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James Ashley Fennell, II v. Edward D. Green, Neil Wall, AKA Neil J. Wall, and GMW Development Inc., DBA Ivory North : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

JAMES ASHLEY FENNELL, II,

Plaintiff and Appellant,

vs.

EDWARD D. GREEN, NEIL WALL, aka
NEIL J. WALL, and GMW
DEVELOPMENT INC., dba IVORY
NORTH,

Defendants and Appellees.

Civil No. 000601295 PD
Court Of Appeals No. 20011029SC

BRIEF OF APPELLEE
GMW DEVELOPMENT INC., dba IVORY NORTH

Appeal from Summary Judgment entered by
The Honorable Thomas L. Kay,
Second Judicial District Court, Davis County, State of Utah

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FILED
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CONSTITUTIONAL PROVISIONS

None are applicable.

JURISDICTION

This Court has jurisdiction to decide this appeal pursuant to §78-2a-3(2)(j) (1953, as amended).

STATEMENT OF THE ISSUES ON APPEAL

The following issues are presented on appeal:

1. Did the trial court properly grant Ivory North's Motion for Summary Judgment based on Fennel's failure to dispute the relevant facts set forth in Ivory North's Motion for Summary Judgment? In examining the trial court's order granting summary judgment, the appeals court determines only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact. *Otsuka Electronics (USA, Inc., v. Imaging Specialists, Inc.*, 937 P.2d 1274, 1277 (Utah Ct. App. 1997). The Appellate Court may affirm a grant of summary judgment on any ground available to the trial court, even if it is one not relied upon by the trial court. *Id.*

2. Did the trial court properly conclude that Ivory North did not have any knowledge of any geological condition on the subject property, the Maughan report or evaluation of the subject property, or the possibility of the subject property being the site of potential landslides? A "genuine" issue of fact sufficient to defeat summary judgment exists only if the non-moving party provides evidence which is "sufficiently probative" that "a reasonable jury could return a

verdict for the non-moving party ” *Anderson v Liberty Lobby Inc* , 477 U S 242, 248 (1986)

More specifically, in *Celotex Corp v Catrett*, 477 U S 317 (1986), the Supreme Court clarified that a party seeking to avoid summary judgment must demonstrate genuine issues of material fact with respect to *each* essential element of its case as to which it bears the burden of proof at trial *Id* Conclusory allegations will not establish issues of fact sufficient to defeat summary judgment *McVay v Western Plains Service Corp* , 823 F 2d 1395 (10th Cir 1987)

3. Should the Appellate Court deny Fennel’s Appeal because it does not comply with Rule 24, Utah Rules of Appellate Procedure? “If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below ” *Koulis v Standard Oil Co of California*, 746 P 2d 1182, 1184 (Utah Ct App 1987)

STATEMENT OF THE CASE

A. Nature of the Case

In the Spring of 1995, Fennell contacted Ivory North regarding constructing a new home based upon the Ivory Homes Newport model Fennell, however, did not approve of any of the available lots then owned by Ivory North Consequently, Fennell and Ivory North investigated various lots in the Layton area, eventually finding a lot in the Falcon Ridge subdivision

On or about May 18, 1995, Plaintiff and Ivory North entered into a Real Estate Purchase Agreement for the purchase of a home built on Lot 31 of Falcon Ridge located in the city of

Layton, Utah. Ivory North then constructed the home, which was inspected and approved by Fennell. On or about December 22, 1995, Fennell moved into the home.

On or about April 14, 1998, Fennell alleges that a landslide occurred on the property. No one was injured as a result of the landslide, nor was any other property damaged or destroyed. On or about April 7, 2000, Fennell filed a Complaint. In particular, Fennel alleged that part of the area of the land subdivided as Falcon Ridge Phase 2, including Lot 31, was subject to landslides and erosion, that the fact that the land is subject to landslides and erosion was known or should have been known to Ivory North, as a professional subdivider, developer, seller, and builder.

