitting Lewis's testimony was plainly harmless.

II. The trial court did not abuse its discretion by allowing Sean Lewis to testify as a nonretained expert.

In any case, the trial court did not abuse its discretion. RJW fails to acknowledge, much less shoulder, the steep burden it faces on appeal. "The trial court is afforded broad discretion to admit or exclude evidence, and we will disturb its ruling only for abuse of discretion." Lawrence, 2014 UT App 40, ¶ 16. In reviewing for abuse of discretion, the court "will not reverse a trial court's ruling on evidence unless the ruling was beyond the limits of reasonability." Id.

Further, “[a]n appellate court may affirm the trial court’s decision to admit evidence on any proper grounds, even though the trial court assigned another reason for its ruling.” R.B., 2014 UT App 270, ¶ 35 (internal quotation marks omitted).

The court denied RJW’s motion to exclude Lewis for two broad reasons: First, it was untimely and defective. Second, the disclosure was adequate. The court was correct on both counts, and this Court can affirm on either ground. Moreover, there are multiple reasons why the disclosure was adequate, each of which is independently sufficient to affirm.

A. The trial court did not abuse its discretion by denying RJW’s motion to exclude Lewis because it was untimely and failed to comply with Rule 37.

Heath timely disclosed Lewis as a nonretained expert six months before trial. RJW contends that the description of his anticipated testimony was inadequate under Rule 26. The trial court held that RJW had an obligation to seek additional information and not wait until the “eve of trial” to object:

[I]t seems, to me, that there, probably, is some obligation on the part of Mr. Egan [RJW’s counsel], at that point, to say, “Hey, I don’t have enough information. Please give me more information. Your disclosure is, in my view, insufficient.” And, if no response is forthcoming, I think, at that point, Mr. Egan would be well-positioned to say, “Hey, these folks shouldn’t be able to testify.” On the other hand, I’m not sure it’s fair to take a disclosure that is, sort of, borderline, and not raise any objections to it until the eve of trial.

So, I'm going to allow Mr. Lewis to go ahead and testify. He was disclosed. Even though the disclosure was borderline. I'm going to allow the testimony to come in.

(R.2808:16-17.)

Before a party moves to exclude a witness—a sanction authorized by Rule 37—that party must “attempt[] to confer with the other affected parties *in an effort to secure the disclosure or discovery without court action.*” Utah R. Civ. P. 37(a)(3) (2011) (emphasis added). Thus, the trial court was exactly right—RJW had an obligation to inform Heath that it didn't have enough information and to ask for more. In fact, RJW had an obligation to certify that it had done this when it moved to exclude Lewis. Id.

This case presents a good example of why this meet-and-confer process is necessary. Its very purpose is to see if the information can be obtained through consultation and good-faith accommodations “without court action.” Id. If RJW had timely informed Heath that his disclosure of Lewis was inadequate, the issue might have been resolved without court action, including this costly appeal.

Also, the meet-and-confer process prevents the very “sandbagging” RJW complains of. RJW received a “borderline” disclosure and said nothing. Heath proceeded on the assumption the disclosure was adequate, until four days before trial when RJW finally objected and moved to exclude.

Additionally, a timely motion under Rule 37, after the meet-and-confer process, protects the court's options for handling the issue, including its discretion over appropriate sanctions. See Hales v. Oldroyd, 2000 UT 75, ¶ 15 ("Trial courts have broad discretion in determining discovery sanctions"). This is especially important in situations where a court may want to sanction the attorney who made the mistake rather than imposing a hardship on the client that impacts the truth-seeking function of trial. See Coroles v. State, 2015 UT 48, ¶ 29 ("[A]s a general rule, when the fault lies solely with the attorneys, the impact of the sanction should be lodged with the attorneys.") (alterations and internal quotation marks omitted). For example, if the Lewis disclosure was indeed inadequate, a timely motion by RJW would have allowed the trial court to determine if, as an alternative to excluding Lewis, RJW should instead receive more time to prepare for Lewis's testimony and then be awarded fees and costs for the inconvenience. That certainly would have been within the court's discretion. But RJW's decision to not object until the eve of trial tied the court's hands.

RJW argues that it had no obligation to object or request additional information. (Aplt. Br. at 33.) That is not the best reading of the rules. As noted, when a party receives an "incomplete disclosure" it must first make an attempt to get the information "without court action" — in other words, to ask the other

side for more complete information. Utah R. Civ. P. 37(a)(1)(A), 37(a)(3) (2011). The trial court was, therefore, correct to point out RJW's obligation to object and seek more information rather than sit back and wait until the "eve of trial" to move to exclude Lewis. (R.2808:16-17.)

