

2016

**John Mardesich, Plaintiff and Appellant, v. Anthony Bros.
Construction, a Utah Corporation, DbA Anthony Bros. Pool & Spa;
Sun Hill Homes, l.c., and John Does I-X, Defendants and Appellee
(Sun Hill) Anthony Bros. Construction, a Utah Corporation, DbA
Anthony Bros. Pool& Spa, Third-Party Plaintiff, v. Marie Mardesich,
Third-Party Defendant and Appellant**

Utah Court of Appeals

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UTAH COURT OF APPEALS

JOHN MARDESICH,

Plaintiff and Appellant,

v.

ANTHONY BROS. CONSTRUCTION, a
Utah corporation, dba ANTHONY BROS.
POOL & SPA; SUN HILL HOMES, L.C.,
and JOHN DOES I-X,

Defendants and Appellee (Sun Hill)

**BRIEF OF APPELLEE
SUN HILL HOMES, L.C.**

ANTHONY BROS. CONSTRUCTION, a
Utah corporation, dba ANTHONY BROS.
POOL & SPA,

Third-Party Plaintiff,

v.

MARIE MARDESICH,

Third-Party Defendant and
Appellant

Case No. 20150730

District Court No. 080502342

Appeal from Judge G. Michael Westfall's Decision
of the Fifth Judicial District Court
Washington County, Utah

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

The Utah Supreme Court had original appellate jurisdiction of this appeal under Utah Code section 78A-3-102(3)(j). Pursuant to its authority under Utah Code section 78A-3-102(4) and Utah Rules of Appellate Procedure 42(a), the Utah Supreme Court transferred this appeal to this Court on September 8, 2015. This Court has jurisdiction under Utah Code section 78A-4-103(2)(j).

STATEMENT OF ISSUES / STANDARDS OF REVIEW¹

Appellee does not agree with and is dissatisfied with Appellant's statement of the issues on appeal and statement of the case. Pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, Appellee provides the following statement of the issues:

Issue No. 1: Did Judge Shumate and Judge Westfall² agree with each other that the original Real Estate Purchase Contract for Construction, including its twelve (12) written addenda (together referred to as "REPC"), constitutes the entire agreement between Appellants and Sun Hill Homes, L.C. and did these two district court judges agree that the REPC was never modified by the parties.

Standard of Review: Judge Shumate stated at the trial in this matter that the REPC "...is in fact the agreement between the parties, that is basically uncontroverted". Judge

¹ This appeal arises from the district court's order granting Sun Hill Homes, L.C.'s ("Sun Hill") Motion under Utah R. Civ. P. 59(a)(6) & (7).

² Judge James Shumate was the first judge assigned to this matter. Judge Shumate handled this case through discovery, a motion for summary judgment, and a two day trial. After entering his findings and before Sun Hill's Rule 59 Motion, Judge Shumate retired. The case was then transferred to Judge G. Michael Westfall and Judge Westfall reviewed the pleadings in this case, the trial transcripts, evidence, and Sun Hill's Rule 59 Motion. Judge Westfall then amended Judge Shumate's prior findings and conclusions of law, but the two judges essentially agreed on all issues of fact.

Westfall made the same finding in his Order granting the Rule 59 Motion. “A contract’s interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent. If a trial court interprets a contract as a matter of law, we accord its construction no particular weight, reviewing its action under a correctness standard.” *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985). Factual findings made by the trial court will be upheld unless they are clearly erroneous. *Mostrong v. Jackson*, 866 P.2d 573, 577 (UT App. 1993). Here, Judge Shumate excluded extrinsic evidence and sustained objections based on parol evidence and held that the agreement of the parties was the language within the four corners of the REPC and Judge Westfall agreed. Appellants also stipulated that the REPC was integrated and admitted that it was unambiguous. Thus, the appropriate standard of review on this issue is one of correctness. Further, the standard of review when a district court grants a Rule 59 Motion is an abuse of discretion standard. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶25, 82 P.3d 1064 (stating that “[u]nder our rule 59, it is well settled that, as a general matter, the trial court has broad discretion to grant or deny a motion for a new trial. Under this standard of review, ‘we will reverse only if there is no reasonable basis for the decision.’” (citations omitted)).

Citation to the Record: R. 2044 (Tr. Transcr. Vol. II, 87:5-10 (Dec. 3, 2013)); R. 1752-1763, a copy of said ruling is attached to Addendum to Appellant’s Brief as Exhibit E; R. 2043 (Tr. Transcr., Vol. I, 9:8 – 10:9 (Dec. 2, 2013)); R. 2042 (Hrg. Transcr. 8:24 – 9:1 (Oct. 29, 2013)).

Issue No. 2: Are the Appellants precluded from arguing that the REPC is not the only agreement of the parties because of the Appellants' stipulation that the REPC is integrated and admission that the REPC is unambiguous?

Standard of Review: During the hearing on Sun Hill's Motion for Summary Judgment, Appellants admitted to Judge Shumate that the REPC was unambiguous. During the trial, the Appellants stipulated that the REPC was integrated in response to a question from Judge Shumate after an objection by Sun Hill regarding parol evidence. A review of stipulations are questions of law that are reviewed for correctness. *Lloyd v. Lloyd*, 2009 UT App 314, ¶6, 221 P.3d 884 (citing *Zions First Nat'l Bank, N.A. v. National Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988) (stating that "[q]uestions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court's interpretation no presumption of correctness.") and *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah Ct.App.1997) (stating that "[a] stipulation is construed as a contract.")).

Citation to the Record: R. 2042 (Hrg. Transcr. 8:24 – 9:1 (Oct. 29, 2013)); R. 2043 (Tr. Transcr., Vol. I, 9:8 – 10:9 (Dec. 2, 2013)).

Issue No. 3: Did Judge Westfall's order on the Rule 59 Motion properly find that Judge Shumate erred in finding that the REPC was silent with regard to the risk of loss related to the placement of soil at the property purchased by Appellants.

Standard of Review: Judge Westfall found that the REPC was *not* silent on the issue of risk of loss associated with the placement of soil at Lot 8. The standard of review when a district court grants a Rule 59 Motion is an abuse of discretion standard.

Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶25, 82 P.3d 1064. “A contract’s interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent. If a trial court interprets a contract as a matter of law, we accord its construction no particular weight, reviewing its action under a correctness standard.” *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985) (citation omitted). Here, both judges agreed that the REPC was the entire agreement of the parties and Judge Westfall found that Judge Shumate’s interpretation was incorrect.

Citation to Record: Judge Westfall found that:

...Judge Shumate made no finding that the parties ever mutually agreed that Sun Hill would be responsible to ensure the suitability of the soil for a swimming pool. He only found that Sun Hill was aware of Plaintiffs’ intention to build a swimming pool in their backyard, ... and that *the absence* of any agreement between the parties as to ‘[t]he risk of loss associated with the placement of as much as fifteen feet of additional soil on Lot 8’ resulted in such risk being ‘placed in the hands of Sun Hill Homes.’

R. 1759 (emphasis in original).

Judge Westfall then found that the REPC was “far from silent” on the issue of risk of loss associated with the placement of addition soil at Lot 8. R. 1760.

Issue No. 4: Did Judge Westfall correctly find that “...the Judgment should be amended to correct the *legal error* that occurred when a contractual duty was imposed on Sun Hill to investigate the suitability of the soil for a swimming pool.” R. 1760 (emphasis added).

Standard of Review: The standard of review when a district court grants a Rule 59 Motion is an abuse of discretion standard. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶25, 82 P.3d 1064 (stating that “[u]nder our rule 59, it is well settled that, as a general matter, the trial court has broad discretion to grant or deny a motion for a new trial. Under this standard of review, ‘we will reverse only if there is no reasonable basis for the decision.’” (citations omitted)). “A contract’s interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent. If a trial court interprets a contract as a matter of law, we accord its construction no particular weight, reviewing its action under a correctness standard.” *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985) (citation omitted)).

Citation to Record: R. 2043 (Tr. Transcr., Vol. I, 9:8 – 10:9 & 10:23 – 11:1 (Dec. 2, 2013)); R. 2043 (Tr. Transcr., Vol. I, 9:8 – 10:9 (Dec. 2, 2013)); R. 2042 (Hrg. Transcr. 8:24 – 9:1 (Oct. 29, 2013)); R. 2044 (Tr. Transcr. Vol. II, 87:5-10 (Dec. 3, 2013)); R. 1760.

Issue No. 5: Did Judge Westfall correctly find that Sun Hill was the prevailing party and thus deserving of an award of attorneys’ fees and costs where “...there is no basis for holding Sun Hill liable for breach of contract...”. R. 1760 (emphasis added).

Standard of Review: Whether attorney fees are recoverable is a question of law that is reviewed for correctness. *Rohan v. Boseman*, 2002 UT App 109, ¶17, 46 P.3d 753. However, “...[w]hich party is the prevailing party is an appropriate question for the trial court.” *Crowley v. Black*, 2007 UT App 245, ¶6, 167 P.3d 1087 (citing *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶25, 40 P.3d 1119). As such, “...review the trial court's

determination as to who was the prevailing party [is] under an abuse of discretion standard.” *Id.*

Citation to Record: *See* R. 112-20 (Sun Hill’s Answer in which claim was made for attorney fees and costs); *See Also* R. 1885-94 (Sun Hill’s Motion for Award of Attorneys’ Fees and Costs); *See Also* R. 2047 (Tr. Ex. 1, REPC at § 25) (providing the contractual basis for an award of fees in this action).

DETERMINATIVE RULE

Utah Rules of Civil Procedure 59(a) states that “...on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment [for the following reasons]: (a)(6) [i]nsufficiency of the evidence to justify the verdict or other decision, or that it is against law[; or] (a)(7) [e]rror in law.” *See* Utah R. Civ. P. 59, a complete copy of which is attached to this Brief in the Addendum as **Exhibit A**.

STATEMENT OF THE CASE

I. Nature of the Case

The Appellant purchased a home and lot from the Appellee, Sun Hill Homes, L.C (“Sun Hill”). Sun Hill developed the lot and built the home (“Lot 8” or “Property”). Lot 8 borders the Santa Clara River. During the construction of the home on Lot 8 and due to extensive flooding that occurred in Washington County in 2005, the government provided for the installation of rock walls to armor the banks of the river along Lot 8 and other adjacent lots. This rock wall armoring the river was provided by the government to

help mitigate damage from future flooding of the river. Sun Hill accepted the assistance of the Natural Resources Conservation Service Division of the US Department of Agriculture to make changes to the grading and add rock walls to Lot 8 in order to protect the lot and the home being constructed on Lot 8 from future flooding of the river. The assistance from the government resulted in additional soil being added to Lot 8 and the lot size being increased.

After the construction of the home on Lot 8 and after Appellants closed on the purchase of the home and lot from Sun Hill, the Appellants hired Anthony Bros. Construction ("Anthony Bros.") to construct a pool in the backyard of Lot 8. Appellants did not properly engineer the pool that Anthony Bros. constructed on Lot 8 in spite of the agreement between Sun Hill and the Appellants that requires that certain improvements to Lot 8 be properly engineered by Appellants. After construction of the pool by Anthony Bros., the pool experienced signs of differential movement and Appellants filed the underlying lawsuit claiming damages against both Anthony Bros. and Sun Hill for the failure of the pool.

II. Course of Proceedings

After litigating for nearly two years with Anthony Bros., which is the party that actually constructed the Appellants pool, the Appellants filed an amended complaint in the district court adding Sun Hill to this action. R. 95-106. Appellants alleged, among other things, breach of contract, non-disclosure, and unjust enrichment against Sun Hill. R. 95-106. After discovery, Sun Hill filed a Motion for Summary Judgment and a hearing was held on that Motion. R. 593-670; *See Also* R. 2042 (Hrg. Transcr., generally

(Oct. 29, 2013)). At the October 29, 2013 hearing, Judge Shumate awarded partial summary judgment to Sun Hill and left for trial only Appellants breach of contract claims against Sun Hill³. R. 2042 (Hrg. Transcr. 16:17-23 & 19:15-18 (Oct. 29, 2013)), portions of the hearing held on the motion for summary judgment are included with this Brief in the Addendum as **Exhibit B**.

A trial in this matter was held on December 2nd and 3rd of 2013. R. 2043 (Tr. Transcr. Vol. I, generally); R. 2044 (Tr. Transcr. Vol. II, generally). Judge Shumate made verbal findings on the record at the trial. The portion of the trial transcript containing Judge Shumate's verbal findings is attached to this Brief in the Addendum as **Exhibit C**. Judge Shumate ruled against Sun Hill at the trial and later entered Findings, Conclusions, and Judgment on March 17, 2014. R. 1597-1602. Thereafter, Judge Shumate retired and Sun Hill timely filed a Utah R. Civ. P. 59 Motion for a New Trial ("Rule 59 Motion"). R. 1661-81. After a hearing on the Rule 59 Motion before a newly assigned judge, Judge Westfall entered his Decision and Order Granting Sun Hill Homes, L.C.'s Motion for a New Trial. R. 1752-63; *See Also* R. 1783-1788, a copy of Judge Westfall's Order Vacating Findings, Conclusions, and Judgment; Amended Findings of Fact and Conclusions of Law and Judgment is attached to this Brief in the Addendum as **Exhibit D**.

