

2005

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Justin D. Heideman; Justin R. Elswick; Ascione, Heideman & Mckay; Attorneys for Appellants.
Gregory B. Hadley; Paul D. Dodd; Hadley & Dodd; Attorneys for Appellees.

Recommended Citation

Reply Brief, *Moore v. Smith*, No. 20050626 (Utah Court of Appeals, 2005).
https://digitalcommons.law.byu.edu/byu_ca2/5913

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

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

**WILLIAM MOORE and MARY
MOORE,**

Plaintiffs, Appellees and Cross-
Appellants

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,

Defendants, Appellants and Cross-
Appellees.

**REPLY BRIEF OF THE APPELLEE
/CROSS-APPELLANT**

Appellate Case No. 20050626-CA

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, MILLARD
COUNTY, STATE OF UTAH, FROM A FINAL JUDGMENT AND VARIOUS
ORDERS EMANATING THEREFROM, BEFORE THE HONORABLE
DONALD J. EYRE.

Justin D. Heideman (USB 8897)
Justin R. Elswick (USB 9153)
ASCIONE, HEIDEMAN & MCKAY,
L.L.C.
Attorneys for Appellants
2696 N. University Ave. Suite 180
Provo, Utah 84604
Telephone: (801) 812-1000
Facsimile: (801) 374-1724

Gregory B. Hadley (USB 3652)
Paul D. Dodd (USB 10675)
HADLEY•DODD
Attorneys for Appellees
2696 N. University Ave. Suite 260
Provo, Utah 84604
Telephone: (801) 377-4403
Facsimile: (801) 377-4411

FILED
UTAH APPELLATE COURTS
OCT 18 2006
UTAH APPELLATE COURTS
OCT 18 2006

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

**WILLIAM MOORE and MARY
MOORE,**

Plaintiffs, Appellees and Cross-
Appellants

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,

Defendants, Appellants and Cross-
Appellees.

**REPLY BRIEF OF THE APPELLEE
/CROSS-APPELLANT**

Appellate Case No. 20050626-CA

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, MILLARD
COUNTY, STATE OF UTAH, FROM A FINAL JUDGMENT AND VARIOUS
ORDERS EMANATING THEREFROM, BEFORE THE HONORABLE
DONALD J. EYRE.

Justin D. Heideman (USB 8897)
Justin R. Elswick (USB 9153)
ASCIONE, HEIDEMAN & MCKAY,
L.L.C.
Attorneys for Appellants
2696 N. University Ave. Suite 180
Provo, Utah 84604
Telephone: (801) 812-1000
Facsimile: (801) 374-1724

Gregory B. Hadley (USB 3652)
Paul D. Dodd (USB 10675)
HADLEY•DODD
Attorneys for Appellees
2696 N. University Ave. Suite 260
Provo, Utah 84604
Telephone: (801) 377-4403
Facsimile: (801) 377-4411

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF’S FRAUDULENT NONDISCLOSURE CLAIM.....	1
A. Plaintiff was Compelled to Answer Defendants Second Set of Requests for Admissions in Accordance with the Trial Court’s Definition of “Latent”. 1	
B. Defects No. 12 and No. 38 are not “Clear” Cases Appropriate for Summary Judgment.	3
C. The Doctrine of Caveat Emptor Should Not Apply to the Sale of This Home.	4
D. Smith v. Frandsen is Applicable to this Case.....	6
II. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON PLAINTIFF’S BREACH OF CONTRACT CLAIM	7
III. PLAINTIFF’S NEGLIGENT MISREPRESENTATION CLAIM SHOULD BE REINSTATED	10
IV. DEFENDANTS HAVE MISSTATED THE MAJORITY RULE REGARDING AN EXPERTS TIME SPENT IN PREPARING FOR DEPOSITIONS.....	11
V. ATTORNEYS’ FEES AND COSTS	14
A. Plaintiff is Entitled to all of Her Attorneys’ Fees and Costs Because of the Express Language in the EMSA.	14
B. Plaintiff is Entitled to all her Attorneys’ Fees and Costs Because the Claims are so Closely Related and Intertwined as to be Indistinguishable.	16
C. The Trial Court Inappropriately Reduced Plaintiff’s Requested Fees and Costs Without Supporting Findings of Fact.....	18
CONCLUSION AND PRECISE RELIEF SOUGHT	19