The requirement to seek more information "without court action" for an "incomplete disclosure," Utah R. Civ. P. 37(a) (2011), contrasts with the harsher sanction associated with an entirely "undisclosed witness," see id. at R. 26(d)(4). The difference makes sense. As RJW points out, Heath's supplemental disclosure also disclosed a brand new witness, Robert Taylor. The trial court correctly granted the motion to exclude Taylor because RJW obviously could not confer with opposing counsel and seek additional information about Taylor because it had no knowledge he might be a witness. But Lewis, by contrast, was disclosed and RJW could have asked for additional information about his anticipated testimony. Instead, RJW treated Lewis like an undisclosed witness.

RJW argues in a footnote that Rule 37, which uses the permissive word "may," "does not require" a party to move "the court to compel disclosure." (Aplt. Br. at 34, n.14.) It is certainly true that a party faced with an "incomplete disclosure" is not required to move to compel or for sanctions: it can simply accept the incomplete disclosure. But a motion is obviously required if a party wants the sanction of exclusion. The problem here is that RJW failed to first seek

additional information without court action, as Rule 37 requires, and then waited until the eve of trial to move to exclude Lewis. That motion was defective and untimely, and it was well within the trial court's discretion to deny it.

This Court dealt with a similar situation in a recent decision, Dahl v. Dahl, 2015 UT 23. In that divorce case, the husband submitted discovery responses on June 1, 2007. The wife remained silent for two years and then, two months before trial, filed a motion to compel supplemental responses. This Court said the wife's motion was too little too late.

Ms. Dahl did not notify Dr. Dahl that she considered his discovery requests to be deficient until July 21, 2009. The court specifically noted that Ms. Dahl's counsel had received Dr. Dahl's discovery responses in December 2007, but waited until July 2009—less than two months before the September 2009 trial date—to request supplementation or to challenge the sufficiency of the responses. And counsel offered no explanation for the long delay. We cannot conclude that the [trial] court abused its discretion when it found that Ms. Dahl's motion was “too little too late.”

Id. ¶70.

That same reasoning applies here. The trial court did not abuse its discretion by denying RJW's motion.

B. The trial court did not abuse its discretion by concluding that the initial disclosure of Lewis's anticipated testimony was "borderline" but sufficient under Rule 26.

The trial court gave a second reason for allowing Lewis to testify: the initial description of Lewis's anticipated testimony was adequate. Lewis was disclosed in September 2013, with the following description of his anticipated testimony:

Defendants/Counterclaimants identify the following "non-retained" experts as they provided architectural, planning, construction and or design services for the Heath project. Additionally these witnesses may be asked to provide specific architectural, design, construction, or general building opinions regarding the Heath project as well as opinions and facts regarding Plaintiffs' deck, thus these witnesses are therefore included in this designation.

(Aplt. Br. Add. B; R.955-65.)

The trial court called this description "borderline" but sufficient under Rule 26(a)(4)(E). The requirement is to "serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify." Utah R. Civ. P. 26(a)(4)(E). But the advisory committee notes explain that the "written summary" will differ according to the circumstances. When possible, "the summary of the witness's expected testimony should be just that—a summary." *Id.* advisory committee notes. It does not have to be "prefiled testimony or detailed descriptions of everything a witness might say at trial," but

should be “more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1).” Id.

But sometimes even less is required. “Not all information will be known at the outset of a case.” Id. And “[a] party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness’s expected testimony.” Id. Plus, “[f]or uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about.” Id. Specifically referring to nonretained experts, the advisory committee notes state that “disclosures will necessarily be more limited” when the witness is uncooperative. Id.

Despite “several failed attempts,” Heath was not able to interview Lewis and did not know what he might say. Thus, he initially disclosed only the “subject areas” of his anticipated testimony, precisely as Rule 26 suggests. Under the circumstances, the trial court’s conclusion that this “borderline” disclosure was sufficient was not an abuse of discretion.

C. The supplemental disclosure was timely.

Rule 26 requires disclosures to be made “based on the information then known or reasonably available to the party.” Id. at 26(d)(1). If additional information is learned, the disclosure must be “timely” supplemented:

If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

Id. at 26(d)(5).