Appellants filed a Notice of Appeal of Judge Westfall's ruling on the Rule 59 Motion, but because the matter of attorneys' fees had not been resolved, that appeal was

³ The trial also consisted of claims by Appellants against the Defendant Anthony Bros. but the only claims remaining against Sun Hill were Appellants' breach of contract claims.

dismissed. *See* R. 1933-34; *See Also* Order of Summary Dismissal in Appellate Case No. 20150151-CA. After Judge Westfall awarded Sun Hill its fees under the attorneys' fees provision of the REPC, the Appellants appealed again. R. 1991-92. This matter now comes before this Court on the Appellants' appeal of Judge Westfall's order granting Sun Hill's Rule 59 Motion and appeal of the judgment against Appellants for attorneys' fees and costs.

III. Disposition in the District Court

Judge Westfall ruled in favor of Sun Hill finding that "...the Judgment should be amended to correct the *legal error* that occurred when a contractual duty was imposed on Sun Hill to investigate the suitability of the soil for a swimming pool. Absent such duty, there is no basis for holding Sun Hill liable for breach of contract...". R. 1760 (emphasis added). Judge Westfall then ruled that Sun Hill did not breach the REPC and entered final judgment against Appellants for Sun Hill's attorneys' fees and costs in the amount of \$47,063.91. R. 1972-1973; *See Also* R. 2046 (Hrg. Transcr. at 11:6-7 (June 29, 2015)).

IV. Statement of Facts

The REPC is the Parties' Agreement

1. On or about December 4, 2004, Appellants entered into a Real Estate Purchase Contract for Construction with Sun Hill for the purchase of a lot and home to be constructed on that lot (together the home and lot are referred to as "Property" or "Lot 8"). R. 2047 (Tr. Ex. 1), attached as Exhibit A to the Addendum to Appellant's Brief.

2. The Real Estate Purchase Contract for Construction was signed by Marie Mardesich, who was defined in that written agreement as “Buyer”, and ultimately included twelve (12) addenda dated from September 12, 2005 to May 15, 2006 that were signed by both Appellants John and Marie Mardesich (the Real Estate Purchase Contract for Construction together with the twelve written addenda are referred to herein as “REPC”). R. 2047 (Tr. Ex. 1).

3. The REPC contains an integration clause that states “[t]his Agreement together with its addenda, any attached exhibits, and any subsequent change or extra orders, constitutes the entire Agreement between Buyer and Seller and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts, verbal or written, between buyer and Seller.” R. 2047 (Tr. Ex. 1, REPC at § 29).

4. The REPC also states that “[t]his Agreement cannot be changed, amended, or altered without the written agreement of Buyer and Seller, which written agreement must be signed by Buyer and an authorized representative of Seller.” R. 2047 (Tr. Ex. 1, REPC at § 29).

5. At the hearing on Sun Hill’s motion for summary judgment, and prior to trial in this matter, Appellants conceded that the REPC was unambiguous by stating “...this is undisputed, and both parties agree that the REP-C [sic] is unambiguous.” R. 2042 (Hrg. Transcr. at 8:24 – 9:1 (Oct. 29, 2013)), an excerpt of which is attached to this Brief in the Addendum as **Exhibit B**.

6. At trial, Appellants’ stipulated that the REPC is integrated when counsel for the Appellants was asked by Judge Shumate “[c]ounsel, is there some ambiguity in the

contract that would justify the Court looking at the parol in any way, shape, or form?"; and counsel for Appellants responded that "[y]our Honor, as far as the integration in the contract, there isn't, although that's not where I'm going with this." R. 2043 (Tr. Transcr., Vol. I, at 9:24 – 10:4 (Dec. 2, 2013)), an excerpt of which is attached to this Brief in the Addendum to as **Exhibit E**.

7. At trial, Judge Shumate sustained an objection limiting parol evidence that was outside the four corners of the REPC. R. 2043 (Tr. Transcr., Vol. I, at 9:24 – 10:4 (Dec. 2, 2013)).

8. To yet another objection on parol evidence, Judge Shumate stated "I will receive it not for its obviously parole [sic] purpose, but to explain the actions of the parties as they engaged in this process, *the contract itself so far controls.*" R. 2043 (Tr. Transcr., Vol. I, at 10:23 – 11:1 (Dec. 2, 2013)) (emphasis added).

9. Ultimately, Judge Shumate found that the REPC or "...Exhibit No. 1, entered into by the parties with all 12 addenda *is in fact the agreement between the parties*, that is basically uncontroverted, and the exhibit that is in the Court's hands does and is found by the Court to be a full and true and correct copy of that agreement." R. 2044 (Tr. Transcr., Vol. II, at 87:5-10 (Dec. 3, 2013)), excerpts of the Tr. Transcr. Vol. II are attached to the Addendum to this Brief as **Exhibit D**.

10. Judge Westfall interpreted the REPC as the agreement between the parties and stated that "...Judge Shumate made no finding that the parties ever mutually agreed that Sun Hill would be responsible to ensure the suitability of the soil for a swimming pool." R. 1759.

11. There is no written addendum or other writing signed by Buyer and an authorized representative of Seller that states that Sun Hill would be responsible to ensure the suitability of soil for a swimming pool in the backyard of Lot 8. *See Record, generally, for absence of any such writing.*

12. Judge Westfall also concluded that the REPC was *not* silent with regard to the risk of loss associated with the placement of additional soil at Lot 8 and concluded that it was the obligation of Appellants to properly engineer improvements such as a pool. R. 1759-1760.

Terms of the Parties Agreement

13. The REPC states that “Seller’s model homes and promotional materials contain optional and extra design features such as floor coverings, decorator light fixtures, wall coverings, window treatments, furniture, built-ins, *swimming pools or spas*, and furnishings. Those items shall *not* be included in Buyer’s Home, unless specifically ordered and paid for in accordance with Section 7.” R. 2047 (Tr. Ex. 1, REPC at § 6.4) (emphasis added).

14. The REPC does not contain any requirement that Sun Hill would construct any pool or spa at Lot 8 and the Appellants never ordered or paid for Sun Hill to construct a pool at Lot 8. R. 2047 (Tr. Ex. 1, REPC, generally).

15. The REPC states the following:

Although Buyer is entitled to select and Seller shall endeavor to provide the Options described above, the Home shall not be constructed as nor deemed to be a custom Home. The Home is being constructed as a single structure within Seller’s production housing development and shall be built according to the requirements of the overall development and construction

program. Accordingly, *Seller reserves the right to, at its sole discretion, make changes in the plans, specifications, and materials for the Home as and when Seller deems necessary and appropriate.*

R. 2047 (Tr. Ex. 1, REPC at § 8) (emphasis added).

16. The REPC defines “Home” as the “[l]ot and improvements” at Lot 8. R. 2047 (Tr. Ex. 1, REPC at § 1.3).

17. The REPC states that “[a]ll risk of loss to the Property, including physical damage or destruction of the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller *until the transaction is closed.*” R. 2047 (Tr. Ex. 1, REPC at § 5.8) (emphasis added).

18. The REPC states further in that same “Risk of Loss” section that “[a]fter *closing* all risk of loss shall be borne by Buyer, regardless of the date and time Buyer takes actual possession of the Home.” R. 2047 (Tr. Ex. 1, REPC at § 5.8) (emphasis added).

19. The REPC states the following:

The Sunbrook Development Master Plan, as well as any other development plans prepared by Seller, may be amended or changed from time to time to provide for *changes, modifications, or alterations to ... lot sizes and configurations* ... or other improvements. ... Buyer understands that no statement by one of Seller’s representatives or any sales associate regarding the planned use of the property in or adjacent to Sunbrook should be understood by the buyer or anyone as a warranty or promise regarding Seller’s future development plans. By execution of this agreement and as a material inducement to seller to accept Buyer’s offer to purchase the property, *Buyer waives any right to claim any damages*, costs, liabilities, expenses or obligations *against Seller*, Seller’s officers, employees, agents, and subsidiaries *for any changes to* the Master Plan or any other zoning ordinances or *development plan for Woodlands.*

R. 2047 (Tr. Ex. 1, REPC at § 11) (emphasis added).

20. The REPC states that:

Buyer [or Appellants] agrees to purchase the Property subject to the following additional disclaimers and to release Seller from any liability, and to indemnify Seller from any liability, with respect to the following enumerated items: ...14.3 *Future improvements* by Buyer, including walls, fencing, grading, landscaping or *excavation work* on the Lot which could disrupt drainage and/or retention and cause flooding or ponding if not correctly engineered (and *Buyer hereby agrees to correctly engineer all such future improvements*).

R. 2047 (Tr. Ex. 1, REPC at § 14 (emphasis added)).

21. The REPC states explicitly that “[i]n no event shall Seller [or Sun Hill] be responsible for incidental or consequential damages”⁴. R. 2047 (Tr. Ex. 1, REPC at § 15.2).

The Increase of the Size of Lot 8

22. Prior to 2005 and at the time Lot 8 was subdivided, that lot was prepared and graded according to the grading plan prepared by Rosenberg Associates. R. 2047 (Tr. Ex. 16, generally); R. 1600 at ¶ 27, a copy of such part of the record is attached to Appellant’s Addendum as Exhibit D; R. 1786 at ¶ 28, attached to this Brief in the Addendum as **Exhibit D**.

⁴ Sun Hill maintains that the trial judge erred when he awarded joint and several liability; however, the ruling by Judge Westfall rendered the requirement to address this aspect of Judge Shumate’s ruling moot. *See Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, P21, 83 P.3d 391 (stating that “Utah law holds that Plaintiffs can only recover ‘general damages, which flow naturally from the breach, and consequential damages, which, while not an invariable result of breach, were reasonably foreseeable by the parties at the time the contract was entered into.’” (citations omitted)); *See Also* R. 1661-81; *See Also* R. 1760.

23. In 2005, there were “epic floods” on the Santa Clara River, which river borders Lot 8. R. 2043 (Tr. Transcr., Vol. I, at 16:3 – 17:3 (Dec. 2, 2013)).

24. Judge Shumate found “... by a preponderance of the evidence that the 2005 flood changed what was contemplated by the parties when they entered into [the REPC], and that the defendant Sun Hill Homes was required to adapt to those changes. They adapted to those changes and *had every right to do so under the terms of this contract...*”. R. 2044 (Tr. Transcr., Vol. II, 88:9-14 (Dec. 3, 2013)) (emphasis added).

25. The REPC specifically states that “[Sun Hill] reserves the right to, at its sole discretion, make changes in the plans, specifications, and materials for the Home [defined as the lot and improvements] as and when Seller deems necessary and appropriate.” R. 2047 (Tr. Ex. 1, REPC at § 8 & 1.3).

26. Due to the flooding, Sun Hill reasonably used the services provided by the Natural Resources Conservation Service Division of the US Department of Agriculture to make changes to the grading of Lot 8 and add rock armoring walls to Lot 8 in order to protect the lot and home from future flooding. R. 2043 (Tr. Transcr., Vol. I, 23:1 – 27:25 (Dec. 3, 2013)); *See Also* R. 1608 at ¶29; *See Also* R. 1786 at ¶30.

27. After the pool constructed by Anthony Bros. failed, Jared Hanks, a soils engineer, performed soils testing on the soil that the government added to Lot 8, and during trial was asked “...when the soil in the backyard area of lot 8 was tested, it came back 89 to 90 percent?” to which he responded “[y]es”. R. 2043 (Tr. Transcr., Vol. I, 182:24 – 183:2 (Dec. 2, 2013)).

28. When Jared Hanks was asked “...to what compaction level are backyards usually compacted?” he responded by saying that “Landscaping is usually somewhere from 85 to 90 percent.” R. 2043 (Tr. Transcr., Vol. I, 160:17-19 (Dec. 2, 2013)).

29. Jim Nordquist, an expert for both Appellants and Sun Hill, was asked “[i]s it customary for backyards and even front yards to be compacted by developers to – in excess of 90 percent?” and he replied “Not very often”. R. 2043 (Tr. Transcr., Vol. I, 200:23-25 (Dec. 2, 2013)).

30. Mr. Nordquist testified that compacting a backyard to 95 percent or 90 percent would be a “unique situation” and that “it would be rare” for a developer “... in a multiple lot subdivision such as Woodlands [where Lot 8 is]” to compact backyards to 90 or 95 percent. *See* R. 2043 (Tr. Transcr., Vol. I, 201:7-18 (Dec. 2, 2013)).

