

2005

# William Moore and Mary Moore v. Dan Smith and Carol Smith : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS, STATE OF UTAH**

---

WILLIAM MOORE and MARY MOORE,  
Plaintiffs, Appellees and Cross-Appellants,

vs.

DAN SMITH, individually and as Trustee  
of the Dan Irvin Smith Inter Vivos Trust,  
and CAROL SMITH, individually and as  
Trustee of the Carol L. Smith Inter Vivos  
Trust,

Defendants, Appellants and Cross-  
Appellees.

**REPLY BRIEF OF DEFENDANTS,  
APPELLANTS and CROSS-  
APPELLEES DAN SMITH and  
CAROL SMITH**

Appellate Case No. 20050626-CA

District Ct. No.: 000700142 MI

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Appeal from the following entered by Judge Donald J. Eyre, Fourth District Court-  
Millard, Millard County, State of Utah:

1. An Order partially denying Defendants' Motion for Summary Judgment entered on August 16, 2001;
2. an Order partially denying Defendants' Motion for Summary Judgment entered on August 29, 2003;
3. a Special Verdict and Judgment entered on March 10, 2005 for the amount of \$30,680.00 against Defendants and in favor of Plaintiffs;
4. an Order denying Defendants' Rule 50(b) Motion for Judgment Not Withstanding the Verdict entered on July 6, 2005
5. an Order denying Defendants' Rule 60(b) Motion to Set Aside the Judgment entered on July 19, 2005;
6. and an Order entered on August 25, 2005 awarding attorneys' fees to Plaintiffs.

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
ISSUES PRESENTED FOR REVIEW.....	1
ARGUMENT .....	1
I.    THE TRIAL COURT ERRED BY FAILING TO DETERMINE WHICH STATUTE OF LIMITATIONS VERSION GOVERNED THE CASE.....	1
A.    The Defendants Preserved This Issue For Appeal.	1
B.    The Trial Court Erred In Failing to Correctly Determine the Appropriate Version of the Relevant Statute of Limitations.	3
C.    The trial court erred in applying the Discovery Rule.	7
1.    The Legislature has affirmatively left equitable discovery/tolling out of the language of the U.C.A. § 78-12-21.5.....	7
2.    Even if equitable tolling should be applied, the tolling period is still is dependent upon the accrual date.....	8
II.    THE DOCTRINE OF <i>CAVEAT EMPTOR</i> APPLIES IN THIS CASE.....	9
III.   THE TRIAL COURT ERRONEOUSLY SUBMITTED QUESTIONS OF LAW TO THE JURY.....	10
VI.   THE TRIAL COURT DID ` ERR IN GRANTING PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S FRAUDULENT NONDISCLOSURE CLAIM.....	11
A.    The ruling of the trial court that all but five of the alleged defects were patent, and thus disposable through Defendants' summary judgment motion, was correct.	12
B.    The trial court did not "invade the province of the jury" in granting summary judgment as to defects No. 12 and 38.	15
C.    The trial court properly concluded that the Defendants' home was "used."	16
D.    The trial court's application of the doctrine of <i>caveat emptor</i> in this case was proper.	19



V. THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT ON PLAINTIFF’S BREACH OF CONTRACT CLAIM. ....	23
VI. THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT ON PLAINTIFF’S NEGLIGENT MISREPRESENTATION CLAIM.....	26
VII. THIS COURT SHOULD UPHOLD THE MAJORITY RULE AND FIND THAT RULE 26(b)(4)(C) DOES NOT PERMIT RECOVERY FOR AN EXPERT’S TIME IN PREPARING FOR DEPOSITION. ....	27
VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD OF ATTORNEY FEES WHERE THE COURT’S AWARD OF REASONABLE ATTORNEY FEES WAS PROPERLY SUPPORTED BY EVIDENCE IN THE RECORD.....	29
A. The trial court correctly found that Plaintiff was only entitled to recover the fees arising from the Breach of Contract claim. ....	32
B. Under paragraph “N” of the EMSA, a party may only recover attorney fees incurred in enforcing the agreement if it can prove the other party defaulted on the Agreement. ....	34
C. The trial court’s evaluation of reasonable attorney fees was properly supported by its findings of fact. ....	35
D. The trial court did not apply Rule 54(d) standards to his determination of reasonable costs. ....	39
CONCLUSION .....	40
ADDENDA .....	43
CERTIFICATE OF SERVICE.....	44

## TABLE OF AUTHORITIES

### **Cases**

<i>Anderson v. Provo City Corp.</i> , 2005 UT 5, ¶10, 108 P.3d 701.....	13, 25, 29
<i>Berenda v. Langford</i> , 914 P.2d 45, 50 (Utah 1996).....	4
<i>Boud v. SDNCO, Inc.</i> , 2002 UT 83, ¶ 10, 54 P.3d 1131 .....	13, 26, 29
<i>Cotton v. Consolidation Coal Co.</i> , 457 F.2d 641, 546-47 (6th Cir. 1972).....	31
<i>Cottonwood Mall Co. v. Sine</i> , 830 P.2d 266, 268 (Utah 1992).....	41, 43
<i>Diversified Holdings, L.C., v. Turner</i> , 63 P.3d 686, 692-93 (Utah 2002).....	1
<i>Dixie State Bank v. Bracken</i> , 764 P.2d 985 (Utah 1988) .....	35, 44, 45
<i>Fashion Place Associates v. Glad Rags, Inc.</i> , 754 P.2d 940, 942 (Utah 1988) .....	38, 39
<i>Foote v. Clarke</i> , 962 P.2d 52, 56 (Utah 1998) .....	36, 37, 40
<i>Herbst v. Int'l Telephone &amp; Telegraph Corp.</i> , 65 F.R.D. 528, 531 (D. Conn. 1975).....	31
<i>Hermansen v. Tasulis</i> , 2002 UT 52, ¶ 24, 48 P.3d 235.....	21, 23
<i>Ilot v. University of Utah</i> , 2000 UT App 286, 12 P.3d 1011 .....	16
<i>Kurth v. Wiarda</i> , 991 P.2d 113,116 (Utah App. 1999) .....	43
<i>Maack v. Resource Design &amp; Const., Inc.</i> , 875 P.2d 570 (Utah App.,1994).....	21
<i>Matson v. Burlington N. Santa Fe R.R.</i> , 240 F.3d 1233, 1235 (10th Cir. 2001).....	4
<i>Maynard v. Wharton</i> , 912 P.2d 446, 449 (Utah App. 1996).....	36, 37
<i>McBrian v. Liebert Corp.</i> , 173 F.R.D. 491 (N.D. Ill 1997) .....	32
<i>Mountain States Broadcasting Co. v. Neale</i> , 783 P.2d 551, 555-56 (Utah App. 1989)....	37
<i>Orton v. Carter</i> , 970 P.2d 1254, 1260 (Utah 1998) .....	13, 26, 29
<i>Rhee v. Witco</i> , 126 F.R.D. 45 (D. Kan. 2002).....	32
<i>S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District</i> , 154 F.R.D. 212, 214 (E.D.Wis. 1994).....	passim
<i>Schafir v. Harrigan</i> , 879 P.2d 1384, 1390 (Utah App., 1994).....	7, 18, 21

<i>Sears v. EEOC</i> , 138 F.R.D. 523 (N.D. Ill. 1991) .....	31
<i>Sevy v. Security Title Co. of Southern Utah</i> , 902 P.2d 629, 634 (Utah 1995) .....	10
<i>Smith v. Frandsen</i> , 2004 UT 55, 94 P.3d 919 .....	24, 25
<i>Spears v. Warr</i> , 2002 UT 24, ¶ 33, 44 P.3d 742 .....	4
<i>State v. Ellifritz</i> , 835 P.2d 170, 178 (Utah App. Ct. 1992).....	1
<i>Turtle Management, Inc. v. Haggis Management, Inc.</i> 645 P.2d 667, 671 (Utah 1982) ..	36
<i>Warren v. Provo City Corp.</i> , 838 P.2d 1125, 1129 (Utah 1992).....	9
<i>Winters v. Schulman</i> , 2001 WL 357124 (Utah App. 2001) .....	43

## **Statutes**

U.C.A. § 78-12-21.5.....	7, 11
--------------------------	-------

## **Rules**

Utah R. Civ. P. 26(b)(4)(C)(i) .....	30, 31
Utah R. Civ. P. 51(d).....	2
Utah R. Civ. P. 54(d).....	45, 46

## **ISSUES PRESENTED FOR REVIEW**

In her Brief (filed on or about July 19, 2006), Plaintiff/Appellee/Cross-Appellant (hereinafter, “Plaintiff”) combined her response to Defendants’/Appellants’ (hereinafter, “Defendants”) Brief and her own principal Brief which presents several new issues. This Reply Brief will serve as a reply to Plaintiff’s response to Defendant’s principal Brief and will also address the new enumerated issues raised by Plaintiff in her Brief. Issues I through III are those issues initially raised by Defendants in their principal Brief to which Plaintiff responded. Issues IV through VIII are new issues raised by Plaintiff in her July 19, 2006 Brief.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED BY FAILING TO DETERMINE WHICH STATUTE OF LIMITATIONS VERSION GOVERNED THE CASE**

#### **A. The Defendants Preserved This Issue For Appeal.**

In Utah, “when a defendant fails to object to jury instruction at trial, [Utah appellate courts] will consider an alleged error on appeal only where it falls into the category of plain error.” *State v. Ellifritz*, 835 P.2d 170, 178 (Utah App. Ct. 1992).

Although the plain error rule is commonly used in criminal appeals, Utah courts have also applied the same rule in civil appellate matters. See *Diversified Holdings, L.C., v. Turner*, 63 P.3d 686, 692-93 (Utah 2002) (quoting Utah R. Civ. P. 51(d) and stating that “unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice...[This] rule applies in both criminal and civil contexts.”). In the instant case, the Court may properly review the issue of whether the trial court erred when it submitted questions of law to the jury because

such error falls within the plain error rule and a review of such issue is necessary to avoid a manifest injustice.

Neither party in the instant matter dispute the fact that the contract for the sale of the home at issue closed no later than May 2, 1994. Furthermore, both parties agree that Plaintiffs did not file their Complaint until August 24, 2000. According to the law applied by the trial court (as evidenced by Jury Instruction No. 31) [Jury Instruction No. 31 is attached to Defendants' Brief, Addendum "19], "Utah law provides that an action for construction defect based in contract or warranty shall be commenced within six years of the closing of the sale of the house."

Jury Instruction No. 31 also contains the following language: "Utah law provides that an action for fraudulent nondisclosure shall be commenced within two years of the time that Plaintiffs discovered their cause of actions for fraudulent nondisclosure or the date upon which such cause of action should have been discovered through reasonable diligence." Jury Instruction No. 31 also states that "Plaintiffs filed their suit on August 24, 2000."

Given the undisputed facts that the home at issue closed on or before May 2, 1994 and that Plaintiffs did not file their suit until August 24, 2000, the trial court erred by requesting the jury to make a determination concerning the statute of limitations on Plaintiffs' contract claims. The trial court committed plain error by submitting the statute of limitations question to the jury because on its face, the court's own instruction barred all of Plaintiff's contractual claims. Moreover, because the jury was not instructed to determine an accrual date for Plaintiff's causes of action (a question of fact), the legal

conclusion by the jury that Plaintiff's Fraudulent Nondisclosure claims were not barred is unsupported.

Review of the trial court's error is essential to avoid the manifest injustice caused by a complete disregard for obvious facts and applicable law. Without review, Defendants will be denied the proper protection afforded by Utah law and will be forced to pay a \$30,680.00 judgment, and at least \$50,000.00 in attorney's fees and costs *despite the clear fact* that Plaintiff did not file any of her claims until more than six years from the closing of the sale of the house. Given that the home was sold to Plaintiff and her husband for only \$83,000.00, Defendants have suffered a manifest injustice in being required to pay Plaintiff \$80,680.00 (nearly the entire cost of the home itself).

For the foregoing reasons, the Court should hold that the trial court did commit plain error and that failure to review such error will result in a manifest injustice, thereby providing proper grounds for the Court to review the instant matter.

**B. The Trial Court Erred In Failing to Correctly Determine the Appropriate Version of the Relevant Statute of Limitations.**

In a case where the central issue is whether the cause of action is barred by operation of a statute of limitations, it is of primary importance to establish, through a finding of fact, the approximate date on which the cause of action accrued.

"A cause of action accrues for statute of limitations purposes when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause." *Matson v. Burlington N. Santa Fe R.R.*, 240 F.3d 1233, 1235 (10th Cir. 2001) (citation omitted). "Generally, a cause of action accrues upon the

happening of the last event necessary to complete the cause of action.”” *Spears v. Warr*, 2002 UT 24, ¶ 33, 44 P.3d 742 (quoting *Berenda v. Langford*, 914 P.2d 45, 50 (Utah 1996)) (other internal quotations and citations omitted).

The general requirement that the appropriate fact-finder in a case *establish an approximate date as to when a cause of action accrued* is doubly pressing in the case because (as explained in Defendants’ initial Brief), several versions of the relevant statute of limitations provisions existed between the time that Plaintiff and her husband purchased the house in 1994 and when they finally filed their suit *over six years later*.

As fully detailed in Defendants’ initial Brief, application of the *appropriate* version of the relevant statutory provision will determine whether Plaintiff’s claims (both in contract and tort) should be barred by the statute of limitations.

Defendants are *not* confused as to which version of the statute of limitations should apply. Defendants’ believe (and the trial court intimated) that Plaintiff’s claims were all reasonably discoverable at the time the earnest money sales agreement (“EMSA”) was executed (on February 15, 1994). If this is the case, then the “accrual” date of Plaintiff’s causes of action was February 15, 1994 and, accordingly, the 1991 version of the statute of limitations should have applied. Application of that version would have barred all of Plaintiff’s claims. As discussed below, Plaintiff is not entitled to rely upon an equitable tolling argument—however, even if equitable tolling did apply, an accrual date of February 15, 1994 would mean that any equitable tolling of the statute of limitations would have ended on that same date.

It is important to re-emphasize that the statute of limitations, in all its variations,

demands that a specific date be determined as to when a cause of action accrues in order for the appropriate version of the statute to apply.

In the instant case, the trial court failed to clearly establish, through a finding of fact, the specific date on which Plaintiff and her husband discovered or should have discovered the facts forming the basis for their causes of action. As a consequence of not having determined the specific time frame on which to base its decisions of law, the trial court committed reversible error.

The most obvious example of the trial court's error in applying the statute is evidenced in the split ruling of its September 29, 2003 Order on Defendants' Motion for Summary Judgment. In the Order, the lower court ruled that:

1. Defendants' motion for summary judgment is granted in part and denied in part in accordance with the following.
2. Plaintiffs admitted that all defects except defects 9, 11, 12, 26, 27, 38 and 39 were patent and not latent defects ***and could have been discovered by a home inspection.*** (Court's decision at page 5.) In addition, the court determines that defect items 12 and 38 are patent defects. ***Therefore, the motion for summary judgment is granted regarding plaintiffs' fraudulent nondisclosure claims as to all defects except 9, 11, 26, 27 and 39.***
3. ***This construction defect case is governed by the Utah Code Section 78-12-21.5 of which subsection (3)(a) provides that an action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the improvement. (Decision at page 6.) Subsection (3)(b) provides that all other causes of action against the provider shall be commenced within two years of the discovery of a cause of action or the date upon which a cause of action should have been discovered through reasonable diligence.*** In accordance with UCA 78-12-21.5 (3)(b) the discovery rule applies in this case. ***Plaintiffs have created material issues of fact as to when such defects were first discovered and therefore summary judgment as to such relief is denied.*** [See Defendants' Brief, Addendum "9", emphasis added].



In analyzing the lower court's ruling, the emphasized segments *clearly* suggest that the trial court actually *premised* its decision to dismiss the Fraudulent Nondisclosure claim as to certain "patent" defects because they *were discoverable* by the process of a home inspection. In ruling that some defects were patent and that those defects could have been discoverable by a home inspection, the lower court made a ruling of law and established the date on which the Plaintiff discovered or should have discovered defects in the home.

In *Schafir v. Harrigan*, 879 P.2d 1384, 1390 (Utah App. 1994) this Court emphasized:

The responsibility to observe patent, and any discoverable latent, defects falls on the buyer of the home and is usually accomplished by hiring a knowledgeable home inspector to scrutinize the home before finalizing a sale. Oftentimes, however, real estate agents and sellers are understandably unaware of latent defects in the home at the time of sale. This is an inherent risk involved in purchasing a home.

As inferred from the foregoing language, a home inspection generally assists home buyers in discovering *both* patent and latent defects. Accordingly, the trial court's focus on the difference between "patent" and "latent" becomes less-relevant. What *is* important is that both types of defects could have been discovered if a home inspection had been undertaken at the time the Plaintiff and her husband purchased the home. Again, this is highly important, because it establishes the accrual date for Plaintiff's claims.

It is noteworthy that Plaintiff utterly fails in its Brief to directly establish any point at which the jury or the trial court determined an accrual date. Plaintiff tries to convince this Court that the jury "obviously concluded that the Moores should not have reasonably

discovered the footings defects before April of 2000.” [See Plaintiff’s Brief, pp. 11-12]—yet such a conclusion is nowhere to be found. As discussed hereinafter, all versions of U.C.A. § 78-12-21.5 after 1991 distinguish between “contract/warranty” causes of action, and all “other” types of causes of action. Even if the accrual date for the claims on the footings was determined to be April 2000, Plaintiff’s Breach of Contract claim would be barred because the statute of limitations provides a strict period within which contract/warranty claims may be brought.

**C. The trial court erred in applying the Discovery Rule.**

The trial court erred in applying the discovery rule to this case and the Plaintiff is incorrect in her analysis of the applicability of the discovery rule.

**1. The Legislature has affirmatively left equitable discovery/tolling out of the language of the U.C.A. § 78-12-21.5.**

The whole purpose for U.C.A. § 78-12-21.5 is to provide a limit on actions related to improvements in real property. Plaintiff has completely failed to grasp that in enacting U.C.A. § 78-12-21.5, the Legislature has already incorporated a tolling period for certain causes of actions.

Plaintiff erroneously argues that the equitable discovery/tolling rule applies to claims under U.C.A. § 78-12-21.5. All versions of the statute that might potentially apply to this case, however, contain specific language that tolls the filing period until discovery of the defect. Furthermore, subsection (5) of all versions of U.C.A. 78-12-21.5 specifically removes the maximal filing period limit in cases where a provider (1) has fraudulently concealed the act, error, omission, or breach of duty, (2) for a willful or

intentional act, error, omission, or breach of duty.

The only interesting point of distinction is that in all versions *after 1991*, actions for breach of contract or warranty are distinguished from other causes of action and are specifically required to be filed within six years of the completion of the improvement or abandonment of construction (unless otherwise provided for by express warranty or contract).

The statute, in all variations, speaks for itself. The Legislature has already considered the tolling issue and embodied such considerations into the statute itself. The Legislature has affirmatively left out any equitable discovery/tolling rule from the contract/warranty component of the statute in all versions after 1991. If the Court did, in fact, apply the 1999 version of the statute, Plaintiff's Breach of Contract claim was clearly barred (inasmuch as it was not filed within six years from the date of completion of construction). However, the same question arises: if Plaintiff's claims accrued in 1994, then which version of the statute should apply?

**2. Even if equitable tolling should be applied, the tolling period is still is dependent upon the accrual date.**

Before a trial court may properly apply the discovery rule to extend a statute of limitations period, "an initial showing must be made that the plaintiff did not know or and could not reasonably have known of the existence of the cause of action in time to file a claim." *Warren v. Provo City Corp.*, 838 P.2d 1125, 1129 (Utah 1992). In fact, the entire purpose of the discovery rule is to ensure that an applicable statute of limitations does not begin to run until a party knows or should have known of the existence of a particular

cause of action. *Sevy v. Security Title Co. of Southern Utah*, 902 P.2d 629, 634 (Utah 1995) (stating that, “the discovery rule is an exception to the general rule, and it delays the running of the limitation period ‘until the discovery of facts forming the basis for the cause of action.’”) (internal citations omitted).

Without a specific determination as to the date on which Plaintiff and her husband discovered or should have discovered the facts for forming the basis of their causes of action, the trial court could not have applied the discovery rule without committing reversible error.

In this case, the discovery rule was erroneously applied because the trial court found that 35 of the defects were “patent” and therefore discoverable through a home inspection prior to the purchase of the home. This is particularly significant, given that all other “latent” defects were actually discovered through a subsequent home inspection in 2000. In other words, even if Plaintiff was entitled to invoke the doctrine of equitable tolling (which, as explained in the previous section, she is *not* entitled to do), such equitable tolling would terminate at the time she could have discovered both patent and latent defects (i.e. via a home inspection prior to the purchase of the home). Because no accrual date was ever precisely determined, there is no way of knowing when Plaintiff’s equitable tolling period ended.

## **II. THE DOCTRINE OF *CAVEAT EMPTOR* APPLIES IN THIS CASE.**

As set forth in Defendants’ initial Brief (pp. 32-25), the doctrine of *caveat emptor* as elucidated by Utah courts applies to the facts in this case and bars Plaintiff’s Breach of Contract and other tort claims.

Plaintiffs were aware that they were buying the home in an “as is” condition, and that the EMSA disclaimed all warranties and representations other than those found in paragraph “C”. The alleged defects were ultimately discovered by a non-destructive inspection in 2000, and could have been discovered in similar fashion before the sale of the home in 1994. Governing case law clearly establishes that Plaintiffs had a responsibility to protect themselves by having the home inspected before the sale. Plaintiffs did not have the home inspected before the sale; instead Plaintiffs failed to exercise reasonable diligence, waiting until August, 2000 (over six years after purchasing the home) to have it inspected. Paragraph “B” of the EMSA itself specifically provides:

¶ B. INSPECTION. Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer’s *own examination and judgement* and not by reason of *any representation* made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income here from or as to its production. Buyer accepts the property in “as is” condition subject to Seller’s warranties as outlined in Section 6. In the event that Buyer desires an *additional inspection*, said inspection shall be allowed by Seller but arranged for and paid by Buyer (emphasis added).

Plaintiffs were clearly given every opportunity to perform their due diligence and were put on notice of the home’s status by the language of the EMSA. Plaintiffs did not exercise ordinary due diligence to discover the alleged defects and, therefore, the doctrine of *caveat emptor* precludes Plaintiffs from bringing suit for the alleged defects in the home.

### **III. THE TRIAL COURT ERRONEOUSLY SUBMITTED QUESTIONS OF LAW TO THE JURY.**

The trial court’s special verdict questions to the jury as to whether “the statute of

limitations barred or prohibited the Plaintiff's fraudulent non-disclosure claim" to the defects involving the footings and the windows, were clearly erroneous. The trial court erred not only in posing a legal question to the jury, but also erred in accepting the ruling based on the jury's response to the question.

If, indeed, Plaintiff was required to file her Breach of Contract claim within six years from the date of closing (as indicated by Jury Instruction No. 31)<sup>1</sup>, the jury completely erred in granting judgment for Plaintiff on her Breach of Contract claim since it is undisputed that the claim was filed more than six years after closing. As discussed in Section I (C), above, equitable tolling does not apply to the Breach of Contract claim (nor to any other tort claims under U.C.A. § 78-12-21.5 because a tolling period is incorporated in the statute's very language).

Similarly, the jury's legal conclusion that Plaintiff's Fraudulent Nondisclosure claims as to the windows and footings were not barred by the statute of limitations is equally suspect if both defects were discoverable at or before the closing occurred in 1994.

#### **IV. THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S FRAUDULENT NONDISCLOSURE CLAIM.**

On appeal, a trial court's grant of summary judgment is reviewed for correctness. All undisputed facts are viewed in the light most favorable to the party against whom the motion was granted. See *Anderson v. Provo City Corp.*, 2005 UT 5, ¶10, 108 P.3d 701. However, the reviewing court may affirm the result reached by the trial court "if it is

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<sup>1</sup> This jury instruction is apparently based on the 1999 or 2003 versions of the statute.

sustainable on any legal ground or theory apparent on the record even though that ground or theory was not identified by the lower court as the basis of its ruling. *Boud v. SDNCO, Inc.*, 2002 UT 83, ¶ 10, 54 P.3d 1131, (quoting *Orton v. Carter*, 970 P.2d 1254, 1260 (Utah 1998)).

As argued in the first three Sections of this brief and as set forth in Defendants' brief-in-chief, Plaintiff's Fraudulent Nondisclosure claim (as well as her other claims) is barred by the applicable statute of limitations and by the doctrine of *caveat emptor*. In other words, the partial dismissal of Plaintiff's Fraudulent Nondisclosure claim as to 37 of the 42 alleged defects was appropriate on statute of limitations and/or *caveat emptor* theories in any case, and should be upheld.

Irrespective, the trial court correctly ruled in its Memorandum Decision on Defendants' second Motion for Summary Judgment (filed August 21, 2003) [and attached hereto as Addendum "1"] that: (1) all but five of the alleged defects were patent, (2) that the Defendants' home was "used," and (3) that the doctrine of *caveat emptor* precluded Plaintiff's fraudulent nondisclosure claims as to 37 of the 42 alleged defects. Furthermore, the trial court did not "invade the province of the jury" as alleged by Plaintiff in granting summary judgment as to defects No. 12 and 38. Finally, the Utah Supreme Court has not abandoned the doctrine of *caveat emptor* as asserted by Plaintiff.

**A. The ruling of the trial court that all but five of the alleged defects were patent, and thus disposable through Defendants' summary judgment motion, was correct.**

Plaintiff takes issue with the trial court's grant of summary judgment in Defendants' favor on her fraudulent nondisclosure claim as related to 37 of the 42 alleged

defects in the home.

Plaintiff begins that she was “*required* to admit that all but defects no. 9, 11, 12, 26, 27, 28, and 39 of the original 42 defects in the home were in fact not “latent” or were not visibly hidden (*italics added*).” [See Plaintiff’s Brief, pp. 26-27]. Plaintiff suggests that she was somehow compelled or forced to admit that 35 of the defects were “patent.” However, as discussed hereinafter, Plaintiff answered the requests for admissions in question freely and without compulsion.