After “several failed attempts” Heath was able to interview Lewis on March 3, 2014. Just as Rule 26 requires, Heath timely—*the very next day*—supplemented his disclosure and explained why the information was not previously provided.

RJW argues for a different definition of “timely.” Supplemental disclosures are untimely, RJW argues, when “provided to a party at a time when the party can make no meaningful use of them.” (Appt. Br. at 36.) But this is not the definition suggested by Rule 26, which ties the timeliness of the supplement to when the party “learns that a disclosure . . . is incomplete.” Utah R. Civ. P. 26(d)(5). See In re Aramark Sports & Entm’t Servs., LLC, 289 F.R.D. 662, 665 (D. Utah 2013) (supplemental disclosure was timely where served “as soon as possible”). More generally, Rule 26 requires disclosures “based on the information then known or reasonably available to the party.” Utah R. Civ. P. 26(d)(1). Supplementation is required “[a]s the information becomes known.” Id. advisory committee notes. Further, the purpose of the rule is “to discourage

sandbagging.” Id. Sandbagging implies sitting on information for tactical advantage. Requiring *prompt* disclosure prevents sandbagging.

And this makes sense. If information comes to light shortly before trial and a previous disclosure is immediately supplemented, assuming the information was not “reasonably available” at an earlier time, the supplemental disclosure is timely because the parties will have received the new information at about the same time. The trial court would, of course, still have discretion about how to handle the new information, but the supplement would be timely.

Heath was not able to interview Lewis until March 3, 2014, and he supplemented his disclosure the next day. Under Rule 26, the supplemental disclosure was timely.

D. Even if the initial disclosure was inadequate and the supplemental disclosure was untimely, Lewis’s testimony was still admissible because any failure in this regard was “harmless” and justified by “good cause.”

Even assuming the disclosures were inadequate and untimely, Lewis’s testimony was still admissible under the two exceptions in Rule 26(d)(4):

If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document, or material at any hearing or trial unless [1] the failure is harmless or [2] the party shows good cause for the failure.

Utah R. Civ. P. 26(d)(4).

The failure to supplement sooner is harmless unless “prejudice would result from allowing the disputed evidence at trial.”⁹ Posner v. Equity Title Ins. Agency, Inc., 2009 UT App 347, ¶ 23. RJW cannot plausibly claim prejudice because no new issue was introduced in the supplemental disclosure. In fact, RJW moved to exclude Lewis’s testimony as “cumulative and duplicative” precisely because Heath had “already designated Eric Hoff to testify about these very matters.” (R.2562.) And that was true. The supplemental disclosure explained that Lewis was expected to testify that “under the [SBDC] . . . a dwelling requires cooking facilities and more particularly, the structure needs to be plumbed with a 220V outlet for a stove.” (R.2612.) Six months earlier, Eric Hoff’s expert report pointed specifically at the relevant provisions of the SBDC and explained that the carriage house did not violate the CC&Rs because it “does not contain provisions for cooking, specifically wiring or plumbing for a cooking range.” (R.2584.)

Further, this precise issue was disputed when Heath moved for summary judgment, which also put RJW on notice that it would be a primary focus at trial. Heath argued that the carriage house was not a dwelling because it “does not

⁹ This is obviously a different “harmlessness” analysis than that set forth above, which assumes it was error to admit Lewis’s testimony and asks whether it changed the outcome of the trial. The issue here is whether RJW was prejudiced in its preparation for trial by the timing of the disclosure.

contain a stove, nor does it have a gas line or 220 volt outlet for a stove.” (R.1825.) In support of that position, Heath offered testimony from Hoff, Upwall, and himself on this precise point. (R.1825.) The deposition testimony from Heath’s architect, Michael Upwall, was almost identical to what Lewis would later say at trial: a microwave is not sufficient—cooking facilities “require a 220 outlet or a gas line.” (R.1808.)

Thus, when Heath supplemented his disclosures to say that Lewis would also testify about this exact issue, there was no “unfair surprise.” See R.B., 2014 UT App 270 ¶ 40. And thus there was no prejudice. Indeed, RJW *was* prepared to address this issue. Its own retained expert, Rick Brighton, submitted his rebuttal report on November 11, 2013, in which he offered his interpretation of the same provisions of the SBDC that Lewis testified about. (R.2588.) RJW even designated the relevant provisions of the SBDC as trial exhibits. (R.2231.)