B. The Course of Proceedings

On October 25, 2001, Ivory North's motion for summary judgment came on regularly for hearing. The Court after reviewing the submitted memorandum and hearing oral arguments granted Ivory North's motion for summary judgment on all causes of action. Generally, the Court held that Fennel failed to properly dispute the relevant facts set forth in Ivory North's Motion, and therefore, Ivory North's Statement of Undisputed Facts were deemed admitted due to the lack of response. Specifically, the Court held that it was undisputed that Ivory North did not have any knowledge of any geological condition on the subject property, had no knowledge of the report and evaluation of the property prepared by Glenn Maughan, and had no knowledge of the possibility of the subject property being the site of potential landslides.

C. Facts Relevant to the Issues on Appeal

1. In the spring of 1995, Fennell contacted Ivory North regarding constructing a new home based upon Ivory Newport model. *See* Deposition Transcript of James Fennell at R.351.

2. Fennell and Ivory North investigated various lots in the Layton area, eventually finding the lot in the Falcon Ridge subdivision. *See* Deposition Transcript of James Fennell at R.351, and Affidavit of Karen Galloway at R.354.

3. Ivory North did not encourage Fennell to select the lot in the Falcon Ridge subdivision. *See* Deposition Transcript of James Fennell at R.351 and Affidavit of Karen Galloway at R.354.

4. Ivory North has no interest in the Falcon Ridge subdivision, did not own the lot selected by Fennell, and did not participate in any manner in the subdividing of Falcon Ridge. *See* Affidavit of Karen Galloway at R.354.

5. Ivory North had no knowledge regarding any geological conditions or alleged problems with soil on the subject property or the Falcon Crest subdivision. *See* Affidavit of Karen Galloway at R.354.

6. On or about May 18, 1995, Fennell and Ivory North entered into a Real Estate Purchase Agreement ("Agreement") for the purchase of a home built on Lot 31 of Falcon Ridge located in the city of Layton, Court of Davis. *See* Real Estate Purchase Agreement at R.357.

7. Section 3.7 of the Agreement states:

IVORY HOME WARRANTY. At or after CLOSING, SELLER shall provide BUYER with a home buyers warranty (the" IVORY

HOME WARRANTY”) from SELLER (or in SELLER’s sole discretion, a third party providing such warranties) that covers the HOUSE and that contains terms and conditions then being provided by SELLER. **The construction quality standards that are set forth in the IVORY HOME WARRANTY shall be the sole and exclusive standards applicable to the HOUSE.** (Emphasis added).

See Real Estate Purchase Agreement at R.360.

8. Section 3.8 of the agreement states:

EXCLUSION OF OTHER WARRANTIES. Except for the IVORY HOME WARRANTY and SELLER’s obligation to repair or replace WALK-THROUGH ITEMS” (a) **SELLER conveys the PROPERTY to BUYER, “AS IS, WHERE IS,” WITHOUT REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, HABITABILITY OR WORKMANSHIP;** (b) SELLER makes no representations or warranties to BUYER that any particular view exists or shall continue to exist from the PROPERTY or regarding the environmental condition of the PROPERTY (including the presence or freedom from radon, hazardous waste or hazardous materials); (c) SELLER expressly disclaims any other representations or warranties regarding the PROPERTY; (d) BUYER accepts the PROPERTY in the condition in which the PROPERTY exists on the CLOSING DATE; and (e) BUYER releases SELLER from any liability for the PROPERTY under federal or state environmental laws, including, but not limited to , claims under CRCLA and RCRA.

See Real Estate Purchase Agreement at R.360.

9. Section 7.7 of the Agreement states:

ENTIRE AGREEMENT.