Post-Closing Construction of Pool

31. On or about May 16, 2006, Appellant and Sun Hill “closed” on the sale of the home and Lot 8 (“Property” or “Lot 8”) and Sun Hill conveyed the Property to Appellants by Special Warranty Deed (hereinafter “Warranty Deed”) which was recorded on or about June 6, 2006. R. 1561 (Pretrial Order, Stipulated and Uncontroverted Facts) at ¶8.

32. After the property had been deeded to Appellants by Sun Hill, Appellants hired Anthony Bros. to construct a pool in the backyard of Lot 8 at the Woodlands (hereinafter “Pool”). R. 1561 at ¶9.

33. Sun Hill did not construct the Pool and the Pool was constructed at the Property after Appellants accepted title to the Property. R. 1561 at ¶11.

34. Appellants never had a contract with Sun Hill for Sun Hill to construct the Pool. R. 1561 at ¶12.

35. Prior to signing their agreement with Anthony Bros. for the construction of the Pool, Appellant John Mardesich reviewed his contract with Anthony Bros. R. 2043 (Tr. Transcr., Vol. I, 81:15-24 (Dec. 2, 2013)).

36. In the course of reviewing his agreement with Anthony Bros. for the construction of the Pool prior to execution of that agreement, Mr. Mardesich came across a section of that agreement where the “homeowner ... basically guarantee[d] that the soil [in the back yard on Lot 8] was compacted to 90 percent”. R. 2043 (Tr. Transcr., Vol. I, 81:23 – 82:2 (Dec. 2, 2013)).

37. Mr. Mardesich told Anthony Bros. that he didn’t know what that guarantee meant in the agreement with Anthony Bros. and tried to offer the soils report for the development (R. 2047 (Tr. Ex. 16)) to Anthony Bros.; the representative of Anthony Bros. did not look at or accept a copy of the soils report from Mr. Mardesich. R. 2043 (Tr. Transcr., Vol. I, 82:2-13 (Dec. 2, 2013)).

38. In spite of the requirements of §14 of the REPC, Appellants did not pay a licensed engineer to complete proper engineering for the construction of the pool. *See* R. 2043 (Tr. Transcr., Vol. I, 102:23 – 103:6 (Dec. 2, 2013)); *See Also* R. 2043 (Tr. Transcr., Vol. I, 60:23 – 61:4 (Dec. 2, 2013)).

39. When John Mardesich was asked “[w]ho did you have do the engineering for the pool, the spa and the fire pit and the creek?”, Mr. Mardesich responded that “Hal

Anthony” of Anthony Bros. did the engineering. *See* R. 2043 (Tr. Transcr., Vol. I, 102:23 – 103:6 (Dec. 2, 2013)).

40. When the Appellant John Mardesich was asked “[d]id you believe it was your responsibility as the homeowner to engineer the pool and the spa and the creek and –”, he responded that “[w]ell, I believe that it was my responsibility to hire a contractor that would engineer it, yes.” *See* R. 2043 (Tr. Transcr., Vol. I, 103:7 – 103:10 (Dec. 2, 2013)).

41. During the construction of the pool and while the rebar was being placed in the pool prior to the application of gunite, Jared Hanks of AGECE noticed the construction of the swimming pool and went to Anthony Bros. to disclose potential soils conditions to the pool contractor. *See* R. 2043 (Tr. Transcr., Vol. I, 159:2-25 (Dec. 2, 2013)).

42. The reason that Jared Hanks went to tell Anthony Bros., the contractor for the pool, about the soil conditions was that he “...had knowledge that the building pads were only prepared to accept the building foundations and then potentially five feet outside the building foundations.” *See* R. 2043 (Tr. Transcr., Vol. I, 159:22-25 (Dec. 2, 2013)).

43. Mr. Hanks informed Anthony Bros. that the pool they were constructing at Appellants’ property was being constructed in an area outside of compaction and that there could be soil issues with the pool. *See* R. 2043 (Tr. Transcr., Vol. I, 160:7-14 (Dec. 2, 2013)).

44. The representative of Anthony Bros. responded to Mr. Hanks that he had engineers design the reinforcing steel in the pool, but did not engage a soils engineer stated that “...there were never any soil problems prior to engineers being involved.” R. 2043 (Tr. Transcr., Vol. I, 161:7-17 (Dec. 2, 2013)).

45. Judge Shumate found that Mr. Hanks' testimony that he alerted Anthony Bros. to the soils issues at Lot 8 was more credible than Mr. Anthony's denial regarding those conversations and found further that Anthony Bros. had knowledge of the issues of the soils conditions at Lot 8 while the pool was in the steel framing stage. R. 2044 (Tr. Transcr., Vol. II, 84:1-16 (Dec. 3, 2013)).

46. After completion of the construction of the pool by Anthony Bros., the pool and spa experienced significant differential settlement. R. 1562 at ¶12.

Judge Shumate's Interpretation of the REPC

47. Judge Shumate ruled that the REPC or "...Exhibit No. 1, entered into by the parties with all 12 addenda *is in fact the agreement between the parties*, that is basically uncontroverted, and the exhibit that is in the Court's hands does and is found by the Court to be a full and true and correct copy of that agreement." R. 2044 (Tr. Transcr., Vol. II, 87:5-10 (Dec. 3, 2013)).

48. Judge Shumate interpreted the REPC as providing Sun Hill the contractual right to alter the grading of Lot 8 and to accept the assistance from the government R. 2044 (Tr. Transcr., Vol. II, 88:9-14 (Dec. 3, 2013)) (stating that "... by a preponderance of the evidence that the 2005 flood changed what was contemplated by the parties when they entered into [the REPC], and that the defendant Sun Hill Homes was required to adapt to those changes. They adapted to those changes and had every right to do so under the terms of this contract...").

49. Judge Shumate then interpreted the REPC in such a way to find that "[t]he REPC poses a duty on Sun Hill Homes to investigate the suitability of the soil added to

Lot 8 for its intended use as a buildable lot for the construction of a swimming pool.” R. 1601 at ¶ 37.

50. However, Judge Shumate found that “... *there was no bargain* between the parties with respect to what liability under Exhibit 1 [the REPC] would apply to that change [or the addition of soil].” R. 2044 (Tr. Transcr., Vol. II, 90:18-19 (Dec. 3, 2013)) (emphasis added).

51. In finding there was no “bargain” regarding the placement of soil, Judge Shumate stated that “[w]here there is no specific understanding of what the contract is mean [sic] and what the bargain is meant between the parties when this thousand year flood or between 500 and 1,000, maybe it’s a 750 year flood if there is such a thing, when this occurred no one took the next step to say what are the different circumstances.” R. 2044 (Tr. Transcr., Vol. II, 91:7-12 (Dec. 3, 2013)).

52. Judge Shumate then said “[i]t may seem somewhat arbitrary for the Court to place that risk in the hands of Sunhill [sic], but they were the ones in charge of the lot during this period of time.” R. 2044 (Tr. Transcr., Vol. II, 91:13-15 (Dec. 3, 2013)).

53. Judge Shumate found that the parties did *not* have an agreement regarding the risk of loss associated with the placement of soil at Lot 8. R. 2044 (Tr. Transcr., Vol. II, 91:13-15 (Dec. 3, 2013)); *See Also* R. 1601 at ¶ 38.

54. Judge Shumate found that “[w]here there is no express understanding as to the changed circumstances, the risk associated with the placement of additional soil is placed in the hands of Sun Hill Homes.” R. 1601 at ¶ 39.

Judge Westfall's Correction of Legal Error in Judge Shumate's Interpretation of the REPC and determination that the parties had an agreement regarding the risk of loss associated with the placement of soil at Lot 8.

55. Judge Westfall pointed out that Judge Shumate "...made no finding that the parties ever mutually agreed that Sun Hill would be responsible to ensure the suitability of the soil for a swimming pool." R. 1759.

56. However, Judge Westfall found that Judge Shumate erred in finding that the parties had not addressed the risk of loss associated with the placement of additional soil at Lot 8. R. 1760.

57. Judge Westfall determined that "[f]ar from being silent, however, the REPC clearly imposes on Plaintiffs the responsibility for proper engineering of an improvement such as the swimming pool here." R. 1760 (referring to R. 2047 (Tr. Ex. 1, REPC at § 14.3)).

58. Judge Westfall also stated that "...there does not appear to be any reasonable basis for finding that Sun Hill had a contractual duty under the REPC to investigate the soil's suitability for a swimming pool, particularly when section 14 of the REPC expressly allocates to Plaintiffs the responsibility for proper engineering of improvements involving excavation, which would include an improvement such as a swimming pool here." R. 1759.

59. Judge Westfall then said that "[i]t is unreasonable to circumvent this express provision [section 14] by purporting to fill a void about the risk of loss associated with placement of additional soil." R. 1760.

60. Judge Westfall ruled that "...the Judgment should be amended to correct the *legal error* that occurred when a contractual duty was imposed on Sun Hill to investigate the suitability of the soil for a swimming pool. Absent such duty, there is no basis for holding Sun Hill liable for breach of contract...". R. 1760 (emphasis added).

Sun Hill's Award of Attorneys' Fees and Costs

61. Appellants' claims against Sun Hill were based in, and founded upon, the REPC. R. 95-106.

62. Section 15.3 of the REPC provides for mandatory Arbitration⁵. See R. 2047 (Tr. Ex. 1, REPC, at § 15.3).

63. Without requesting or demanding Arbitration, Appellants initiated this action against Sun Hill after obtaining permission from the Court to amend its Complaint to include Sun Hill. See R. 74-75; See Also R. 95-106.

64. Sun Hill responded to the Amended Complaint by filing an Answer filed on or about August 16, 2010. R. 112-120.

65. By the actions of Appellants and Sun Hill in filing an Amended Complaint and responding with an Answer without requiring Arbitration, each Party waived the

⁵ Appellants have not challenged the award of attorneys' fees to Sun Hill based on the term of the REPC only permitting an award of fees in arbitration or mediation. Instead, the Appellants only basis for arguing that Sun Hill should not be awarded fees is under the doctrine of "first breach" where the Appellants claim that Sun Hill breached the REPC by allowing the government to add soil and rock walls to Lot 8. This contention is made in spite of Judge Shumate's finding that Sun Hill had every right under the contract to accept the assistance of the government. See R. 2044 (Tr. Transcr., Vol. II, 88:9-14 (Dec. 3, 2013))

requirement for mandatory Arbitration in accordance with section 78B-11-105(1) of the Utah Code. *See* R. 95-106; *See Also* R. 112-120.

66. The Appellants specifically sought fees in accordance with the contract (or REPC) of the parties. R. 106.

67. Sun Hill sought fees in its Answer to Appellants Amended Complaint. R. 119.

68. The REPC states that “[i]n the event of any arbitration or mediation between Seller and Buyer, before or after the Closing, the prevailing party shall be entitled to an award of all attorney’s fees and costs in an amount to be determined by the arbitrator or mediator hearing the matter.” R. 2047 (Tr. Ex. 1, REPC at § 25).

69. The REPC states further that “[a]ny court or arbitration hearing any matter on appeal may also award such fees to the prevailing party in and for any prior mediation or arbitration.” R. 2047 (Tr. Ex. 1, REPC at § 25).

70. Both parties have claimed fees in this action under the provision of the REPC awarding attorneys’ fees and costs to the prevailing party. *See* R. 1577-79; *See Also* R. 1885-94.

71. Judge Westfall ruled that “... I don’t find that there’s an initial breach by SunHill [sic]”. *See* R. 2046 (Hrg. Transcr. 11:6-7 (June 29, 2015)).

72. Judge Westfall stated further that “[t]hey [or Sun Hill] complied with their contractual obligations, so their attorney fees as requested are awarded.” *See* R. 2046 (Hrg. Transcr. 11:18-19 (Jun. 29, 2015)).

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SUMMARY OF ARGUMENT

The REPC is the entire agreement between Appellants and Sun Hill with regard to Lot 8. The Appellants stipulated and conceded that the REPC was both integrated and unambiguous. Judge Shumate excluded parol evidence during trial and ruled that the REPC was "...in fact the agreement of the parties...". R. 2047 (Tr. Transcr. Vol. II at 87:5-7 (Dec. 3, 2013)). Sun Hill approached trial and its defense at trial based on the rulings of Judge Shumate regarding parol evidence and the integration and unambiguity of the REPC. Judge Shumate found that there was no bargain or understanding outside of the REPC⁶. Judge Shumate also found that the REPC permitted Sun Hill to make changes to Lot 8 and thus permitted Sun Hill to accept the assistance of the government to add soil and rock armoring walls to Lot 8 on the border of the Santa Clara River.