After Defendants filed their Second Set of Requests for Admissions on October 9, 2002, Plaintiff objected to *every* request on grounds of vagueness, ambiguity and that certain requests required Plaintiff to posit a legal conclusion. (R. 527-530). A review of Defendants’ Second Set of Requests for Admissions reveals that Defendants asked, among other things: (1) whether each of the alleged 42 defects had actually been discovered through inspection by a knowledgeable inspector and whether such discovery had been accomplished without destructive testing, (2) whether a home inspection at any time could have revealed each of the 42 alleged defects, (3) whether each of the 42 defects were “latent”, and (4) whether each of the 42 defects was “material.”

After an extension was allowed for Plaintiff, and after several requests by Defendants that Plaintiff submit answers to the Second Set of Requests for Admissions, Defendants filed a Motion for Sanctions, or in the Alternative to Compel Discovery. (R. 390).

Obviously, a response by Plaintiffs to these questions was highly important given the potential application of the statute of limitations and *caveat emptor* defenses to the



case and also given that the EMSA itself disclaimed all warranties other than those listed in paragraph “C.”

The trial court ultimately required Plaintiff to answer. While Plaintiff correctly notes that the trial court defined “latent” as “hidden,” Plaintiff was *not* forced by the trial court to admit anything. In fact, if Plaintiff could have simply denied that any or all of the alleged defects were patent.

Plaintiff’s reliance on case law and *Black’s Law Dictionary* does not necessarily prove that the trial court’s definition of the term “latent” was incorrect or misleading. Plaintiff’s own reference to *Ilot v. University of Utah*, 2000 UT App 286, 12 P.3d 1011 is illustrative. In that case, this Court quoted *Black’s Law Dictionary* in defining a “latent defect” as “a defect which reasonably careful inspection will not reveal.” *Id.* at ¶18. Although this definition is somewhat more specific than the definition provided by the trial court (“hidden”), the two definitions are closely synonymous. More importantly, if Plaintiff had reservations about the trial court’s definition and wished to rely upon *Black’s Law Dictionary* as the standard definition for the terms “patent” and “latent,” she could have simply denied that any of the alleged defects were “patent.”

On appeal, Plaintiff asks this Court to probe her internal subjective reasoning concerning her understanding of the term “latent” at the time she answered the requests and then to find that she was somehow misled by the trial court into admitting that 35 of the defects were not “latent.”

In the instant case, Plaintiff and her husband purchased an inexpensive home for \$83,000.00. Plaintiffs opted *not* to have an inspection done even though the

EMSA itself was rife with disclaimers as to warranties.

Presumably, all of the 42 alleged defects that were discovered in 2000 would have been discoverable in 1994 irrespective of *whether the defects were patent or latent* if an inspection had been obtained. Most importantly, Plaintiff offers no actual proof that any of 35 defects that she admitted were “patent” were, in fact, “unobservable upon reasonable inspection.” Plaintiff made an admission as to the status of the alleged defects and the trial court acted appropriately in granting summary judgment on those admittedly patent defects. The trial court’s definition of “latent” as being synonymous with “hidden” is not so divergent from the *Black’s Law Dictionary* definition as to support Plaintiff’s allegation that she was misled into mistaken admissions.

**B. The trial court did not “invade the province of the jury” in granting summary judgment as to defects No. 12 and 38.**

In addition to the 35 admittedly patent defects, the trial court granted summary judgment as to defects No. 12 and 38. The trial court explained its rationale in the August 21, 2003 Memorandum Decision on Defendants’ Second Motion for Summary Judgment as follows:

Additionally, the Court finds that the alleged defect item number 12, “no smoke detectors in the bedrooms and the only smoke detector in the house is a battery detector” to be an item that could have reasonably been discovered by Plaintiffs. Likewise, alleged defect Item number 38 “insulation baffles to allow ventilation at exterior walls” is an item that could have reasonably been discovered by the Plaintiffs by observing there were not vents on the House in the roof area. [See Addendum “1,” p. 6].

The trial court assessed that these two alleged defects were so reasonably discoverable by Plaintiff and her husband that summary judgment was warranted. The

trial court had been fully briefed on all of the facts prior to rendering its decision and believed that this was a “clear case” in which summary judgment was appropriate. *Id.* at ¶18.

**C. The trial court properly concluded that the Defendants’ home was “used.”**

Plaintiff takes issue with the trial court’s reasonable conclusion that the Defendants were selling a “used” home. In the August 21, 2003 Memorandum Decision on Defendants’ Second Motion for Summary Judgment, the trial court cited *Schafir v. Harrigan*, 879 P.2d 1384, 1389 (Utah App. 1994) as the standard for determining whether the doctrine of *caveat emptor* could be invoked by Defendants. [Addendum “1,” p. 4]. The court then explained why Defendants’ home was deemed “used:”

“[a] home inspection is not required when purchasing a new home because the doctrine of caveat emptor does not apply. In this case, Plaintiffs did not dispute that the Smiths lived in the Home or that the Smiths intended it to be their home in their response to Defendants’ first Motion for Summary Judgment, therefore, it is an admission. The Court finds that the Home is a used home because the Smiths intended it to be their home, they lived in the Home for a short period of time, and Plaintiffs have admitted these facts. . [Addendum “1,” pp. 4-5].

On appeal, Plaintiff attempts to persuade this Court that the home was not “used”—this despite the *undisputed* fact that Defendants’ lived in the home for a period before selling it to Plaintiff and her husband.<sup>2</sup> In an effort to create its own legal definition of the term “used,” Plaintiff postulates that because Defendants only lived in the home for three weeks after the certificate of occupancy was issued, the home should not have been considered “used.”

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<sup>2</sup> Even Plaintiff acknowledges that Defendants lived in the home for a period before

Plaintiff also argues that Defendants' never claimed that the home was "used." [See Plaintiff's Brief, p. 33]. This assertion is absurd. Defendants and the trial court obviously understood the common and generally accepted definition of the term "used" given the context of this case. It is not necessary or remotely feasible for parties in litigation to minutely define and claim ownership of a term when the facts sufficiently provide a basis for a commonsense understanding of the term. Plaintiff is straining at gnats.

A lengthy argument is made by Plaintiff that the trial court unfairly held Plaintiff to a prior admission that Defendants built the home "for their own residence." [See Plaintiff's Brief, pp. 31-32]. Plaintiff admits that she and her husband did not originally contest Defendants' assertion that the home had been build for Defendants' residence. [See Plaintiff's Brief, p. 31]. Nevertheless, Plaintiff explains that this admission was only made in the context of the first summary judgment motion filed by Defendants in February 2001. [See Plaintiff's Brief, p. 31]. After two years had elapsed, Plaintiff apparently changed her mind for purposes of Defendants' second Motion for Summary Judgment filed on May 6, 2003. In Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, Plaintiff and her husband denied that Defendants built the home for their own residence. (R. 958). Plaintiff made no motion, oral or written, to formally withdraw her prior admission that Defendants *had* built the home for their residence.

Furthermore, in the Memorandum in Opposition to Motion for Summary Judgment, Plaintiff relied upon her own deposition testimony in attempting to refute

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selling it. [See Plaintiff's Brief, pp. 30-31].

Defendants' contention that the home was built for their own residence. The problem is that Plaintiff is merely offering her opinion as to *Defendants'* subjective intentions. How do Plaintiff and Mr. Peterson know what the intentions of Defendants were in constructing the home? Defendants dissect this problem in their Reply Memorandum in support of summary judgment. [See Reply Memorandum of Points and Authorities in Support of Motion for Summary Judgment, pp. 1-2, attached hereto as Addendum "2"].

Finally, Plaintiff warns that if this Court does not reverse the trial court's categorization of the home as "used," then "it may become a customary habit for some general contractors to live in a home a few short weeks and then sell it to an unsuspecting buyer who thinks he is buying a "new" home, when in-fact, he may be buying a "used" home in which the doctrine of caveat emptor applies." [See Plaintiff's Brief, pp. 31-32]. This is pure conjecture. More problematic, however, is that Plaintiff offers no clear-cut alternative for trial courts who are attempting to determine whether a home is "used" or not. Should this Court actually reverse the trial court, what standard should be imposed for determining whether a home is "used?" Should a home be considered "used" if a person lives in it for one month? Two months? Should the subjective intent of the builder/owner be dispositive? Should other extrinsic questions of fact be explored (such as whether the home was listed)?

In sum, the trial court's determination that the home was "used" was reasonable and well-founded. The trial court relied upon a common understanding of the term and upon the clear undisputed facts of the case. Plaintiff's revocation of her admission that the home was intended by Defendants to be their residence (even if proper) is based only

on her subjective opinion. Reversal of the trial court's determination on this issue is unwarranted.

**D. The trial court's application of the doctrine of *caveat emptor* in this case was proper.**

Plaintiff acknowledges that *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570 (Utah App., 1994) and *Schafir v. Harrigan*, 879 P.2d 1384 (Utah App., 1994) remain governing law in Utah on the application of the doctrine of *caveat emptor*. Defendants have previously analyzed these two case along with *Hermansen v. Tasulis*, 2002 UT 52, ¶ 24, 48 P.3d 235 and applied the rulings in those cases to the present case. [See Defendants' Brief, pp. 32-34].

The following undisputed facts are also relevant [see Defendants' Brief, pp. 6-7]:

1. An Earnest Money Sales Agreement ("EMSA") was executed between Defendants and Plaintiffs on February 15, 1994 for the sale of the Home.
2. The relevant provisions of the EMSA for purposes of this appeal are:

¶ 1(e) *Buyer has made a visual inspection of the property subject to Section 1(c) above and 6 below, accepts in its present physical condition, except: (BLANK)*

¶ 6. *SELLER'S WARRANTIES. In addition to warranties contained in Section C, the following*

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

¶ C. *SELLER WARRANTIES. Seller warrants that: (a) Seller has received*

*no claim or notice of any building or zoning violation concerning the property which has not or which will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.*

3. Plaintiffs walked through the Home on February 11, 1994 before executing the EMSA on February 15, 1994.
4. Defendants read the “as is”/no warranties clauses with Plaintiffs at the time the EMSA was executed by both parties.

Despite the obvious disclaimers made by Defendants against any warranty other than those outlined in ¶ C, despite the fact that Plaintiff and her husband agreed that they were buying the home “as is,” and despite the fact that Plaintiff could have obtained a home inspection, Plaintiff chose to purchase the home without conducting any inspection.

The language of this Court in the *Schafir* decision bears repeating:

The responsibility to observe patent, and any discoverable latent, defects falls on the buyer of the home and is usually accomplished by hiring a knowledgeable home inspector to scrutinize the home before finalizing a sale. Oftentimes, however, real estate agents and sellers are understandably unaware of latent defects in the home at the time of sale. This is an inherent risk involved in purchasing a home. *Schafir*, 879 P.2d at 1390 (emphasis added) (citations omitted).

....

Generally, absent some express agreement between the parties—which is absent here—the doctrine of caveat emptor precludes a home buyer from bringing suit for discoverable defects in the home. Especially when the sale of a used home is involved, the purchaser is on notice that the residence is not new and may contain defects affecting the home’s quality or condition. *Id.* at n.12.

It is noteworthy that in the foregoing quote, this Court associates “patent” defects as those that are observable and “latent” defects as “discoverable.” Irrespective, this Court correctly notes *both* patent and latent defects are typically “discoverable” through the process of home inspection.

Another important aspect of this case that should not be overlooked is the fact that the EMSA itself provided notice that the Plaintiffs were purchasing the home “as is” without any reliance upon any representations of Defendants. The EMSA also indicates that the buyers had conducted an inspection of their own and that they were entitled to obtain a further professional inspection. All of these contractual “red flags” were placed squarely within the purview of the Plaintiffs at the time they were considering purchasing the home. In other words, Plaintiffs were *doubly* informed of their rights and potential risks in this case. Even if the doctrine of *caveat emptor* was inapplicable, the trial court’s decision to grant summary judgment was still reasonable given the disclaimers in the EMSA.

Plaintiff suggests that the *Smith v. Frandsen*, 2004 UT 55, 94 P.3d 919, decision has created new judicial law imposing an implied warranty of habitability on all sales of residential homes. In *Smith v. Frandsen*, the developer of a subdivision sold partially developed property to a builder-contractor, who in turn sold the property to another contractor-builder who then constructed a home. The *new* home was purchased by the Smiths. The central question in the case was whether the remote developer could be liable to homeowners for damages caused to the home as a result of unstable soil. The focus in *Smith v. Frandsen* was not on whether the relationship between the Smiths and



their builder-contractor imposed a legal duty to disclose information about soil conditions. The builder-contractor was not a party to the lawsuit. The inquiry into the builder-contractor's role was, instead, directed at whether parity existed between what the builder-contractor knew about the condition of the soil that lay beneath the Smiths' house and the developer's knowledge of the same soil instability.

Ultimately, the *Smith v. Frandsen* court found that the Smiths could not recover from the developer because duty to disclose material information is extinguished once the information is communicated or otherwise acquired by the party (in this case, the builder-contractors) to whom the duty was first owed. *Smith v. Frandsen*, 2004 UT 55, ¶ 17.

Plaintiff emphasizes with bold lettering certain language from the *Smith v. Frandsen* in support of its proposition that the doctrine of *caveat emptor* has been abandoned in Utah. [See Plaintiff's Brief, pp. 34-35]. Yet, all of the language in that quote is culled from other jurisdictions. The *Smith v. Frandsen* case was not directly concerned with application of the doctrine of *caveat emptor* as between a home-builder and a purchaser (as recognized in the concurring opinion of Justice Wilkins and Justice Durrant). Moreover, the decision was rendered in 2004—well after the trial court issued its Memorandum Decision on Defendants' second Motion for Summary Judgment in August, 2003.

The trial court properly applied the doctrine of *caveat emptor* in granting summary judgment in favor of Defendants on 35 of the 42 alleged defects as to Plaintiff's Fraudulent Nondisclosure Claim. The ruling of the trial court on this matter should be

affirmed.

**V. THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT ON PLAINTIFF’S BREACH OF CONTRACT CLAIM.**

On appeal, a trial court’s grant of summary judgment, is reviewed for correctness. All undisputed facts are viewed in the light most favorable to the party against whom the motion was granted. See *Anderson v. Provo City Corp.*, 2005 UT 5, ¶10, 108 P.3d 701. However, the reviewing court may affirm the result reached by the trial court “if it is sustainable on any legal ground or theory apparent on the record even though that ground or theory was not identified by the lower court as the basis of its ruling. *Boud v. SDNCO, Inc.*, 2002 UT 83, ¶ 10, 54 P.3d 1131, (quoting *Orton v. Carter*, 970 P.2d 1254, 1260 (Utah 1998)).

As argued in the preceding sections of this brief and as set forth in Defendants’ brief-in-chief, Plaintiff’s entire Breach of Contract claim (as well as her other claims) is barred by the applicable statute of limitations and by the doctrine of *caveat emptor*. In other words, the partial dismissal of Plaintiff’s Breach of Contract claim as to all alleged defects except for the finish grading issue (R. 1749) by the trial court was appropriate on statute of limitations and/or *caveat emptor* theories in any case, and should be upheld.

Notwithstanding the foregoing, Defendants will address the substance of Plaintiff’s argument that the trial court erred in granting partial summary judgment in favor of Defendants as to the Breach of Contract claim.

The essence of Plaintiff’s argument is whether paragraph “C” of the EMSA was properly interpreted by the trial court. Specifically, the issue raised is whether Defendant

Dan Smith received any *claim or notice* of zoning violation concerning the property. As noted by Plaintiff, paragraph “C” of the EMSA contains the *only* warranties made by the Defendants—the EMSA expressly disclaims all other warranties and/or representations.

Paragraph “C” provides:”

¶ C. SELLER WARRANTIES. Seller warrants that: (a) Seller has received no claim or notice of any building or zoning violation concerning the property which has not or which will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.

Defendants brought a motion to dismiss Plaintiff’s Breach of Contract claims. (R. 1377). Defendants argued that the EMSA itself contains a disclaimer of all warranties and iterates the “as is” status of the home, except for those warranties contained in paragraph “C.” Defendants also noted that there was no evidence that the HVAC (heating, air-conditioning, ventilating system) was inoperable at the time of closing. Nor was there any evidence that the electrical systems, plumbing or appliances were not in proper working condition at the time of closing. Plaintiff and her husband had used these systems for over six years without complaint.

Plaintiff admitted that paragraph “C” was the only warranty given upon which she could base a breach of contract claim. (R. 1528). Plaintiff’s primary argument (which is reasserted on appeal) is that “notice” of any zoning violation should be imputed to Defendant Dan Smith because he was a licensed contractor and built the home. Defendants have already responded to this position in their Reply Memorandum in

Support of Defendants' Motion for Summary Judgment on Breach of Contract Claims  
[attached hereto as Addendum "3"].

Defendants reassert those same arguments as set forth in the Reply Memorandum, namely: (1) that building inspector, Jack Peterson, performed a complete inspection, finding no violations other than the incomplete grading, and issued a certificate of occupancy, (2) a deviation from the applicable building code is not equivalent to a "violation," (3) the building inspector should legally be the final authority as to whether a "violation" exists or not—and in this case Jack Peterson issued the certificate of occupancy, thereby approving the home as compliant with applicable building code sections, (4) Paragraph "C" clearly states that the seller must not "receive" any claim or notice of any building or zoning violation. It is undisputed that Defendants did not "receive" any claim or notice of any building or zoning violation, (5) the applicable code sections allow for some deviation.

Plaintiff tries to impose a specific definition of the term "notice" to the facts in this case. However, when read in the context of paragraph "C," it is clear that Plaintiff's multi-definitional version of the word "notice" is not what was intended. Plaintiff should not be allowed to redefine the plain meaning of the term as it is used in the EMSA.

Plaintiff also briefly mentions that the attic ventilation system was not in proper working order at the time of closing. Obviously, the trial court and the record prove otherwise, and Plaintiff has not marshaled any evidence to support its contention. The trial court was entirely justified in granting summary judgment as to the attic ventilation system based on the evidence before it.

The trial court did not err in dismissing Plaintiff's Breach of Contract claims as to all alleged defects other than the grading.

**VI. THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM.**

On appeal, a trial court's grant of summary judgment, is reviewed for correctness. All undisputed facts are viewed in the light most favorable to the party against whom the motion was granted. See *Anderson v. Provo City Corp.*, 2005 UT 5, ¶10, 108 P.3d 701. However, the reviewing court may affirm the result reached by the trial court "if it is sustainable on any legal ground or theory apparent on the record even though that ground or theory was not identified by the lower court as the basis of its ruling. *Boud v. SDNCO, Inc.*, 2002 UT 83, ¶ 10, 54 P.3d 1131, (quoting *Orton v. Carter*, 970 P.2d 1254, 1260 (Utah 1998)).

Plaintiff seeks review of the trial court's Order on Defendants' first Motion for Summary Judgment. In that Order, the trial court dismissed Plaintiff's claim for Negligent Misrepresentation on the basis that the claim was barred by the doctrine of merger. [See Plaintiff's Brief, p. 39].

As with the two preceding Sections of this brief, Defendants assert that Plaintiff's Negligent Misrepresentation claim is barred by the applicable statute of limitations and by the doctrine of *caveat emptor*. Thus, the subsidiary issue of whether the Negligent Misrepresentation claim was properly dismissed because of the merger doctrine becomes irrelevant.

Furthermore, even if this Court finds that the trial court erred in dismissing

Plaintiff's Negligent Misrepresentation claim, Plaintiff has also brought a claim for Fraudulent Nondisclosure (which she prevailed on at trial). Plaintiff would not be entitled to double recovery even if both claims were allowed and she prevailed on both claims.

Defendants otherwise do not contest the analysis of the issue of the doctrine of merger set forth in Plaintiff's Brief (pp. 39-42). Because Defendants agree with Plaintiff's analysis of the doctrine of merger, Defendants need not address whether the collateral rights exception analysis presented by Plaintiff is accurate. Again, however, Defendants assert that dismissal of the Negligent Misrepresentation claim was proper because the claim was brought outside the statute of limitations period and/or because the claim is barred by the doctrine of *caveat emptor*.

**VII. THIS COURT SHOULD UPHOLD THE MAJORITY RULE AND FIND THAT RULE 26(b)(4)(C) DOES NOT PERMIT RECOVERY FOR AN EXPERT'S TIME IN PREPARING FOR DEPOSITION.**

Plaintiff claims that she should be compensated for her experts' time in preparing for deposition. [See Plaintiff's Brief, pg 44]. The Utah Rules of Civil Procedure provide that "the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery." Utah R. Civ. P. 26(b)(4)(C)(i). This statute is not ambiguous. It states that where one party deposes the opposing party's expert, the deposing party is responsible to pay the expert "a reasonable fee" for the time spent at the deposition. *Id.*

It has never been the customary practice in Utah for one party to pay the other party's expert for the time that expert spends preparing for a deposition. Indeed, it is the customary practice for the deposing attorney to pay only for the expert's time during the

deposition. This custom is in harmony with the vast majority of federal courts interpreting the identical federal discovery provision of the Federal Rules of Civil Procedure. An Illinois federal court succinctly stated the majority rule regarding payment of expert witness preparation time, holding that “[i]t should normally be the case...that Rule 26(b)(4)(C) does not permit recovery for time spent “preparing for a deposition.” *Sears v. EEOC*, 138 F.R.D. 523 (N.D. Ill. 1991). *See also S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District*, 154 F.R.D. 212, 214 (E.D.Wis. 1994); *Cotton v. Consolidation Coal Co.*, 457 F.2d 641, 546-47 (6th Cir. 1972); *Herbst v. Int’l Telephone & Telegraph Corp.*, 65 F.R.D. 528, 531 (D. Conn. 1975); and *McBrian v. Liebert Corp.*, 173 F.R.D. 491 (N.D. Ill 1997). The majority of federal courts uphold this rule because, “[o]ne party need not pay for the other’s trial preparation. *Rhee v. Witco*, 126 F.R.D. 45 (D. Kan. 2002).

It would be inequitable to require Defendants to pay for the dubiously lengthy preparation time of Plaintiff’s expert witnesses. Indeed, to adopt the rule as proposed by Plaintiff would provide an incentive for plaintiffs to educate themselves and prepare for trial at the expense of the party deposing their expert. Where a plaintiff is the one to bring suit, the plaintiff should be required to pay for the cost of their own prosecution. Otherwise, the defendant will in effect pay a substantial amount of the plaintiff’s trial preparation costs and plaintiffs’ counsel’s education.

Some of the federal courts in the majority do find an exception to the general rule prohibiting the recovery for time spent by experts preparing for their depositions. However, this exception does not apply to this case because the exception is limited to

“complex cases where there has been a considerable lapse of time between an expert’s work on a case and the date of his actual deposition. *S. A. Healy Co. v. Milwaukee Metropolitan Sewerage District*, 154 F.R.D. 212, 214 (E.D. Wis. 1994). Here, a considerable amount of time had not lapsed between the work of the Plaintiff’s experts and their depositions, and what time had passed was due to Plaintiff’s failure over a period of seven months to properly respond to discovery requests regarding her expert witnesses. Moreover, this is not a complex case. *See Rhee*, 126 F.R.D. at 45 (single plaintiff and one single defendant is not a complex case). Therefore, Defendants respectfully request that the Court follow the majority rule and establish that “normally...Rule 26(b)(4)(C) does not permit recovery for time spent “preparing for a deposition.” *Sears*, 138 F.R.D. 523.

**VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD OF ATTORNEY FEES WHERE THE COURT’S AWARD OF REASONABLE ATTORNEY FEES WAS PROPERLY SUPPORTED BY EVIDENCE IN THE RECORD.**

Plaintiff alleges that the trial court erred in ruling that she was only entitled to attorney’s fees and costs on her Breach of Contract cause of action. [See Plaintiff’ Brief, pp. 49]. Plaintiff further argues that the language found in the attorney’s fees clause of the EMSA exempted her from having to designate her fees based on successful and unsuccessful claims as required by Utah law. [*Id.*] Alternatively, Plaintiff claims that even if she was required to designate her fees, she fulfilled this requirement because “the causes of action were so closely related and intertwined as to be indistinguishable.” [*Id.*, p. 50].



***Proceedings below.*** On or about April 4, 2005, Plaintiff filed a verified Motion for Attorney's Fees and Costs asking the court to award her \$120,645.88 in attorney fees and \$35,131.53 in costs for a total of \$155,777.41. (R. 2148). Defendants filed objections to the motion, arguing that Plaintiff's only right to fees and costs arose under paragraph "N" of the EMSA and that, therefore, Plaintiff was only entitled to recover fees incurred in bringing her Breach of Contract claim. (R. 2188). Defendants further noted that the Plaintiff had failed to designate the fees attributable to unsuccessful claims as opposed to successful claims as required by Utah law and therefore Plaintiff's request for attorney fees and costs should be denied.

At a hearing on the issue, the court ruled that under Utah law, Plaintiff was only entitled to recover attorney fees and costs where she had a contractual right to them and that in this case a contractual right only arose from the Breach of Contract claim under the EMSA. [R. Transcript hearing on Motions June 6, 2005, pp. 45-46]. In conformance with this ruling, the trial court ordered that Plaintiff "review [her] proposed billing and submit a new billing with those fees associated with pursuing the breach of contract claim that [they] were successful on." [*Id.*, p. 71].

On June 20, 2005, Plaintiff submitted her amended billing to the court. [See Response to Court's Directive Regarding Attorney's Fees, Costs and Expenses, attached hereto as Addendum "4"]. According to the amended billing, Plaintiff's claim for attorney fees increased from their original claim of \$155,777.41 to \$158,927.72. This increase reflected an additional \$6,717.00 in attorney's fees accrued since the last motion and a reduction of the original claim for attorney's fees in the amount of \$3,822.24 in

response to the Court's directive. In its order awarding attorney fees, the court noted that "[i]n the Court's opinion Plaintiff's attorney made no real effort to comply with the Court's directive to submit a claim for attorney's fees and costs associated with the successful breach of contract claim." [See Plaintiff's Brief, Addendum No. "10," pp. 2-3].