BUYER hereby represents to SELLER that BUYER is not relying upon any warranties, promises, guarantees or representations made

by SELLER, by one acting or claiming to act on behalf of SELLER or by a SELLER AFFILIATE, unless the same is reduced to writing and is made a part of this AGREEMENT. This AGREEMENT and the documents that are specifically referred to herein constitute the entire agreement and understanding between BUYER and SELLER with respect to BUYER's purchase of the PROPERTY and cannot be amended, changed, modified or supplemented except by an instrument in writing signed by both parties, but no such modification needs consideration to be binding. This AGREEMENT supersedes all prior agreements, correspondence, memoranda, representations and understandings of the parties relating to the PROPERTY, whether oral or written. No representations have been made to induce the parties hereto to enter into this AGREEMENT except as are set forth herein. Any agreements, representations, covenants and warranties on the part of either party hereto that are contained in this AGREEMENT and any amendment and supplement hereto shall survive the CLOSING and deliveries of documents and instruments hereunder and shall not be merged into such documents and instruments.

See Real Estate Purchase Agreement at R.361.

10. Plaintiff acknowledged signing and entering into the subject Agreement with Ivory North. *See Deposition Transcript of James Fennell at R.352.*

11. On or about December 22, 1995, Plaintiff signed the Ivory Home Warranty, Warranty Certificate which indicates that Plaintiff received the Ivory Homes Express Limited Warranty. *See Deposition Transcript of James Fennell at R.352 and Ivory Home Warranty, Warranty Certificate, R.371.*

12. The Warranty Certificate states in Section 7 that "[T]he Homebuyer understand, and by signing this form do hereby acknowledge, that the warranty is an EXPRESS LIMITED WARRANTY and that no person or entity shall have any liability whatsoever, by implication or otherwise, for claims which are not EXPRESSLY covered by the General Provisions and

Warranty Standards. NO CONSEQUENTIAL DAMAGES ARE COVERED BY THIS WARRANTY. *See Ivory Home Warranty, Warranty Certificate, R.371.*

13. Section 1.7 of the Ivory Home Express Limited Warranty states:

1.7. EXCLUSIONS

Builder is not responsible for:

1.7.1. Defects not resulting in actual physical damage or loss. . . .

1.7.3. Decks, boundary walls, retaining walls, and bulkheads. . . .

1.7.11. Loss of use, loss of opportunity, loss of market value, loss of rental value or any other consequential loss.

1.7.16. Loss or damage externally caused, including, but not limited to; acts of God, . . . mud slides, . . . abuse or use of the Home, or any part thereof, beyond the reasonable capacity of such part for such use, or by any other external cause.

1.7.18. Loss or damage resulting from or made worse by subsidence or soil movement.

See Ivory Homes Express Warranty at R.377-78.

14. Ivory North constructed the home located on Lot 31 of Falcon Ridge which was inspected and approved by Fennell. *See R.4-5.*

15. Ivory North conveyed title to the subject property to Fennell by deed dated December 22, 1995, and Fennell moved into the home. *See R.4-5.*

16. Fennell alleges that on April 14, 1998, a landslide occurred on the back portion of the lot. *See R.5.*

17. No one was physically injured as a result of the landslide, nor was any other property damaged or destroyed. *See* R.783.

18. On or about April 7, 2000, Fennell filed a Complaint. *See* R.2-11.

19. Green and Wall did not disclose to potential purchasers of Lot 31 the geologist reports and geological hazards of Lot 31 on the Subdivision Plat. R.1348.

20. Defendant Green and Wall did not disclose to potential purchasers of Lot 31, including Ivory North, the geologist reports and geological hazards of Lot 31 in the protective covenants. R.1348.

21. Defendant Green and Wall did not disclose the geological hazards of Lot 31 in the contract of sale to Ivory North. R.1348.

22. Defendant Green and Wall did not disclose the geological hazards of Lot 31 in the deed of conveyance to Ivory North. R.1348.

23. On or about May 17, 2001, Ivory North filed its Motion for Summary Judgment. *See* R.330.

24. On October 25, 2001, the trial court heard Ivory North's Motion for Summary Judgment. At the hearing, Fennell waived his claim for breach of implied warranty. *See*, R.1705 at pp. 76-77.