“Good cause” is also apparent from the record. See Townhomes at Pointe Meadows Owners Ass’n v. Pointe Meadows Townhomes, LLC, 2014 UT App 52, ¶ 13 (question is whether “good cause excuses tardiness”). Heath made “several failed attempts” to interview Lewis, and he supplemented the day after he was able to interview him. (R.2666.) Further, it should be noted again that Lewis had been disclosed, and RJW had not objected. Under the circumstances, there was “good cause” for Heath’s failure to supplement sooner.

In sum, even if the initial description of Lewis’s anticipated testimony was inadequate, and even if Heath should have supplemented sooner, the trial court did not abuse its discretion in admitting the testimony because the failure was either harmless or for good cause, or both.

* * * *

In brief, even assuming the trial court abused its discretion by allowing Lewis to testify, the error was harmless. Heath presented credible evidence in the form of other testimony that the carriage house was not a second residence or dwelling—a conclusion that comports with the ordinary sense of those terms. RJW has failed to demonstrate that, even excluding Lewis’s testimony, the clear weight of the evidence requires a contrary conclusion. Thus, RJW’s appeal of the trial court’s evidentiary ruling fails.

In any case, the trial court did not abuse its discretion in allowing Lewis to testify. This Court “will not reverse a trial court’s ruling on evidence unless the ruling was beyond the limits of reasonability.” Lawrence, 2014 UT App 40, ¶ 16. Given all the circumstances, it was perfectly reasonable for the trial court to allow Lewis’s testimony. Indeed, “[e]xcluding a witness from testifying is . . . extreme in nature and . . . should be employed only with caution and restraint.” Welsh v. Hosp. Corp. of Utah, 2010 UT App. 171, ¶ 10 (alterations in original) (internal quotation marks omitted). Even with a totally “undisclosed witness” —

a much more serious situation than the allegedly inadequate disclosure here—the trial court still “retains discretion to determine how properly to address this issue in a given case.” Utah R. Civ. P. 26 advisory committee notes. See also Utah R. Civ. P. 37(h) (2011) (court may fashion sanction “in lieu of” excluding undisclosed witness). Allowing Lewis to testify was not beyond the limits of reasonability and thus was not an abuse of the trial court’s broad discretion.

III. Adequate evidence supports the factfinder’s conclusion that RJW failed to prove that Heath breached Article II, Section 2 of the CC&Rs by failing to get his construction plans approved.

On the issue whether Heath breached Article II, Section 2 of the CC&Rs, RJW does not allege any error in evidentiary or legal rulings. It simply disagrees with the trial court’s factual finding, arguing that the evidence supports its position that the HOA’s Architectural Committee (“AC”) did not approve “complete plans” as required by the CC&Rs. As with the admissibility issue, RJW subtly attempts to shift the burden of proof and claim the evidence is confused, but once again this tactic only undermines its appeal. Affording appropriate deference to the trial court, it is evident that the court’s conclusion is by no means against the clear weight of the evidence.

Here is what the evidence showed: In early September 2012, Heath submitted his first set of plans to the HOA and its independent architect, Stoker, for review. (R.2808:144; Pl. Exhs. 4 & 5.) In those plans, the garage and office

were attached to the house. (R.2808:155; 2809:115.) Heath's architect redesigned the plans with a detached carriage house. (R.2809:14, 90-91, 106-09, 113.)

Heath submitted this second set of plans to Stoker and the HOA in early October 2012. (R.2809:40; Def. Exh. R.) Heath testified that these were "*full plans, complete plans.*" (R.2809:127-28 (emphasis added).) Upwall testified that Heath "could not begin any construction until we had the plat amendment" from the County and that he couldn't get the plat amendment approved without approval from the HOA. (R.2809:40.) "So, we went in with *the full package* to the HOA to get their approval." (R.2809:40 (emphasis added).) The HOA's independent architect, Stoker, also testified that these were "*complete plans*" because "they were far enough along for the HOA and the architectural committee to do a review on it." (R.2808:161-62 (emphasis added).)

Stoker reviewed these plans between October 5th and 9th. (Def. Exh. R; R.2808:157.) On October 9th, he sent a letter to Tabacco recommending that Heath's plans be approved, contingent on the County's approval of the plat amendment. (Pl. Exh. 9.) Stoker testified that the letter was intended not only to recommend approval so that Heath could seek the plat amendment, but as final approval under the CC&Rs. (R.2808:179.)