The Court also concluded that because Plaintiff "failed to provide any factual basis upon which the Court can determine the reasonableness of the Plaintiff's claim for attorney's fees and costs, the Court will have to make its own evaluation of the request based upon its knowledge of the case and evaluation of the claimed fees and costs and the Court's experience and knowledge of attorney's fees in similar cases." [*Id.*] The court then reviewed Plaintiff's request for attorney fees based on the factors set out in *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988) and ultimately determined that it was reasonable for Plaintiff to be awarded attorney fees in the amount of \$40,000 and costs in the amount of \$10,000. [*Id.*, pp. 3-5].

***Standards of review.*** Whether Plaintiff was entitled to recover attorney fees and costs under the EMSA is a question of law which the court will review for correctness. *Maynard v. Wharton*, 912 P.2d 446, 449 (Utah App. 1996). However, the determination of what constitutes reasonable attorney fees and costs "is in the sound discretion of the trial court, and will not be overturned absent the showing of a clear abuse of discretion." *Dixie State Bank*, 764 P.2d at 988 (citations omitted). As the Supreme Court has noted, "[b]ecause the trial court is in a better position than an appellate court to gauge the quality and efficiency of the representation and the complexity of the litigation, we have endowed the trial courts with discretion to assess the reasonableness of the fees requested

under a contract or statute.” *Foote v. Clarke*, 962 P.2d 52, 56 (Utah 1998).

**A. The trial court correctly found that Plaintiff was only entitled to recover the fees arising from the Breach of Contract claim.**

Plaintiff is only entitled to recover her attorney fees and costs incurred in pursuit of the breach of contract claim. In Utah, attorney fees authorized by contract are awardable only in accordance with the explicit terms of the contract and only to the extent permitted by the contract. *Turtle Management, Inc. v. Haggis Management, Inc.* 645 P.2d 667, 671 (Utah 1982); *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 555-56 (Utah App. 1989). Furthermore, parties seeking an award of attorney fees under a contract must establish that the contract’s terms anticipate such an award. *Maynard v. Wharton*, 912 P.2d 446 (Utah App. 1996).

Plaintiff’s claim for attorney fees and costs arises under Paragraph “N” of the “EMSA”. Paragraph “N” provides, in pertinent part:

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

Plaintiff argues that under this clause, she is entitled to recover all attorney fees incurred in pursuit of all six of her causes of action, not just those fees arising from her breach of contract action. [See Plaintiff’s Brief, p. 47].

This issue on appeal is governed by the case of *Foote v. Clark*, in which the Utah Supreme Court examined an award of attorney fees based on a clause virtually identical to the one at issue. *See Foote v. Clark*, 962 P.2d 52 (Utah 1998).

In *Foote v. Clark*, the parties entered into a standard real estate purchase contract for the sale of a home. The attorney fee provision in the real estate purchase contract stated:

Both parties agree that should either party default in any of the covenants or agreements contained herein, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise. See *Foote*, 962 P.2d at 54.

This provision is virtually identical to the attorney fee provision contained in Paragraph "N" of the EMSA. Later, when the parties were unable to agree as to certain of the contract's provisions, defendant sold the home to a third party. Plaintiff brought a suit for breach of contract against defendant, and a suit for tortious interference with the contract against defendant's real estate agent and brokers. At trial, the court found that although defendant had breached the contract, plaintiff had suffered no actual harm and therefore was only entitled to minimal damages. The court also ruled that pursuant to the attorney fee provision of the contract, plaintiff was entitled to recover all of its attorney fees and costs from defendant, even those expended in pursuing claims against defendant's agents.

On appeal, defendant argued that a plaintiff who only recovers nominal damages is not considered "successful" under Utah law, and therefore is not entitled to attorney fees under a "prevailing party" statute. See *Fashion Place Associates v. Glad Rags, Inc.*, 754 P.2d 940, 942 (Utah 1988) (holding that a party who recovers only nominal damages is not "successful" where the attorney fees contract clause provided that "the unsuccessful

party in such action or proceeding agrees to reimburse the successful party for the reasonable expense of attorney fees...). The Supreme Court rejected this argument and found that “[t]he amount of plaintiffs’ recovery in this case is irrelevant under the language of the contract.” *Id.* at 54. “Rather, the sole criterion for the plaintiff to obtain attorney fees in a remedial action pursuant to this contract is to show a default by the other contract party.” *Id.* The Court noted, however, that “[t]he contract only authorizes fees to be collected for time expended in remedying a default in the purchase agreement.” *Id.* at 55.

**B. Under paragraph “N” of the EMSA, a party may only recover attorney fees incurred in enforcing the agreement if it can prove the other party defaulted on the Agreement.**

Plaintiff argues that the trial court erred in ruling that she could not recover attorney fees and costs on all of their causes of action. [See Plaintiff’s Brief, p. 47]. Plaintiff bases this claim on the assertion that Paragraph “N” of the EMSA “requires that that [sic] the defaulting party...pay all costs, expenses and reasonable attorney’s fee.” [See Plaintiff’s Brief, p. 49]. Plaintiff further argues that “[j]ust because Plaintiff’s basis for recovery was found in a contract, does not necessarily mean that she could only recover for breach of that contract.” [*Id.*, p. 50]

These arguments misconstrue the law in *Foote v. Clark*. As noted by the Court, the contract, or EMSA, “only authorizes fees to be collected for time expended in remedying a default in the purchase agreement.” *Foote*, 962 P.2d at 55. Plaintiff points out that Defendants’ default in the EMSA arose from their breach of Paragraph C(a) of the EMSA with respect to the violation of the building code for improper grading. [See

Plaintiff's Brief, pg. 48] Therefore, under *Footte v. Clark*, Plaintiff is only authorized to collect fees for time spent remedying the default, or in other words, the time spent remedying the breach of contract claim respecting the violation of the building code for improper grading.

Plaintiff is correct in arguing that paragraph "N" does not require there to be a successful or prevailing party in order for attorney's fees to be awarded. Rather, all a plaintiff must do in order to recover attorney fees under paragraph "N" is *prove* that the defendant defaulted under the contract. A plaintiff has proven there is a default *only* when the court or jury makes a finding of fact that the defendant breached, or defaulted, on the contract. Therefore, the trial court did not err when it limited Plaintiff's recovery of attorney fees to the portion of the breach of contract claim they were successful on.

**C. The trial court's evaluation of reasonable attorney fees was properly supported by its findings of fact.**

On appeal, Plaintiff argues "that the trial court erred in arbitrarily reducing Plaintiff's attorney fees and costs without support in its Findings of Fact." [See Plaintiff's Brief, p. 53].

It is well established that "An award of attorney fees must be based on evidence and supported by findings of fact." *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992). Therefore, "[the] party who requests an award of attorney fees has the burden of presenting evidence sufficient to support an award." *Id.* For this reason, the courts have required that one who seeks a reward must set out the time and fees expended for:

- (1) Successful claims for which there may be an entitlement to attorney fees,

- (2) Unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and
- (3) Claims for which there is no entitlement to attorney fees. *Id.*

After a party has submitted sufficient evidence supporting the request of an award, the trial court must then make its own independent determination of the reasonableness of the requested fees in light of that parties' evidence. *Foote*, 962 P.2d at 55. However, while ultimately "a trial court may, in its discretion, deny fees altogether for [the requesting party's] failure to allocate, it may not award wholesale all attorney fees requested if they have not been allocated as to separate claims and/or parties." *Foote*, 962 P.2d at 57.

On April 4, 2005, Plaintiff filed a motion and supporting memorandum requesting an award of attorney fees. (R. 2148). The trial court found the evidence in the supporting memorandum insufficient, however, because it failed to allocate fees between successful and unsuccessful claims. In an attempt to remedy this insufficiency, the court ordered Plaintiff to "review [her] proposed billing and submit a new billing with those fees associated with pursuing the breach of contract claim that she was successful on." [R. Transcript hearing on Motions June 6, 2005, p. 71]. In spite of the court's direct order, Plaintiff's response to the court's directive contained only minor modifications from the prior request.

In its memorandum order awarding attorney fees, the court noted that "[i]n the Court's opinion Plaintiff's attorney made no real effort to comply with the Court's directive to submit a claim for attorney's fees and costs associated with the successful breach of contract claim." [See Plaintiff's Brief, Addendum No. "10," pp. 2-3]. The

court therefore determined that “[s]ince the Plaintiff has failed to provide any factual basis upon which the Court can determine the reasonableness of the Plaintiff’s claim for attorney’s fees and costs, the Court will have to make its own evaluation of the request based upon its knowledge of the case and evaluation of the claimed fees and costs and the Court’s experience and knowledge of attorney’s fees in similar cases.”

On appeal, in defense of her failure to designate fees, Plaintiff argues that even if she was required to designate her fees, she met this requirement because it was impossible to separate the time spent on the Breach of Contract claim compared to the other causes of action. [See Plaintiff’s Brief, p. 50]. Likewise, Plaintiff argues that her recovery of attorney fees should not be limited to those fees arising from the Breach of Contract claim because her causes of action “were so closely related and intertwined as to be indistinguishable.” [*Id.*]. Plaintiff argues that because her causes of action are so closely related, she is entitled to recover the fees expended in pursuit of all the claims because “[w]here the proof of a compensable claim and otherwise non-compensable claim are closely related and require proof of the same facts, a successful party is entitled to recover its fees incurred in proving all of the related facts.” [*Id.* (citing *Kurth v. Wiarda*, 991 P.2d 113,116 (Utah App. 1999)).]

In *Winters v. Schulman*, this court affirmed that when there are multiple claims and the party prevails on only a portion of them, if the claims all involve a common core of facts and legal theories, the party may recover all attorney fees *reasonably incurred*. *Winters v. Schulman*, 2001 WL 357124 (Utah App. 2001). However, the court also noted that it was *not* an abuse of discretion when a trial court reduced the fee requested based



on the trial court's specific finding that although the facts and legal theories involved in the claims originally overlapped, they were "not so intertwined that they could not be categorized according to the theory at issue." *Id.*

Like the court in *Winters v. Schulman*, the trial court in the case at hand did not commit an abuse of discretion when it reduced the fees Plaintiff requested. In its Findings of Facts on the issue of attorney fees, the trial court specifically noted:

The Court realizes that it is difficult to differentiate between what legal services were necessary for the prosecution of the subject breach of contract claim and the Plaintiffs other causes of action. The Court does know from his involvement with the case *that a substantial portion* of the motions in the case, especially the various motions for summary judgment involved causes of action other than the breach of contract cause of action. It is the Court's perception also *that a substantial portion of the discovery* in the case involves defects other than the improper grading and involved information dealing with the other causes of action.

Based on these findings, Plaintiff should have been able to designate her fees as requested, and it was not an abuse of discretion for the court to refuse to award her the entire amount of her request.

The court also based its reduction of the requested amount of attorney fees on its evaluation of the factors set forth by the Utah Supreme Court in the case of *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988) that trial courts should consider in determining a reasonable attorneys fee. In regards to the issue of whether the work performed was reasonably necessary to adequately prosecute the matter, the Court observed that both sides generated attorney fees that were not reasonable or necessary. Specifically, the court found that "[t]here were substantial unnecessary attorney's fees generated in Motions to Reconsider and in disputes over the language in proposed orders

and unnecessary discovery disputes.” [See Plaintiff’s Brief, Addendum No. “10,” p. 4]. The trial court went on to identify two other factors that while not determinative of the reasonableness of the subject fee, were factors the court believed relevant in making an overall determination of reasonableness. First, the fact that the requested fee of \$120,000 was more than four times the monetary award granted to the Plaintiff by the jury, and second, that the requested fee was substantially more than the entire purchase price of the house at issue. *Id.* Ultimately, the court noted that “[g]iven the fact the Plaintiff failed to respond to the Court directive to recalculate her attorney’s fees and costs to those associated with the breach of contract claim only and for the reasons stated above, the Court finds that it is reasonable that the Plaintiff be awarded an attorney’s fee in the amount of \$40,000.” *Id.*

**D. The trial court did not apply Rule 54(d) standards to his determination of reasonable costs.**

Finally, the Plaintiff argues that the trial court erred in applying Utah R. Civ. P. 54(d) standards to the meaning of costs. In reviewing Plaintiff’s itemized claims for costs the trial court noted that many of the items listed were not the type of costs usually recoverable under Rule 54 of the Utah Rules of Civil Procedure. [See Plaintiff’s Brief, Addendum No. “10,” p. 4]. The Court then went on to list the other, nontraditional costs that Plaintiff claimed she had a right to recover under paragraph “N” of the EMSA. The court ultimately found that as the prevailing party, Plaintiff was “entitled to recover those normal costs awarded to a prevailing party pursuant to Rule 54 and *any other costs or expenses* associated with the breach of contract claim. As can be seen by this language,

the court was not “limiting the meaning of costs to fit within the confines of Rule 54” as Plaintiff claims. Instead, plaintiff’s limitation on the recovery of costs occurred for the same reason as its limitation on the recovery of attorney fees, because “[t]here was no attempt by Plaintiff to allocate which costs...should be attributed to the breach of contract claims for which recovery was awarded by the jury.” Likewise, because the Plaintiff “failed to respond to the Court directive to recalculate her...costs to those associated with the breach of contract claim only and for the reasons stated above, the Court [found] that it was reasonable to award costs in the amount of \$10,000.” *Id.*

Plaintiff’s final attorney fee and costs request in the amount of \$158,927.72 is shocking given the fact that the cost of the home itself was only \$83,000.00. Plaintiff’s request does not even take into account the award of damages in the amount of \$30,680.00. The trial court simply did not abuse its discretion in limiting the recovery by Plaintiff of her fees and costs.

Finally, Plaintiff would not be entitled to recover *any* fees or costs should this Court find that Plaintiff’s Breach of Contract claims are barred by the relevant statute of limitations.

### **CONCLUSION**

The trial court erred by failing to determine and require the jury to determine when Plaintiff’s causes of action could have been reasonably discovered. This failure of the trial court and jury to situate this fact throughout the course of litigation led to numerous mistakes in sundry rulings by the trial court and ultimately in the verdict rendered by the jury. Instead, the jury was improperly asked to determine a question of law (whether the

statute of limitations barred Plaintiff's claims) without first determining when the Plaintiff's causes of action accrued. These failures resulted in a misapplication of the incorrect statute of limitations, and a misinterpretation of that statute.

Furthermore, Plaintiff's claims should have been barred by the doctrine of *caveat emptor* because Plaintiff could have discovered any patent or latent defects through a simple inspection. The EMSA indicated that the Plaintiff and her husband were purchasing the home "as is" and even granted Plaintiff an opportunity to have the home inspected. Plaintiff failed to do so.

The trial court correctly granted partial summary judgment in favor of Defendants on both Plaintiff's Fraudulent Nondisclosure claim and the Breach of Contract claim. In any case, both claims should have been barred by the statute of limitations and/or the doctrine of *caveat emptor*.

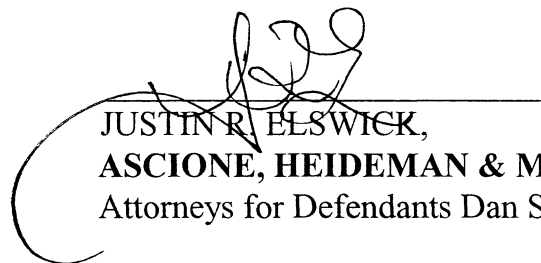
Plaintiff is not entitled to attorney's fees or costs because her breach of contract claim is *barred* by the statute of limitations and/or *caveat emptor*. Defendants, however, should be entitled to recoup all of their reasonable attorney's fees and costs as set forth in the EMSA for prevailing in their defense under the contract.

Accordingly, Defendants respectfully request that this Court:

1. partially reverse the following Orders insofar as those Orders failed to properly apply and interpret the correct statute of limitations : (a) Defendants' Motion for Summary Judgment entered on August 16, 2001, (b) Order partially denying Defendants' Motion for Summary Judgment entered on August 29, 2001
2. remand for new trial, if necessary on any of Plaintiff's claims that survive summary judgment
3. reverse the Special Verdict and Judgment entered on March 10, 2005 for the amount of \$30,680.00 against Defendants and in favor of Plaintiffs;
4. reverse the Order denying Defendants' Rule 50(b) Motion for Judgment

- Notwithstanding the Verdict entered on July 6, 2005
5. reverse the Order denying Defendants' Rule 60(b) Motion to Set Aside the Judgment entered on July 19, 2005;
  6. reverse the Order entered on August 25, 2005 awarding attorneys' fees to Plaintiff inasmuch as Plaintiff's failed on her breach of contract claim;
  7. instruct the trial court to award Defendants their reasonable attorney's fees and costs incurred in defending this lawsuit and pursuant to the EMSA.

Respectfully submitted this 18<sup>th</sup> day of September, 2006.



JUSTIN R. ELSWICK,  
**ASCIONE, HEIDEMAN & MCKAY, L.L.C.,**  
Attorneys for Defendants Dan Smith and Carol Smith

### **ADDENDA**

1. August 21, 2003 Memorandum Decision
2. Reply Memorandum of Points and Authorities in Support of Motion for Summary Judgment
3. Reply Memorandum in Support of Defendants' Motion for Summary Judgment on Breach of Contract Claims
4. Response to Court's Directive Regarding Attorney Fees, Costs and Expenses.

### CERTIFICATE OF SERVICE

On the 8 day of September, 2006, I caused to be delivered via the following method two copies of the foregoing to the following:

Greg B. Hadley (USB 3652)

Paul D. Dodd (USB 10675)

HADLEY DODD

Attorneys for Plaintiffs

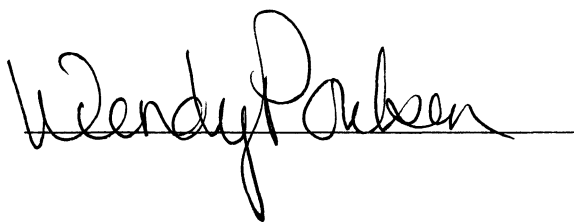
2696 N. University Ave., Suite 260

Provo, Utah 84604

Telephone: 801-377-4403

Facsimile: 801-377-4411

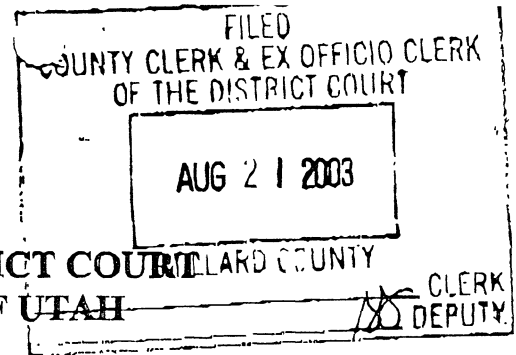
- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand-Delivered
- ☐ Federal Express

A handwritten signature in black ink, reading "Wendy Parken", written over a horizontal line.

# **ADDENDUM 1**



F mss



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

WILLIAM MOORE and MARY  
MOORE,

Plaintiffs,

v.

DAN SMITH, individually and as Trustee  
of the Dan Irvin Smith Inter Vivos Trust,  
and CAROL SMITH, individually and as  
Trustee of the Carol L. Smith Inter Vivos  
Trust,

Defendant.

MEMORANDUM DECISION

Case No. 000700142 MI

Judge Donald J. Eyre

This matter comes before the Court on Defendant's Motion for Summary Judgment. The Court has reviewed the file, considered the pleadings filed by the parties, heard the argument of counsel, and being fully advised in the premises, issues this ruling:

**PROCEDURAL HISTORY**

Plaintiffs filed a complaint alleging breach of contract, rescission, fraudulent nondisclosure, misrepresentation, violation of the Consumer Sales Practice Act, and punitive damages causes of action. Defendants raised the affirmative defense of the statute of limitations among others. Defendants filed a previous Motion for Summary Judgment. This Court granted the Motion as to the claim for negligent misrepresentation and dismissed the claim. The Court denied the Motion as to Plaintiffs fraudulent nondisclosure and fraudulent misrepresentation claims. The Court also ruled that the discovery rule applies in this case and tolled the statute of limitations. The Plaintiffs were also required to elect a remedy, and the Plaintiffs elected to pursue the remedy of recession.

Defendants filed this second Motion for Summary Judgment.

**UNDISPUTED FACTS**

1. Plaintiffs' home, the subject matter of this litigation, is located at 155 West 300 South, Fillmore City, Millard County, State of Utah (hereinafter the "Home").

2. Defendant Dan Smith is an experienced licensed builder, who obtained the proper building permit and constructed the Home with the intent that it be Defendants' residence.

3. Neither of the Plaintiffs have ever been a contractor or an engineer, nor do Plaintiffs have any special knowledge concerning building codes, home construction, safety inspections, etc.

4. The Home's construction was inspected and approved by the Fillmore City Building Inspector throughout its construction

5. At the time of the final inspection, the ground around the house was so muddy that the finish grading was impossible. Jack Peterson, Fillmore City's Building Inspector, gave the Smiths permission to finish grading in the spring when the weather cleared. Based upon the Smiths' promise to complete the grading, Jack Peterson approved the final Home inspection. As uncorrected this is a violation of the Uniform Building Code.

6. Defendants moved in to the Home in November of 1993. Defendants received a Certificate of Occupancy from Fillmore City Building Inspector on or about January 28, 1994. On February 11, 1994 the Plaintiffs and Defendants met to discuss the sale of the Home, and an Earnest Money Sales Agreement was entered between the parties on or about February 15, 1994

7. The Agreement stated in pertinent part that:

Buyer has made a visual inspection of the property and subject to Section 1(c) above and 6 below, accepts it in its present physical condition, except: \_\_\_\_\_  
(blank)

8. The relevant general provisions state:

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

**C. SELLER WARRANTIES.** Seller warrants that: (a) Seller has received no claim or notice of any building or zoning violation concerning the property which has not or which will not be remedied prior to closing.

9. Plaintiffs walked through the Home before entering into the Agreement.

Defendants did not disclose any alleged code violations or defects to the Plaintiffs prior to the sell.

10. Plaintiffs did not condition the purchase of the property on the outcome of a home inspection, and Plaintiffs did not have an independent home inspection performed prior to purchasing the Home.

11. In the year 2000, Jason Bullock walked through the house as though he were performing a final inspection and discovered the thirty (30) alleged code violations identified by the Plaintiffs. An addition twelve (12) alleged code violations identified by the Plaintiffs were added by Lloyd Steenblik's inspection.

13. Plaintiffs admitted that all of the (forty two) 42 alleged defects could have been discovered by a home inspection before they bought the house, and Plaintiffs admitted that the only latent defects as defined by the court are alleged defect items 9, 11, 12, 26, 27, 38, 39.

### **DISPUTED FACTS**

1. The home contained Uniform Building Code (UBC) violations during the inspection period and the home was approved despite those alleged violations. The Smiths were aware of the alleged UBC violations.

2. Felt paper was properly installed and served as flashing for the windows.
3. Some floor joists are overspanned.
4. Plaintiffs discovered or were placed on notice of many of the alleged defects long before the home inspection in 2000.
5. Alleged defect items 9, 11, 12, 26, 27, 38, 39 are latent defects.

#### **ANALYSIS AND RULING**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), Utah Rules of Civil Procedure. When applying this rule, the Utah Supreme Court has indicated that, when considering a motion for summary judgment, all facts and inferences arising therefrom must be considered in a light most favorable to the nonmoving party *Winegar v. Froer Corp.*, 813 P.2d 104, 107 (Utah 1991). Accordingly, the Court hereby grants Defendant’s Motion for Summary Judgment in part and denies in part.

#### **Fraudulent Nondisclosure**

To support a claim of fraudulent nondisclosure a plaintiff must show (1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate. *Mitchell v. Christensen*, 31 P.3d 572, 576 (Utah 2001).

In the sale of new homes, the Utah Supreme Court has stated that the doctrine of caveat emptor has eroded, but in the area of used residences it is “reasonable to hold the purchaser to the caveat emptor doctrine.” See, *Schafir v. Harrigan*, 879 P.2d 1384, 1389 (Utah App. 1994)(quoting, *Utah State Medical Ass’n v. Utah State Employees Credit Union*, 655 P.2d 643, 645 (Utah 1982). A home inspection is not required when purchasing a new home because the

doctrine of caveat emptor does not apply. In this case, Plaintiffs did not dispute that the Smiths lived in the Home or that the Smiths intended it to be their home in their response to Defendants' first Motion for Summary Judgment, therefore, it is an admission. The Court finds that the Home is a used home because the Smiths intended it to be their home, they lived in the Home for a short period of time, and Plaintiffs have admitted these facts.

A duty to disclose in a vendor-vendee transaction of a used home exists only where a defect is "not discoverable by reasonable care," and if the defect could be discovered by reasonable care, the doctrine of caveat emptor prevails and precludes recovery by the vendee. *Mitchell*, 31 P.3d at 575; *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570, 579 (Utah App. 1994). The standard of reasonable care is whether the defect would be apparent to ordinary prudent persons with like experience, not to persons with specialized knowledge in the field of construction or real estate. *Mitchell*, 31 P.3d at 575. The ordinary prudent person standard does not mean that inspection by an expert will never be required. There are circumstances where "reasonably prudent buyer should be put on notice that a possible defect exists, necessitating either further inquiry of the owner of the home, who is under a duty not to engage in fraud, *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980), or inspection by someone with sufficient expertise to appraise the defect." *Mitchell*, 31 P.3d at 575.

Citing facts most favorable to Plaintiffs, the nonmoving party, the alleged nondisclosed building code defects are material, and Defendant Smiths knew of the alleged building code violations. Therefore, the Smiths were only legally obligated to disclose defects that were not discoverable by reasonable care.

Plaintiffs admitted that all of the defects items except items number 9, 11, 12, 26, 27, 38, 39 were patent and that they could have been discovered by a home inspection. Therefore, the doctrine of caveat emptor applies, and the Court grants the Defendants Motion for Summary

Judgment regarding the admitted patent items because they could have reasonably been<sup>z</sup> discovered by the Plaintiffs.

Additionally, the Court finds that alleged defect item number 12, “no smoke detectors in bedrooms and the only smoke detector in the house is a battery detector” to be an item that could have reasonably been discovered by the Plaintiffs. Likewise, alleged defect Item number 38 “insulation baffles to allow ventilation at exterior walls” is an item that could have reasonably been discovered by the Plaintiffs by observing there were not vents on the House in the roof area. Therefore, the Court grants the Defendants Motion for Summary Judgment as to these alleged defects and denies the Motion as to the remaining alleged defects.