25. The Court after reviewing the submitted memorandum and hearing oral arguments granted Ivory North's motion for summary judgment on all causes of action. Generally, the Court held that Fennel failed to properly dispute the relevant facts set forth in

Ivory North's motion, and therefore, Ivory North's Statement of Undisputed Facts were deemed admitted due to the lack of response. *See* R.1705 at 92. Specifically, the Court held that it was undisputed that Ivory North did not have any knowledge of any geological condition on the subject property, had no knowledge of the report and evaluation of the property prepared by Glenn Maughan, and had no knowledge of the possibility of the subject property being the site of potential landslides. *See* R.1705 at 92-94.

SUMMARY OF ARGUMENT

1. The trial court properly granted Ivory North's Motion for Summary Judgment based on Fennel's failure to comply with Rule 4-501(2)(B), Utah Rules of Judicial Administration, which requires a party contesting a Motion for Summary Judgment to include a section that contains a verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party's contention. In the instant case, in his memorandum in opposition to Fennel's Motion for Summary Judgment, Fennel did not dispute any of Ivory North's statements of undisputed facts. Thus the trial court's entry of summary judgment in favor of Ivory North was proper and should be upheld.

2. The trial court properly concluded that Ivory North did not have any knowledge of any geological condition on the subject property, the Maughan report or evaluation of the subject property, or the possibility of the subject property being the site of potential landslides. It is undisputed that Ivory North did not have any knowledge of any alleged geological problems

with the subject property, that Ivory North was never provided with a copy of the Maughan report, or advised of any alleged problems with the subject property. Accordingly, the trial court's entry of summary judgment in favor of Ivory North should be affirmed.

3. The Appellate Court should deny Fennell's appeal because it does not comply with Rule 24, Utah Rules of Appellate Procedure. In particular, Fennell's brief does not include a coherent statement of the issues presented for appeal nor in the statement of facts relevant to the issues on appeal include a single proper cite to the record. Consequently, the Appellate Court should reject Fennell's appeal and assume the correctness of the trial court's entry of summary judgment in favor of Ivory North.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED IVORY NORTH'S MOTION FOR SUMMARY JUDGMENT BASED ON FENNEL'S FAILURE TO DISPUTE THE RELEVANT FACTS SET FORTH IN IVORY NORTH'S MOTION FOR SUMMARY JUDGMENT

Rule 4-501(2)(b) states:

Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party's contention. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Id. (emphasis added).

Fennell contends on appeal that the trial court abrogated its duties by granting summary judgment based upon his failure to comply with Rule 4-501(2)(B) of the Rules of Judicial Administration. However, the language of Rule 4-501(2)(B), Rules of Judicial Administration, unmistakably provides that unless specifically controverted, all material facts set forth in Ivory North's statement and supported by an accurate reference to the record are deemed admitted. In his memorandum in opposition to Ivory North's motion for summary judgment, Fennell clearly failed to controvert, specifically or otherwise, the material facts set forth in Ivory North's statement of undisputed facts. In fact, when questioned directly by the trial court regarding his failure to comply with the rule, Fennel's counsel acknowledged that he may have been deficient. *See* R.1705 at 43.

Fennell also argues on appeal that he complied with the rule as it existed at the time of briefing and arguments. The basis for Fennel's argument is that the trial court prematurely applied the November 2001, amendments to the rule. However examination of the rule as it existed in October 2001, shows the rule still required Fennell to dispute the Ivory North's statement of undisputed facts.

Fennel finally argues on appeal that even if he didn't comply with rule, it was improper for the trial court to grant summary judgment because the adverse party is entitled to have the Court survey the evidence and all reasonable inferences. . . . However, the record shows that the trial court did not rely solely on Fennell's failure to comply with Rule 4-501(2)(B), Rules of

Judicial Administration, when granting Ivory North's motion for summary judgment. Rather, the record clearly shows that the trial court determined that summary judgment was appropriate, as a matter of law, because the pleadings filed and matters presented did not create genuine issues as to any material facts.

Given the foregoing, upon examining the trial court's order granting summary judgment, the trial court did not err in applying the governing law and the trial court correctly held that there were no disputed issues of material fact. Thus, the trial court's entry of summary judgment in favor of Ivory North was appropriate and should be upheld.