Stoker's letter noted six minor issues that needed to be addressed. (Pl. Exh. 9.) Tabacco testified that "Mr. Upwall addressed the issues that Mr. Stoker

had raised in his letter and he did so point-by-point and I was satisfied.” (R.2809:221.) Tabacco then “specifically communicated [to the AC] that we had received responses to Stoker’s issues and that Mr. Stoker’s recommendation was that the plans, as presented, were good to go for final approval.” (R.2809:221-22.) Tabacco received approval from the other members of the AC and then sent an approval letter to Heath, dated October 10, 2012. (R.2809:222-24.) Tabacco testified that “the intent” of the October 10th letter “was to say that the HOA signs off on the final plans and on the amendments for the plat. The HOA, we’re good to go. I was just communicating that to the county.” (R.2809:225.) On October 11, 2012, Tabacco emailed Heath and told him again that the “uninterested Timber’s HOA Board members” had approved his project. (Def. Exh. R.)

RJW argues that there is “extreme confusion regarding the plans at issue in this case and when and to whom various sets of plans were submitted.” (Aplt. Br. at 47.) “But despite this confusion,” RJW continues, “two things are clear: First, Michael Stoker . . . only reviewed two sets of plans, and neither set of plans was complete. Second, there is no evidence in the record that the plans approved by Stoker and the AC are the plans that Heath ultimately submitted to the county and for which Heath received a building permit.” (Aplt. Br. at 48.)

On the first point, as noted, there is testimony in the record from Heath, Upwall, and Stoker, that the second set of plans were “complete plans.” RJW challenges this testimony by arguing that *complete plans* “must have some measure of finality—the subject of the plans must be capable of actually being built.” (Aplt. Br. at 47.) From this, RJW makes the leap that *complete plans* means “plans for which a lot owner could receive a building permit from the county.” (Aplt. Br. at 47.) That leap is not logical.

The term *complete plans* should be interpreted in light of the purpose of the provision at issue. Review and approval by the AC is obviously not for the purpose of getting a building permit from the county; rather, the purpose is to “ascertain whether the architecture conforms to the Design Guidelines.” (R.19; Pl. Exh. 1.) Thus, *complete plans* are plans that are capable of being reviewed to determine conformance with the Design Guidelines. Anything that is immaterial to ensure conformance with the Design Guidelines is irrelevant.

Michael Stoker, who was hired by the AC to advise them on this very issue, testified that the plans he reviewed were “far enough along for the HOA and the architectural committee to do a review on it.” (R.2808:162.) Pressed, he reiterated that “they were complete enough for the HOA and their review process.” (R.2808:162.) In sum, the trial court did not commit reversible error by concluding that complete plans were submitted and reviewed.

RJW's second assertion is that "there is no evidence in the record that the plans approved by Stoker and the AC are the plans that Heath ultimately submitted to the county and for which Heath received a building permit" (Aplt. Br. at 48.) This might be persuasive if Heath had the burden of proving that the plans were the same. But RJW bears the burden of proving the plans reviewed were not complete. The lack of evidence of any difference between the plans approved by the AC and the plans approved by the county undermines RJW's case. RJW offered no evidence that what Heath constructed differs in any way whatsoever from what the AC approved.¹⁰

RJW argues that the second set of plans "were submitted to the AC for the purpose of approving the plat amendment," and not for the purpose of approval under the CC&Rs. (Aplt. Br. at 48.) In fact, the testimony was to the contrary. Stoker's letter plainly recommended final approval of the plans. (Pl. Exh. 9.) And he testified that he recommended approval not only so Heath could seek the plat amendment, but also so he could seek final approval under the CC&Rs. (R.2808:179.) Tabacco testified that he "specifically communicated" to the AC that "we had received responses to Stoker's issues and . . . were good to go for

¹⁰ RJW quotes correspondence that suggests the *possibility* that the plans Heath submitted to the County differed in some way from the plans approved by the AC. (Aplt. Br. at 50-51.) But RJW failed to present evidence to the trial court as to how they differed, if at all, and if there was any difference, whether it was material to the AC's review process.

final approval.” (R2809:221-22.) Tabacco sent an approval letter to Heath and testified that “the intent” of the letter “was to say that the HOA signs off on the final plans and on the amendments for the plat. The HOA, we’re good to go.” (R.2809:225.) On October 11, 2012, Tabacco emailed Heath and told him again that the “uninterested Timber’s HOA Board members” had approved his project. (Def. Exh. R.)