#### **Fraudulent Misrepresentation**

The elements of an action based on fraudulent misrepresentation are: (1) a representation, (2) concerning a presently existing material fact, (3) which was false, (4) which the representor either, (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation, (5) for the purpose of inducing the other party to act upon it, (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it, and (8) was thereby induced to act to his injury and damage. *Maack*, 875 p.2d at 584.

In *Maack*, caveat emptor was not dispositive of this issue. The Court relied on whether the misrepresentation was concerning a presently existing material fact. *Id.* at 584. The Court finds that there are disputed material facts regarding this claim and denies Defendants Motion for Summary Judgment as to this claim.

#### **Statute of Limitations**

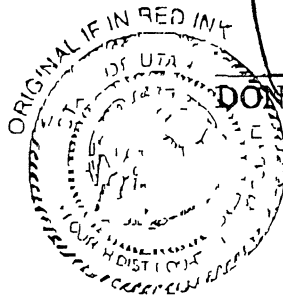
Construction defect cases are governed by Utah Code Section 78-12-21.5, which states that an action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the improvement or abandonment of construction. All other

actions by or against a provider shall be commenced within two years from the earlier of the date of discovery of a cause of action or the date upon which a cause of action should have been discovered through reasonable diligence. Also, this Court ruled in the first Motion for Summary Judgment that the discovery doctrine applies in this case. The discovery doctrine tolls a cause of action until the plaintiff knew or should have known the facts giving rise to the cause of action *BYU v. Paulsen*, 744 P.2d 1370, 1374 (Utah 1987). Plaintiffs assert that they were first aware of the defects in the year 2000. Defendants assert that Plaintiffs were aware of some of the defects shortly after moving into the home. The Court finds that there are disputed material facts as to this defense and deny Defendants Motion for Summary Judgment as to this issue.

### CONCLUSION

For the above reasons, the Court hereby grants Defendants' Motion for Summary regarding the Plaintiffs' Fraudulent Nondisclosure claim as to defect items 1-8, 10, 12 -25, 28-38, and 40. The Court denies the Defendants' Motion as to all remaining issues. The Court directs counsel for the defendant to prepare an order consistent with the decision, submit it to opposing counsel for review, and then to the Court for execution.

DATED this 21<sup>st</sup> day of August, 2003.



DONALD J. EYRE, JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000700142 by the method and on the date specified.

METHOD NAME

Mail A BRYCE DIXON  
ATTORNEY DEF  
192 EAST 200 NORTH, SUITE203  
ST GEORGE, UT 84770  
Mail GREGORY B HADLEY  
ATTORNEY PLA  
2696 NORTH UNIVERSITY AVENUE  
SUITE 200  
PROVO UT 84604

Dated this 21 day of Aug, 2003.

  
Deputy Court Clerk



## **ADDENDUM 2**

# ORIGINAL

A. BRYCE DIXON (#889)  
AARON M. WAITE (#8992)  
**DIXON, TRUMAN & FISHER, P.C.**  
192 East 200 North, Suite 203  
St. George, UT 84770  
Telephone: (435) 652-8000  
Facsimile: (435) 652-9000  
Attorneys for Defendants

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

---

WILLIAM MOORE and MARY MOORE,	)	
	)	
Plaintiffs,	)	<b>REPLY MEMORANDUM OF POINTS</b>
	)	<b>AND AUTHORITIES IN SUPPORT OF</b>
vs.	)	<b>MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT</b>
DAN SMITH, individually and as Trustee of	)	
the Dan Irvin Smith Inter Vivos Trust, and	)	
CAROL SMITH, individually and as Trustee	)	
of the Carol L. Smith Inter Vivos Trust,	)	
Defendants.	)	
	)	Civil No. 000700142 MI
	)	Judge EYRE

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**I. DISCUSSION OF UNDISPUTED FACTS-REBUTTAL TO PLAINTIFFS FALSE STATEMENTS ATTEMPTING TO CREATE ISSUES OF FACT.**

Nearly every fact that Plaintiffs tried to dispute remains undisputed. The tactic Plaintiffs' counsel employs to dispute facts suggests his *modus operandi*: he misstates or mis-characterizes the fact in order to have grounds to dispute it. This is apparent with every alleged disputed material fact.

**Fact Number 2:** "The Smiths built the Home for their own residence. Deposition of Dan Smith, p. 71, the pertinent pages of which are annexed hereto as Exhibit 4."

The Smiths supported this statement with deposition testimony of Dan Smith. The Plaintiffs

dispute this fact by a reference to the deposition of Mary Moore that says nothing of Dan Smiths' intentions. Plaintiffs also cite to the deposition of Jack Peterson where on several pages he states his understanding that the Smiths intended to live in the home he was inspecting. Page 63 of his deposition cited by Plaintiffs shows a good example: "well, I think ought to be clear is at that time this home was, as far as I knew, not for sale. I thought Dan and his wife were going to be in there permanently." Therefore, Jack Peterson's deposition supports the Smiths' assertion of fact.

Plaintiffs have presented no evidence that the Smiths built the home for the purpose of resale. There is only Plaintiffs' disbelief of the testimony of Dan Smith and Jack Peterson. The Plaintiffs can choose to disbelieve the Smiths' intentions and Dan Smiths' and Jack Peterson's testimony, but if they are to raise a genuine issue they must do so with facts. The only facts alleged by Plaintiffs are misleading. While it is true that the Certificate of Occupancy was issued in January of 1994, the final inspection happened on November 8, 1993. See exhibit 8 to the moving memorandum. The Smiths moved in shortly thereafter, one week before Thanksgiving. Dan Smith deposition, p. 61, lines 14-15 annexed hereto as exhibit 15. Plaintiffs also fail to acknowledge that the house was not listed for sale when they approached the Smiths about buying it. Dan Smith deposition, pp. 67-68. Moore deposition, p. 9, ll. 12-13. The Plaintiffs also fail to acknowledge that the sale of the house did not close until May 2, 1994. Affidavit of Mary Moore, p. 61, line 4, annexed hereto as exhibit 16. See also Settlement Statement annexed hereto as exhibit 17. Nor do they acknowledge that Smith testified that they moved because the Smith's son moved to Cedar City and asked his father to build him a new home in Cedar City. Dan Smith deposition. P. 61.

**Fact Number 4:** “The Home’s construction was inspected and approved by the appropriate agencies throughout its construction. See May 4, 2001, letter from Fillmore City annexed hereto as Exhibit 6. Also see p. 89 of Peterson deposition annexed hereto as Exhibit 7.”

These facts are not in dispute. There is no dispute that Jack Peterson actually approved the final inspection and issued a Certificate of Occupancy. Plaintiffs’ counsel goes off on a tangent about whether a building inspector has the right to approve code violations. Thus, he engages in this self-contradiction at page 2 of his brief: “Approval of a violation of the UBC shall not be construed to be “approval.” This argument assumes facts that don’t exist in this case except in a couple of instances, one involving the stairs where Jack Peterson observed the stairs were not compliant and specifically approved them as a variance. Whether Jack Peterson had the right to approve a variance<sup>1</sup> is beside the point. He did approve the stairs. There is no factual citation to the contrary. This is simply another illustration of Plaintiffs’ counsel’s willingness to torture key definitions in the most brazen and audacious ways.

The relevance of the city building inspector’s approval is very important. It addresses whether Dan Smith was aware of latent defects. If he received approval of the building inspector on the very points where he has been accused of code violations he has no reason to believe that there are latent defects he must disclose to any purchasers.

**Fact Number 5:** “The Fillmore City Building Inspector, Jack Peterson, discussed the amount

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<sup>1</sup> The Smiths’ expert has said that the code does give the inspector this right. But that is an issue that need not be discussed because it is not relevant to this motion.

of roof ventilation with Mr. Smith and approved the as-built ventilation. See Deposition of Jack Peterson at p. 111, Exhibit 7 and Exhibit 5 to his deposition, annexed as Exhibit 7a.”

**Fact Number 6:** “The City Building Inspector expressly approved the height of the stairs even though they were not in technical compliance with the code. See Exhibit 7, Peterson deposition at pp. 65, 66.”

Plaintiffs’ counsel simply asserts that “approval” was not granted based on his argument that Peterson’s approval was not “approval.” The purpose of a statement of facts is to show the court where there are genuine issues of fact. This quibbling over definitions frustrates this purpose. There can be no communication here because words don’t mean to Plaintiff’s counsel what they mean ordinarily. The Smiths’ factual assertions in five and six are that the inspector approved the attic ventilation and the stairs. There is no rational or genuine dispute about these facts. The legal effect of this fact might be disputed but Plaintiffs cannot honestly deny the fact exists simply because they dispute its relevance.

**Fact Number 7:** “During one of the construction inspections, the City Building Inspector observed the felt paper that served as flashing for the windows. See Peterson deposition at p. 54, Exhibit 7.”

Here again Plaintiff cannot honestly dispute this fact. Whether Plaintiffs’ experts who never did destructive testing disagree is irrelevant. The fact that Jack Peterson observed it is undisputed.

**Fact Number 8:** “The Smiths obtained a Certificate of Occupancy and Zoning Compliance on or about January 28, 1994. See Certificate of Occupancy and Zoning Compliance annexed to

Peterson deposition as Exhibit 7, found here as Exhibit 8.”

**Fact Number 9:** “The City Building Inspector signed off on the certificate of occupancy and the final inspection. See Peterson deposition. at p. 88, Exhibit 7.”

Here again, Plaintiffs’ grounds for dispute are dishonest. They do not really dispute the facts. They cannot. They only allege that the certificate is meaningless because it was fraudulently obtained. They of course have no facts to support this outrageous allegation. Where do they even insinuate that Jack Peterson was deceived? He saw everything and approved it. This deserves Rule 11 Sanctions.

**Facts Numbered 23-23g:** “Plaintiffs discovered, or, were placed on notice of, many of the alleged defects long before the home inspection in 2000:

A. Mary Moore knew of the alleged window defects almost immediately upon moving into the house when she saw flaking of paint caused by water at the end of the first winter. See Moore deposition, Vol I, pp. 41-42. Exhibit 11.

B. Mary Moore also saw exposed footings the first spring when she moved into the house while doing landscaping. See Moore deposition, Vol I, pp. 46,47. Exhibit 11.

C. Defect Number 4 on Steenblik’s list, alleging water damage and cracking to the southeast corner of the foundation, was known to Mary Moore the first spring after she moved into the house. See Moore deposition, Vol. I, pp. 107-108. Exhibit 11.

D. Some allegedly bad shingles on the garage roof were called to Mary Moore’s attention on November 7, 1997, when she had the shingles inspected by the shingle manufacturer

and was told that they were damaged by inadequate ventilation. See Moore deposition, Vol. II, p. 167 (Exhibit 11), and Exhibit 6 to her deposition. (Annexed here as 11A).

E. Defect Number 41 in Steenblik's list, alleging plumbing defects, were known to Mary Moore six months after she moved into the Home. See Moore deposition, Vol. I, p. 27. Exhibit 11.

F. Defect Number 12, alleging that the smoke detectors were omitted from the bedrooms, was known to Mary Moore approximately one year after moving into the Home. See Moore deposition, Vol. I, pp. 94,95. Exhibit 11.

G. The various minor electrical problems alleged by Plaintiffs were known to Mary Moore in December, 1997, when she was given notice of the need to check the circuit breaker after the furnace stopped working. See Moore deposition, Vol. I, p. 104. Exhibit 11. See also Exhibit 11A."

Plaintiffs' disputations of these facts are again inappropriate. Mary Moore saw these conditions as she testified in her deposition. She was asked to testify to the damage she had seen caused by the defects alleged. She responded to those questions in the pages cited above. Plaintiffs have not shown that these deposition citations are wrong. Plaintiffs simply argue that knowledge of the condition is not knowledge of a defect. They argue that Mary Moore needed an expert opinion before she knew there were defects. The Smiths disagree, asserting confidently that when Mary learned of the condition the statute of limitations began to run, not when she was given an expert's report. That is a legitimate issue of law which is discussed below. However, it is not an

issue of fact. For plaintiffs' counsel to pretend that Mary Moore did not see the flaking of paint at window sills which she herself attributed to defective windows is sanctionable.

**Fact Number 25:** "Plaintiffs have admitted that all of the alleged defects are patent except items 9, 12, 26, 27, 38 and 39.<sup>2</sup> See Plaintiffs' Answers to Second Set of Admission, Response Number 9, and the Second Set of Requests for Admission, Request Number 9. Exhibit 10."

The cited responses to requests for admissions clearly show that Plaintiffs did make the admissions stated. Plaintiffs have disputed this only on the grounds that the definition of "latent defects" that they were using when they answered the requests was a different definition than what they are using to dispute Fact Number 25. That sophistry is nothing less than sanctionable. It should be given no credence by this court. As shown in the moving brief, the requests themselves refer the plaintiffs to the use of the phrase "latent defect" by the court in its previous order on the Smiths' motion for summary judgment. Anticipating the Plaintiffs' counsel's slipperiness, the Smiths defined the phrase for him in the requests to admit and yet he still has the audacity to use double definitions.

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<sup>2</sup> The Smiths propounded to the Plaintiffs a request for admission intended to establish which defects were admittedly patent and which were considered by the Plaintiffs to be "latent," as the latter term is used in the Court's August 16, 2001, Order. Request Number 9 stated:

Admit that the alleged construction defects described in items 1 thru 42 in your expert witness report at the time of the sale of the house were not a latent defects as the phrase "latent defect" is used in the court's order regarding the Smiths' motion for summary judgment."


In response, Plaintiffs admitted that all of the defects were not latent except items 9, 12, 26, 27, 38 and 39.



**Fact Number 26:** “There is no evidence of serious damage to the integrity of the house. There is no allegation that the roof leaks. See Mary Moore deposition, p. 20. Exhibit 11. There is no known damage to footings or foundation. See Mary Moore deposition p. 45. Exhibit 11.”

Plaintiffs’ counsel misleads in this attempted to dispute of facts. Again, the factual matter is not disputed. Mary Moore admitted there were no roof leaks, and that she knew of no damage to the footings or foundation. Neither do her experts. Counsel simply changes the definition of “damage to the integrity of the house” to mean that technical code violations constitute physical damage. It is close to intentional falsehood. It is certainly sanctionable.

**Fact Number 29: “Allegation of Overspanning of Floor Joists.** Peterson testified that the code allows for a 13 foot one inch span. Peterson measured the span and found in his report , Exhibit 4 to his deposition, annexed hereto as Exhibit 7B, that no joists exceeded that span. P. 75.”

Again, these facts are undisputed. Plaintiffs do not cite facts to the contrary. That they have an expert who at one time had a different opinion does not change the fact that the building inspector found the floor joists to be code compliant. The relevance of this fact is not whether the code allows that length of floor joist. The relevant fact is Smith’s knowledge of any potential defect. Dan Smith had no reason to believe that he should disclose anything about floor joists to the plaintiffs. The  conclusion about Smith’s knowledge might even be in dispute but the fact that Peterson found the floor joists to be code compliant is not disputed.

**Fact Numbers 30 and 31: “Alleged lack of dirt covering the footings.** At the time of the final inspection the ground around the house was so “muddy” that the finish “grading was

the home in question, may have had a legal duty to disclose to Plaintiffs any latent and material defects in the home” of which the Smiths were aware. Plaintiffs quote in their brief this pertinent language from Maack: if there are any ““material defects of which the seller was aware, the buyer may have a cause of action for fraud.’ P. 582.” See page 12 of the opposition brief. The plaintiffs argue that a house the Smiths moved into in November of 1993 and that the Moores moved into in May of 1994 was new when they moved in. But even if that preposterous position were true, what difference would it make to their proof? They believe that it would eliminate the requirement that they must have a home inspection in order to avoid caveat emptor. As shown below, that argument fails. But at least the parties agree on this much, Plaintiffs must prove that the Smiths knew of material, latent construction defects at that time they sold the house to the Plaintiffs.

The Smiths in section “C” of their moving brief at pages 23-26 alleged that the Plaintiffs had not complied with the elements of their case in chief as mentioned above, that is, proof of latent defects of which the Smiths were aware. The plaintiffs only opposed this argument by claiming without support that “virtually” and “almost all of the 42 violations would not be apparent to the ordinary buyer without specialized knowledge in construction. . . .” This argument ignores the undisputed facts. First, Plaintiffs have by response to requests for admissions admitted that of the 42 alleged defects all but items 9, 26, 27, 38, 39 and 12 are not latent defects. Thus, only six defects survive this first threshold of summary judgment. All the rest, not qualifying as latent defects, must be dismissed. Plaintiffs try to give some unintelligible explanation for why they admitted that 36 defects were not latent. However, the request for admission is plain. It referred

to the definition of the phrase “latent defect” as used “in the court’s order regarding the Smiths’ motion for summary judgment.” Therefore, 36 of the 42 alleged defects are not of the type of defect that could survive summary judgment according to the court’s previous order.

Of the six items remaining only items 9, 26 and 27 are material. The other three are so minor that if they survive summary judgment they will not justify a rescission. Therefore, only 9, 26 and 27 will be discussed. Item 9 concerns whether there was a defect in the flashing. It is undisputed that Dan Smith believes there is no defect and that he has no knowledge of a defect in the flashing. It is undisputed that the inspector has concluded there is no defect in the flashing and that the small amount of water comes from condensation on the windows. It is undisputed that the building inspector saw the flashing or felt paper when he performed his inspection. It is also undisputed that the Plaintiffs’ experts have performed no destructive testing of the windows to determine the nature of any flashing defect. The only disputed fact is this. It is Plaintiff’s experts’ opinion simply that since there is some small evidence of water there must be a defect in the flashing. That falls far short of evidence that Dan Smith knew of a defect in flashing when he built the house. That issue cannot go to trial.

Item 26 concerns the span lengths of the floor joists. Jack Peterson testified to the allowable span of a joist as 13 feet one inch. He also testified that he provided home builders with a sheet of paper that showed among other things the maximum length of floor joists. This was exhibit 3 to his deposition and is annexed hereto as exhibit 18. It is undisputed that Jack Peterson measured the spans and found them to be code compliant. It is undisputed that Peterson passed that item off on

his inspection. How then could Dan Smith have known of a defect when the building inspector says there was no defect?

Item 27, as shown before, was also a matter known by Jack Peterson who allowed a Certificate of Occupancy without technical compliance.

### **III. PLAINTIFFS HAVE NOT REBUTTED THE STATUTE OF LIMITATIONS DEFENSE.**

Plaintiffs do not respond to the substance of the Smiths' arguments on the statute of limitations. They make two points only, both of which are glaringly erroneous. First, they argue that this defense had been defeated in a previous motion for summary judgment. Exhibit 3 to the memo in support of summary judgment is the order granting in part and denying part the Smiths' previous motion for summary judgment. The court at page 3 of the order specifically stated: "The Court will consider, at the close of all discovery, a motion for summary judgment by Defendants, based on their limitations defense."

Second, Plaintiffs argue that the discovery rule applies to the statute of limitations. That is true under certain circumstances that may not exist in this case (See the BYU case discussed below) but Plaintiffs erroneously argue that they, as a matter of law, discovered the defects only upon receiving their expert's report of alleged code violations. It is not when the expert gives the opinion that governs the start of the limitations period. It is when the plaintiff learns of a condition that may or may not be caused by a construction defect. The plaintiff is then placed on inquiry notice to find out what caused the damage. Otherwise, a Plaintiff could delay the running of the limitations period

indefinitely until he or she got around to getting an expert report.

Apparently in the one case presented to the Utah appellate courts asking for the application of the discovery rule to a construction defect, the court decided that the discovery rule was not applicable. See BYU v. Paulsen Construction Co, 744 P. 2d 1370 (Utah 1987) discussed below. But in a case alleging that the government destroyed mining rights and did damage to real property, Dahl v. US, 155 F. Supp. 2d 1298 (C.D. Utah 2001), the court succinctly explained the discovery rule in Utah:

Under the discovery accrual rule, if an injury is such that it should reasonably be discovered at the time it occurs, then a plaintiff should be charged with the discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury. Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date, often the same but sometimes later, on which the plaintiff discovers that he has been injured.

Lumsden v. Design Tech Builders, Inc., 749 A. 2d 796 (MD App. 2000) is a recent case applying the discovery rule to a construction defect case. In Lumsden a homeowner saw his driveway crack in October after an ice clearing company salted it down. The following August he discovered that the cracks were not the ice clearing company's fault, but instead the driveway had been installed with poor concrete. The two-year Maryland statute of limitation against the builder of the driveway for breach of warranty began to run when the homeowner first discovered the

cracks. The court described the law regarding inquiry notice and the discovery rule:

Under the discovery rule for a statute of limitation, a claimant reasonably should know of a wrong if the claimant has knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry, which would charge the claimant with notice of all facts which such an investigation would in all probability have disclosed.

In other words, under the discovery rule, a statute of limitations begins to run when a claimant gains knowledge sufficient to put him on inquiry notice; from that date forward he will be charged with knowledge of facts that would have been disclosed by a reasonable investigation. Thus the homeowner was charged with inquiry notice when he saw the cracks, and the statute of limitations began to run at the same time. Thus, in this case when the Moores first saw water damage and cracking in the foundation and curling roof tiles they were then charged with the knowledge they later gained upon learning of the expert's reports.

In BYU v. Paulsen Construction Co., 744 P. 2d 1370 (Utah 1987), the Utah Supreme Court discussed the discovery rule:

The general rule in Utah is that "mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations." *Becton Dickinson & Co. v. Reese*, 668 P.2d 1254, 1257 (Utah 1983); *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981).

. . . We find nothing in the present case that warrants use of the discovery rule. The six-year period of limitation expired on BYU's cause of action against Paulsen on November 1, 1982. It is undisputed that BYU discovered the leakage and improper pipe insulation no later than May of 1979. Unlike the plaintiffs in *Myers*, BYU knew of its cause of action against Paulsen three and a half years before the limitation period expired. The discovery rule has no application when an action easily could have been filed between the date of discovery and the end of the limitation period.

The court implied that the discovery rule could be applied where equitable circumstances demanded

it but found none in that case. Thus, all damage that Mary Moore discovered in the few years after her purchase of the house started the statute of limitations running. There was thus no need for the application of the discovery rule. Mere ignorance, whether intentional or not, does not suspend the running of the statute.

In Buck v. Miles, 971 P.2d 717 (Haw. 1999), the Hawai'i Supreme Court rejected (in the context of a medical malpractice action) the exact argument being made by the Plaintiffs here. In Buck, the plaintiff appealed the trial court's grant of the defendant's motion for summary judgment – the motion was granted, in part, on the grounds that the plaintiff's failed to file her complaint within the two year statute of limitations. Plaintiff based her appeal on the argument that the statute of limitations was tolled until she was able to secure a favorable expert opinion supporting her claims. Buck at 718 – 719. Indeed, she argued that her “‘subjective, unsubstantiated belief’ that she had a cause of action . . . [was] insufficient to trigger the statute of limitations.” Buck at 722. The Hawai'i Supreme Court unequivocally rejected the plaintiff's arguments, stating:

[I]t is clear from the language of the statute and from the Hawai'i Supreme Court's language in Yamaguchi that the statute of limitations is triggered by the plaintiff's knowledge, not by [her] counsel's investigation.

Buck at 720. Moreover, the Buck court concluded by holding that:

None of our cases support [plaintiff's] contention. For a cause of action to accrue, and thus the statute of limitations to commence . . . , legal knowledge of the defendant's negligence is not required. Under the discovery rule, a plaintiff need only have factual knowledge of the elements necessary for an actionable claim. Thus, contrary to [plaintiff's] contention, an expert opinion validating the legal basis for a claim is not required in order to trigger the running of the statute of limitations

Buck at 722 – 723 (citations omitted).

If the discovery rule applies, the limitations period began to run when Mary Moore and her late husband found out about the damage they are alleging in this case. As shown in the opening brief there is no substantial damage to this house. In best case scenario for Plaintiffs there are a few technical code violations, but they do not arise to the level of a construction defect. Still, although the damage is slight it is this slight damage that has given birth to this huge lawsuit. Therefore, notice of slight damage is notice sufficient to start the limitations running.

Thus, the Plaintiffs have not even attempted to dispute the knowledge of damage that Mary Moore admittedly received and when she received it. Their only opposition centers around the argument she could not have understood that the damage was caused by a code violation. The plaintiffs would have the court ignore the undisputed facts that Mary Moore knew of slight water damage at the window sills (there has been no substantial damage caused by water intrusion), knew that the concrete footings were exposed (there has been no damage to the footings), knew there was a small crack in the foundation (there is again no substantial damage) knew there were some bad roof shingles (a part of the roof over the garage was replaced even though there were never any leaks), and knew there were insufficient smoke detectors and knew these conditions existed shortly after she bought the house. As shown in the moving memorandum, these conditions were known to Mary Moore some five years before she found out from her expert report that there may have been a code violation involved with this slight damage. As a matter of law, the statute begins to run upon inquiry notice to the plaintiff, not upon the report of an expert.



**IV. PLAINTIFFS' FAILURE TO OBTAIN A HOME INSPECTION FOR \$60 REQUIRES DISMISSAL OF THEIR CLAIMS.**

Plaintiffs argue they had no duty to obtain a reasonable home inspection under Maack, supra, because they purchased a new home not a used home. It seems that these plaintiffs continually assert frivolous legal positions based on strained definitions. They argue that "latent defect" means something different when they responded to the Smiths' requests for admission from what it means in the Judge's order and in the cases discussing construction defects. This willingness to torture definitions is on display again here where they argue that a used house only becomes used if someone other than the builder lives in it. Thus, under their definition, if the Smiths had lived in the house for six years instead of six months, the house would still be new because no third party had lived in the house.

They argue that a house is not used after it has been lived in for five months. This strain is eased by slight of hand. They never mention that the Smiths moved into the home in November and that the Moores moved in six months later in May, 1994. They simply talk about the signing of the purchase contract in February 14, 1994. Even then they don't mention that the Smiths have lived in the house since before Thanksgiving. They act as though the date of the certificate of occupancy was the date the Smiths moved in when they know better. The final inspection took place on November 8, 1993. See exhibit 5 to the Peterson deposition annexed hereto as exhibit 19. See also the testimony of Jack Peterson at page 23 of his deposition annexed hereto as exhibit 20. The defendants moved in shortly thereafter.