However, at the conclusion of two days of testimony, Judge Shumate then contradicted his own findings regarding the integrated and unambiguous REPC and found that the REPC imposed a duty on Sun Hill to investigate the soils added to Lot 8 by the government for the suitability of a pool. In spite of the REPC imposing an explicit duty on the Appellants to engineer improvements to Lot 8 and in spite of the homeowner understanding that it was his duty to hire a contractor that would properly engineer the pool⁷, Judge Shumate found that the parties had been silent on the risk of loss associated with the addition of the soil. Such a finding is an improper interpretation of the REPC and contrary to the finding that that writing is the entire integrated agreement of the

⁶ Specifically, Judge Shumate found that with regard to the risk of loss associated with the addition of soil to Lot 8 the parties had no agreement.

⁷ See R. 2043 (Tr. Transcr., Vol. I, 103:7 – 103:10 (Dec. 2, 2013)).

parties. Judge Shumate ignored the explicit terms of the REPC and his own rulings, and then imposed an additional implied term upon Sun Hill in order to find a purported breach under the REPC.

Judge Westfall agreed with Judge Shumate that that REPC was the entire agreement of the parties, but Judge Westfall properly corrected the legal error committed by Judge Shumate. The legal error that Judge Shumate committed was that after he had concluded that the integrated and unambiguous REPC was "...in fact the agreement of the parties..." he interpreted this written contract to impose a duty on Sun Hill to investigate the suitability of the additional soils on Lot 8 for a pool. The REPC stated explicitly that Sun Hill was not constructing the pool at Lot 8. The REPC imposed a duty on the Appellants to properly engineer improvements such as the pool. Judge Shumate misinterpreted the REPC. Judge Shumate's interpretation directly contradicts the explicit terms of the REPC. It is legal error for Judge Shumate to create contract terms that are contradictory to the explicit bargain of the parties and which were never agreed upon by the parties.

Judge Westfall also properly corrected another erroneous interpretation of the REPC by Judge Shumate. Judge Shumate found that the parties had no bargain regarding the risk of loss associated with the addition of soils at Lot 8, when the REPC did in fact address such a risk of loss by requiring the Appellants to properly engineer improvements. Judge Shumate's finding that the REPC was silent on this issue was in error because the parties had such a bargain within the four corners of the REPC. All risk

of loss on the property was to be borne by the Appellants after closing⁸. As also noted by Judge Westfall, “[i]t is unreasonable to circumvent this express provision [section 14, which requires the Appellants to properly engineer improvements such as the pool] by purporting to fill a void about the risk of loss associated with placement of additional soil.” Because of the explicit terms of the REPC, Judge Westfall found that Judge Shumate improperly found an absence of an agreement regarding the risk of loss where in fact there was an agreement.

It is well within the discretion of the district court under Utah R. Civ. P. 59 to amend a judgment entered after a bench trial to correct legal error and where there is insufficient evidence to conclude that parties did not have an agreement. Here, Judge Westfall agreed with and adhered strictly to the findings of fact of Judge Shumate in the context of the finding that the REPC was the only agreement of the parties. Judge Shumate never found that the parties had a meeting of the minds outside the explicit terms of the REPC (stating that they had no “bargain”). Judge Westfall agreed with and adhered to this finding, but, as within his discretion, he corrected legal error regarding the interpretation of the parties’ agreement, which is the REPC.

The Appellants argue both that there was an agreement outside the REPC and that Sun Hill did not sufficiently marshal evidence for the Rule 59 Motion. Both arguments fail. Parol evidence was excluded and the Appellant Mardesich never testified that he had an agreement with Sun Hill regarding the investigation of the added soil for a pool. Further, Appellants specific Rule 59 Motion did marshal all necessary evidence and

⁸ See R. 2047 (Tr. Ex. 1, REPC at 5.8).

Judge Westfall ruled on the Rule 59 Motion after a careful review of Judge Shumate's findings, the evidence, and a proper interpretation of the REPC.

Lastly, Sun Hill is the prevailing party and entitled to fees and costs. Sun Hill fulfilled its obligations under the REPC. The Appellants agreed and the Appellant Mardesich acknowledged in his testimony that he knew that he had an obligation to properly engineer the pool. He did not engineer the pool. The Appellants agreed to indemnify Sun Hill under the REPC for improvements that were not properly engineered. Instead of this, Appellants brought this action seeking redress for a failed pool that had been constructed by a third-party after the Appellants closed on the Property. As a result, Judge Westfall properly ruled that Sun Hill is the prevailing party and correctly awarded Sun Hill its fees and costs. Sun Hill is also entitled to its fees and costs in defending this Appeal.

ARGUMENT

I. Judge Shumate and Judge Westfall both agreed that the REPC was the entire agreement between Sun Hill and the Appellants and that the REPC was never modified by the parties.

Judge Shumate found that the REPC was "...in fact the agreement between the parties...". R. 2044 (Tr. Transcr. Vol. II at 87:5-7 (Dec. 3, 2013)). Judge Shumate's finding came after a stipulation and admission that the REPC was integrated and unambiguous. R. 2042 (Hrg. Transcr. 8:24 – 9:1 (Oct. 29, 2013)); R. 2043 (Tr. Transcr., Vol. I, 9:8 – 10:9 (Dec. 2, 2013)). Judge Westfall accepted the same factual findings as Judge Shumate and did not disrupt the finding of Judge Shumate that the REPC was the entire agreement of the parties. *See* R. 1752, generally.

The only claim made by Appellants against Sun Hill that remained for trial was Appellants' breach of contract claim. R. 2042 (Hrg. Transcr. 19:15-18 (Oct. 29, 2013)). A breach of contract claim requires (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages. *Blair v. Axiom Design*, 2001 UT 20, ¶14, 20 P.3d 388 (citation omitted). Here, Judge Shumate concluded that the only agreement between the parties was the REPC. Judge Shumate further made a factual determination that the parties did not have any additional "bargain" or understanding outside of the REPC⁹. Judge Shumate's determination came after he had excluded parol evidence during two days of testimony and after Appellants conceded and stipulated that the REPC was both integrated and unambiguous.¹⁰ Judge Westfall accepted Judge Shumate's finding that REPC is the only agreement of the parties.

The REPC is unambiguous and integrated and requires that any modification to the agreement of the parties be in writing and signed by both Appellants and a representative of Sun Hill. The Supreme Courts has "...defined an integrated agreement as 'a writing or writings constituting a final expression of one or more terms of an agreement.'" *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶13, 182 P.3d 326 (citations omitted). "To determine whether a writing is an integration, a court must determine whether the parties adopted the writing 'as the final and complete expression of their

⁹ See R. 2044 (Tr. Transcr., Vol. II, at 90:18-19 (Dec. 3, 2013)); See Also R. 2044 (Tr. Transcr., Vol. II, at 91:7-12 (Dec. 3, 2013)).

¹⁰ See R. 2046 (Tr. Transcr. Vol. II at 87:5-7 (Dec. 3, 2013)); See Also R. 2042 (Hrg. Transcr. at 8:24 – 9:1 (Oct. 29, 2013)); See Also R. 2043 (Tr. Transcr., Vol. I, at 9:24 – 10:4 (Dec. 2, 2013)).

bargain.’’ *Id.* Here, the REPC itself contains an integration clause and requires that any changes or modifications be in writing and signed by both parties. R. 2047 (Tr. Ex. 1, REPC at § 29). This aspect of the agreement was well understood by the Appellants as they entered into twelve (12) separate addenda to the original contract that were all in writing and signed.

Where a contract is integrated, parol evidence is only admissible to clarify ambiguous terms and is not admissible to vary or contradict clear and unambiguous terms of an agreement. *See Tangren*, 2008 UT at ¶¶11-12. The Appellants conceded during the hearing on Sun Hill’s Motion for Summary Judgment that the REPC is unambiguous. R. 2042 (Hrg. Transcr. 8:24 – 9:1 (Oct. 29, 2013)). Judge Shumate excluded parol evidence during the trial and never concluded that the REPC contained any ambiguities. Not only did Judge Shumate not admit or allow any parol evidence about modifying the REPC, Judge Shumate explicitly concluded that there was no additional understanding or bargain between Appellants and Sun Hill outside of the REPC¹¹.

The integrated and unambiguous REPC states that “[t]his Agreement cannot be changed, amended, or altered without the written agreement of Buyer and Seller, which written agreement must be *signed* by Buyer and an authorized representative of Seller.” R. 2047 (Tr. Ex. 1, REPC at § 29) (emphasis added). The Appellants did not present any writing at trial that was signed by either the Appellants or the Buyer which imposed a duty on Sun Hill to investigate the suitability of soils added to Lot 8 by the government for the suitability of a pool. There was no testimony, either admitted or countenanced by

¹¹ See R. 2044 (Tr. Transcr., Vol. II, 90:18-19 & 91:7-12 (Dec. 3, 2013)).

Judge Shumate, that the REPC was modified¹². This body of addenda and the original agreement are integrated and unambiguous and were never further modified to place a burden regarding investigating the soil added by the government for the suitability of a pool on Sun Hill. Judge Westfall reiterated that Judge Shumate did not find any agreement between Sun Hill and the Appellants other than the REPC when he found:

...Judge Shumate made no finding that the parties ever mutually agreed that Sun Hill would be responsible to ensure the suitability of the soil for a swimming pool. He only found that Sun Hill was aware of Plaintiffs' intention to build a swimming pool in their backyard, ... and that *the absence* of any agreement between the parties as to '[t]he risk of loss associated with the placement of as much as fifteen feet of additional soil on Lot 8' resulted in such risk being 'placed in the hands of Sun Hill Homes.'

R. 1759 (emphasis in original).

In short, both Judge Shumate and Judge Westfall concluded that the REPC was "in fact" the entire agreement of the parties. It is integrated and unambiguous and is the final expression of the parties' entire agreement with regard to the purchase of Lot 8 from Sun Hill.

II. Appellants conceded, stipulated, and agreed that the REPC is integrated and unambiguous and should now be precluded from arguing that Sun Hill and Appellants had any other agreement.

At the hearing on Sun Hill's Motion for Summary Judgment, Appellants conceded that the REPC was unambiguous by stating "...this is undisputed, and both parties agree that the REP-C [sic] is unambiguous." R. 2042 (Hrg. Transcr. at 8:24 – 9:1 (Oct. 29,

¹² The Appellants and Sun Hill executed twelve (12) written addenda to the REPC changing or modifying certain terms contained in the original contract, but none of these addenda addressed the addition of the soil to Lot 8.

2013)). During trial, counsel for Sun Hill objected to parol evidence. Counsel for Appellants were then asked by Judge Shumate “[c]ounsel, is there some ambiguity in the contract that would justify the Court looking at the parol in any way, shape, or form?”; and counsel for Appellants responded that “[y]our Honor, as far as the integration in the contract, there isn’t, although that’s not where I’m going with this.” R. 2043 (Tr. Transcr., Vol. I, at 9:24 – 10:4 (Dec. 2, 2013)).

Because of this stipulation and concession that the REPC was both integrated and unambiguous, together with Judge Shumate’s exclusion of parol evidence, Sun Hill proceeded at trial with evidence and witnesses based on the need to remain within the four corners of the REPC. Now, in contradiction to Judge Shumate’s rulings and Appellants stipulation and concessions, Appellants try to argue that there is an agreement between the parties other than the REPC. Such an argument should be precluded by this Court based on the rulings and stipulation and admissions at Judge Westfall. *See State v. Santonio*, 2011 UT App 385, ¶29, 265 P.3d 822 (stating that “trial courts [are not required] to imagine all reasonable offshoots of the argument actually presented to them before making a ruling....[and citing another case that] explain[s] that the preservation rule prevents parties not only from raising new issues on appeal, but also from raising new arguments on appeal) (citations omitted)). Here, the Appellants and Sun Hill tried this case as a contract case based on a written agreement which Appellants conceded and stipulated that it was integrated and unambiguous. Allowing them to now argue that there is another agreement between the parties would be improper and would allow new

arguments that are not supported by the evidence and which are wholly inconsistent with Appellants trial position.

III. Judge Westfall properly concluded that the REPC imposes a contractual obligation on the Appellants to “properly engineer” improvements such as the pool constructed by Anthony Bros and that Appellants failed to perform this obligation.

Regardless of the compaction of the soils added to Lot 8 by the government¹³, the REPC imposed a duty on the Appellants to properly engineer the pool constructed by Anthony Bros. The REPC explicitly states that the Appellants “...hereby agrees to correctly engineer all such future improvements [including excavation work]”. R. 2047 (Tr. Ex. 1, REPC at § 14). The Appellant John Mardesich testified that he “... believe[d] that it was [his] responsibility to hire a contractor that would engineer [the pool], yes.” See R. 2043 (Tr. Transcr., Vol. I, 103:7 – 103:10 (Dec. 2, 2013)). In spite of the explicit requirement of the REPC for all excavation at the Property to be properly engineered, the pool was not properly engineered and the pool settled.