TABLE OF AUTHORITIES

Cases

<i>Culp Constr. Co. v. Buildmart Mall</i> , 795 P.2d 650 (Utah 1990)	10
<i>Dejavue, Inc. v. U.S. Energy Corp.</i> , 1999 UT App 355, 993 P.2d 222	16
<i>Dugan v. Jones</i> , 615 P.2d 1239 (Utah 1980)	6
<i>Foote v. Clark</i> , 962 P.2d 52 (Utah 1998).....	15, 16, 19
<i>Hose v. Chicago & N.W. Transp. Co.</i> , 154 F.R.D. 222 (S.D. Iowa 1994)	12
<i>Ilott v. University of Utah</i> , 2000 UT App 286, 12 P.3d 1011.....	3
<i>In Collins v. Vill. Of Woodridge</i> , 197 F.R.D. 354 (N.D. Ill. 1999)	12
<i>Kurth v. Wiarda</i> , 1999 UT App 335, 991 P.2d 1113.....	16
<i>Loveland v. Orem City Corp.</i> , 746 P.2d 763 (Utah 1987).....	8
<i>Magee v. Paul Revere Life Ins. Co.</i> , 172 F.R.D. 627, 646 (E.D.N.Y. 1997)	11, 12
<i>Maynard v. Wharton</i> , 912 P.2d 446 (Utah App. 1996)	14
<i>Rhee v. Witco</i> , 126 F.R.D. 45, 47 (N.D. Ill. 1989)	13
<i>Smith v. Frandsen</i> , 2004 UT 55, 94 P.3d 919	6, 7
<i>Swan Creek Vill. Homeowners Ass’n v. Warne</i> , 2006 UT 22, 134 P.3d 1122	10
<i>Texaco, Inc. v. Pennzoil, Co.</i> , 729 S.W.2d 768 (Texas App. 1987).....	13
<i>Turtle Management, Inc. v. Haggis Management, Inc.</i> , 645 P.2d 667 (Utah 1982) ..	15,
	16
<i>Valcarce v. Fitzgerald</i> , 961 P.2d 305 (Utah 1998).....	18
<i>Winters v. Schulman</i> , 2001 WL 357124 (Utah App. 2001).....	16, 17

Statutes

U.R.C.P. Rule 73(b).	18
Utah R. App. P. Rule 43	7
Utah R. Civ. P. 26(b)(4)(C)(i).....	11

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S FRAUDULENT NONDISCLOSURE CLAIM

A. Plaintiff was Compelled to Answer Defendants Second Set of Requests for Admissions in Accordance with the Trial Court's Definition of "Latent".

As stated previously in Plaintiff's initial Brief, Plaintiff objected to Defendants request for admissions and Defendants brought a motion to compel discovery. The trial court ordered Plaintiff to answer which defects in the home were "latent" based upon the trial court's definition of "latent" meaning hidden. *See* Brief of Appellee/Cross-Appellant pg. 26. Defendants assert that Plaintiff was in no way compelled by the trial court to admit which defects were "latent" or "patent". Defendants state "Plaintiff answered the requests for admissions in question freely and without compulsion." *See* Reply Brief of Defendants, Appellants and Cross-Appellees Dan Smith and Carol Smith pg. 13. (Hereinafter Defendants' Reply Brief). However, Defendants admit that "[t]he trial court ultimately required Plaintiff to answer." *See* Defendants' Reply Brief pg. 14. Plaintiff was compelled to answer which defects were visibly hidden or "latent" pursuant to the trial courts definition.

However, Defendants argue that if Plaintiff had "reservations about the trial court's definition for the terms "patent" and "latent", she could have simply denied that any of the alleged defects were "patent". *Id.* This is not true as many of the defects were "visible" pursuant to the trial courts definition. Plaintiff had no reservations regarding the trial courts definition at that time because the fact regarding whether a

defect was visible or not visible would be a factor for the jury to consider in determining if Plaintiff acted reasonably in not discovering the defect. Therefore, Plaintiff answered these admissions pursuant to the trial court's definition. The error the trial court committed was not in requiring Plaintiff to answer the admissions pursuant to its definition of "latent" but in taking those admissions one step further by mistakenly applying them to the doctrine of caveat emptor. By taking that step, the trial court, mid-stream and without any notice to Plaintiff, abandoned its definition of latent for the legal definition of reasonably discoverable. Plaintiff, who had merely admitted that many of the defects were "visible", was now held to have admitted that they were "discoverable". This was reversible error.

Plaintiff has shown that the legal definition of a "latent" defect is vastly more complicated than a simple visible or non-visible analysis. A "latent" defect, for the purposes of the doctrine of caveat emptor, is a defect that is not discoverable upon a reasonable inspection by an ordinary buyer without any specialized knowledge in the field of construction or real estate. *See* Brief of the Appellee/Cross-Appellant pg. 27-28. Further, Plaintiff has never claimed that she was "mislead" by the trial court into mistaken admissions as the Defendants claimed. Plaintiff merely believes that the trial court erred in applying these admissions to the doctrine of caveat emptor and granting Defendants' motion for summary judgment.