Even if this were not a used house, where is the law that says that caveat emptor does not apply to this particular sale? There is no citation to authority other than to a quote that there has been some erosion of caveat emptor in new housing. The extent of that erosion has not been explained by the Plaintiffs by any citation to authority. Is it tract housing that is now exempt from caveat emptor? Homes built with a specific buyer in mind? Custom homes? Spec homes? Homes over six months old? Who knows? The plaintiffs have never told us. If they had any authority in Utah they would have cited it. It appears that the erosion may be a movement in other states but Utah still observes caveat emptor.

The Plaintiffs, impliedly acknowledging the continuing effectiveness of the Maack case, argues for its distinction here. They say that in Maack the house had been lived in for more than one year by a party other than an owner builder. They don't say where Maack suggests the validity of such a distinction. Maack simply says that where caveat emptor applies, as in Utah, it requires the purchaser to obtain a reasonable home inspection. As shown in the moving brief, a home inspection costing \$60 and taking about an hour of time revealed the alleged code violations. That is not a big burden to place on a prospective homeowner. If they are going to be picky about ambiguous, hyper-technical code violations, they should get a home inspector. If they are going to now challenge the building inspector's right to issue a certificate of occupancy, then they should have gotten an independent inspection.

## **V. CONCLUSION**

The material facts are not disputed. Plaintiffs have admitted that 36 of the 42 alleged code

violations were not latent. They have not disputed the facts that they knew of the slight damage to their home, of which they now complain, within the first year of living there. Therefore, the statute of limitations has run. Finally, Plaintiffs attempt to distinguish the Maack case but fail to do so. Maack clearly holds that where a buyer fails to obtain a reasonable home inspection prior to purchase, they are as a matter of law unable to prove that they acted in reasonable reliance on the alleged failure to disclose of the homeowner. Under all three of these theories, the Smiths prevail as a matter of law. The court should put an end to the financial hemorrhaging caused by this frivolous lawsuit.

DATED this 23<sup>rd</sup> day of June, 2003.

DIXON, TRUMAN & FISHER, P.C.

By: A. Bryce Dixon (#889)  
for A. BRYCE DIXON, ESQ. (#889)  
Attorneys for Defendants  
192 East 200 North, Suite 203  
St. George, UT 84770

CERTIFICATE OF MAILING AND FACSIMILE

I do hereby certify that on the 23 day of June, 2003, I mailed a true and correct copy of the foregoing via Federal Express, overnight delivery, at St. George, Utah, postage repaid and addressed as follows, and that I faxed the same, without exhibits, as follows:

Gregory B. Hadley  
HADLEY & ASSOCIATES  
2696 North University Avenue Suite 200  
Provo, UT 84604  
(801) 377-4411

Kara Clark  
An Employee of Dixon, Truman & Fisher, P.C.

1 Q. Southwest or northwest?

2 A. West, not southwest or northwest but west.

3 Q. I believe it is your contention that you have built  
4 Mary Moore's home for the purpose of you and Carol living in  
5 it, is that correct?

6 A. We built it for our use yes.

7 Q. What do you mean by "your use"?

8 A. We intended on staying in Fillmore and that is the  
9 reason we built the home.

10 Q. So for "your use" means to occupy it?

11 A. Yes.

12 Q. Was it a retirement home or was that the intention?

13 A. Yes.

14 Q. When did you move into the home?

15 A. A week before Thanksgiving in 1993.

16 Q. And when did you move out of the home?

17 A. The end of March of 1994.

18 Q. What happened to the retirement in this home plan  
19 between Thanksgiving of 1993 and March of 1994?

20 A. My son who was in medical school just finishing up his  
21 residency asked us if we would go to Cedar City and build him a  
22 new home.

23 Q. When did he ask you that?

24 A. Probably in January of 1994.

25 Q. Where was he living at the time?

Gregory B. Hadley (3652)  
James K. Haslam (6887)  
HADLEY & ASSOCIATES  
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**IN THE FOURTH JUDICIAL DISTRICT COURT OF MILLARD COUNTY  
STATE OF UTAH**

**WILLIAM MOORE and MARY MOORE,**

Plaintiffs,

Vs.

**DAN SMITH**, individually and as Trustee  
of the Dan Irvin Smith Inter Vivos Trust,  
and **CAROL SMITH**, individually and as  
Trustee of the Carol L. Smith Inter Vivos  
Trust,

Defendants.

**AFFIDAVIT OF MARY MOORE**

Civil No. 000700142 MI

Judge

STATE OF UTAH                    )  
  : ss.  
COUNTY OF MILLARD        )

Mary Moore, having first been duly sworn upon her oath, deposes and states as follows:

1. I am over the age of twenty-one, and I have personal knowledge of the matters stated herein except as to any matter stated on information and belief only.
2. I am a named plaintiff in the above-encaptioned case.

3. In February of 1994, my husband, William Moore, and I entered into an agreement to purchase a home from Dan and Carol Smith.

4. We closed that transaction on May 2, 1994.

5. The Smiths were paid a total of \$83,000.00 for the sale of the home.

6. The home was intended to be the final home for me and my husband, who is retired.

7. Neither my husband nor I have ever been a contractor or engineer, nor do we have any special knowledge concerning building codes, home construction, safety inspections, or anything like that.

8. Despite the fact that Dan Smith had built the home just a few months before selling it to us, he did not ever disclose the fact that the home contained certain defects, not in compliance with the applicable building code, rendering the home unsafe for human occupancy.

9. In deciding to purchase the relatively new home, my husband and I relied upon the certificate of occupancy, which had been issued by the City of Fillmore in January of 1994, along with Dan Smith's representations that he was selling us improved, residential real property, safe for occupancy.

10. Although my husband and I visually inspected the property, the defects and problems that have subsequently been discovered were not of the kind that such an inspection would have revealed to us.

11. We subsequently took possession of the home, landscaped the yard, and have generally maintained the home since that time.

12. A little more than six years after the purchase, my husband and I had retained a company to install a fence on our property.

13. On May 16, 2000, when the fence workers were digging holes and putting in poles for the fence next to the home, the workers called my attention to the fact that the home's foundation was not the proper depth into the ground.

14. That same day, I contacted the City of Fillmore to find out what the requirements were for foundation depth and learned that our home's foundation was not deep enough into the ground.

15. I became deeply concerned over this information and retained a contractor to determine what would be required to fix the problem.

16. On August 5, 2000, Ken Zeigler of Ken Zeigler Co. came to our home to determine what would need to be done to fix the foundation.

17. At that time, Mr. Zeigler informed me that he would require that we first obtain a safety inspection and recommended that we use Jason Bullock of Sunrise Engineering, Inc. for that purpose.

18. On August 8, 2000, Mr. Bullock came to our home and performed a safety inspection.

25. I do not believe that we have yet discovered all of the significant defects in the construction of our home, and my husband and I are attempting to obtain the funds to hire an engineer to conduct a complete inspection and to provide a detailed report.

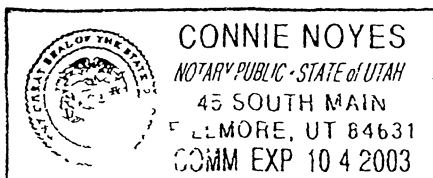
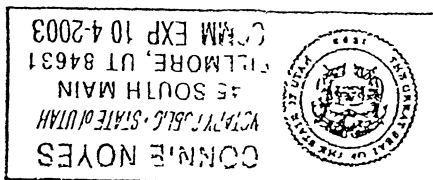
26. I do not believe that my husband and I could have discovered these structural defects prior to August of 2000.

27. Unless my husband and I can obtain some relief through this court action, we will likely not be able to pay to have the defects corrected, or to sell the home for anything close to what we paid for the home, and we currently have no other place to live.

DATED this 12 day of March, 2001.

Mary Moore  
Mary Moore  
Affiant

SUBSCRIBED AND SWORN to before me by Mary Moore, this 12 day of March, 2001.



Connie Noyes  
Notary Public



### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be mailed by U.S. mail, first class, postage prepaid, the foregoing **AFFIDAVIT OF MARY MOORE** this 12 day of March, 2001, to the following:

A. Bryce Dixon  
Nathan K. Fisher  
Dixon & Truman  
192 East 200 North, Suite 203  
St. George, Utah 84770

Mary Moore



U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT  
SETTLEMENT STATEMENT

EXHIBIT

Form Approved OMB No. 2502-0285

Type of Loan

☐ FHA ☐ 2 ☐ FmHA ☐ 3 ☐ Conv Unins  
☐ VA ☐ 5 ☐ Conv Ins.

6 File Number  
29827-M

7 Loan Number

8 Mortgage Insurance Case Num

Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing, they are shown here for informational purposes and are not included in the totals.

Name and Address of Borrower  
William K. Moore  
Mary J. Moore  
Rt. Box 234  
Fillmore, Ut. 84631

E. Name and Address of Seller  
Dan Irvin Smith  
Carol L. Smith  
P.O. 985  
Fillmore, Ut. 84631

F. Name and Address of Lender

Property Location

located in  
Fillmore, Ut. 84631

Site of Lot 6, Blk. 32, Plat A, Fillmore  
County Survey.

H. Settlement Agent

SECURITY TITLE COMPANY OF MILLARD COUNTY

Place of Settlement  
P.O. Box 658  
Fillmore, Utah 84631

I. Settlement Date

5/02/94

Summary of Borrower's Transaction

Gross Amount Due From Borrower

Contract sales price 83,000.00

2 Personal property 164.60

3 Settlement charges to borrower (line 1400)

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5

Adjustments for items paid by seller in advance

6 City/town taxes to

7 County taxes to

8 Assessments to

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K. Summary of Seller's Transaction

Gross Amount Due To Seller

401 Contract sales price 83,000.00

402 Personal property

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405

Adjustments for items paid by seller in advance

406 City/town taxes to

407 County taxes to

408 Assessments to

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BUYERS:

William K. Moore  
Mary J. Moore

SELLERS:

Dan Irvin Smith  
Carol L. Smith, Trustee

(Rev 7/8)

Settlement Charges				Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
00	Total Sales/Broker's Commission based on price \$	@	% =		
	Division of Commission (line 700) as follows:				
01	\$	to			
02	\$	to			
03	Commission paid at Settlement				
04					
00	Items Payable In Connection With Loan				
01	Loan Origination Fee	%			
02	Loan Discount	%			
03	Appraisal Fee	to			
04	Credit Report	to			
05	Lender's Inspection Fee				
06	Mortgage Insurance Application Fee to				
07	Assumption Fee				
08					
09					
10					
11					
00	Items Required By Lender To Be Paid In Advance				
01	Interest from	to	@ \$ /day		
02	Mortgage Insurance Premium for	months to			
	Hazard Insurance Premium for	years to			
		years to			
05					
00	Reserves Deposited With Lender				
001	Hazard Insurance	months @ \$	per month		
002	Mortgage Insurance	months @ \$	per month		
003	City property taxes	months @ \$	per month		
004	County property taxes	months @ \$	per month		
005	Annual assessments	months @ \$	per month		
006		months @ \$	per month		
007		months @ \$	per month		
008		months @ \$	per month		
00	Title Charges				
001	Settlement or closing fee	to	Security Title Company	75.00	75.00
002	Abstract or title search	to			
003	Title examination	to			
004	Title insurance binder	to			
005	Document preparation	to	Security Title Company	25.00	25.00
006	Notary fees	to			
007	Attorney's fees	to			
	(includes above items' numbers:				
008	Title Insurance	to	Security Title Company		529.00
	(includes above items' numbers:				
009	Lender's coverage	\$			
010	Owner's coverage	\$	83,000.00		
011					
012					
013					
200	Government Recording and Transfer Charges				
201	Recording fees: Deed \$ 15.00	Mortgage \$ 0.00	Release \$ 0.00	15.00	
202	City/county tax/stamps: Deed \$	Mortgage \$			
203	State tax/stamps: Deed \$	Mortgage \$			
204					
205					
300	Additional Settlement Charges				
301	Survey	to			
302	Pest inspection to				
303	Water Stock Re-issue Fee	Fillmore Water Users Assoc		10.00	
304	Water Assessments	Fillmore Water Users Assoc		39.60	
305					
400	Total Settlement Charges (enter on lines 103, Section J and 502, Section K)			164.60	629.00

BUYERS INITIALS: WKM

SELLERS INITIALS: \_\_\_\_\_

1121-2 (Rev. 7/87)

## GENERAL CONDITIONS

**HANDLING OF FUNDS AND DOCUMENTS:** Deposit all funds in connection with this escrow in any of our escrow accounts in any federally insured depository selected by you and disburse same by the issuance of checks from said account. Pay encumbrances in accordance with this agreement, prorate all agreed items, and record such escrowed instruments as are necessary or proper for commission, and disburse balance of escrowed funds to the party or parties entitled thereto. If sale be based on contract of sale, deliver such contract and all related instruments to designated escrow collection agent. Cause fire insurance policies to show the interest of the respective parties after closing sale. You are hereby relieved of any obligation to determine if fire insurance policy is in force and its premium paid.

**TAXES AND SPECIAL ASSESSMENTS:** It is understood that property taxes are assessed and interest on special assessments is charged on a calendar year basis. You are therefore instructed to make all prorations thereof on that basis. In prorating taxes, if the amount of the current year's taxes be unknown, use prior year's taxes as a basis. You are hereby released from any and all liability which could arise by reason of any variance between the amount payable in taxes on the year of closing and on the said prior year. If parcel being sold be a portion of a larger tract and no separate tax assessment is available therefor, no proration shall be required to be made in escrow the Buyer and Seller hereby agreeing that they will adjust the proration of taxes between themselves. You are to make no proration of unpaid principal of special assessments unless specifically instructed to do so. You shall have no assessment as may be reported by the various municipal offices involved.

**PRORATIONS:** Before prorating items relating to existing encumbrances and in accounting for assumed obligations and impounded reserves, obtain from agent or individual making collections thereon all needed information, including rate of interest, payment terms and existing balances. You are instructed to use information in making required prorations and effecting settlement between the parties and are hereby released from any liability or responsibility should the information furnished to and used by you prove to be incorrect.

**CANCELLATION OR AMENDMENT:** This escrow may not be cancelled or its terms modified without consent of all the parties hereto. Should either party to this escrow elect to cancel the same, you are instructed to notify forthwith the remaining parties by mailing written notice of said election to them and the real estate agent at their last known address. In the event of cancellation, all documents are to be returned to the respective parties who shall have deposited same with you. If cancellation occurs because of the default of seller and not of buyer, you are instructed to refund to buyer all funds escrowed by him, after deducting your charges and expenses. However, if cancellation is occasioned by default of buyer and not of seller, you are authorized to pay to seller buyer's escrowed earnest money, which shall be forfeited to seller and treated as liquidated damages. In the event you have documents executed by both buyer and seller, you shall cancel same by marking with the word "void," retaining said documents in your files.

Failure to close this escrow within the period hereinabove provided shall not automatically terminate or cancel same. You may continue to regard it as executory until notified to the contrary in writing by any of the parties hereto. Should a dispute or controversy arise between buyer and seller, you shall hold all monies and documents until such a time as existing differences shall have been resolved through compromise or a final judicial determination had of the rights of the parties. In the event you interplead you may deposit the documents and funds in court, deducting all your charges and expenses incurred, including reasonable attorney's fees and you will thereupon be relieved of further liability or responsibility in connection with this escrow. The parties hereto agree to save you harmless, in the event of any such disagreement between the parties, against all liability, costs, damages, expenses and attorney's fees that may arise or which may be incurred or sustained by you by reason hereof.

MISCELLANEOUS PROVISIONS: Parties hereto agree that SECURITY TITLE COMPANY, assumes no responsibility or liability of unrecorded tax or mechanic's liens, personal property taxes, mining locations, rights of parties in possession of the premises, surveys, location of improvement or boundary lines, use of property in compliance with zoning ordinances or restrictions and such other matters as are excepted under Schedule "B" of the standard form policy or title insurance. It is further agreed that SECURITY TITLE COMPANY, makes no representation as to the sufficiency or validity of the documents deposited herewith nor makes any representations as to the value, quantity, or condition of the property described herein. In the event sale includes furniture or other personal property, it is understood and agreed that SECURITY TITLE COMPANY has made no search of the records for chattel mortgages or conditional sales contracts and does not certify as to title thereto, and buyer accepts the bill of sale with understanding. Parties hereto further agree that SECURITY TITLE COMPANY assumes no liability for and is expressly released from any claim or claims whatsoever in connection with the receiving, retaining, and delivering of the above papers, except to account for payments made thereon, from which it is authorized to deduct its customary collection charges and expenses, together with any amount which may be required to pay costs, attorney fees and other legal expenses by reason of any litigation or controversy which may arise in connection herewith.

SECURITY TITLE COMPANY, as ESCROW AGENT and ESCROWEE, assumes no responsibility for determining that the parties to this escrow have complied with the requirements of the Truth in Lending, Consumer Credit Protection Act, (Public Law 90-321), Utah Consumer Credit Code, or similar laws.

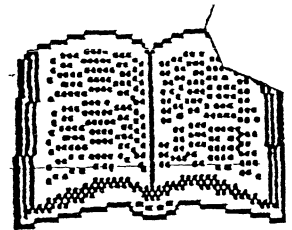
#### ADDITION TO GENERAL CONDITIONS

DISCLOSURE OF TAXPAYER IDENTIFICATION NUMBERS: Internal Revenue Code Section 6109(h) imposes requirements for furnishing, disclosing, and including taxpayer identification numbers in tax returns on the parties to a residential real estate transaction involving seller-provided financing. The parties understand that the disclosure reporting requirements are exclusive obligations between the parties to this transaction and that SECURITY TITLE COMPANY is not obligated to transmit the taxpayer identification numbers to the Internal Revenue Service or to the parties. SECURITY TITLE COMPANY is not rendering an opinion concerning the effect of this law on this transaction, and the parties are not acting on any statements made or omitted by the escrow or closing officer.

To facilitate compliance with this law, the parties to this escrow hereby authorize SECURITY TITLE COMPANY to release any party's taxpayer identification number to any requesting party who is a party to this transaction. The requesting party shall deliver a written request to escrow. The parties hereto waive all rights of confidentiality regarding their respective taxpayer identification numbers and agree to hold SECURITY TITLE COMPANY harmless against any fees, costs, or judgments incurred and/or awarded in connection with the release of taxpayer identification numbers.



Ex 3



## PROVO CITY

### BUILDING INSPECTION

TO OBTAIN A BUILDING PERMIT YOU MUST COMPLETE THE FOLLOWING STEPS:

1. Provide 2 complete sets of plans and 3 plot plans to the Building Inspection Department. These sets MUST include: floor plan, elevations, wall sections, basement or foundation plan, (see attached sheets for example drawings and pertinent code requirements). Minimum Scale 1/4" - 1'
2. Fill out a Building Permit Application at the Building Inspection Dept. Include both the owner's and contractor's signatures.
3. The plans are reviewed by:
  - A. Zoning Department
  - B. Engineering Dept.
  - C. Building Inspection(This review process usually takes about ONE week.)
4. Purchase the Permits from the Building Inspection Department. (All fees are due at this time.)

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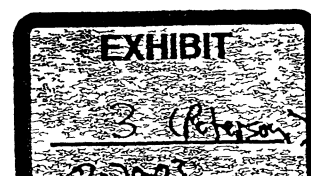
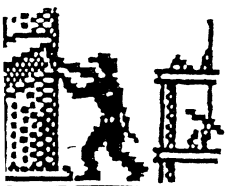
COMMERCIAL PLANS HAVE SOME ADDITIONAL STEPS THAT REQUIRE MORE TIME.

1. Architect and/or Engineer stamps may also be required.
2. A contractors license is required except when a home owner works on his/her own residence.

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A BUILDING PERMIT IS REQUIRED FOR:

1. All new structures and additions to existing structures
2. All accessory buildings, storage, garage, etc in excess of 120 sq ft.
3. All fences more than 6' in height
4. All retaining walls more than 4' in height measured from bottom of ftg.
5. All remodel work that is not maintenance.



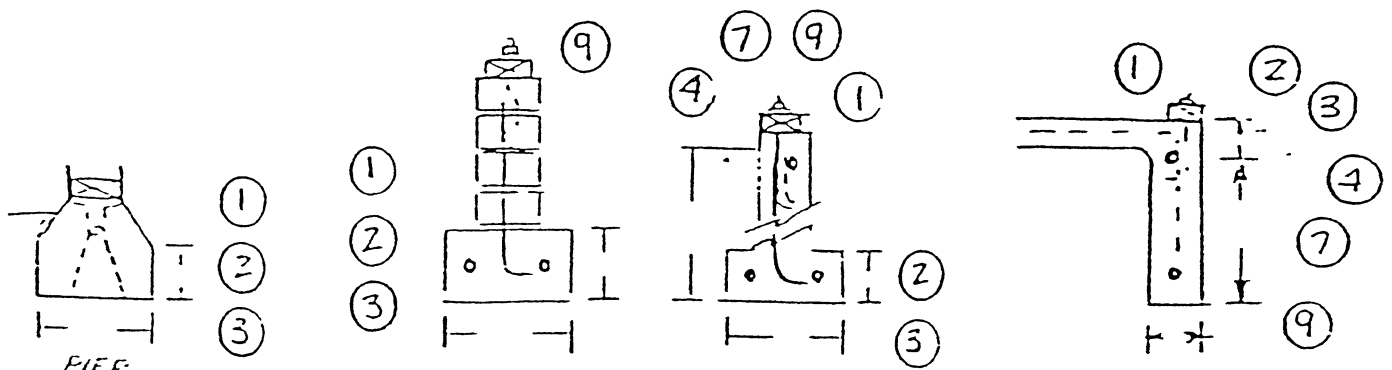
This check list should be used in conjunction with the sample drawings to assist you in preparing a set of drawings for your permit application. Be sure that all requirements are clearly shown on your plans. Plans must be drawn on unlined or graph paper with a straight edge, minimum 8½" x 11" size.

1. Concrete: 3000 # PSI, 5 1/2 bag mix,
2. Footings: Provo City recommends a 10" x 20" footing with 2 #4 bars continuous.
3. Foundations: #4 bars 24" o.c. each way with a 30" dowel from footing to foundation every 24". Show dimensions of foundation wall.
4. Frost level protection for footings: 30" earth coverage show earth to wood clearance.
5. Show dimensions of building rooms and doors.
6. Show setbacks on plot plan, lot dimensions.
7. Foundation: Minimum of 6" above final grade.
8. Redwood plates are required on concrete.
9. Anchor bolts: 1/2" x 10"- 6 feet on center with a minimum of 2 anchors per piece.
10. Provide combustion air to the furnace.
11. Provide a floor drain by the water heater.
12. Show location: Electric meter and service panel.
13. Show GFI protection on receptacles in baths, garages and on outside plugs.
14. Show location of electrical lights-( $\phi$ ), switches-( $\$$ ), and outlets-( $\oplus$ ): minimum of one outlet every 12 feet of wall space.
15. Bedroom windows: 4° 36' minimum window sills: 44" maximum height from finished floor.
16. Windows within 18" of floor, 18" or wider-tempered or protected.
17. Window size: Minimum 10% floor area - 50% operable.
18. Brick ties: 16" o.c. each way - 1" x 22 gauge.
19. Attic access required: 22" x 30" minimum
20. Water closet/shower: 30" minimum required dimensions
21. Vent fan required in baths without windows.
22. Studs- 16" o.c. or 24" o.c.
- 23.\* CEILING JOISTS SPANS: 2 x 4, 24" o.c. - 9' 8" max.  
2 x 6, 24" o.c. - 15' 2" max.  
2 x 8, 24" o.c. - 19' 11" max.  
2 x 10, 24" o.c. - 25' 5" max.
- 24.\* ROOF RAFTER SPANS: 2 x 6 - 24" o.c. - 9' 2" max.  
2 x 8 - 24" o.c. - 12' 1" max.  
2 x 10 - 24" o.c. - 15' 5" max.  
2 x 12 - 24" o.c. - 18' 9" max.
- 25.\* FLOOR JOIST SPANS: 2 x 8, 16" o.c. - 13' 1" max.  
2 x 8, 24" o.c. - 11' 5" max.  
2 x 10, 16" o.c. - 16' 9" max.  
2 x 10, 24" o.c. - 14' 7" max.  
2 x 12, 16" o.c. - 20' 4" max.  
2 x 12, 24" o.c. - 17' 9" max.
- 26.\* HEADER SIZES: 4 x 4 - 4' span  
4 x 6 - 4' to 6' span  
4 x 8 - 6' to 8' span  
On edge if two pieces
- \*All spans are based on Douglas Fir #2 or better.\*
27. Solid blocking between joists over all bearing points.

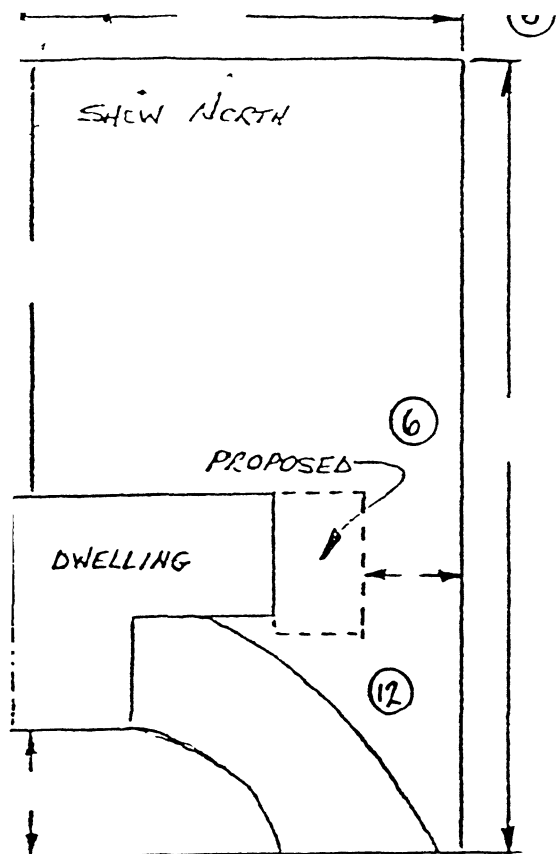
28. Ceiling/floor headroom: 7' 6" minimum
29. All Stairs: 6'6" minimum headroom.
30. All Stairs: 7 1/2 rise max - 10" run minimum.
31. All Stairs: 30" - 34" handrails, 36" guardrails.
32. Shear bracing required on both sides of each corner and every 25' lineal feet.
33. Insulation: All exterior walls R-11, ceilings R-19 double glazed windows: Basement and crawl space also must be insulated.
34. Crawl space vents required: 1 1/2 sq. ft. per every 25 lineal feet.
35. Crawl space access: 18" x 24" minimum.
36. Attic vents required: 1/150th of floor area.
37. Hearth: 20" minimum in front, 12" each side of opening.
38. Chimney cap: 4" minimum with drip edge.
39. One hour firewall with self-closing door between house and garage.
40. Smoke detectors required in bedroom access areas. Interconnect if multi
41. Show: mechanical, plumbing and heating fixtures.
42. Roof coverings.
43. Roof decking
44. Floor decking
45. Exterior siding or covering
46. Interior wall and ceiling covering
47. Carports: 12" soffit or use exterior grade plywood or use exterior grade gypboard.
48. Method of attachment
49. Type of footing and dimensions
50. Size and spacing of supports
51. Size and span of beam

The circled numbers refer to the preceding list. They indicate the typical location of the plans for the appropriate statement explaining construction details. i.e. What the building is made of (materials), its size (dimensions), and any special methods of construction (technique).