Judge Shumate found that the REPC was silent with regard to the risk of loss associated with the addition of soil to Lot 8. However, Judge Westfall correctly interpreted the REPC to find that the REPC was *not* silent with regard to that risk of loss.

¹³ There was no evidence at trial that the soil added by the government to Lot 8 did not meet industry standards. When the expert Jared Hanks was asked “...when the soil in the backyard area of lot 8 was tested, it came back 89 to 90 percent?”, he responded “[y]es”. R. 2043 (Tr. Transcr., Vol. I, 182:24 – 183:2 (Dec. 2, 2013)). When Mr. Hanks was asked “...to what compaction level are backyards usually compacted?” he responded by saying that “Landscaping is usually somewhere from 85 to 90 percent.” R. 2043 (Tr. Transcr., Vol. I, 160:17-19 (Dec. 2, 2013)). The expert witness Jim Nordquist regarding backyard fill was that backyards are often compacted less than 90%. R. 2043 (Tr. Transcr., Vol. I, 200:23-25 Dec. 2, 2013)).

Instead, Judge Westfall found, the REPC is “far from being silent” and does impose on Appellants the duty for proper engineering of an improvement such as the swimming pool. R. 1760. Judge Westfall also concluded that it is “...unreasonable to circumvent this express provision by purporting to fill a void about the risk of loss associated with the placement of additional soil.” R. 1760.

As stated above, a breach of contract claim requires performance by the party seeking recovery. *Blair*, 2001 UT at ¶14 (citation omitted). Here, it is uncontroverted that the Appellants failed to properly engineer the pool for the soils at Lot 8. It is uncontroverted that the Appellant knew that it was his obligation to hire someone to properly engineer the pool. Yet, in spite of the explicit contractual requirements, and the Appellant’s knowledge of this requirement, the pool was not properly engineered¹⁴. As such, there is a breach by the Appellant of the REPC requiring that improvements, such as the pool, be “properly engineered”. Due to this breach, the Appellants cannot and did not meet the second element of a breach of contract claim requiring “performance by party seeking recovery.” *Blair*, 2001 UT at P14. Judge Westfall correctly found that this contractual obligation regarding engineering the pool placed the risk of loss on the Appellants and ruled in Sun Hill’s favor.

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¹⁴ Anthony Bros. was put on notice of the soil conditions and potential lack of compaction, and yet Anthony Bros. disregarded such information and failed to properly engineer the pool for such soil conditions.

IV. Judge Westfall properly concluded that the REPC *does not* impose a duty on Sun Hill to investigate the suitability of the soil added to Lot 8 for a pool.

After finding that the REPC was the agreement of the parties and concluding that there was no other agreement between the Appellants and Sun Hill, Judge Shumate stated that:

[i]t's the Court's position that the reasonable interpretation of the contract, the REP-C [sic], Exhibit 1, would impose a duty upon Sunhill [sic] to make investigation as to the utility of this additional buildable area on the lot because this was a different lot than they bound themselves under the contract and placed the burden, the risk of loss that might arise on that when the lot changed. ... [i]t may seem somewhat arbitrary for the Court to place that risk in the hands of Sunhill [sic], but they were the ones in charge of the lot during this period of time."

R. 2044 (Tr. Transcr., Vol. II, 90:6-12 & 91:13-15 (Dec. 3, 2013)).

As pointed out by Judge Westfall, a "...court can only supply reasonable [implied-in-law] terms to supplement a contract which is *silent*." R. 1760 (citing *Ross v. Epic Eng'g, PC*, 2013 UT App 136, ¶14 n.4, 307 P.3d 576 (add'l citations omitted)) (emphasis added). Judge Shumate found that the REPC was silent regarding the risk of loss associated with the additional soil the government placed on Lot 8. However, Judge Shumate found that the parties never mutually agreed to any specific terms regarding the placement of the soil. As such, Judge Shumate found that the REPC contained implied-at-law terms instead of mutually agreed upon terms¹⁵.

¹⁵ If Judge Shumate concluded that the REPC does impose a duty on Sun Hill to investigate the suitability of the soil for a pool based on some statements of the parties and not through implied-at-law terms in the REPC, then the trial judge improperly relied on parol evidence that he excluded during the trial. See *Garrett v. Ellison*, 93 Utah 184, 188, 72 P.2d 449 (Utah 1937) (stating that "Parol evidence is inadmissible to vary, alter,

Judge Westfall corrected the error of Judge Shumate by pointing out that the REPC was *not* silent on the risk of loss associated with additional soil placed on Lot 8 by the government. Judge Westfall found instead that the REPC imposed an explicit duty on the Appellants to engineer the pool that they chose to have Anthony Bros. construct at Lot 8. Here, Judge Westfall concluded that Judge Shumate never found that the parties ever mutually agreed that Sun Hill would be responsible to ensure the suitability of the soil for a swimming pool. R. 1759. Judge Westfall pointed out that Judge Shumate only found that the parties did not have an agreement regarding the investigation of the suitability of the soil for a pool.

This finding by Judge Westfall regarding Judge Shumate's finding is wholly consistent with the trial transcripts and the written judgment of Judge Shumate. Judge Shumate ruled that the REPC "... is in fact the agreement between the parties, that is basically uncontroverted...". R. 2044 (Tr. Transcr., Vol. II, 87:5-10 (Dec. 3, 2013)). Judge Shumate found that "... *there was no bargain* between the parties with respect to what liability under Exhibit 1 [the REPC] would apply to that change [or the addition of soil]." R. 2044 (Tr. Transcr., Vol. II, 90:18-19 (Dec. 3, 2013)) (emphasis added). In finding there was no "bargain" regarding the placement of soil, Judge Shumate stated that "[w]here there is no specific understanding of what the contract is mean [sic] and what the bargain is meant between the parties when this thousand year flood or between 500 and 1,000, maybe it's a 750 year flood if there is such a thing, when this occurred no one

control, or contradict the terms of a written instrument, in an action founded upon such writing, between the parties or privies thereto.").

took the next step to say what are the different circumstances.” R. 2044 (Tr. Transcr., Vol. II, 91:7-12 (Dec. 3, 2013)). Judge Shumate concluded that “... the 2005 flood changed what was contemplated by the parties when they entered into [the REPC], and that the defendant Sun Hill Homes was required to adapt to those changes. They adapted to those changes and *had every right to do so under the terms of this contract...*”. R. 2044 (Tr. Transcr., Vol. II, 88:9-14 (Dec. 3, 2013)) (emphasis added).

Judge Shumate found that “[w]here there is no express understanding as to the changed circumstances, the risk associated with the placement of additional soil is placed in the hands of Sun Hill Homes.” R. 1601, at ¶ 39. Thus, Judge Shumate imposed “implied-at-law” terms into the REPC. Judge Shumate erred in concluding that the REPC was in fact silent on this issue of the added soils. First, the REPC did address risk of loss and placed it squarely on the Appellants in section 5.8 of the REPC. Second, the REPC required the Appellants to properly engineer “[f]uture improvements”, such as a pool, under section 14.3. Third, the Appellant acknowledged in his own testimony that he knew he had the obligation to have the pool engineered. Because of the explicit terms of the REPC, which Appellant knew and understood, finding that the REPC is silent on the risk of loss regarding the soil fails to acknowledge the actual written agreement of the parties and is in error. As such, Judge Westfall did not abuse his discretion in finding that Judge Shumate erred by concluding that the integrated and unambiguous agreement of the parties did not address the risk of loss associated with a pool that was constructed by Anthony Bros. and which was not properly engineered. Judge Westfall’s ruling in correcting the error of Judge Shumate with regard to the implied-at-law terms is

reasonable given the other rulings of Judge Shumate regarding the integration and completeness of the REPC as the parties' agreement. *See Smith*, 2003 UT at ¶25 (stating that "we will reverse only if there is no reasonable basis for the [Rule 59] decision." (citation omitted).

V. There is no factual basis for Appellants' argument that there was an agreement between the parties regarding the use of the backyard as a "buildable area"; such an argument requires an improper modification of the REPC.

Appellants state in their Brief, at statement of fact number 28, that "[p]ursuant to conversations between Mr. Mardesich and Sun Hill's agent, Mr. Roger Stratford, it was agreed and understood that the level portion of the back yard area was increased and that the entire level portion of the backyard area was able to be used as a buildable area." Brief of Appellant, p. 9, Statement of Fact 28. This statement incorrectly characterizes the testimony of the Appellant and the record. The part of the transcript that Appellant cites to support this "statement of fact" actually states: "[s]o after that discussion with Roger Stratford, was it your understanding that the entire level portion of your yard would be able to be used as buildable area for backyard improvements?" To which, Mr. Mardesich responded "Yes.". R. 2043 (Tr. Transcr. Vol. I, 54:17-21 (Dec. 2, 2013)).

Mr. Mardesich does not actually state that it was "agreed and understood" and never actually testified that he had any agreement with Sun Hill other than the REPC. Mr. Mardesich never testified that he had a verbal agreement with Sun Hill regarding the suitability of the soil in the backyard for a pool or a verbal modification of the REPC. His understanding that the area where the soil had been added could be used for

improvements does not support a conclusion that there ever was a meeting of the minds between him and Sun Hill regarding the imposition of a duty on Sun Hill to investigate the suitability of the soils. Indeed, if Mr. Mardesich had attempted to testify that he had verbal discussions with Sun Hill regarding an agreement of the parties other than the REPC or verbal discussion that altered the REPC, counsel for Sun Hill would have objected as to parol evidence and, based on the prior ruling of Judge Shumate, such testimony would have been excluded.

The REPC requires that “[t]his Agreement cannot be changed, amended, or altered without the written agreement of Buyer and Seller, which written agreement must be signed by Buyer and an authorized representative of Seller.” R. 2047 (Tr. Ex. 1, REPC at § 29). Under the Statute of Frauds, “[e]very contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.” U.C.A. § 25-5-3. Here, the Appellants understood that all changes to the REPC had to be in writing and signed as is evidence by the twelve (12) addenda executed by the Appellants for Lot 8. *See* R. 2047 (Tr. Ex. 1, REPC, generally).

Further, it is unreasonable that the Appellant believed that the REPC had been modified to impose the duty of ensuring the suitability of the added soil upon Sun Hill because the Appellant himself testified that “[he] believe[d] that it was [his] responsibility to hire a contractor that would engineer [the pool], yes.” *See* R. 2043 (Tr. Transcr., Vol. I, 103:7 – 103:10 (Dec. 2, 2013)). Appellants brief fails to capture the

actual testimony, tenor, and findings during trial. Judge Shumate did not conclude that there was any agreement other than the REPC. As such, there is no agreement between Appellants and Sun Hill other than the REPC and there is no factual or legal basis for finding such an agreement.

VI. Appellants' argument that Sun Hill did not properly marshal evidence¹⁶ for its Rule 59 Motion fails to recognize the nature of Sun Hill's Rule 59 Motion.

Appellants attempts to argue that Sun Hill has failed to properly marshal the evidence in its Motion for New Trial. Appellants cites to *Harris v. IES Assocs.* to support their argument. 2003 UT App 112, 69 P.3d 297. However, Appellants have misunderstood the tenor of this case, the evidence needing to be marshaled, and the evidence actually marshaled. *Harris* states that “[i]n order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports the very findings the appellant resists.*” 2003 UT App at ¶39 (emphasis added).

The Rule 59 Motion was based on Sun Hill resisting very specific findings of Judge Shumate. Sun Hill resisted the contradictory findings of Judge Shumate that (a) on the one hand the REPC is integrated and unambiguous and the agreement of the parties, and (b) on the other hand that Judge Shumate inserted a contradictory term that he said

¹⁶ Appellants have argued that Sun Hill failed to marshal evidence. However, Appellants now challenge the finding of Judge Shumate that there was no meeting of the minds or bargain outside of the REPC and yet Appellants fail to marshal all evidence in support of Judge Shumate's conclusion.

did not exist in the agreement¹⁷. In addition, Sun Hill resisted the contradictory findings that (c) on the one hand Anthony Bros. knew of possible soil problems with the Appellants' backyard and was the contractor that actually constructed the pool that ultimately failed and (d) on the other hand awarding joint and several liability against Sun Hill¹⁸. With regard to these specific contradictory findings, Sun Hill did marshal all necessary evidence.

During the proceedings, Judge Shumate ruled that the REPC was integrated and unambiguous and Appellants conceded and stipulated the same. As a result, Sun Hill presented a case based on the explicit terms of the REPC. Had Judge Shumate ruled during the trial that the REPC was ambiguous or that it was not integrated, then Sun Hill would have presented a very different case at trial including presenting additional testimony regarding evidence outside the four corners of the REPC. But this was not the finding of Judge Shumate and Sun Hill did not challenge Judge Shumate's ruling that the REPC was integrated and unambiguous in its Rule 59 Motion. On the contrary, Sun Hill agrees with the Court's ruling that the REPC was integrated and unambiguous and "in fact the agreement" of the parties. As a result, Sun Hill need not cull through every scrap of evidence that could point to an ambiguity in the contract or that it was not integrated. Because Sun Hill is not challenging the ruling of Judge Shumate that the REPC is

¹⁷ Specifically, Judge Shumate added a term to the REPC that Sun Hill had to ensure the suitability of the backyard for a pool even though the REPC was silent with regard to any obligation with regard to a pool, clearly provided Sun Hill the opportunity to change the lot specifications and plans, and required the Appellants to engineer the pool.