Defendants further argue that all of the 42 defects would have been discovered in 1994 if an inspection had been obtained. *See* Defendants Reply Brief pg. 15. This argument is not true and is based on the incorrect assumption that a home inspection is

required before the purchase of all homes or the doctrine of caveat emptor will apply. As Plaintiff has already shown, Utah law does not mandate a home inspection. Plaintiff had no reason to believe that a home inspection would be necessary on a home that was only a few weeks old, purchased directly from the licensed general contractor who had built it and who informed them that there were no problems they needed to know about because it was a “new home”. *See* Brief of the Appellee/Cross-Appellant pg. 23-24.

Lastly, Defendants argue that Plaintiff has not offered any actual proof that any of the 35 defects were “unobservable upon reasonable inspection.” *See* Defendants Reply Brief pg. 15. Plaintiff is not required to do this. Plaintiff merely has to show that the trial court erred in granting summary judgment on the 35 defects based upon an incorrect definition of “latent” as it relates to the doctrine of caveat emptor. This error alone requires that the trial court’s granting of the motion for summary judgment be overturned leaving it to the jury to determine which defects were “latent” or “patent” pursuant to the legal definition.

B. Defects No. 12 and No. 38 are not “Clear” Cases Appropriate for Summary Judgment.

Whether or not a defect is discoverable upon a reasonable inspection is a question of reasonableness that should be reserved for jury resolution except in the clearest cases. *Ilott v. University of Utah*, 2000 UT App 286, ¶ 18, 12 P.3d 1011. Defendants claim that this is a “clear case” in which summary judgment was appropriate. *See* Defendants’ Reply Brief pg. 16. Plaintiff respectfully disagrees.

Defect #12 was a defect in the smoke detectors. The UBC requires that all smoke detectors be hard wired and not merely battery operated. This allows all smoke detectors to go off simultaneously if one smoke detector in any part of the house goes off making it more likely that all people in the home will escape in case of a fire. (R. 591). A reasonable inspection on the part of the Plaintiff would not have revealed that the smoke detectors were not hard wired. Further, even if Plaintiff could have observed that the smoke detectors were not hardwired how would she know that this was a defect in the construction of the home? Plaintiff was not aware of the requirement of the UBC.

Defect #38 was a lack of ventilation in the roof. (R. 622). Only a person with expert knowledge in construction would be aware of what amount of ventilation is necessary in an attic. Even if you could see the ventilation, Plaintiff would have no way of knowing if it was lacking. These two defects certainly do not qualify as a “clear case” and should have been reserved for a jury to decide.

Although these two defects may seem trivial in the cost of the repairs, many of the other defects in the home that were dismissed will require substantial cost in making the repairs. Defects #12 and #38 should not have been dismissed in summary judgment.

C. The Doctrine of Caveat Emptor Should Not Apply to the Sale of This Home.

Defendants do not cite any authority contrary to Plaintiff’s position that an admission for a prior motion for summary judgment is not necessarily an admission for a subsequent motion for summary judgment. Further, Plaintiff did not admit that the home was “used”. *See* Brief of the Appellee/Cross-Appellant pg. 32-33.

The doctrine of caveat emptor should not apply to the sale of this home under these circumstances. Defendants assert that if a home is lived in at all, even for only a few short weeks by the builder, it should be defined as “used”. Defendants contend that it would be more problematic for trial courts to not have a clear-cut definition when determining if a home is “new” or “used” for purposes of the doctrine of caveat emptor. *See Defendants’ Reply Brief* pg. 18. However, no bright line standard is necessary. A fact intensive review of each case could be conducted to determine if the doctrine of caveat emptor should apply with a determination of “new” or “used” not being necessary.

In this case, the doctrine of caveat emptor should not apply since the home was virtually new, Plaintiff purchased the home directly from the builder and there was nothing that put Plaintiff on notice that there might be problems in the home. Defendants claim that the “as is” language should have put Plaintiff on notice. However, when Plaintiff inquired of potential problems in the home when discussing the “as is” clause, the Defendants reassured the Plaintiff that the home was new indicating that there were no problems. (R. 2424 Jury Trial Transcript pg. 0103).