THE NUMBERED CIRCLES ARE FOR EXAMPLES ONLY, YOU MAY NEED MORE INFORMATION. CAREFULLY CHECK THE REQUIREMENT LIST AND INCLUDE ALL REQUIREMENTS ON YOUR PLANS.

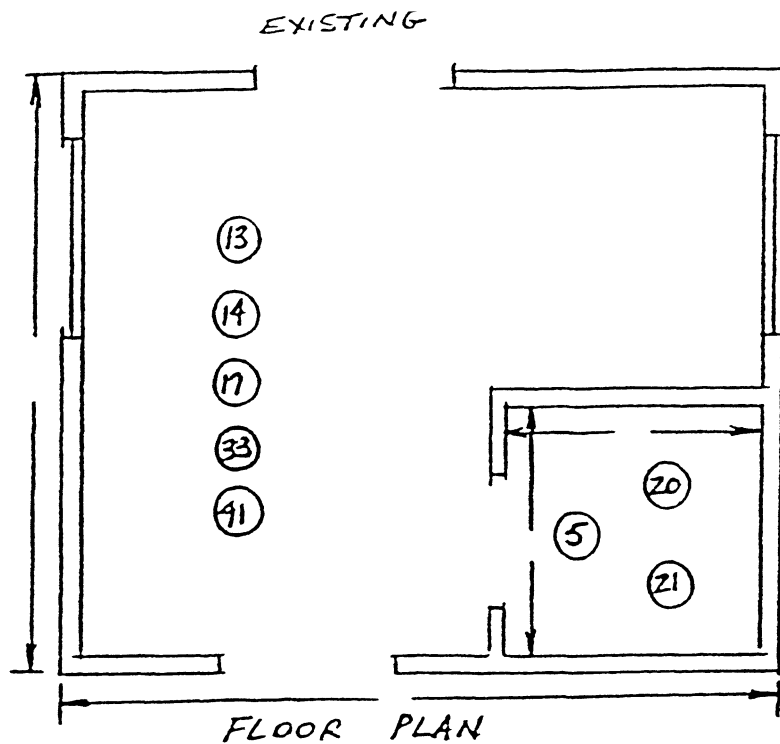




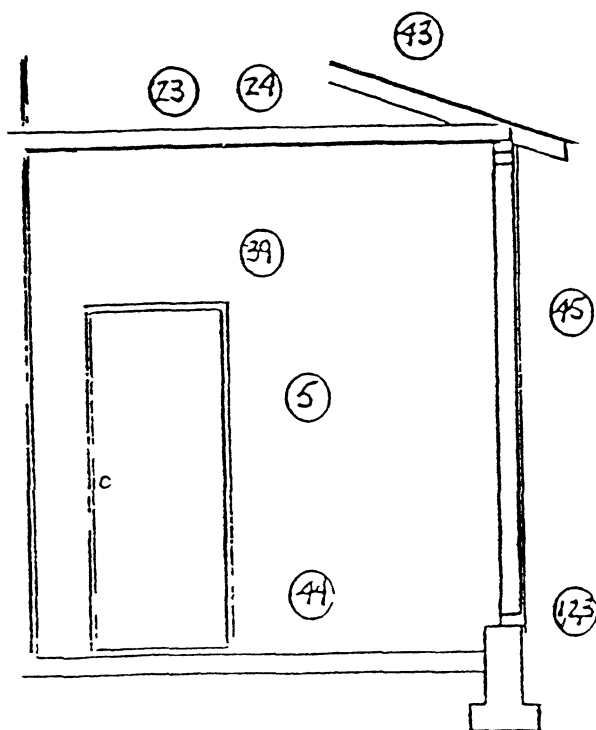


STREET-ADDRESS

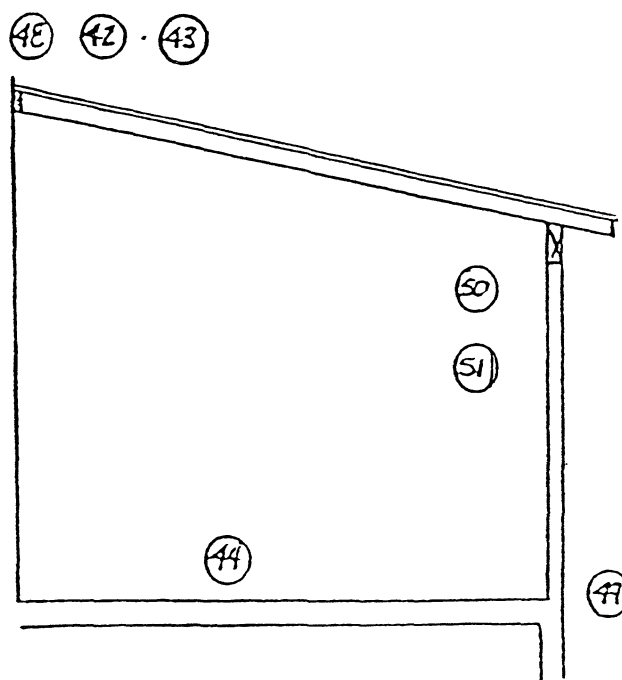
TYPICAL PLOT PLAN



The circled numbers refer to the preceding list. They indicate the typical location of the plans for the appropriate statement explaining construction details. i.e. What the building is made of (materials), its size (dimensions), and any special methods of construction (technique)



GARAGE



CARPORT

Ex 5

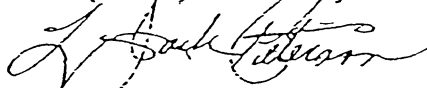
L. Jack Peterson  
95 East 500 South  
P O Box 84  
Fillmore, Utah 84631

To whom it may concern

I was contacted by Dan Smith and went over the property and the layout of the home on the 11<sup>th</sup> of August 1993, and inspected the footings on Friday 13<sup>th</sup>. It was called to his attention at that time that the footings were not at proper depth, but he stated this would be taken care of when the back fill was put around the house. The basement walls were inspected on the 16<sup>th</sup> and the rough plumbing on the 18<sup>th</sup>. The rough electrical and plumbing, along with the framing inspection, was done on the 8<sup>th</sup> and 9<sup>th</sup> of September 1993. I checked the building progress on both the 28<sup>th</sup> and the 29<sup>th</sup> of October. I also visited the job site another occasion and Dan and I discussed the venting of the attic. Dan felt that it was adequate.

Dan and Carol were living in the home when we asked to do the final inspection on the home on the 8<sup>th</sup> of November. At that time they hadn't built the deck on the back of the house and the final grading hadn't been done as well. At the time the final inspection was done, I discussed with Dan the fact that the access into the attic did not meet the minimum code requirements and that the smoke detectors had not been installed. None of these items had been corrected at the time that the house was sold to the Moore's. The Moore's did the landscaping around the house not realizing that the back fill around the house did not meet the 30 inch depth requirement.

Respectfully submitted by



L. Jack Peterson, Fillmore City Building Inspector



1 July 29th.

2 A. I think this is when we were working on the  
3 permit, getting permits to do it.

4 Q. Okay. Any other references to Dan Smith  
5 that you found in there?

6 A. Oh, it goes all the way through. There's  
7 one here. I don't know whether that was electrical.

8 Q. Do you mind if we make a copy of that?

9 A. I can make copies for you as quick as we get  
10 through. That would give you the dates.

11 Q. Yeah, it would give us the dates. I don't  
12 know how that would do.

13 A. It doesn't do a whole a lot. I have a big  
14 planner if I have a problem I write down. The final  
15 inspection was on November the 8th. I was surprised I  
16 hadn't thrown this away.

17 Q. Where did you find that?

18 A. I had it stuck in the tax box at home.

19 MR. HADLEY: Love it.

20 MR. DIXON: There you go.

21 Q. All right. I think what we'll do, we'll  
22 call Exhibit 1 -- when you make a copy of that we'll  
23 attach that as a exhibit as Exhibit 1.

24 Copy of what do we call that, a day planner?

25 A. Just a day planner.

## **ADDENDUM 3**

COPY

replied  
11/16/04

A. BRYCE DIXON, ESQ (#889)  
AARON M. WAITE, ESQ (#8992)  
**DIXON, TRUMAN, BANGERTER & FISHER, P.C.**  
192 East 200 North, Suite 203  
St. George, UT 84770  
Telephone: (435) 652-8000  
Facsimile: (435) 652-9000  
Attorneys for Defendants

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

---

WILLIAM MOORE and	)	
MARY MOORE,	)	
	)	<b>REPLY MEMORANDUM</b>
Plaintiffs,	)	<b>IN SUPPORT OF DEFENDANTS'</b>
vs.	)	<b>MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT ON BREACH</b>
	)	<b>OF CONTRACT CLAIMS</b>
DAN SMITH, individually and as	)	
Trustee of the Dan Irvin Smith	)	
Inter Vivos Trust, and CAROL SMITH,	)	
individually and as Trustee of the	)	
Carol L. Smith Inter Vivos Trust,	)	Civil No.: 000700142 MI
	)	
Defendants	)	Judge: EYRE

---

**THERE ARE NO ISSUES OF FACT. THE COURT NEED  
ONLY INTERPRET THE CONTRACT**

Plaintiffs have not raised an issue of fact. They contend that paragraph two is disputed. However, Plaintiffs acknowledge in their opposition papers that the Court has already ruled that Dan Smith built this home for his primary residence and that when he sold it to the Moores it was a used home. Plaintiffs do not dispute the quoted provisions of the contract. The Plaintiffs only

dispute the interpretation of the contract. This case is therefore ripe for summary judgment.

**THE SMITHS RECEIVED NO NOTICE FROM THE  
BUILDING INSPECTOR OF ANY BUILDING VIOLATION**

Plaintiffs acknowledge that they have no contract claims except those arising under the “Seller’s Warranties” under paragraph “C” of the Earnest Money Agreement.<sup>1</sup> That paragraph provides as follows:

¶ C. SELLER WARRANTIES. Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; . . . (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.

Regarding clause “C(a)” they argue that the alleged laundry list of code deviations raised by their experts constitute “building violations” and that Dan Smith had knowledge of these “building violations” because he built the house as an owner-builder. They are wrong in this interpretation of the contract.

Clause “C(a)” contemplates a situation where a builder’s construction has been “red-tagged” by a building inspector; in other words, the building inspector has notified the builder that a certain deviation from code must be corrected. The builder must have received such a “claim or notice” from the building inspector. If so, he must correct it prior to closing. Here,

---

<sup>1</sup> Plaintiffs argue some vague notion of good faith and fair dealing but they offer no specifics of how such a term was breached so it is not discussed in this brief.

however, Dan Smith received a final inspection and a certificate of occupancy from Jack Peterson, the building inspector. (Ex. 3, Certificate of Occupancy) Peterson never red-tagged this home. (Ex. 1, Peterson depo. at 18,19) Therefore, Smith did not “receive a claim or notice of any building . . . violation.”

Plaintiffs’ interpretation of clause “C(a)” is erroneous for the following five reasons:

1. **Plaintiffs’ interpretation of this contract language presumes that every deviation from code would be a “building violation” even the deviations where the building inspector has specifically determined them to be insignificant from a structural or safety standpoint and thus passed them off.** If every code deviation were a “building violation”, then every builder would be liable to correct inconsequential deviations that come to light decades after the construction of the house, even though the building inspector passed them off.

2. **If every code deviation were a “building violation,” then every builder would remain liable when the deviation has been presented to the building official who, under the discretion granted him by the Uniform Building Code, waived strict compliance.** Dan Smith knew there were certain deviations from code in the construction of this house. But he took care of them properly. Dan Smith called attention to the building inspector that the stairs did not comply with the building code. The inspector considered the matter and waived strict compliance. (Ex. 1, Peterson depo. at 66) Jack Peterson also considered the attic access, found it a little small but found the deviation insignificant and so passed it off. (*Id.* at 53) Similarly, the

building inspector considered the amount of the roof ventilation and did not require Smith to change the ventilation and passed it off. (*Id.* at 48)

Plaintiffs' interpretation thus assumes that Dan Smith has breached his contract where he has knowledge of a building code deviation that the building inspector has expressly determined not to be a building violation. Obviously, such an interpretation is outrageous. If it were adopted, it would have vast, unexpected and disastrous consequences to home builders all over the state of Utah.

**3. The word “receive” implies just this kind of notification from a building inspector.** One “receives” notice from another, not from himself. One “receives” notice of a building code violation from a building inspector. He may already know there is a violation but he does not “receive a notice or claim” from himself.

**4. Plaintiffs' interpretation of clause “C(a)” runs counter to the plain language of the rest of the agreement.** Plaintiffs agreed under paragraph “1B” to buy a house “as is” and with no warranties other than those in paragraph “C.” Plaintiffs interpretation of paragraph “C” would nullify this plain language. It would make every home seller liable for all conceivable construction defects when the seller intends that the buyer is buying the house **subject to all such defects**. That after all is the definition of “as is.”<sup>2</sup> Plaintiffs' faulty interpretation of this contract

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<sup>2</sup> The phrase “as is” in the real estate means the buyer takes subject to all existing conditions and excludes breach of contract claims and warranties. 8 ALR 5<sup>th</sup> 312, § 9. Also see *Maack v. Resource Design & Construction, Inc.* 875 P.2d 570 (Ut App 1994).



is thus: 'Plaintiffs take the house "as is", subject to all defects with the exception of . . . all deviations from the building code, no matter how slight.' That is not what the parties intended.

In this contract under paragraph "1(e)" Plaintiffs acknowledged they inspected the house to their satisfaction and accepted "it in its present physical condition." They were given the opportunity in paragraph "6" to insist upon other warranties but in handwriting chose to ask for "none." To accept Plaintiffs too broad interpretation of paragraph "C" would be to deny the Smiths the benefit of their bargain and contradict the plain language of these several prominent provisions of the contract.

**5. Plaintiffs presume that Dan Smith knew the building code as they interpret it and chose to deviate from code compliance.** There is simply no evidence of that presented in this case. Without proof Plaintiffs simply assert that Dan Smith must have known of the alleged code violations because he built homes in Salt Lake City in the 1970's.<sup>3</sup> This is false for several reason.

Some of the alleged code violations are based on interpretation of the code where the building inspector and the Smiths' expert disagree with the Plaintiffs' expert. For example, the building inspector gave to owner-builders the standard handout listing certain building code requirements. (Ex. 3 to Peterson depo, annexed hereto as part of Second Appendix of Exhibits, as Ex. 2) (Ex. 1, Peterson depo at 26, 30) It stated that the maximum length of a floor joist was \_\_\_\_\_.

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<sup>3</sup> Dan Smith built over 200 homes in Salt Lake County in the 1970's. (Ex. 3, Dan Smith depo at 25) He moved to Fillmore in 1979/1980 and became a dairy farmer. (*Id.* at 69,70)

13 feet one inch. Plaintiffs' expert has stated by his interpretation of the code that the maximum length was actually 12 feet. This expert recognized however that the 13 feet one inch might be proper and it was within the discretion of the building inspector to choose. (Ex. 4, Steenblik depo. at 183-186) Does paragraph "C" mean here that Dan Smith is subject to liability for having notice of a building code violation if he followed precisely what the building inspector told him to do?

Moreover, the Smiths' expert testified building inspectors are necessary because it is not always clear what the code requires. (Ex. 6, Barrett depo. at 25-27) There are code changes every few years that could trip up any contractor. (*Id.* at 26, 27, 31, 32) If Dan Smith thought he was complying because he built the home as he built it in Salt Lake City years before, does he have knowledge of a building code violation such that he has breached the contract? For example, Dan Smith did not realize the code had changed the requirement for a stair handrail. (Exhibit 5, Smith depo. at 137, 138) The 1991 code allowed a straight handrail. The next code (1993) required the handrail return and attach to the wall. Jack Peterson did not know about this handrail change so he passed it off. (Exhibit 1, Peterson depo. at 52) Is Dan Smith charged with actual knowledge of committing a code violation even though it is so recent that the building inspector failed to catch it as well and passed it off? Is Dan Smith to be held liable for not having remedied this code deviation prior to closing when he never realized it existed?

Moreover, Plaintiffs accuse Dan Smith of knowingly breaching the building code on the

issue of attic ventilation. However, the building code provides that the amount of ventilation is not determined strictly by the code but is to be determined by the building inspector who, in fact, determined that Dan Smith complied. (Ex. 6, Barrett depo. at 36, 37) (Ex. 1, Peterson depo. at 48).

Clearly, the building code is not as black and white as Plaintiffs would lead the court to believe. There is much discretion and interpretation left to the building inspector. That is why Dan Smith cannot be charged with a breach of paragraph "C(a)" unless the building inspector has red-tagged a code deviation.

Plaintiffs' strained interpretation ignores the fact that the building inspector, having inspected, found compliance, or having exercised discretion where appropriate and or having waived certain code deviations, granted final inspection and signed off on the certificate of occupancy. For another example, Jack Peterson says he examined and found proper flashing at the windows and passed that off. (Exhibit 1, Peterson depo. at 55). Plaintiffs' expert has never done any destructive testing to see if there really is flashing but still alleges that there was no flashing. (Ex. 7, itemization of alleged code deviations, item #9.) The Plaintiffs' interpretation of the contract would require Dan Smith repair this "building violation." How could he have notice of no flashing when the building inspector saw it with his own two eyes? Of course, Defendants contend that to avoid these anomalous scenarios mentioned above the contract phrase "notice or claim" must be construed to mean that which comes from a building inspector.

**THE ALLEGED CODE DEFECTS DO NOT CONSTITUTE A BREACH OF THE  
WARRANTY THAT THE ELECTRICAL, PLUMBING AND HVAC SYSTEMS WOULD  
BE IN SOUND OR SATISFACTORY WORKING CONDITION AT CLOSING**

The arguments made above apply for the most part to this section. Plaintiffs desire to bootstrap their code deviation allegations into a part of the contract [clause "C(c)"] where they do not belong and even though claims of such alleged defects were expressly waived by the Plaintiffs in the contract.

One thing is very different. Under this clause of the contract, only the defects that are by nature electrical, plumbing or heating and air-conditioning (HVAC) can apply. A review of the laundry list (Ex. 7 annexed hereto.) shows that only items 10 (caulking of bathroom fixtures), 15 (no water pressure reducing valves), 22 (strapping of water heater) 23-25, 29,30 (non- GFCI circuits and failure to label electrical panel), 33 (no outlet in basement) 35 (add grounding kit to circuit breaker box) and 41, 42 (plumbing repairs of some unknown type) could be subject to this contractual provision because these are the only items that relate to plumbing, electrical or HVAC. Thus, as a matter of law all other defects must be dismissed from the contract claims under paragraph "C(c)".

However, even these items do not give rise to a contract claim because they do not affect the satisfactory working condition of the systems. The clause at "C(c)" does not warrant against defects. It warrants that these three systems would be working at the time of closing. There is no evidence that they were not. As is now well known in this case, the laundry list items were

discovered over six years after the sale of the house. Even now there is no evidence that these systems are not in sound working order. Mere deviations from code do not necessarily mean that the electrical or plumbing systems were not “working.” If they were not “working” properly Plaintiffs would have known about it right after they moved in.

In fact, as shown in the previous motion for summary judgment the only actual damage to the house that Plaintiffs have suffered is some small water intrusion and buckling of some of the roof shingles. There is no evidence of serious damage to the integrity of the house. There is no allegation that the roof leaks. (See Ex.8, Moore depo at 20.) There is no known damage to footings or foundation. (*Id.* at 45.) There is no evidence of leaking toilets, water lines, no evidence of electrical blackouts, no evidence of heating or air conditioning failure. There was no breach of clause “C(c)” at the time of the closing and there has been no such breach since.

The only alleged defect that Plaintiffs attempted to bring within the scope of clause “C(c)” is the attic ventilation. They say that because the surface of the attic vents was not large enough the attic heated up and shriveled the roof shingles. (Opp. brief, p.5) They argue that the alleged code violation did not manifest itself until years later.

First, this alleged code violation is not contemplated by a clause that talks about the plumbing, electrical and HVAC systems being in sound working condition. One does not speak of attic ventilation as being in any kind of “working condition.” The size of the vents in the attic

is either adequate or not. One does not call the AC man and say that my attic ventilation is broken down and not working.

Second, attic ventilation is not part of the HVAC (heating, air-conditioning and ventilation system) which is a term of art commonly understood to deal with the ducts that are built to supply a home with hot and cool air. The mere placement of vents designed to allow hot air in the attic to escape can hardly be described as part of the HVAC system.

Since Plaintiffs have not attempted to squeeze any other of the items on their laundry list into clause "C(c)", there is nothing more to discuss. Clearly, the court can rule as a matter of law that Plaintiffs interpretation of "C(c)" is incorrect and such clause gives rise to no contract claim.

### **CONCLUSION**

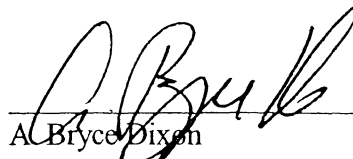
Plaintiffs' have admitted that there is no implied warranty of habitability in Utah. They admit there are no contract provisions except those found in paragraph "C" upon which to predicate a claim of breach of contract. Their interpretation of the scope of said paragraph is wrong as a matter of law. Paragraph "C" does not cover the laundry list of defects "discovered" by their experts some seven years after they bought the house. Since Dan Smith never received any claim or notice of a building code violation from the building inspector clause "C(a)" does not apply. None of the items on the laundry list constitute a breach of "C(c)" because the

\* \* \* \* \*

electrical, HVAC and plumbing systems have all been in sound working condition since the house was sold.

Dated this 12<sup>th</sup> day of Jan, 2004.


DIXON, TRUMAN, BANGERTER & FISHER, P.C.

  
A. Bryce Dixon  
Attorneys for Defendants

#### CERTIFICATE OF MAILING

I do hereby certify that on the 13<sup>th</sup> day of January, 2004, I mailed a true and correct copy of the foregoing in the United States mail at St. George, Utah, with first class postage prepaid and addressed as follows:

Gregory B. Hadley  
James K. Haslam  
HADLEY & ASSOCIATES  
2696 North University Avenue Suite 200  
Provo, UT 84604

  
An Employee of Dixon, Truman, Bangerter & Fisher, PC

## **ADDENDUM 4**



Gregory B. Hadley (3652)  
Counsel for Plaintiffs  
2696 North University Avenue, Suite 260  
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Telephone (801) 377-4403  
Facsimile: (801) 377-4411

IN THE FOURTH JUDICIAL DISTRICT COURT OF MILLARD COUNTY  
STATE OF UTAH

**WILLIAM MOORE and MARY  
MOORE,**

Plaintiffs,

v.

**DAN SMITH, et al.**

Defendants.

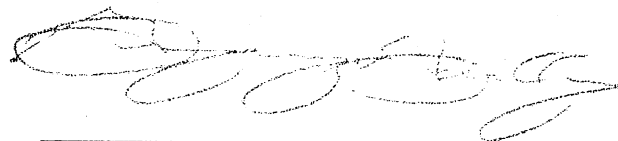
**RESPONSE TO COURT'S  
DIRECTIVE REGARDING  
ATTORNEY'S FEES, COSTS AND  
EXPENSES**

Civil No. 00700142 MI

Judge Donald J. Eyre

Pursuant to this Court's directive regarding Attorney's Fees on June 6, 2005, Plaintiff does submit this revised billing summary. Plaintiff has followed this Court's directive and has removed all fees, costs and expenses that could be determined to have no relation to the factual development and prosecution of Plaintiff's Breach of Contract Claim. Much of the fees are so closely related and intertwined with the Breach of Contract Claim as to be indistinguishable and can not now be separated. Attached is Plaintiff's Revised Billing Summary.

DATED this 7 day June, 2005.