¹⁸ Judge Westfall's ruling renders the latter portion of the Rule 59 Motion regarding joint and several liability moot, but the issue was raised, briefed, and properly marshalled in the district court.

integrated and unambiguous and the agreement of the parties, Sun Hill need not marshal evidence that would contradict this ruling.

However, Sun Hill did challenge Judge Shumate's ruling that the REPC was silent as to the obligations of the parties as it related to the additional soil and the requirement to engineer improvements. Because the REPC is integrated and unambiguous, it may be interpreted as a matter of law. *See Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985) (stating that "[a] contract's interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent." (citation omitted)). Judge Shumate's addition of a term to the agreement appeared to be based on some reliance on parol evidence or, as Judge Westfall pointed out, based on an implied-at-law term. The REPC is not silent or ambiguous on the risk of loss associated with the pool constructed by Anthony Bros. and thus any additional term added by Judge Shumate is in error. Sun Hill properly marshalled evidence and Judge Westfall ruled accordingly.

VII. Sun Hill is entitled to its fees and costs in defending this action and this appeal.

"In Utah, attorney fees may be awarded 'if authorized by statute or by contract.'" *Crowley v. Black*, 2007 UT App 245, ¶12, 167 P.3d 1087 (citing *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988)). Here, the REPC provides the following:

In the event of any arbitration or mediation between Seller and Buyer, before or after the Closing, the prevailing party shall be entitled to an award of all attorney's fees and costs in an amount to be determined by the arbitrator or mediator hearing the matter. Any court or arbitration hearing any matter on appeal may also award such fees to the prevailing party in and for any prior mediation or arbitration.

R. 2047 (Tr. Ex. 1, REPC at § 25).

The Appellants initiated legal action and waived the mandatory arbitration provision of the REPC. *See* U.C.A. § 78B-11-105 (authorizing waiver of mandatory arbitration). In addition, both Appellants and Sun Hill have sought their fees in this action and the Appellants have not argued that fees are not appropriate because this matter was litigated instead of arbitrated. Judge Westfall determined that Sun Hill is the prevailing party and awarded Sun Hill its reasonable fees¹⁹. “In certain circumstances, a court may easily determine which party is the prevailing party. For example, ‘[w]here a plaintiff sues for money damages, and plaintiff wins, plaintiff is the prevailing party; if defendant successfully defends and avoids adverse judgment, defendant has prevailed.’” *Crowley v. Black*, 2007 UT App 245, ¶12, 167 P.3d 1087 (citing *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶23, 40 P.3d 1119).

Appellants sued Sun Hill and the only claim of Appellant against Sun Hill that remained for trial was Appellants breach of contract claim. Sun Hill, as the defendant, successfully avoided an adverse judgment. As such, under *Crowley* and *R.T. Nielson*, Sun Hill is the prevailing party and entitled to its fees. Appellants contend that Sun Hill breached the REPC first. This is not the case. Judge Shumate found that Sun Hill modified the lot “...and had every right to do so under the terms of this contract”. R. 2044 (Tr. Transcr. 88:12-15). Judge Westfall found that the Appellants actually breached their obligations under section 14 of the REPC by failing to have the pool properly

¹⁹ Appellants did not challenge the reasonableness of the fees and costs of Sun Hill. *See* R. 1939.

engineered. As such, there is no breach by Sun Hill under *Blair* because there was not performance by Appellants. Sun Hill prevailed and is entitled to its attorneys' fees and costs accrued in trying this case.

In addition, because the REPC explicitly states that "[a]ny court or arbitration hearing any matter on appeal may also award such fees to the prevailing party in and for any prior mediation or arbitration," Sun Hill is entitled to all of its fees in defending this appeal. *See* R. 2047 (Tr. Ex. 1, REPC at § 25).

CONCLUSION

Judge Shumate never found that the REPC had been modified. Judge Shumate found that Sun Hill had every right under the REPC to accept the assistance of the government to add soil and rock walls to Lot 8 to armor and protect it from future flooding. Judge Shumate found that the parties did not have any other agreement, bargain, or understanding regarding Lot 8. Judge Shumate then erred by inferring that there was an implied term in the REPC that did impose a duty on Sun Hill to investigate the added soil for the suitability of that soil for a pool. Judge Westfall corrected this error and ruled that the REPC was "far from silent" on this issue and instead clearly imposed a duty on Appellants to properly engineer the pool, which they did not. Judge Westfall corrected the legal error of Judge Shumate and ruled that the REPC did not impose a duty on Sun Hill to investigate the soils for suitability of the pool and that therefore, Sun Hill had not breached the REPC. Because of this, Judge Westfall ruled that Sun Hill was the prevailing party and properly awarded attorneys' fees and costs to Sun Hill. For the

foregoing reasons, the appeal should be dismissed and the district's court judgment against Appellants upheld.

DATED this 27th day of April, 2016.

DUNN LAW FIRM

A handwritten signature in black ink, appearing to read 'Clifford V. Dunn', written over a horizontal line.

CLIFFORD V. DUNN

ADAM C. DUNN

Attorneys for Appellee Sun Hill Homes

UTAH R. APP. P. 24(f)(1)
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of Appellee contains 12,756 words, based on the word count of the word processing system used to prepare the brief. The word count is exclusive of the table of contents, table of citations, and any addendum containing statutes, rules, regulations or portions of the record. Therefore, I certify that the foregoing Brief complies with the type volume limitations set forth in Utah R. App. P. 24(f)(1).

DATED this 27th day of April, 2016.

DUNN LAW FIRM



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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2016, I served true and correct copies of the foregoing **Brief of Appellee Sun Hill Homes, L.C.** upon the following and as follows:

One (1) Original and Seven (7) copies via First Class US Mail to:

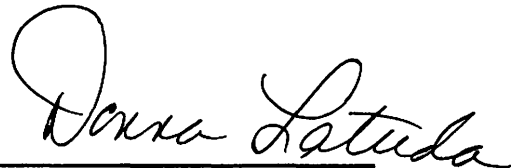
Court of Appeals

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Two (2) copies via Hand Delivery to:

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An employee of the Dunn Law Firm

ADDENDUM

Addendum to
Brief of
Appellee
Sun Hill Homes, L.C.

Exhibit A

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 14 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 14 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 21 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 14 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 14 days after entry of the judgment.

Addendum to
Brief of
Appellee
Sun Hill Homes, L.C.

Exhibit B

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IN THE FIFTH JUDICIAL DISTRICT COURT
OF WASHINGTON COUNTY, STATE OF UTAH

FIFTH DISTRICT COURT
WASHINGTON COUNTY
BY _____

JOHN MARDESICH,

Plaintiff,

vs.

ANTHONY BROS CONSTRUCTION,
et al.,

Defendant.

Case No. 080502342 DC



ORIGINAL

Hearing
Electronically Recorded on
October 29, 2013

BEFORE: THE HONORABLE JAMES L. SHUMATE
Fifth District Court Judge

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1 testimony that Sunhill presents is that at some point prior to
2 closing on this lot they had the backyard graded to plan.
3 Mr. Dunn referenced that Mr. Mardesich said it was graded to
4 plan. I believe that's inconsistent with his affidavit. He said
5 it had a steeper slope. He had never seen the plan prior to
6 this, and wouldn't have known whether that was consistent with
7 the plan or not.

8 That brings us back to the issue when this case started
9 out, your Honor, it started out as a well, you didn't compact the
10 backyard to 90 percent, which according to all these different
11 documents, there's no area within the site -- and it's important
12 to recognize that while the -- while Sunhill asserts that this
13 investigation by AGEK in 2004 was limited only to the building
14 pads, the report itself on page 3 says, "A field investigation
15 was conducted on the subject site to obtain information on the
16 subsurface conditions and obtain samples for laboratory testing."
17 Figure 2 is the site plan for that investigation, and that
18 includes all of the lots 1 through 17.

19 So I believe that the -- to narrowly classify this as
20 an investigation only to the building lots may have been what
21 Sunhill thought it was, but according to the language within the
22 report itself, it's not so limited. It's a broader thing.

23 THE COURT: More than just the building footprint.

24 MR. SPENDLOVE: Correct, because the REP-C itself -- and
25 this is undisputed, and both parties agree that the REP-C is

1 unambiguous. The REP-C itself refers to the home or the property
2 as the lot and the improvements, and that's a quote out of -- I
3 had it here, but I kind of don't have it in front of me right
4 now, but both parties have cited the same language stating that
5 that is what was done.

6 So when this started, it was an issue of well, all these
7 reports say you didn't compact the soil in the backyard to the 90
8 percent like you were supposed to. Defendants make a big issue
9 of well, the REP-C doesn't refer to a swimming pool. Plaintiffs
10 have never said that it did. It just so happens that 90 percent
11 is the same, the subgrade recompaction for the fill, according
12 to AGECE, needed to be to 90 percent. The site grading fill,
13 according to Rosenberg, needed to be to 90 percent, and to build
14 the pool it needed to be to 90 percent. It's just whether happy
15 or unhappy, it's a coincidence that that number is the same.

16 THE COURT: Counsel, what do you want to tell me about
17 what Mr. Dunn referred to, and that's an apparent shifting of
18 responsibilities and liabilities from buyer to -- or seller to
19 buyer for anything that isn't the house. That's the position
20 he's taking. How do you read that language?

21 MR. SPENDLOVE: Your Honor, I don't believe that's true
22 because it's not just the house. As I said, the REP-C refers to
23 both the lot and the improvements on it, and so the lot is
24 required to comply with the building plan. As I was getting to,
25 the -- we originally thought it was just a compaction issue, but

1 has the ability to recognize undisputed facts. We would ask the
2 Court to do that so as to minimize any length of trial. There's
3 a significant number of facts which are undisputed between the
4 parties, and simply --

5 THE COURT: And whether those facts are undisputed,
6 Counsel, that would be part of a pre-trial order. Just making
7 sure that the finder of fact is not swamped with a tidal wave
8 when really we have a fairly good sized swimming pool
9 (inaudible). All right. Thank you.

10 MR. SPENDLOVE: Your Honor, if you have any other
11 questions in regards to that, as I said, the basis for this is --
12 like I said, clarify there's a difference between structural fill
13 and subgrade fill. Sunhill Homes hasn't recognized that, and
14 also Sunhill had the obligation to hand this lot and house -- not
15 just the house -- over in its appropriate condition, and they did
16 not.

17 THE COURT: Okay. I appreciate that. Mr. Dunn, I'm
18 going to grant your motion for summary judgment as to the
19 material non-disclosure and intentional fraud claims, and also as
20 to the breach of good faith and fair dealing, but the contract
21 claims made by plaintiffs survive. Those will still be there.
22 Mr. Berrett, let's give you a chance to talk with your side of
23 it. Go right ahead, Counsel. I'll pull up your memorandum here.

24 MR. BERRETT: If not, I've got a copy here.

25 THE COURT: I've got it right here in the database,

1 THE COURT: And it ain't moving.

2 MR. SPENDLOVE: It's (inaudible) okay.

3 THE COURT: Yes. I have full right, title and interest
4 of that one right there. Nobody is going to contest it.

5 MR. SPENDLOVE: Thank you, your Honor.

6 THE COURT: If it goes, heads will roll. So it will be
7 here. Feel free to contact the clerk's office so you can get
8 some time to come in and work with the interface and make sure
9 you understand how the programs operate to get it up on the
10 screen for your witnesses. Anything else the Court can help with
11 as far as the pre-trial issues? Mr. Dunn?

12 MR. DUNN: Yes, your Honor. I understood your ruling.
13 There also is a claim from the plaintiff of unjust enrichment.

14 THE COURT: That's gone, too, Counsel.

15 MR. DUNN: Okay. So we're faced with just the claim of
16 breach of contract.

17 THE COURT: It's a breach of contract case. That's the
18 way I see it.

19 MR. DUNN: Thank you, your Honor.

20 THE COURT: Gentlemen, I'll let you go ahead and do the
21 typing. Let's get it put together and be ready for trial on
22 December 2. Thank you.

23 MR. DUNN: Thank you, your Honor.

24 MR. SPENDLOVE: Thank you, your Honor.

25 THE COURT: We'll be in recess.

Addendum to
Brief of
Appellee
Sun Hill Homes, L.C.