In addition to the foregoing, Utah law clearly allows that the Appellate Court may affirm a grant of summary judgment on any ground available to the trial court, even if it is one not relied upon by the trial court. *Otsuka Electronics (USA, Inc., v. Imaging Specialists, Inc.*, 937 P.2d 1274, 1277 (Utah Ct. App. 1997).

The Utah Supreme Court has conclusively determined that a cause of action for breach of implied warranty of habitability does not extend to the purchasers of residential property.

American Towers Owners Ass'n, Inc. v. CCI Mech., Inc., 930 P.2d 1182, 1193 (Utah 1996).

The main policy reason behind extending an implied warranty of habitability to residential leases are the unequal bargaining position of the parties and the prospective tenant's limited ability to inspect and repair the property. These policy reasons are not present to the same degree in the purchase of residential property. The purchaser has the right to inspect the house before purchase as thoroughly as that individual desires, and to condition purchase of the house upon a satisfactory inspection report. Further, if there are particular concerns about a home, the parties can contract for an express written warranty from the seller. Finally, if there a

material latent defects of which the seller was aware, the buyer may have a cause of action in fraud. Therefore, the circumstances presented to the purchaser of a residence are not closely analogous to those of a relatively powerless lessee. . . .

Maak v. Resource Design & Const., Inc., 875 P.2d at 582-583 (Utah Ct. App. 1994). The Supreme Court later upheld the reasoning in *Maak*, stating that “[t]he terms of a contract for the sale of a residence are much more open to negotiation than a rental contract because the buyer and seller have similar bargaining power. If the seller refuses to accede to an express warranty, nothing prevents the buyer from halting negotiations and looking elsewhere.” *American Towers*, 930 P.2d at 1193-94.

Additionally, the Real Estate Purchase Contract between Ivory North and plaintiff explicitly excludes any implied warranties. The Contract states in Section 3.8:

EXCLUSION OF OTHER WARRANTIES. Except for the IVORY HOME WARRANTY and SELLER's obligation to repair or replace WALK-THROUGH ITEMS” (a) **SELLER conveys the PROPERTY to BUYER, “AS IS, WHERE IS,” WITHOUT REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, HABITABILITY OR WORKMANSHIP** (emphasis added).

The Utah Supreme Court has upheld “as is” provisions in real estate contracts and found that they properly exclude breach of implied warranty claims. In *Tibbitts v. Openshaw*, 18 Utah 2d 442, 425 P.2d 160 (1967), the Utah Supreme Court held, in regard to the vendees' counterclaim for breach of implied warranties in the purchase of two new residences, that the “as is” provision in the contracts justified the court's refusal to submit to a jury requested instructions upon breach of

implied warranties. The court initially found that the vendees had not filed the breach of warranty claim within a reasonable time, but also indicated that the contract provision, which stated that the vendees accepted the property in its present condition without representations, covenants or agreements between the parties, was controlling. The Utah Supreme Court referred to the Utah Commercial Code and stated that although it was not in effect for the subject contract, the reasoning by analogy was appropriate. The Court quoted Section 70A-2-316(3)(a) which states that “unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is,’ ‘with all faults’ or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes it plain that there is no implied warranty.” The Utah Supreme Court found that based upon the above reasoning there was no error in the trial court’s refusing to submit to the jury a requested instruction on the breach of implied warranty.

Likewise in the subject matter, the Real Estate Purchase Contract contains even more explicit exclusionary language. The Real Estate Purchase Contract states that not only does Ivory North convey the property to Plaintiff, “as is, where is, without representation or warranty, express or implied,” but that Ivory North also explicitly excludes all warranties other than the Ivory Homes Express Warranty, including “warranties of merchantability, fitness for a particular purpose, habitability or workmanship.” Therefore, even if Utah did recognize a cause of action for implied warranty of habitability in the purchase of a residential home, the contract between Plaintiff and Ivory North conclusively excludes the warranty from this matter.