In its oral ruling from the bench, the trial court cut right to the core of the issue.

My task, here, is to try to determine whether Mr. Heath did what he was supposed to do under the CC&R’s to go ahead and get his project approved and I find that he did. Again, I think he, Mr. Heath, under the CC&R’s needed to get approval. The CC&R’s don’t allow him to just haul off and build whatever he wants in his back yard. They don’t allow him to build any kind of home he wants on his lot. The CC&R’s require that Mr. Heath submit plans to the HOA and get those plans approved and Mr. Heath did that.

(R.2810:193.)

The trial court’s conclusion that “the preponderance of the evidence demonstrates that Mr. Heath did not violate CC&Rs Article II and Design Guidelines Article II” is not against the clear weight of the evidence. (R.3029.)

Alternatively, even if the “complete plans” provision was breached, RJW has not proved any harm. RJW has sued Heath for breach of contract, and the only remedy it seeks is an injunction requiring Heath to tear everything down

and start over. Harm is an essential element of a breach-of-contract claim. See Am. W. Bank Members, L.C. v. State, 2014 UT 49, ¶ 15. Even if the plans approved by the HOA were not “complete” plans, RJW did not submit evidence of any harm. RJW did not submit evidence, for example, that what Heath constructed violates the Design Guidelines.

As the trial court pointed out, RJW’s only requested remedy did not fit the circumstances, even if there was a technical breach of the CC&Rs: “Well, let’s assume you’re right” that Heath did not get the required approval, the court asked during closing arguments. “Why is it tear-down? Why isn’t it he has to go back to the HOA and get that approval . . . ?” (R.2810:141.) “[T]his is built and we have, at most here, a procedural violation. We have—what you’re alleging is they didn’t jump through the right hoops to procedurally approve this thing, and, so, you want me to go back and bring the wrecking ball in. That seems like a little bit too much remedy for the problem, no?” (R.2810:114-15.)

The remedy must fit the harm. And RJW failed to prove any harm. There is no evidence RJW suffered any monetary harm. Nor is there any harm in the form of noncompliance with the Design Guidelines. There is no evidence that the approval process did not serve its intended purpose of ensuring that plans comply with the Design Guidelines. Thus, not only did RJW fail to prove that Heath did not get complete plans approved; RJW failed to prove that any harm

resulted from this alleged technical violation. Its breach of contract claim therefore fails.

CONCLUSION

RJW doesn't like Heath's new home and has raised CC&R technicalities to get some or all of it torn down. It claims that a mere room over the garage renders the garage an improper second residence and that Heath failed to submit complete plans to the HOA. The trial court held a trial, examined the facts, and rejected RJW's claims.

RJW now complains about a single evidentiary ruling allowing Lewis, one of several witnesses on the second-residence issue, to testify. But the outcome of this case would not have been different if the trial court had excluded Lewis's testimony. As RJW accurately noted before trial, Lewis's testimony was cumulative. Other witnesses supplied ample evidence supporting the court's finding that the carriage house was not a second residence—a conclusion further confirmed by the ordinary meaning of the relevant CC&R terms. The most RJW can muster is that excluding Lewis would have left insufficient evidence to adjudicate the second-residence issue. But if true, RJW still loses because it had an affirmative duty to supply sufficient evidence not only to adjudicate but to prevail on that issue. In any case, for multiple reasons the trial court was well within its broad discretion in refusing to exclude Lewis's testimony. If this Court


finds an abuse of discretion here, then that standard will truly have lost its meaning and this Court will be very busy second-guessing myriad evidentiary rulings.

RJW's cavil that "complete plans" were not submitted is equally baseless. The undisputed testimony was that Heath's plans were "complete." They were certainly as "complete" as necessary for the HOA's Architectural Committee to perform its function. And RJW does not contend Heath built a home that was different than his submitted plans. So what is the harm to RJW? There is none. Hence, this Court can affirm on the alternative ground that RJW failed to prove damages for its breach of contract claim alleging violation of the CC&Rs. RJW is certainly not entitled to tear down Mr. Heath's home based on a technical violation of CC&Rs that was entirely harmless.

This Court should affirm the trial court's ruling and reject RJW's appeal.

DATED this 16th day of December, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 12046 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally space typeface using Microsoft Word 2010 in 13 point Book Antiqua.

DATED this 16th day of December, 2015.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 2015, the foregoing **BRIEF OF APPELLEES** was served on the following by the method indicated below:

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