Exhibit C

IN THE FIFTH JUDICIAL DISTRICT COURT
OF WASHINGTON COUNTY, STATE OF UTAH

JOHN MARDESICH,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 080502342 DC
)	
ANTHONY BROS CONSTRUCTION,)	(Volume II)
et al,)	
)	
Defendant.)	

Bench Trial
Electronically Recorded on
December 3, 2013

BEFORE: THE HONORABLE JAMES L. SHUMATE
Fifth District Court Judge

APPEARANCES

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1 rule from the bench.

2 (Noon recess)

3 COURT BAILIFF: All rise. The Court will now continue
4 in session. You may be seated.

5 THE COURT: Thank you, everyone. We're back on the
6 record in Mardesich vs. Anthony Brothers Construction and Sunhill
7 Homes. The Court having heard the testimony of the parties and
8 having reviewed the evidence, both the testimonial evidence as
9 well as the written documents is prepared to make findings of
10 fact.

11 Counsel, we will rely on first and foremost as findings
12 of fact those uncontroverted facts that are contained within the
13 Court's pre-trial order signed on the 29th of November of 2013.
14 Paragraphs 1 through 15 are included in the Court's findings of
15 fact, and in my analysis and ruling from the bench, I will
16 concentrate first on the issue between plaintiffs and Anthony
17 Brothers Construction.

18 The Court finds specifically that at the time that
19 Mr. Mardesich contacted Dave from Anthony Brothers Construction,
20 he had in his possession the soils report, which has been
21 received in evidence, and that he offered that to Anthony
22 Brothers representative, but it was not accepted by Anthony
23 Brothers for any purpose.

24 The Court finds that at that time Anthony Brothers was
25 placed on notice that there were soils issues with respect to

1 this building site. The Court also finds that while the pool was
2 in its steel framing stage -- and when I say steel framing, I
3 should be more specific, the rebar stage before gunite was
4 installed, that Mr. Hanks then of ACEG -- AGECE. Yeah, I've got
5 it wrong, AGECE, noticed the site and went to Anthony Brothers
6 representatives on site and again disclosed to them the issues of
7 the soils conditions and his knowledge of the soils reports and
8 those concerns.

9 I find these by the requisite burden of proof, and so
10 that you know, Mr. Anthony, the Court has the responsibility of
11 weighing the testimony of the witnesses. If I am convinced by
12 only the slightest tilting of those scales of justice, I make the
13 findings accordingly here. This is not a case where a serious
14 burden of proof is required, but only a preponderance of the
15 evidence, and I am more convinced by Mr. Hanks's testimony than I
16 am by yours, Mr. Anthony.

17 The same general timing goes to the allegation that
18 Mr. Mardesich made representations that the lot was quote,
19 "pool ready," close quote. I simply am not persuaded that
20 Mr. Mardesich made such a statement in his interactions with
21 Anthony Brothers.

22 There is a provision within the Anthony Brothers
23 contract, which has been received and which the Court has as
24 Exhibit No. 31 that purports to create a statute of limitations
25 of a one year time period in which the action on this contract

1 must be brought. However, the Court is not persuaded as Anthony
2 Brothers argues, not persuaded by the preponderance of the
3 evidence that this action was filed outside of the one year
4 limitation contained within the contract.

5 In addition, I'll just note this parenthetically. It's
6 not necessary for the Court's decision, but the Court isn't very
7 certain that such a limited statute of limitations built within a
8 contract is necessarily favored by public policy concerns.

9 The Court is also persuaded by the evidence and the
10 testimony of the experts, the expert report, that while as
11 Anthony Brothers accurately points out that at the time of the
12 preparation of the report that the slippage on the swimming pool
13 was only 1.2 inches, and at 1 inch is within industry standards,
14 as testified to by the expert.

15 The Court is persuaded that at the time of the expert
16 report was prepared that there was that much slippage, but the
17 Court is also equally persuaded that the potential for continued
18 motion and continued movement is more than likely, and that
19 certainly the spa has tilted out of the industry standard of 1
20 inch, it haven't settled by 1.9 inches as opposed to the only 1.2
21 inches on the pool.

22 The other issue that bears on the statute of limitations
23 clause in the Anthony Brothers contract is the circumstance in
24 which the Court finds that Mr. Mardesich did indeed attempt to
25 contact Anthony Brothers regarding his concerns with this matter

1 at least 60 times without response, and that Anthony Brothers
2 only came on one occasion to address the issues with respect to
3 the creek installed and the multiple cracks in the creek, and for
4 the period of those calls being made and no response, it would be
5 appropriate and certainly within the powers of this Court to find
6 that the statute of limitations built into the contract would be
7 tolled during the period of time that Mr. Mardesich was unable to
8 reach Anthony Pools.

9 Now the issue of damages is fairly clear to the Court as
10 a result of the Court's findings and the breach of the Anthony
11 Brothers contract by Anthony Brothers in numerous ways. I would
12 point out that those ways are specifically enumerated in Exhibit
13 16 and the testimony of Mr. Mardesich. Anthony Brothers's
14 contract in its specifications sheet specifies the three 2-
15 horsepower pumps to be installed, and the Court is persuaded by
16 the necessary burden of proof that only two 1-horsepower pumps --
17 no, one 2-horsepower pump and two 1-horsepower pumps were
18 installed, and apparently the 1-horsepower pump was more powerful
19 than the pool installation would accommodate, and that had to be
20 replaced by an even smaller pump, so there is another breach of
21 the contract there. The other breaches of the contract are
22 persuasively outlined in Exhibit No. 15.

23 Based upon the breach, the judgment is for \$179,000
24 together with interest at the statutory rate of 10 percent from
25 and after the date of filing of suit, Counsel. That's the best

1 high water mark I can find because the date of the contract is
2 unclear, the precise dates of the appearance of the damage is
3 unclear, but we can certainly grant judgment with interest
4 thereon from the date of filing this action.

5 Now with respect to Sunhill Homes, the Court finds that
6 the contract, Exhibit No. 1, entered into by the parties with all
7 12 addenda is in fact the agreement between the parties, that is
8 basically uncontroverted, and the exhibit that is in the Court's
9 hands does and is found by the Court to be a full and true and
10 correct copy of that agreement.

11 Exhibit No. 29 offered by Sunhill Homes as the buyer's
12 limited warranty statement appended to Exhibit No. 1 and
13 referenced in Exhibit No. 1, the Court is not persuaded by the
14 requisite burden of proof that Defendant's Exhibit No. 9 -- 29 is
15 a part of this contract. It is unfortunate that matters of this
16 import did not have better record keeping. It may well be that
17 such a limited warranty statement was prepared and used at the
18 closing of this transaction, but without the actual document, the
19 burden of proof would lie with Sunhill to try to find this
20 apportion of the binding agreement, and I'm simply not persuaded
21 that it is.

22 I do note that Exhibit No. 29 bears with it an actual
23 signature line for the buyers on the 14th page of the document,
24 and if we had that it would be no question about what we have
25 here as we clearly have the real estate purchase contract for

1 construction, Exhibit No. 1.

2 The factual circumstance that makes this case so
3 difficult and required it to come to trial is that at the time
4 that lot 8 was subdivided and improved and extra excavated for
5 this project, the Court finds that it was exactly and precisely
6 done as the grading plan, Exhibit No. 7, outlines.

7 I am persuaded by the testimony of both Mr. Mardesich
8 and Mr. Rogers and all the parties' positions in this matter that
9 the home was built to that grading spec. The Court does find by
10 a preponderance of the evidence that the 2005 flood changed what
11 was contemplated by the parties when they entered into Exhibit
12 No. 1, and that the defendant Sunhill Homes was required to adapt
13 to those changes. They adapted to those changes and had every
14 right to do so under the terms of this contract, as was argued by
15 Mr. Dunn.

16 In the circumstance where they very reasonably used
17 the services offered to them after the flood by the National
18 Resources people from the Department of Agriculture to build the
19 riprap, and it's fairly clear by inference that in the process
20 that's where the remaining portions of the -- let's call it
21 buildable area of the lot were added on. The Court was most
22 impressed by Mr. Rogers's calculation and testimony and
23 description that every linear foot of the back lot line created
24 27 yards of material that had to be moved.

25 Mr. Mardesich's photographs in Exhibit 5 -- I'm sorry,

1 Exhibit 6, all three of those photographs show not only the
2 placement of the riprap, but the substantial bank built up in
3 that process, adding to the back of the home. The Court finds
4 specifically that this was done while the lot was under the sole
5 control of Sunhill Homes.

6 Now the Court also finds that Sunhill was completely
7 aware through all of its agents, that its realtor, Ms. Campbell,
8 and also through our chief executive officer --

9 MR. DUNN: Roger Stratford.

10 THE COURT: Mr. Stratford -- thank you, Counsel -- Roger
11 Stratford that it was in fact Mr. and Mrs. Mardesich's intention
12 to build a pool on this lot. The Court is also persuaded by a
13 preponderance of the evidence that the additional soil on the end
14 of the lot changed the plans on the part of the Mardesiches. In
15 order to put their pool in they had contemplated an infinity
16 style pool that did not have a hard edge all the way around it.
17 When they found that they had more real estate within which to
18 work, the reasonable position to take was to go with a different
19 style of pool.

20 I honestly don't know if there's a difference in
21 expense. No one testified to me about that, but understanding
22 the way that an infinity edge works on a pool, having one that
23 would be quieter would be advantageous to some people. I like
24 quiet, but I'm not going to impose my judgment on the parties.
25 It's just that it changed.

1 When it did change, there is no evidence that any action
2 was taken on the part of Sunhill to investigate the change in
3 this lot from the condition it was in at the time it was sold
4 when Exhibit No. 1 was entered into and the REP-C was entered
5 into.

6 It's the Court's position that the reasonable
7 interpretation of the contract, the REP-C, Exhibit 1, would
8 impose a duty upon Sunhill Homes to make investigation as to the
9 utility of this additional buildable area on the lot because this
10 was a different lot than they had bound themselves under the
11 contract and placed the burden, the risk of loss that might arise
12 on that when the lot changed. This particular risk of loss that
13 came from the addition of what may have been as many as 15 feet
14 of additional depth and soil because Mr. Hanks's study of
15 uncompacted soil as much as 15 feet deep does impress the Court
16 at least that there is potential of that much additional soil
17 having been moved in the remediation project from the 2005 flood,
18 but there was no bargain between the parties with respect to what
19 liability under Exhibit 1 would apply to that change.

20 The soils reports were exchanged. The admonition from
21 the sales staff and Mr. Stafford as well was that soils issues
22 need to be looked at, but this additional soil issue was left
23 open to the sad regret of everyone involved in the project. No
24 one stopped to say what do we do about this?

25 If Mr. Anthony had said, "Boy, let's look at it," he'd

1 have found it immediately right then. If Mr. Mardesich would
2 have said, "Well, this is different, maybe we ought to think
3 about it," he'd have found out then. If Sunhill had thought,
4 "This is different, we better find out about it," then all of
5 this really could have been sidestepped or at least addressed by
6 the parties.

7 Where there is no specific understanding of what the
8 contract is mean and what the bargain is meant between the
9 parties when this thousand year flood or between 500 and 1,000,
10 maybe it's a 750 year flood if there is such a thing, when this
11 occurred no one took the next step to say what are the different
12 circumstances.

13 It may seem somewhat arbitrary for the Court to place
14 that risk in the hands of Sunhill, but they were the ones in
15 charge of the lot during this period of time. So I find for the
16 plaintiffs and against Sunhill in a sense that this is joint and
17 several liability. I go with your theory of judgment in the same
18 amount, \$179,000 plus interest from the date contract -- at the
19 contract rate, 10 percent from the date of filing of the suit.

20 Now because of the Court's findings, plaintiffs are
21 also entitled to their attorney's fees, and for the parties to
22 understand the way the Court deal with the attorney's fees issue
23 is that Mr. Spendlove in behalf of plaintiff will prepare a
24 detailed affidavit of attorney's fees, and submit that to the
25 Court.

Addendum to
Brief of
Appellee
Sun Hill Homes, L.C.

Exhibit D

The Order of Court is stated below:

Dated: January 29, 2015
11:28:54 AM

/s/ G MICHAEL WESTFALL
District Court Judge



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Counsel for Defendant Sun Hill Homes, LC

**DISTRICT COURT OF THE STATE OF UTAH
FIFTH JUDICIAL DISTRICT
WASHINGTON COUNTY**

JOHN MARDESICH, an individual

Plaintiff/Counterclaim Defendant,

v.

ANTHONY BROS. CONSTRUCTION, a Utah
corporation, dba ANTHONY Bros POOL &
SPA; SUN HILL HOMES, L.C., and JOHN
DOES I-X,

Defendants/Counterclaimant

**ORDER VACATING
FINDINGS, CONCLUSIONS AND
JUDGMENT;**

**AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
AND
JUDGMENT**

Case No.: 080502342

Judge: G. Michael Westfall

ANTHONY BROS. CONSTRUCTION, a Utah
corporation, dba ANTHONY BROS. POOL &
SPA,

Third-party Plaintiff

vs.