Gregory B. Hadley

1351

1712

### CERTIFICATE OF MAILING

I hereby certify that I hand delivered a true and correct copy of the foregoing on this 17  
day of June 2005 to the following:

Patrick J. Ascione  
Ascione, Heideman & McKay, L.L.C.  
2696 University Avenue, Suite #180  
P.O. Box 600  
Provo, Utah 84603



---

Gregory B Hadley  
 Suite 260 Century Park Plaza  
 2696 North University Avenue  
 Provo, UT 84604

Invoice submitted to:  
 Mary Moore  
 155 West 300 South  
 Fillmore, UT 84631

March 31, 2005

Professional Services

			<u>Hrs/Rate</u>	<u>Amount</u>
8/11/2000	JKH	Reviewing and analyzing documentation from client	0.40	54.00
			135.00/hr	
8/15/2000	JKH	Telephone conversation with Tanya Tracy; Legal research and analysis of claims	0.60	81.00
			135.00/hr	
8/16/2000	JKH	Legal research and analysis	0.20	27.00
			135.00/hr	
8/17/2000	JKH	Telephone conversation with Tanya Tracy; legal research and analysis	0.50	67.50
			135.00/hr	
8/18/2000	JKH	Legal research and analysis	0.50	67.50
			135.00/hr	
	JKH	Legal research; telephone conversation with Tanya Tracy	1.00	NO CHARGE
			135.00/hr	
8/23/2000	JKH	Telephone conversation with Tanya Tracy; planning strategy with Mr. Hadley; met with client; draft Complaint	1.10	148.50
			135.00/hr	
8/24/2000	JKH	Legal research; drafting and revising Complaint; telephone conversation with Tanya Tracy; telephone conversation with court clerk; met with client	2.40	324.00
			135.00/hr	
8/28/2000	JKH	Reviewing filed Complaint; preparing letter to client,	0.10	13.50
			135.00/hr	
8/30/2000	JKH	Telephone conversation with Tanya Tracey	0.20	27.00
			135.00/hr	
9/20/2000	JKH	Preparing letter to clients	0.10	13.50
			135.00/hr	
	JKH	Telephone conversation with Mrs. Tracy	0.20	27.00
			135.00/hr	
10/11/2000	JKH	Telephone call from Mark O'Barr, electrician	0.10	13.50
			135.00/hr	
10/30/2000	JKH	Telephone conversation with Tanya Tracey; Reviewing fax from client	0.20	27.00
			135.00/hr	
11/15/2000	JKH	Reviewing faxed materials; Outlining demand letter	0.50	67.50
			135.00/hr	
11/27/2000	JKH	Telephone conversation with client	0.20	27.00
			135.00/hr	

12/1/2000	JKH	Telephone conversation with Shane Moore; Drafting demand letter to Mr. Smith	0.60 135.00/hr	81.00
12/12/2000	JKH	Telephone conversation with client	0.30 135.00/hr	40.50
12/14/2000	JKH	Reviewing fax re: service of Smiths	0.10 135.00/hr	13.50
12/20/2000	JKH	Reviewing letter from Mr. Dixon; Telephone conversation with client	0.30 135.00/hr	40.50
	GBH	Draft correspondence to counsel	0.10 160.00/hr	16.00
1/10/2001	GBH	Telephone call with opposing Attorney	0.10 160.00/hr	NO CHARGE
1/16/2001	JKH	Reviewing correspondence; Telephone conversation with St. George law firm; Preparing Proofs of Service for filing with Court	0.20 135.00/hr	27.00
1/23/2001	JKH	Telephone conversation with Mr. Dixon; Planning strategy with Mr. Hadley	0.20 135.00/hr	27.00
	GBH	Telephone conversation with opposing counsel; Conference with client; Draft letters	0.20 180.00/hr	36.00
1/26/2001	JKH	Preparing for conference with opposing counsel; Meeting with client and friends; Telephone conference with opposing counsel	1.70 135.00/hr	229.50
1/29/2001	JKH	Planning strategy with Mr. Hadley	0.40 135.00/hr	54.00
1/30/2001	JKH	Legal research and analysis	0.90 135.00/hr	121.50
2/1/2001	GBH	Conference with client	0.50 180.00/hr	90.00
2/6/2001	DH	Drafting jury demand	0.30 90.00/hr	27.00
2/7/2001	GBH	Telephone conversation with Tonya	0.70 180.00/hr	126.00
2/8/2001	GBH	Telephone conversation with opposing counsel; Draft letter	0.60 180.00/hr	108.00
2/9/2001	GBH	Conference with client	0.70 180.00/hr	126.00
2/16/2001	JKH	Reviewing statute; Drafting letter to client	0.70 135.00/hr	94.50
2/28/2001	GBH	Conference with client; Review Motion	0.50 180.00/hr	90.00
2/28/2001	JKH	Discussing strategy with Mr. Hadley; Reviewing Memorandum in Support of Motion for Summary Judgment and Affidavit of Dan Smith	0.40 135.00/hr	54.00
3/1/2001	JKH	Analysis of Summary Judgment Motion and Affidavit; Telephone conversation with client; Reviewing Pleading; etc.	1.40 135.00/hr	189.00
	JKH	Legal research; outlining response to summary judgment	1.40 135.00/hr	189.00
3/2/2001	JKH	Legal research and analysis; Outlining response to Motion for Summary Judgment; Telephone message from client received; outlining facts for affidavit, etc.	3.00 135.00/hr	405.00
3/5/2001	JKH	Planning strategy with Mr. Hadley	0.50 135.00/hr	67.50
	JKH	Legal research and analysis; Drafting response to Motion for Summary Judgment; Telephone conversation with John Petersen; Telephone conversation with client, etc.	2.40 135.00/hr	324.00
3/6/2001	JKH	Drafting Affidavit of Mary Moore and faxing to client; Preparing statement of material facts; Telephone conversation with client	4.20 135.00/hr	567.00
3/6/2001	GBH	Conference with client; Review Affidavit	0.20 180.00/hr	36.00

3/7/2001	JKH	Drafting opposing memorandum; Reviewing fax from John Peterson; Revising opposing memorandum; Telephone conversation with client; Preparing affidavit for John Peterson	2.40 135.00/hr	324.00
3/8/2001	GBH	Review draft of Memorandum	0.20 180.00/hr	36.00
	JKH	Drafting and revising Memorandum; Drafting Affidavits for John Peterson, Jason Bullock and Mark O'Barr; Telephone conversations with client, Jason Bullock and John Peterson; Drafting letter to client, Court and opposing counsel	4.00 135.00/hr	540.00
3/9/2001	JKH	Telephone conversation with client	0.40 135.00/hr	54.00
3/12/2001	JKH	Telephone call from client	0.10 135.00/hr	13.50
3/16/2001	JKH	Telephone conversation with Jason Bullock; Revising Affidavit; Met with Mr. Bullock; Telephone conversation with client; Preparing letter to Court; Preparing letter and faxing to opposing counsel	0.90 135.00/hr	121.50
3/26/2001	JKH	Reviewing Reply Memorandum from opposing counsel	0.50 135.00/hr	67.50
3/27/2001	GBH	Telephone conversation with clerk and client	0.30 180.00/hr	54.00
4/6/2001	GBH	Telephone conversation with client and Court clerk	0.20 180.00/hr	36.00
4/11/2001	GBH	Telephone conversation with client and Court	0.10 180.00/hr	18.00
4/16/2001	GBH	Telephone conversation with Shane	0.30 180.00/hr	NO CHARGE
5/15/2001	JKH	Telephone conversation with Shane Moore; Telephone conversation with Mary; Reviewing Memorandum in Opposition to Motion to Amend Complaint; Calendaring response time	0.50 135.00/hr	67.50
5/18/2001	JKH	Telephone conversation with Mr. Dixon; Reviewing fax from Mr. Dixon	0.30 135.00/hr	40.50
5/22/2001	JKH	Reviewing Opposing and Supplemental Memorandum from opposing counsel; Legal research and analysis; Planning strategy	2.00 135.00/hr	270.00
5/23/2001	JKH	Legal Research and analysis; Outlining and preparing response	1.00 135.00/hr	135.00
5/24/2001	JKH	Legal Research and analysis; Drafting Objections and reply Memorandum in Support of Alternative Motion to Amend	4.90 135.00/hr	661.50
5/25/2001	GBH	Review Objection and Reply Memorandum	0.20 180.00/hr	NO CHARGE
5/25/2001	JKH	Drafting Objections and Reply Memorandum; Meeting with Mr. Hadley to discuss strategy; Revising Objection and Reply Memo; Faxing documents to opposing counsel; Preparing and reviewing case law to assist Mr. Hadley's preparation for Court hearing in Fillmore	3.30 135.00/hr	445.50
5/28/2001	GBH	Prepare for Hearing	3.70 180.00/hr	NO CHARGE
5/29/2001	JKH	Planning strategy with Mr. Hadley; Preparing Response to Smith's Reply Memo; Obtaining case law in preparation for Court Hearing	1.70 135.00/hr	NO CHARGE
5/31/2001	JKH	Preparing for, travel to, and appearance at Court Hearing in Fillmore; Discussing strategy with clients; Travel back	7.50 135.00/hr	1,012.50
6/4/2001	JKH	Reviewing fax from client	0.10 135.00/hr	13.50
6/5/2001	GBH	Research on Mr. Smith license status	0.20 120.00/hr	24.00

6/5/2001	JKH	Telephone conversation with client, Preliminary preparing Order	0 40 135 00/hr	54 00
<del>6/6/2001</del>	<del>JKH</del>	<del>Discussing Mr. Smith's licensure with Mr. Hunter, Reviewing licenses with DOPL, Telephone call to Tanya Tracey</del>	<del>0 40 135 00/hr</del>	<del>54 00</del>
6/7/2001	JKH	Planning strategy re Order	0 20 135 00/hr	27 00
6/9/2001	GBH	Conference with client	0 50 180 00/hr	90 00
6/11/2001	JKH	Telephone call from Marta at Fourth District Court	0 10 135 00/hr	13 50
	GBH	Telephone call with opposing counsel	0 30 180 00/hr	54 00
6/12/2001	GBH	Draft settlement letter	1 00 180 00/hr	180 00
6/13/2001	JKH	Obtaining tapes of hearing, Reviewing tapes to outline and prepare order	0 90 135 00/hr	121 50
6/14/2001	JKH	Planning strategy with Mr. Hadley, Reviewing tape recorded for preparation of Order	0 30 135 00/hr	40 50
6/19/2001	JKH	Listening to tape of hearing and outlining order	0 40 135 00/hr	54 00
6/20/2001	JKH	Preparing Order on Summary Judgment Motions, Reviewing audio tape	0 60 135 00/hr	81 00
6/26/2001	JKH	Reviewing portions of hearing, Drafting and revising Order	1 20 135 00/hr	162 00
6/29/2001	GBH	Met with Bryce Dixon	0 50 180 00/hr	90 00
	<del>JKH</del>	<del>Investigating status of Dan Smith's license</del>	<del>0 30 135 00/hr</del>	<del>40 50</del>
7/2/2001	JKH	<del>Telephone conversation with Division of Occupational and Professional Licensing</del>	<del>0 20 135 00/hr</del>	<del>27 00</del>
7/5/2001	JKH	Reviewing fax from Mr. Dixon	0 20 135 00/hr	27 00
	GBH	Telephone conversation with Bryce Dixon and client	0 20 180 00/hr	36 00
7/6/2001	JKH	Planning strategy with Mr. Hadley, Reviewing audio tape of hearing, Telephone call to Mr. Dixon's office	0 30 135 00/hr	40 50
7/11/2001	JKH	Discussing strategy with Mr. Hadley, Reviewing and analyzing letter from Mr. Dixon	0 30 135 00/hr	40 50
7/12/2001	JKH	Planning strategy with Mr. Hadley	0 20 135 00/hr	27 00
7/18/2001	JKH	Making decisions to Order, Drafting letter to Mr. Dixon	1 70 135 00/hr	229 50
7/19/2001	JKH	Revising and sending letter to Order to Mr. Dixon	0 20 135 00/hr	27 00
7/30/2001	JKH	Discussing strategy with Mr. Hadley, Reviewing letter from Mr. Dixon, Outlining response	0 30 135 00/hr	40 50
7/31/2001	JKH	Discussing strategy with Mr. Hadley, Planning for response to Dixon letter	0 20 135 00/hr	27 00
8/1/2001	JKH	Telephone conversation with client	0 20 135 00/hr	27 00
8/2/2001	JKH	Outlining response to Mr. Dixon	0 60 135 00/hr	81 00
8/3/2001	JKH	Draft letter to Mr. Dixon, Making revisions to proposed Order, Telephone call to Judge Howard's clerk	1 20 135 00/hr	162 00
8/9/2001	JKH	Telephone conversation with Mr. Dixon, Revising Order, Faxing Order to Mr. Dixon	0 40 135 00/hr	54 00
8/10/2001	JKH	Telephone conversation with Mr. Dixon	0 10 135 00/hr	13 50
8/13/2001	JKH	Reviewing fax from Mr. Dixon, Telephone conversation with Court, Reviewing letter from Mr. Dixon	0 30 135 00/hr	40 50

8/15/2001	JKH	Telephone conversation with Fillmore Courthouse, Telephone call to Judge Howard's chambers Preparing letter to Judge Howard	0 40 135 00/hr	54 00
8/16/2001	JKH	Delivering Order to Judge Howard, Obtaining Judge's signature on Order	0 40 135 00/hr	54 00
9/5/2001	GBH	Telephone conversation with Dixon's office	0 10 180 00/hr	18 00
	GBH	Conference with Client	0 30 180 00/hr	NO CHARGE
9/7/2001	GBH	Met with Mary	8 00 180 00/hr	NO CHARGE
9/8/2001	JKH	Discussing strategy with Mr Hadley	0 20 135 00/hr	27 00
9/9/2001	JKH	Legal research re suggestions of death and substitution of parties, Reviewing discovery requests, Planning strategy with Mr Hadley	0 90 135 00/hr	121 50
9/10/2001	GBH	Conference with client	0 40 180 00/hr	72 00
9/12/2001	GBH	Work on expert	1 00 180 00/hr	NO CHARGE
9/13/2001	GBH	Locate expert, Call client	0 50 180 00/hr	90 00
9/14/2001	JKH	Preparing responses to discovery requests	0 40 135 00/hr	54 00
9/19/2001	JKH	Preparing discovery responses	0 50 135 00/hr	67 50
9/20/2001	JKH	Reviewing pleadings and affidavits in preparing discover responses	0 30 135 00/hr	40 50
9/21/2001	JKH	Reviewing letters and other documentation in file, Outlining discovery responses, legal research Telephone conversation with client Preparing responses	3 40 135 00/hr	459 00
9/25/2001	JKH	Draft and revise discovery responses, Reviewing documentation from client, Conversation with client	2 70 135 00/hr	364 50
	JKH	Preparing responses to Requests for Admissions	0 50 135 00/hr	67 50
9/26/2001	JKH	Telephone Conversation with Client	0 10 135 00/hr	13 50
10/1/2001	JKH	Revising and drafting Responses to Requests for Admissions, Reviewing photographs and notes from client	0 50 135 00/hr	67 50
10/2/2001	JKH	Drafting and revising discovery responses	0 50 135 00/hr	67 50
10/3/2001	JKH	Final drafting of discovery responses Telephone conversation with client	2 90 135 00/hr	391 50
10/4/2001	GBH	Review Response to Admissions	0 10 180 00/hr	18 00
	JKH	Telephone conversation with client, faxing discovery to Mr Dixon	0 60 135 00/hr	81 00
	JKH	Telephone conversation with Mr Dixon, preparing Certificate of Service	0 40 135 00/hr	54 00
10/5/2001	GBH	Telephone conversation with Expert Lynn Larsen	0 20 180 00/hr	36 00
10/8/2001	GBH	Organize Trial Notebook, Draft letter to Expert	3 00 180 00/hr	540 00
10/15/2001	JKH	Reviewing signed discovery responses from client and note	0 10 135 00/hr	13 50
10/16/2001	JKH	Preparing and mailing new Certificate of Service	0 30 135 00/hr	40 50

11/8/2001	JKH	Planning strategy with Mr Hadley, Legal Research and analysis, Preparing Motion for Substitution and Memorandum in Support Telephone conversation with client	1 90 135 00/hr	256 50
11/9/2001	GBH	Conference with client	0 10 180 00/hr	18 00
11/13/2001	GBH	Telephone conversation with Expert	0 10 180 00/hr	18 00
11/20/2001	GBH	Draft letter	0 10 180 00/hr	18 00
11/27/2001	GBH	Draft Notice and Order	0 30 180 00/hr	54 00
11/28/2001	JKH	Telephone conversation with client	0 20 135 00/hr	27 00
12/24/2001	GBH	Conference with client	0 40 180 00/hr	72 00
12/31/2001	JKH	Review expert's report on building code violations	0 20 135 00/hr	27 00
1/18/2002	JKH	Review and analyze Expert Report, Legal research and analysis, Telephone call to Project Analyst, Planning strategy	1 50 135 00/hr	202 50
1/22/2002	JKH	Telephone conversation with Sande @ Project Analysts, Review prior correspondence with Dixon, Telephone conversation with client, Outlining and Drafting letter to Dixon	2 00 135 00/hr	270 00
1/23/2002	JKH	Prepare letter to Mr Dixon, Telephone conversation with Mr Dixon, Legal research and analysis	1 30 135 00/hr	175 50
1/28/2002	JKH	Prepare strategy with Mr Hadley, Telephone conference with client, etc	1 20 135 00/hr	NO CHARGE
	GBH	Analyze strategy, Consult with client	1 20 180 00/hr	216 00
1/29/2002	GBH	Conference with client	0 10 180 00/hr	18 00
1/30/2002	JKH	Prepare stipulated discovery plan, Motion, Order, Legal research	0 90 135 00/hr	121 50
1/31/2002	JKH	Revise stipulated discovery plan, Motion and Scheduling Order, Prepare cover letter for Mr Dixon	0 40 135 00/hr	54 00
2/1/2001	JKH	Discuss strategy, Telephone call to Project Analysts, Planning strategy, Outline discovery requests	1 50 135 00/hr	202 50
2/4/2002	JKH	Prepare discovery requests and initial disclosures	0 60 135 00/hr	81 00
2/5/2002	JKH	Revise schedule order and fax to Mr Dixon	0 20 135 00/hr	27 00
2/8/2002	JKH	Prepare letter to Mr Dixon	0 40 135 00/hr	54 00
2/11/2002	JKH	Review letter from Mr Dixon's office	0 10 135 00/hr	13 50
2/19/2002	JKH	Telephone call to Mr Dixon and Mr Fisher, Prepare and fax letter to opposing counsel	0 40 135 00/hr	54 00
	JKH	Prepare discovery requests	1 00 135 00/hr	135 00
2/21/2002	JKH	Telephone conversation with Nathan Fisher, Telephone conversation with client	0 40 135 00/hr	54 00
2/22/2002	JKH	Review proposed scheduling order from opposing counsel	0 10 135 00/hr	13 50
2/26/2002	JKH	Telephone conversation with client, Plan strategy with Mr Hadley	0 80 135 00/hr	108 00
	GBH	Various calls to Court and Bryce Dixon, Review Scheduling Orders, Draft letter to counsel	1 10 180 00/hr	198 00
2/27/2002	GBH	Call Bryce, Call court, Draft letter	0 30 180 00/hr	54 00
3/1/2002	GBH	Telephone conversation with Bryce, court and Mary	0 40 180 00/hr	72 00



3/1/2002	JKH	Legal research; Review documents; Draft Motion for scheduling conference and order and the supporting memo	1.20	162.00
3/4/2002	JKH	Revise and draft motion and memo re: scheduling order	135.00/hr 0.20	27.00
3/5/2002	JKH	Review fax from Mr. Fisher	135.00/hr 0.10	13.50
3/7/2002	JKH	Telephone conversation with Mr. Fishers office	135.00/hr 0.10	13.50
3/22/2002	GBH	Meeting with Expert	135.00/hr 0.10	18.00
3/25/2002	JKH	Review proposed interrogatories and requests from experts; Prepare further interrogatories	180.00/hr 0.40	54.00
3/26/2002	JKH	Review and revise stipulated discovery plan, motion and order; Preparing letter to opposing counsel	135.00/hr 0.40	54.00
3/28/2002	JKH	Meeting with law clerk re: discovery, Phone conversation with Nathan Fisher	135.00/hr 0.40	54.00
4/3/2002	JKH	Telephone conversation with law clerk re: discovery	135.00/hr 0.10	13.50
4/8/2002	JKH	Prepare formal discovery requests	135.00/hr 1.50	202.50
4/9/2002	JKH	Prepare formal discovery requests; Review int. disc. rule	135.00/hr 0.40	54.00
4/12/2002	JKH	Telephone conversation with opposing counsel office	135.00/hr 0.10	13.50
4/15/2002	JKH	Review letter from opposing counsel; Telephone conversation with opposing counsel; Prepare initial disclosures	135.00/hr 0.70	94.50
4/17/2002	JKH	Prepare letter to Court; Legal research; Finalize disclosures	135.00/hr 0.80	108.00
4/18/2002	JKH	Telephone conversation with client; Finalize discovery	135.00/hr 1.30	175.50
4/25/2002	JKH	Review faxed initial disclosures from opposing counsel	135.00/hr 0.20	27.00
4/29/2002	JKH	Review; Planning strategy with Mr. Hadley	135.00/hr 0.20	27.00
5/22/2002	JKH	Review 2nd set of interrogatories from Smiths	150.00/hr 0.20	30.00
5/24/2002	JKH	Prepare responses to discovery; legal research on expert	150.00/hr 1.00	150.00
5/29/2002	JKH	Prepare outlining expert reports	150.00/hr 0.40	60.00
5/31/2002	RC	Read and outline research	60.00/hr 0.20	12.00
6/4/2002	RC	Research and writing	60.00/hr 2.50	150.00
	RC	Research and writing	60.00/hr 1.50	90.00
	JKH	Prepare planning strategy with Mr. Hadley	60.00/hr 0.40	60.00
6/5/2002	JKH	Outline information needed in expert reports	150.00/hr 0.50	75.00
6/6/2002	RC	Research	150.00/hr 0.60	36.00
6/7/2002	RC	Prepare proof chart	60.00/hr 0.60	36.00
6/10/2002	GBH	Meeting with Mr. Haslam and law clerk	60.00/hr 0.70	126.00
	JKH	Meeting with Mr. Hadley and law clerk	180.00/hr 0.70	NO CHARGE
			150.00/hr	

6/10/2002	RC	Meeting with Mr Hadley and Mr Haslam	0 70	NO CHARGE
			60 00/hr	
	RC	Prepare proof chart and meeting	1 50	90 00
			60 00/hr	
	JKH	Legal research re amendment of complaint	0 20	30 00
			150 00/hr	
6/11/2002	RC	Research	0 30	18 00
			60 00/hr	
6/12/2002	JKH	Prepare expert reports, subpoena to City of Fillmore	1 30	195 00
		Planning strategy	150 00/hr	
6/13/2002	JKH	Telephone conversation with Mark O'Barr	0 30	45 00
			150 00/hr	
6/14/2002	JKH	Telephone conversation with Nathan Fisher, Phone	1 00	150 00
		conversation with Jason Bullock, Prepare letter to O'Barr	150 00/hr	
6/17/2002	JKH	Prepare letter to Mr Fisher, Telephone conversation with Mr	1 10	165 00
		Bullock, Prepare reports, Outline defects for discovery	150 00/hr	
6/19/2002	JKH	Review new discovery requests from Smiths, Prepare letter	0 80	120 00
		to Sheriff, Phone conversation with client	150 00/hr	
	JKH	Planning strategy with Mr Hadley and law clerk	0 40	60 00
			150 00/hr	
6/20/2002	GBH	Draft letter, Consultation with client, Retain appraiser	0 80	144 00
			180 00/hr	
6/24/2002	JKH	Telephone conversation with client, Review discovery	0 40	60 00
		requests and outline responses	150 00/hr	
6/25/2002	JKH	Prepare expert reports, Legal research	0 40	60 00
			150 00/hr	
6/26/2002	JKH	Telephone conversation with Mr Hatch, Planning strategy	0 70	105 00
		with Mr Hadley, Prepare discovery responses Legal	150 00/hr	
		research re Motion to Amend (cause of action)		
6/27/2002	JKH	Telephone conversation with Mr Steenblik, Finalize expert	1 70	255 00
		report for Radford and Steenblik, Prepare letter to Mr Fisher	150 00/hr	
		For professional services rendered	190 50	\$22,373 50
		Additional Charges		- 145.50
				Total \$ 22,228.00
8/24/2000	GBH	Filing Fee	Qty/Price 1	120 00
			120 00	
12/13/2000	GBH	Service of Summons and Complaint to Mr & Mrs Smith	1	31 00
			31 00	
2/6/2001	GBH	Long Distance	1	1 95
			1 95	
2/9/2001	GBH	Jury Demand	1	50 00
			50 00	
3/8/2001	GBH	Long Distance	1	13 36
			13 36	
4/9/2001	GBH	Long Distance	1	5 60
			5 60	
6/4/2001	GBH	Order tapes	1	16 00
			16 00	
6/7/2001	GBH	Long Distance	1	3 22
			3.22	
7/11/2001	GBH	Long Distance	1	4 03
			4.03	
8/16/2001	JKH	Copy Costs	1	3 45
			3 45	
9/6/2001	GBH	Copy Costs	15	2 25
			0 15	

9/10/2001	GBH	Long Distance	1	1.21
			1.21	
9/12/2001	GBH	Copy Costs	1	0.60
			0.60	
9/21/2001	GBH	Copy Costs	2	0.30
			0.15	
10/4/2001	GBH	Postage	1	2.57
			2.57	
	GBH	Copy Costs	31	4.65
			0.15	
10/8/2001	GBH	Copy Costs	18	2.70
			0.15	
10/11/2001	GBH	Long Distance	1	10.56
			10.56	
10/16/2001	GBH	Copy Costs	15	2.25
			0.15	
10/26/2001	GBH	Copy Costs	3	0.45
			0.15	
10/29/2001	GBH	FedEx	1	16.12
			16.12	
11/14/2001	GBH	Long Distance	1	5.36
			5.36	
11/20/2001	GBH	Copy Costs	2	0.30
			0.15	
11/28/2001	GBH	Copy Costs	8	1.20
			0.15	
12/10/2001	GBH	Long Distance	1	3.25
			3.25	
1/14/2002	GBH	Long Distance	1	2.76
			2.76	
1/28/2002	JKH	Copy Costs	57	8.55
			0.15	
2/11/2002	GBH	Long Distance	1	3.94
			3.94	
3/15/2002	GBH	Long Distance	1	3.75
			3.75	
3/19/2002	GBH	Flat fee for analysis of discovery fee	1	115.00
			115.00	
3/20/2002	GBH		0.5	30.00
			60.00	
3/25/2002	GBH		0.5	30.00
			60.00	
3/28/2002	GBH		2.5	150.00
			60.00	
4/17/2002	GBH	Copy Costs	10	1.50
			0.15	
4/30/2002	JKH	Long Distance	1	2.50
			2.50	
5/6/2002	GBH	Long Distance	1	26.67
			26.67	
5/9/2002	JKH	Long Distance	1	2.10
			2.10	
5/31/2002	GBH	Copy Costs	60	9.00
			0.15	
6/19/2002	GBH	Subpoena Fee	1	7.00
			7.00	
6/27/2002	JKH	Copy Costs	80	12.00
			0.15	
Total Costs				<u>\$1,184.52</u>