In conclusion, the Appellate Court may affirm the trial court's entry of summary judgment in favor of Ivory North on the basis that the Real Estate Purchase Contract between Ivory North and Fennell explicitly excludes any implied warranties.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT IVORY NORTH DID NOT HAVE ANY KNOWLEDGE OF ANY GEOLOGICAL CONDITION ON THE SUBJECT PROPERTY OR THE POSSIBILITY OF THE SUBJECT PROPERTY BEING THE SITE OF POTENTIAL LANDSLIDES

One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, *matters known to him* that the other is entitled to know. . . . *First Sec. Bank v. Banberry Dev. Corp.*, 786 P.2d 1326, 30-31 (Utah 1990) (emphasis added).

In his Complaint, Fennell alleged that Ivory North had a duty to Fennell to disclose that Lot 31 was the site of landslides and erosion. This presumes, of course, that Ivory North knew Lot 31 was the site of landslides and erosion. It is undisputed that Wall and Green, not Ivory North, developed, subdivided, and improved Lot 31 of the Falcon Ridge subdivision. It is equally undisputed that Wall & Green never provided Ivory North with a copy of Glenn R. Maughan's geological report and that Wall & Green never informed Ivory North that any problems existed with Lot 31. *See* R.1705 at 92, 93. Finally, it is undisputed that Ivory North was never told about any problems with Lot 31 while obtaining the required building permits and licenses. *Id.* at 55.

Based on the foregoing, the trial court properly concluded that Ivory North did not have a duty to Fennell because Ivory North did not have any knowledge of any alleged geological condition on the subject property and summary judgment in favor of Ivory North was warranted.

III. THE APPELLATE COURT SHOULD DENY FENNEL'S APPEAL BECAUSE IT DOES NOT COMPLY WITH RULE 24, UTAH RULES OF APPELLATE PROCEDURE

Rule 24, Utah Rules of Appellate Procedure, specifically requires Fennell to provide a statement of the issues presented for review. Utah R. App. P. 24(a)(5). Additionally, Rule 24(e) states that “[r]eference shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) pt 11(g).” *Id.* Finally, Rule 24(j) states that briefs which are not in compliance may be disregarded or stricken, on motion or *sua sponte* by the court, and the court may assess attorney fees against the offending lawyer. *Id.*

In his brief, Fennell did not set forth a coherent statement of the issues on appeal or properly cite to the record. Utah’s appellate courts have on many occasions “voiced their frustration with briefs which fail to comply with Rule 24” and “have routinely refused to consider arguments which do not include a statement of the facts properly supported by citations to the record.” *State v. Price*, 827 P.2d 247, 249 (Utah Ct. App. 1992); *Trees v. Lewis*, 738 P.2d 612, 13 (Utah 1987) (appeal dismissed because the appellant did not support the facts set forth in his brief with citations to the record as required by the Utah Rules of Appellate Procedure); *Koulis v. Standard Oil Co. of California*, 746 P.2d 1182, 84 (Utah Ct. App. 1987) (where a party

fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below); *Uckerman v. Lincoln Nat. Life Ins. Co.*, 588 P.2d 142, 44 (Utah 1978) (appellate court need not, and will not, consider any facts not properly cited to, or supported by, the record); *Steele v. Bd. of Rev. of Indus. Com'n*, 845 P.2d 960, 962 (Utah Ct. App. 1993) (where a party fails to provide a statement of the facts along with a citation to the record where those facts are supported, we will assume the correctness of the judgment).

Given that Fennell did not set forth a coherent statement of the issues on appeal or properly cite to the record, Fennell's appeal should be disregarded or stricken and the trial court's entry of summary judgment in favor of Ivory North affirmed.

CONCLUSION

For all the foregoing reasons, Ivory North moves this Court to deny Fennell's appeal and affirm the trial court entry of summary judgment in its favor.

DATED this 16th day of September, 2002.

BERRETT & ASSOCIATES, L.C.

A handwritten signature in cursive script, appearing to read "Barbara K. Berrett", written in dark ink.

BARBARA K. BERRETT

Attorney for Defendant/Appellee Ivory North

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2002, I served a true and correct copy of the foregoing instrument was mailed to the following:

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