MARIE MARDESICH, an individual,

Third-party Defendant.

On March 17, 2014, Judge James L. Shumate signed the Finding, Conclusions and

Judgment for this case which was tried before him on December 2 and December 3, 2013. On March 28, 2014, Defendant Sun Hill Homes, L.C. filed a Motion to Vacate the Judgment, a Motion For a New Trial, and a Motion To Stay Execution of the Judgment. The Court having heard argument and being fully advised in the premises, does hereby Vacate the Judgment against Defendant Sun Hill Homes, L.C., previously entered in the above entitled Court on March 17, 2014, and does further issue the following Amended Findings of Fact and Conclusions of Law.

FINDINGS AND CONCLUSIONS

1. Sun Hill was the developer and promoter of certain properties within the Sunbrook Communities, located in Washington County, Utah.
2. On or about July 31, 2003, Rosenberg Associates provided a Geotechnical Investigation for Sun Hill Homes for the property that would come to be known as the Pointe at Sunbrook which is also known as the Woodlands at Sunbrook, the subdivision where the Plaintiff's Lot 8 is located.
3. In addition to the Geotechnical Investigation, Rosenberg Associates prepared a Grading Plan for the Pointe at Sunbrook which is also known as the Woodlands at Sunbrook, the subdivision where the Plaintiff's Lot 8 is located.
4. Prior to entering into the REPC, Sun Hill, retained Applied Geotechnical Engineering Consultants, Inc., (hereinafter "AGEC") to perform various tests and evaluations on Lots 1-3 and 5-17 in the Woodlands Subdivision, which resulted in a September 21, 2004 AGEC Geotechnical Investigation.
5. On or about December 4, 2004, Plaintiff entered into a Real Estate Purchase Contract for Construction (hereinafter "REPC") with Sun Hill with regard to the property which is the subject of this litigation (hereinafter "Property" or "Lot 8").
6. The REPC, dated November 16, 2004, was signed by Marie Mardesich, who was defined in the REPC as "Buyer".
7. John and Marie Mardesich signed twelve (12) addenda to the REPC from September 12, 2005 to May 15, 2006.

8. The REPC dated November 16, 2004, together with the twelve (12) signed addenda to the REPC, which addenda were executed from September 12, 2005 to May 15, 2006, constitute the entire agreement between Plaintiff Mardesich and Defendant Sun Hill Homes, L.C., and constitute a fully-integrated written contract.

9. On or about May 16, 2006, Plaintiff and Sun Hill "closed" on the sale of the Property and Sun Hill conveyed the Property to Plaintiff and Third-Party Defendant by Special Warranty Deed (hereinafter "Warranty Deed") which was recorded on or about June 6, 2006.

10. After the property had been deeded to Plaintiff and Third-Party Defendant by Sun Hill, Plaintiff hired Anthony Bros. to construct a pool in the backyard of Lot 8 at the Woodlands.

11. After June 6, 2006, Plaintiff contracted with Defendant Anthony Bros. Construction to construct a pool at the Property conveyed to it by Sun Hill (hereinafter "Pool").

12. Plaintiff never had a contract with Sun Hill for Sun Hill to construct the Pool.

13. Sun Hill did not construct the Pool and the Pool was constructed at the Property after Plaintiff accepted title to the Property.

14. Defendant Anthony Bros Construction applied for and received a building permit for the Pool from the City of St. George on or about September 1, 2006.

15. Anthony Bros dug and excavated the hole for the Pool before commencing the construction or the installation of the Pool.

16. The pool and spa experienced significant differential settlement after construction.

17. Plaintiff John Mardesich had a copy of the soils report and offered it to Anthony Brothers Construction.

18. Anthony Brothers Construction did not accept the copy of the soils report and at that time was placed on notice of potential soils issues.

19. During the construction of the pool, while the rebar was being placed in the pool prior to the application of gunite, Jared Hanks of AGECE noticed the construction of the swimming pool and went to Anthony Brothers Construction and disclosed potential soils conditions.

20. Plaintiff John Mardesich did not state to Anthony Brothers that the state of the lot

was pool ready.

21. The action against Anthony Brothers was initiated within the one year time frame provided by the pool contract, and in addition, such time frame is contrary to public policy.

22. The industry standard and construction of swimming pools and spas is a one inch differential in elevation from one side of the pool or spa to the other.

23. The swimming pool at the Mardesich home is out of level by approximate 1.2 inches, and has the potential for additional movement.

24. The spa is clearly out of the one inch standard and has a differential elevation of 1.9 inches.

25. John Mardesich did attempt to contact Anthony Brothers approximately sixty times without response relating to the swimming pool, creek and spa. As a result of Mr. Mardesich's attempts to contact Anthony Brothers with no response, the statute of limitations in the contract was tolled.

26. Exhibit 1 presented at trial the Real Estate Purchase Contract for construction is the agreement between Plaintiffs and Defendant Sun Hill Homes.

27. Exhibit 29 as presented at trial is not a part of the contract as it includes a signature line but contains no signature.

28. At the time Lot 8 was subdivided, it was prepared and graded according to the grading plan prepared by Rosenberg Associates.

29. Defendant Sun Hill Homes reasonably used the services provided by NRSC to make changes to the grading of Lot 8.

30. As a result of the changes made by NRSC the buildable area of Lot 8 was substantially increased and every linear foot of soil added to Lot 8 required that approximately 27 yards of soil be added to Lot 8.

31. Exhibit 6, as presented at trial, demonstrates the placement of the riprap and additional soil on Lot 8.

32. The placement of additional soil on Lot 8 occurred while Lot 8 was under the control of Sun Hill Homes.

33. Defendant Sun Hill Homes was aware, through its agents, Roseanne Campbell and Roger Stratford of Plaintiffs' intention to build a swimming pool in the backyard of Lot 8.

34. While the original plans for the swimming pool had contemplated an infinity pool, the additional soil added to Lot 8 while under the control of Sun Hill Homes resulted in changed plans for the swimming pool.

35. The decision to change the style of the swimming pool built was a result of the changed grading of Lot 8 and was reasonable.

36. After the change in grading to Lot 8, Sun Hill Homes took no action to investigate the effect the changed grading had on the suitability of the Lot for the construction of a swimming pool.

37. The REPC poses no duty on Sun Hill Homes to investigate the suitability of the soil added to Lot 8 for its intended use as a buildable lot for the construction of a swimming pool.

38. There was never an agreement between Plaintiff Mardesich and Defendant Sun Hill that Sun Hill would be responsible to insure the suitability of the soil for construction of a swimming pool

39. Because the RECP posed no duty on Sun Hill Homes to investigate the suitability of the soil added to Lot 8 for its intended use as a buildable lot for the construction of a swimming pool, and because there was no agreement between the parties, that Sun Hill would be responsible to insure the suitability of the soil for a swimming pool, the risk associated with the placement of the additional soil is placed upon the Plaintiff Mardesich.

40. Because there was no duty upon Sun Hill to investigate the suitability of the soil for a swimming pool, Sun Hill did not breach the contract by failing to conduct such investigation.

Based upon the findings and conclusions above;

IT IS HEREBY ORDERED that Plaintiff John Mardesich and third-party defendant Marie Mardesich are hereby awarded judgment against Defendant Anthony Bros. Construction, in the amount of \$179,000.00 plus interest in the amount of \$60,320.55 which is calculated at a rate of ten percent (10%) from date of filing the Amended Complaint which was July 22, 2010, through the date of judgment of December 3, 2013, plus attorney's fees as allowed by contract in

the amount of \$64,953.03, for a total of \$303,913.58. In addition, the judgment amount of \$303,913.58 shall continue to accrue post-judgment interest at the rate of 2.13 percent.

IT IS FURTHER HEREBY ORDERED that all causes of action of any nature of any kind by John Mardesich and Marie Mardesich as against Sun Hill Homes, L.C. be and are hereby dismissed as having no basis in fact or in law.

IT IS FURTHER HEREBY ORDERED that the Supersedeas Bond posted by Sun Hill Homes, L.C. on August 1, 2014 is hereby exonerated and the Clerk of the Court is hereby directed to return said funds to Defendant Sun Hill Homes, L.C.

IT IS FURTHER HEREBY ORDERED that the issue of attorney's fees claimed by Sun Hill Homes, L.C. against Plaintiff John Mardesich may be addressed by further motion.

-----**END OF ORDER**-----

APPROVED AS TO FORM AND CONTENT

JENSENBAYLES, LLP

/s/ James L. Spendlove

Signed by Clifford V. Dunn with permission of James L. Spendlove

JAMES L. SPENDLOVE

Attorney for Plaintiff

Addendum to
Brief of
Appellee
Sun Hill Homes, L.C.

Exhibit E

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IN THE FIFTH JUDICIAL DISTRICT COURT
OF WASHINGTON COUNTY, STATE OF UTAH
FIFTH DISTRICT COURT
WASHINGTON COUNTY

BY _____

JOHN MARDESICH,

Plaintiff,

vs.

ANTHONY BROS CONSTRUCTION,
et al,

Defendant.

Case No. 080502342 DC

(Volume I)



ORIGINAL

Bench Trial
Electronically Recorded on
December 2, 2013

BEFORE: THE HONORABLE JAMES L. SHUMATE
Fifth District Court Judge

APPEARANCES

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1 John and Marie Mardesich who are here in the courtroom today?

2 A. Many times, yes.

3 Q. When was the first time you recall meeting with them?

4 A. Well, we met -- I couldn't give you a date, but we met
5 several times prior to their purchase. We looked at different
6 possibilities, models, talked about options several different
7 times before they made a decision to purchase.

8 Q. Do you recall during those discussions if you had any
9 specific conversations with them regarding what they desired for
10 the home?

11 MR. DUNN: Objection, your Honor. It appears as where
12 we're going is to a discussion about the nature -- formation of
13 the contract. Well, the contract has not been entered into
14 evidence. We have no objection to it being so, but there's a
15 specific integration clause that refers to -- that -- and it's
16 paragraph 29 of the real estate purchase agreement which states
17 that the REP-C itself is the -- constitutes the entire agreement
18 between the buyer and the seller --

19 THE COURT: So your objection that this is parole?

20 MR. DUNN: Yes.

21 THE COURT: Well -- and Ms. Campbell, we're using --
22 we're speaking lawyer here for a minute. What we're really
23 saying is that this is outside the four corners of the contract
24 and not admissible into evidence. Counsel, is there some
25 ambiguity in the contract that would justify the Court looking at

1 the parole in any way, shape or form?

2 MR. SPENDLOVE: Your Honor, as far as the integration in
3 the contract, there isn't, although that's not where I'm going
4 with this.

5 THE COURT: All right.

6 MR. SPENDLOVE: It is not to that point.

7 THE COURT: All right. Well, I'm going to sustain an
8 objection on parole. Let's not go into parole evidence, but
9 let's set the framework. Go ahead.

10 Q. BY MR. SPENDLOVE: Back to the question. I'll speed
11 this along for the purposes. Do you recall ever having
12 discussions with the Mardesiches regarding the construction
13 of a swimming pool?

14 A. Yes, several times.

15 Q. It was their desire to have a swimming pool; is that
16 correct?

17 A. Yes.

18 MR. DUNN: Objection, your Honor. I don't know
19 whether this complies with the contract. She stated that her
20 conversations were prior to the execution of the agreement. All
21 negotiations have been superceded by the contract, and therefore
22 discussions about the swimming pool are still parole.

23 THE COURT: I will receive it not for its obviously
24 parole purpose, but just to explain the actions of the parties
25 as they engaged in this process, the contract itself so far

1 controls.

2 MR. DUNN: Thank you, your Honor.

3 THE COURT: I see where we're going. Go ahead,
4 Mr. Spendlove.

5 MR. SPENDLOVE: Thank you, your Honor.

6 Q. BY MR. SPENDLOVE: That was some of the times you said
7 you had discussions with the Mardesiches prior to entering into
8 an agreement to purchase what was lot 8; is that correct?

9 A. Yes. Uh-huh.

10 Q. Did you have any discussions with them after entering
11 into the agreement regarding the construction of the home and the
12 lot on lot 8?

13 A. Yes, and we discussed the pool several times after they
14 made the agreement to purchase that particular lot.

15 Q. Do you recall previously in this matter that you signed
16 an affidavit? Do you recall doing that?

17 A. Oh, regarding this specific matter here? Yes, I did.

18 Q. I have it up on the screen. It hasn't been made an
19 exhibit to these proceedings because we have you here with us to
20 talk about it.

21 A. Uh-huh.

22 THE COURT: Counsel, any problem admitting the affidavit
23 at this juncture?

24 MR. DUNN: Your Honor, if the witness is here, it seems
25 to me that it would be appropriate for us to have cross