Gregory B Hadley  
 Suite 260 Century Park Plaza  
 2696 North University Avenue  
 Provo, UT 84604

Invoice submitted to  
 Mary Moore  
 155 West 300 South  
 Fillmore UT 84631

June 17, 2005

Professional Services

		<u>Hrs/Rate</u>	<u>Amount</u>
7/2/2002	J Telephone conversation with with Marlen Stevens, Searching for alternate appraisers, etc	0 60 150 00/hr	90 00
7/3/2002	J Telephone conversation with client	0 40 150 00/hr	60 00
7/8/2002	J Telephone conversation with Steve Hatch	0 30 150 00/hr	45 00
	J Preparing discovery responses and motion to amend	0 50 150 00/hr	75 00
7/9/2002	J Telephone conversation with city employees re subpoena, Telephone conversation with Sheriff's office, Reviewing fax from Millard County Sheriff, etc	1 00 150 00/hr	150 00
7/12/2002	GBH Reviewing subpoenaed documents from City of Fillmore	0 30 180 00/hr	54 00
	J Reviewing subpoenaed documents from City of Fillmore	0 30 150 00/hr	45 00
7/16/2002	J Analyzing documentation from city, Planning strategy, Telephone conversation with client	0 80 150 00/hr	120 00
	RC Proof Chart, Research, etc	2 00 50 00/hr	100 00
	GBH Talk with appraiser	0 10 180 00/hr	18 00
7/19/2002	J Legal research, Preparing motion to amend	0 80 150 00/hr	120 00
7/29/2002	J Draft Motion to Amend and Memorandum	0 60 150 00/hr	90 00
7/31/2002	J Telephone conversation with Nathan Fisher	0 20 150 00/hr	30 00
8/1/2002	J Preparing letter to opposing council and amended complaint	0 80 150 00/hr	120 00
8/13/2002	J Telephone conversation with Mr Fisher	0 10 150 00/hr	15 00

		<u>Hrs/Rate</u>	<u>Amount</u>
8/19/2002	J Telephone conversation with Mr Fisher and Mr Dixon, reviewing letters from opposing counsel	0 60 150 00/hr	90 00
8/20/2002	J Preparing Notice of Deposition, drafting letter to opposing counsel drafting letter to client	0 90 150 00/hr	135 00
8/21/2002	J Legal research, finalizing Motion for Leave to Amend Complaint and Memorandum, Revising letter to opposing counsel	1 10 150 00/hr	165 00
9/5/2002	J Legal research, review documents, preparing response to Third Set of Dis	1 20 150 00/hr	180 00
9/10/2002	GBH Draft letter to Mary, review answers	0 10 180 00/hr	18 00
9/11/2002	J Preparing expert report for Hatch, telephone call to Mr Hatch	0 50 150 00/hr	75 00
9/16/2002	J Reviewing opposing memorandum, Discussing strategy with Mr Hadley, telephone conversation with Mr Hatch	0 60 150 00/hr	90 00
9/19/2002	J Legal research and copies at BYU law school, review and analyze opposing memo, Review correspondence, prior court date, and other documents, Draft and revise Reply Memo,	4 20 150 00/hr	630 00
9/20/2002	LC  <i>work not related to Smith Case</i>	0 50 90 00/hr	<del>45 00</del> <i>Deba</i>
9/23/2002	GBH Consultation with Mary	0 10 180 00/hr	NO CHARGE
9/24/2002	J Reviewing letter from Mr Fisher	0 10 150 00/hr	15 00
9/26/2002	J Meeting with Mr Hadley to discuss strategy	0 10 150 00/hr	15 00
9/27/2002	J Preparing Notice to Submit, preparing letter and copies to Mr Fisher	0 50 150 00/hr	75 00
10/2/2002	GBH  <i>Same as Above</i>	0 30 180 00/hr	<del>54 00</del> <i>Deba</i>
	GBH Talk with Bryce Dixon (Smith)	0 20 180 00/hr	36 00
10/3/2002	J Planning strategy with Mr Hadley	0 20 150 00/hr	30 00
	GBH Consultation with Mary	0 30 180 00/hr	54 00
10/9/2002	J Preparing letter to Mr Fisher	0 40 150 00/hr	60 00
10/10/2002	J Legal research, Revising letter to opposing counsel, Sending documents to opposing counsel	0 40 150 00/hr	60 00
10/29/2002	GBH Consultation with client and review motions	0 80 180 00/hr	144 00
	J Reviewing Motion and Strategy with Greg	0 50 150 00/hr	NO CHARGE
10/30/2002	GBH Telephone court clerk, Draft Notice to Submit and Motion for Enlargement	0 70 180 00/hr	NO CHARGE
11/7/2002	GBH Telephone conversation with court clerk, draft Order, Review Motion Talk with Defendant's counsel	1 40 180 00/hr	252 00
11/8/2002	GBH Talk with Bryce Dixon	0 10 180 00/hr	18 00
11/11/2002	GBH Draft Memorialization of Agreement and letter	0 30 180 00/hr	54 00
11/12/2002	GBH Draft and Finalize Motion for Summary Judgment	0 50 180 00/hr	90 00

			<u>Hrs/Rate</u>	<u>Amount</u>
11/14/2002	GBH	Meeting with Court Clerk and Experts	0 80 180 00/hr	144 00
11/18/2002	GBH	Talk with Nathan, Review Code, Draft letter to Jason Bullock	0 20 180 00/hr	36 00
11/20/2002	GBH	Draft Expert Qualifications letter and Objection to hearing	1 00 180 00/hr	180 00
11/21/2002	GBH	Talk with Bryce and Consultation with Mary	1 40 180 00/hr	252 00
	GBH	Reviewing letter from Bryce and draft response, review letter from Nathan	0 30 180 00/hr	54 00
11/22/2002	GBH	Reviewing and organizing file	5 00 180 00/hr	NO CHARGE
	J	Telephone conference with Mr Hadley	0 10 150 00/hr	15 00
11/23/2002	GBH	Draft trial preparation outline and go to Law Library	3 40 180 00/hr	NO CHARGE
11/25/2002	GBH	Talk with Mary, Jim and Nathan Fisher	1 50 180 00/hr	270 00
	J	Reviewing file, discuss strategy with Mr Hadley, telephone conference with client, legal research	1 40 150 00/hr	210 00
11/26/2002	GBH	Meeting with Jim, Consultation with Client and Talk with Aaron	1 00 180 00/hr	180 00
11/27/2002	GBH	Talk with court, Draft Notice	0 30 180 00/hr	54 00
	J	Legal research and analysis, planning strategy with Mr Hadley	2 00 150 00/hr	300 00
11/28/2002	GBH	Preparing file	1 50 180 00/hr	NO CHARGE
11/29/2002	GBH	Reviewing discovery, work on file	3 00 180 00/hr	NO CHARGE
	J	Planning strategy with Mr Hadley	0 20 150 00/hr	30 00
11/30/2002	GBH	Reviewing discovery and documents	1 40 180 00/hr	NO CHARGE
	GBH	Reviewing Plaintiff's discovery and draft objections and answers and letter	1 00 180 00/hr	180 00
12/2/2002	GBH	Consultation with client, finalize answers and objections to Discovery	2 30 180 00/hr	414 00
12/3/2002	GBH	Call Court clerk, draft request, review notes and consultation with client	1 70 180 00/hr	306 00
12/4/2002	GBH	Planning strategy for hearing, call Marty	0 40 180 00/hr	72 00
	J	Planning strategy with Mr Hadley	0 50 150 00/hr	75 00
12/6/2002	J	Prepare Verified Correction to Affidavit and Memorandum	0 50 150 00/hr	75 00
1/2/2003	GBH	Reviewing documents & Letters from Mary	0 50 180 00/hr	90 00
	GBH	Talk with Mary and Court Clerk	0 30 180 00/hr	NO CHARGE
1/3/2003	J	Planning strategy with Mr Hadley	0 40 150 00/hr	NO CHARGE

			<u>Hrs/Rate</u>	<u>Amount</u>
1/8/2003	J	Reviewing prior correspondence and pleadings, Legal research at BYU, drafting Opposing Memo to Motion to Compel/for sanctions	4 10 150 00/hr	615 00
1/9/2003	GBH	Attend Telephonic Oral Argument, Consultation with Client, Call Court Clerk, Draft notices & Letters, Talk with Mary and Nathan Fisher various times, Review Rules	4 00 180 00/hr	720 00
	J	Preparing for telephone hearing, met with Mr Hadley, telephone hearing	1 30 150 00/hr	NO CHARGE
1/10/2003	GBH	various calls and consultation with client, Call Rex and talk with Mary	1 30 180 00/hr	234 00
	J	Legal research at law library, drafting and revising opposing memo	2 10 150 00/hr	315 00
1/13/2003	GBH	Talk with Rex Radford (twice), call Lloyd and Mary, Talk with Nathan Fisher, Draft letter	1 80 180 00/hr	324 00
1/14/2003	GBH	Talk with Stephen Hatch and Rex Radford, Talk with Nathan	1 00 180 00/hr	180 00
1/15/2003	GBH	Talk with Rex Radford, Court, Mary and Nathan	1 20 180 00/hr	216 00
	GBH	Conference call with Court and Nathan, Call witnesses, consultation with Mary, work on Order	2 00 180 00/hr	360 00
1/16/2003	J	Planning strategy with Mr Hadley	0 20 150 00/hr	30 00
1/17/2003	GBH	Review notes, draft Am Sch Order and Cover letter to Nathan Fisher Work on Designation	1 20 180 00/hr	216 00
1/20/2003	GBH	Review prior designation and Draft designations of experts	1 50 180 00/hr	270 00
1/23/2003	J	Legal research at BYU Law Library, Preparing response to motion for sanctions or to compel	2 10 150 00/hr	315 00
1/27/2003	GBH	Finalize Memo	0 50 180 00/hr	90 00
1/28/2003	GBH	Reviewing Nathan's letter, call Jack Peterson, Consultation with client	1 00 180 00/hr	180 00
1/29/2003	GBH	Talk with Nathan Fisher, Consultation with Mary, Call Project Analysts	1 00 180 00/hr	180 00
1/31/2003	GBH	Talk with Nathan Fisher, Jason & Mark-Draft Letter	0 50 180 00/hr	90 00
2/3/2003	GBH	Talk with Mary	0 10 180 00/hr	18 00
2/4/2003	GBH	Telephone calls to Nathan Fisher, Meet with clerk	1 00 180 00/hr	180 00
2/5/2003	GBH	Review Briefs and prepare for Oral Arguments	11 10 180 00/hr	1 998 00
2/6/2003	GBH	Prepare Expert outline, Go to Fillmore, Argue Case, Travel Home	7 50 180 00/hr	1 350 00
	GBH	Meet with Experts and Mary's house	1 00 180 00/hr	180 00
2/10/2003	GBH	Talk with Mary, Call Terry Kemp, organize letter to Mary and Draft do list organization, call Jason, outline preparedness schedule with Terry	3 50 180 00/hr	630 00
	TK	Meeting with Mr Hadley to gather facts	1 90 75 00/hr	142 50
2/11/2003	TK	Legal research	1 10 75 00/hr	82 50
	TK	Legal research	0 80 75 00/hr	60 00

			<u>Hrs/Rate</u>	<u>Amount</u>
2/11/2003	TK	Legal research	0 90 75 00/hr	67 50
	TK	Legal research	0 75 75 00/hr	56 25
2/12/2003	TK	Draft Questions and Comments	0 25 75 00/hr	18 75
	TK	Legal research	0 25 75 00/hr	18 75
	TK	Finish Draftings	1 50 75 00/hr	112 50
	TK	Reviewing Pleadings	1 60 75 00/hr	120 00
2/13/2003	TK	Meeting with Mr Hadley on Fact gathering	0 30 75 00/hr	22 50
	TK	Legal research at BYU Law Library	0 75 75 00/hr	56 25
	TK	Talk with Mr Hadley on Issues	0 79 75 00/hr	58 88
	TK	Reviewing contract	0 25 75 00/hr	18 75
	TK	Reviewing and write UCA provision	0 60 75 00/hr	45 00
	TK	Draft Memos	1 20 75 00/hr	90 00
	TK	Telephone conversation with Holman	0 75 75 00/hr	56 25
	TK	Draft Memos	1 25 75 00/hr	93 75
	TK	Drafting Memos from 6 55 to 8 10	1 25 75 00/hr	93 75
	TK	Finish Drafting Memos	0 75 75 00/hr	56 25
	GBH	Draft Orders, Objections, letter to Nathan, Consultation with client and experts, Draft Answers to Discovery	7 50 180 00/hr	1,350 00
2/14/2003	TK	Finalize, Type & Deliver Memos	0 75 75 00/hr	56 25
	GBH	Travel to and From Fillmore	3 20 180 00/hr	576 00
	GBH	Meeting with Experts, Go to Courthouse & City Offices, Draft objections, finish answers	5 00 180 00/hr	900 00
2/15/2003	LC	Legal research for Proof Sheet	4 00 60 00/hr	240 00
2/17/2003	TK	<del>Legal research, Draft Maack Case</del>	1 80 75 00/hr	<del>135 00</del>
	TK	Meeting with Mr Hadley	0 20 75 00/hr	15 00
	TK	<del>Legal research and Draft Maack Case</del>	1 50 75 00/hr	<del>112 50</del>
	TK	Legal research and draft Schafrir case	1 30 75 00/hr	97 50
	TK	Draft Memo Questions and Ideas	0 25 75 00/hr	18 75



		<u>Hrs/Rate</u>	<u>Amount</u>
2/17/2003	TK Finalize Type and Attempt Delivery	1 25	93 75
		75 00/hr	
	GBH Prepare for Depositions	2 00	360 00
		180 00/hr	
2/18/2003	TK Meeting with Mr Hadley	0 20	15 00
		75 00/hr	
	GBH Travel to Salt Lake, Attend Lloyd's Deposition, Travel to Fillmore	11 80	2,124 00
	Meeting with Mary and Friend	180 00/hr	
2/19/2003	GBH Talk with Experts, organize Depo questions, Consultation with Mary	8 50	1 530 00
	Attend Mark O'Barr's Depo, Attend Mary's Depo, Meet with Jason	180 00/hr	
	Bullock		
2/20/2003	GBH Prepare for Jack and Jason's Depositions, Attend Depos,	13 10	2,358 00
	Consultation with Mary	180 00/hr	
2/21/2003	GBH Prepare for and take Dan and Carol's Deposition, Travel to Provo	11 00	1,980 00
		180 00/hr	
2/26/2003	GBH Talk with Bryce	0 10	18 00
		180 00/hr	
3/5/2003	LC Legal research	0 70	42 00
		60 00/hr	
3/6/2003	LC Legal research	0 20	12 00
		60 00/hr	
	LC Legal research	1 30	78 00
		60 00/hr	
	GBH Consultation with Mary, call Experts	1 10	198 00
		180 00/hr	
	GBH Talk with Jason	0 20	36 00
		180 00/hr	
3/7/2003	LC Legal research	0 70	42 00
		60 00/hr	
3/11/2003	GBH Review letters, talk with Bryce, Rex and Jason	0 60	108 00
		180 00/hr	
3/12/2003	LC Draft Memo	1 00	60 00
		60 00/hr	
	LC Draft Memo	1 50	90 00
		60 00/hr	
3/14/2003	GBH Review Defendant's various correspondence, clerk's brief, draft letter	1 60	288 00
	to counsel, consultation with Mary, call Mark O'Barr, Jason and Rex	180 00/hr	
3/17/2003	GBH Review Mary's Depo, attend depos of Mary and Rex	11 50	2,070 00
		180 00/hr	
3/18/2003	GBH Consultation with Mary, review Jason questions	0 50	90 00
		180 00/hr	
3/19/2003	GBH Talk with all experts, talk with Mary	1 00	180 00
		180 00/hr	
	GBH Prepare for Barrett Depo	7 20	1 296 00
		180 00/hr	
3/20/2003	GBH Final preparation and attend depositions	7 20	1,296 00
		180 00/hr	
3/31/2003	GBH Consultation with client, talk with experts	1 10	198 00
		180 00/hr	
4/1/2003	GBH Talk with Clerk and Robert Stanley	0 20	36 00
		180 00/hr	
4/4/2003	GBH Review Deposition and Consultation with Mary	3 30	594 00
		180 00/hr	

			<u>Hrs/Rate</u>	<u>Amount</u>
4/9/2003	GBH	Review Code on signing of depo, talk with Mary	0.50 180.00/hr	90.00
4/22/2003	GBH	Meeting with Jason Bullock	0.30 180.00/hr	54.00
4/28/2003	GBH	Talk with Lloyd	0.30 180.00/hr	54.00
5/8/2003	GBH	Consultation with Mary	0.20 180.00/hr	36.00
5/14/2003	GBH	Call Experts and Review Moore Deposition	1.00 180.00/hr	180.00
5/15/2003	GBH	Meeting with Clerk, Talk with Mary	0.50 180.00/hr	90.00
5/30/2003	GBH	Talk with Project Analysts	0.10 180.00/hr	18.00
6/4/2003	GBH	Reviewing memos; Draft response; Talk with Court Clerk	1.20 180.00/hr	216.00
6/10/2003	GBH	Reviewing memo	2.40 180.00/hr	432.00
6/11/2003	GBH	Preparing Points and Authorities.	4.50 180.00/hr	810.00
6/12/2003	GBH	Talk with Jason	0.10 180.00/hr	18.00
6/13/2003	GBH	Consultation with Mary; Draft letter to Judge; Review Dixon letter; Work a brief for expert fees.	1.00 180.00/hr	180.00
	LC	Drafting Expert Witness Fees; Meeting with Greg; Drafting Motion and Memo.	6.00 60.00/hr	360.00
6/14/2003	GBH	Preparing Briefs	4.00 180.00/hr	720.00
	LC	Drafting a memo; Meet with Greg.	8.50 60.00/hr	510.00
6/16/2003	GBH	Talk with Jason - Mark; Consultation with Marty- Finalize Motion and Memo; Memo on S.J. Motion	16.00 180.00/hr	2,880.00
	LC	Redraft Moore S.J.; Copy and Mail.	17.00 60.00/hr	1,020.00
6/18/2003	GBH	Reviewing Bill from Mike and Law Clerk	0.10 180.00/hr	18.00
6/20/2003	GBH	Reviewing bill; Call Mary; Draft tender onto court; Draft letter to Mike Barrett.	0.40 180.00/hr	72.00
6/23/2003	GBH	Talk with Court clerk and Mary.	0.70 180.00/hr	126.00
6/24/2003	GBH	Reviewing Brief; Reply to Memo; Draft Notice.	0.60 180.00/hr	108.00
6/26/2003	GBH	Talk with Court Clerk.	0.10 180.00/hr	18.00
7/2/2003	LC	Draft Objection to Reply	2.50 60.00/hr	150.00
7/3/2003	GBH	Work on Memo on Excessive paged Brief	1.00 180.00/hr	180.00
	LC	Legal research	2.00 60.00/hr	120.00
7/8/2003	LC	Draft Reply	5.00 60.00/hr	NO CHARGE

			<u>Qty/Price</u>	<u>Amount</u>
3/1/2003	GBH	Photocopies	83	12 45
			0 15	
3/3/2003	GBH	Photocopies	99	14 85
			0 15	
3/5/2003	GBH	Fees for Rick Tatton- Court Reporter	1	571 00
			571 00	
	GBH	Hotel for Deposition	1	137 04
			137 04	
3/6/2003	GBH	Postage for Smith's Expert Witness Report mailed to Sunrise Engineering, Project Analysts and Mary	1	3 87
			3 87	
3/10/2003	GBH	Long Distance Charges	1	33 04
			33 04	
3/17/2003	GBH	Develop Film	1	56 52
			56 52	
3/20/2003	GBH	Mike Barrett Fee	1	600 00
			600 00	
3/31/2003	GBH	Fees for Project Analyst	1	4,577 79
			4,577 79	
	GBH	Fees for Robert Stanley- Court Reporter	1	1,308 30
			1,308 30	
4/1/2003	GBH	Postage	1	1 00
			1 06	
4/9/2003	GBH	Long Distance Charges	1	20 14
			20 14	
4/22/2003	GBH	Reporter fee for Copies of Mary Moore and Rex Radford Deposition	1	403 20
			403 20	
4/30/2003	GBH	Photocopies	15	2 25
			0 15	
5/7/2003	GBH	4 Copies of Michael Barrett's Expert Report for Deposition	1	107 58
			107 58	
5/8/2003	GBH	Reporter fee for Deposition of Mike Barrett	1	420 00
			420 00	
5/9/2003	GBH	Long Distance Charges	1	11 98
			11 98	
5/15/2003	GBH	Project Analyst Bill (Lloyd Steenblik)	1	170 40
			170 40	
6/16/2003	GBH	Expert Fee - Jason Bullock	1	1,997 50
			1,997 50	
	GBH	Expert Fee - Mark O'Barr	1	1,020 00
			1,020 00	
	GBH	Expert Fee - Tender into Court	1	1,375 00
			1,375 00	
8/1/2003	GBH	Photocopies	11	1 65
			0 15	
8/12/2003	GBH	Long Distance Charges for July	1	2 99
			2 99	
10/1/2003	GBH	Photocopies	24	3 60
			0 15	
10/2/2003	GBH	Postage	1	2 26
			2 26	
10/16/2003	GBH	Long Distance Charges	1	15 51
			15 51	

		<u>Qty/Price</u>	<u>Amount</u>
10/20/2003	GBH FedEx fees for mailing of deposition to Project Analysts	1	37 32
		37 32	
10/29/2003	GBH Postage	1	1 60
		1 66	
10/31/2003	GBH Photocopies	55	8 25
		0 15	
11/7/2003	GBH Long Distance Charges	1	9 44
		9 44	
	GBH Expert Witness- Lloyd Steenblik Invoice of Nov 6, 2003	1	298 60
		298 60	
12/1/2003	GBH Photocopies	11	1 65
		0 15	
12/5/2003	GBH Postage	1	1 52
		1 52	
12/11/2003	GBH Long Distance Charges	1	7 08
		7 08	
1/28/2004	GBH Long Distance Charges	1	4 93
		4 93	
1/31/2004	GBH Photocopies December 2003	39	5 85
		0 15	
	GBH Photocopies January 2004	2	0 30
		0 15	
2/2/2004	GBH Interest @ 18% APR	1	32 12
		32 12	
2/9/2004	GBH Prior Time and Balance Carried Forward from 2003	1	5 548 30
		5,548 30	
3/30/2004	GBH Long Distance Charges	1	3 21
		3 21	
3/31/2004	GBH Photocopies	68	10 20
		0 15	
	GBH Postage	1	1 20
		1 20	
4/29/2004	GBH Long Distance Charges	1	1 70
		1 70	
5/6/2004	GBH Postage	1	1 89
		1 89	
5/26/2004	GBH Postage	1	1 20
		1 20	
5/27/2004	GBH Long Distance Charges	1	8 70
		8 70	
5/28/2004	GBH Photocopies	55	8 25
		0 15	
6/30/2004	GBH Long Distance Charges for June	1	2 27
		2 27	
7/8/2004	GBH Witness Fee (for Jack Peterson)	1	18 50
		18 50	
	GBH Postage	1	1 57
		1 57	
7/9/2004	GBH Postage	1	37 23
		37 23	
	GBH Postage	1	3 37
		3 37	

		<u>Qty/Price</u>	<u>Amount</u>
7/12/2004	GBH Photocopies (Appeal)	1	16 50
		16 50	
7/13/2004	GBH Filing Fee (Appeal)	1	205 00
		205 00	
	GBH UPS charge for Overnight to Dixon (Appeal)	1	19 35
		19 35	
	GBH Postage	1	1 71
		1 71	
7/27/2004	GBH Long Distance Charges	1	32 62
		32 62	
7/30/2004	GBH Photocopies	216	32 40
		0 15	
9/1/2004	GBH Long Distance Charges	1	7 99
		7 99	
2/18/2005	GBH Witness Fees	1	74 00
		74 00	
	GBH Postage	1	2 77
		2 77	
2/28/2005	GBH Postage	1	2 12
		2 12	
	GBH Photocopies	141	21 15
		0 15	
	GBH Long Distance Charges	1	2 35
		2 35	
3/3/2005	GBH Postage	1	3 04
		3 04	
3/4/2005	GBH Duplicate copies of pictures to use as Exhibits at Trial	1	21 01
		21 04	
3/7/2005	GBH Postage	1	1 93
		1 98	
3/10/2005	GBH Hotel for Trial	1	282 76
		282 76	
	GBH Expert Fees for Project Analyst Paid Directly by Mary 10/20/00- \$65 00, 11/12/01- \$2,500 00, 2/10/02- \$3,287 49	1	5,852 49
		5,852 49	
	GBH Expert Fee for Project Analysts Trial Attendance and Prep	1	2 142 35
		2,142 35	
	GBH Expert Fees for Sunrise Engineering Paid Directly by Mary 8/9/00	1	78 00
		78 00	
	GBH Rex Radford Expert Fees (9 00 hours 2/6/03, 6 25 hours 3/14/03, 4 50 hours 3/17/03, 1 00 hour 3/20/03)	1	2 593 75
		2,593 75	
	GBH Expert Fee for Jason Bullock -Depo time 3/20/03 Never Paid by Smiths	1	382 50
		382 50	
	GBH Expert Fee for Jason Bullock Trial Attendance and Prep	1	850 00
		850 00	
3/11/2005	GBH Abstract Fee	1	40 00
		40 00	
3/18/2005	GBH Recorder fee	1	14 00
		14 00	
4/1/2005	GBH Photocopies	598	89 70
		0 15	
	GBH Postage	1	3 96
		3 96	

Mary Moore

Page 20

	<u>Qty/Price</u>	<u>Amount</u>
4/14/2005 GBH Photocopies	16	2 40
	0 15	
GBH Long Distance Charges	1	3 41
	3 41	
GBH Long Distance Charges	1	0 25
	0 25	
5/5/2005 GBH Photocopies	18	2 70
	0 15	
6/2/2005 GBH Long Distance Charges	1	0 13
	0 13	
Total costs		\$34 103 56