Further, the doctrine of caveat emptor should not apply when a person purchases a home directly from a licensed general contractor who built the home. A person should be able to assume that a licensed general contractor is competent, experienced and knowledgeable of the code requirements and that the house will be built without significant defects. A comparison could be made between general contractors and real estate agents. The Supreme Court of Utah stated,

In this state, it is apparent that the rule of caveat emptor does not apply to those dealing with a licensed real estate agent. Though not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be honest, ethical, and competent and is answerable at law for breaches of his or her statutory duty to the public.

Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980) (*superseded by statute on other grounds*). Even when a real estate agent represents the seller and not the buyer in the sale of a home, the doctrine of caveat emptor does not apply to the sale of that home in relation to the real estate agent. The same rule should apply to a licensed general contractor in this State who is selling a home he or she built. The doctrine of caveat emptor should not apply to the sale of this home because Defendant Dan Smith was a licensed general contractor who built the home in question and promptly sold it directly to Plaintiff.

D. Smith v. Frandsen is Applicable to this Case.

Plaintiff readily admits that the builder/contractor in *Smith v. Frandsen*, 2004 UT 55, 94 P.3d 919 was not a party to the lawsuit. However that does not make *Smith v. Frandsen* inapplicable to this case. Defendants argue that (1) the language in *Smith v. Frandsen* which supports the “proposition that the doctrine of caveat emptor has been abandoned in Utah” is language “culled from other jurisdictions” and thus has no application in Utah and (2) because the trial court ruled on the motion for summary judgment in August of 2003 and the *Smith v. Frandsen* decision was not rendered until July of 2004, it is not applicable. See Defendants’ Reply Brief pg. 22. Defendants fail to grasp how case law in many respects is made and how it is applied to lower court rulings.

First, it is beyond dispute that both state and federal appellate courts often look to the reasoning and decisions of appellate courts of sister jurisdictions when faced with a legal issue of first impression. The reasoning of those sister jurisdictions are often cited with approval and adopted. Second, it is the current state of the law which will govern in most cases irrespective of when a lower court entered its ruling. It is nonsensical to assert that *Frandsen* does not apply merely because it was decided after these events occurred.

This case is still being adjudicated and is being appealed at this time; therefore current Utah law will govern. Pursuant to *Smith v. Frandsen*, it appears that the doctrine of caveat emptor has been abandoned in Utah. Once more, if this Court determines that the doctrine of caveat emptor is not abandoned in the sale of “used” residential housing, Plaintiff respectfully requests this Court to certify this appeal pursuant to Utah R. App. P. Rule 43 so that the Utah Supreme Court can decide if this doctrine should be abandoned in the sale of “used” residential construction.

II. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON PLAINTIFF’S BREACH OF CONTRACT CLAIM

Defendants argue that Plaintiff’s entire Breach of Contract claim should be barred by the doctrine of caveat emptor. *See* Defendants’ Reply Brief pg. 23. Defendants have failed to cite any authority in support of this assertion because no authority exists. The Utah Supreme Court stated that under the ancient doctrine of caveat emptor “in the absence of *express agreement* or misrepresentation, the purchaser is expected to make his own examination and draw his own conclusions as to the condition of the land; and the

vendor is, in general, not liable for any harm resulting to him or others from any defect existing at the time of transfer.” *Loveland v. Orem City Corp.*, 746 P.2d 763, 766 (Utah 1987). The doctrine of caveat emptor does not apply to issues where there is an express agreement (contract) or a misrepresentation. A breach of contract is not affected by the doctrine of caveat emptor because the terms of the contract apply and if those terms were breached then the defaulting party would be liable.

Defendants further claim “there was not evidence that the HVAC (heating, air-conditioning, ventilating system) was inoperable at the time of closing.” Pursuant to Paragraph C(c) of the EMSA the ventilating systems were warranted to be in sound and satisfactory working condition at closing, not merely operable. *See* Brief of the Appellee/Cross-Appellant pg. 35-36. There is evidence that the ventilating system was not in sound satisfactory working condition at the time of closing. Defect #6 and #38 showed that there was significant lack of attic ventilation that would cost over \$12,000 to repair. (R. 584, 622). The amount of attic ventilation at the time the expert report was done was the same amount of attic ventilation at the time of closing; Plaintiff never decreased the amount of attic ventilation. Just because this defect laid dormant until enough damage had been caused by the lack of ventilation before the defect could come to light, does not mean that it did not exist at the time of closing. The entire roof of the home had substantial damage at the time of the expert report that would require the entire roof to be replaced. (R. 584).

The interpretation to the term “notice” as used in Paragraph C of the EMSA is critical to any evaluation of Plaintiff’s breach of contract claim. In Plaintiff’s initial brief

she defined the term “notice” pursuant to Utah case law and Black’s Law Dictionary. Clearly, under the legal definition of “notice” it is not required that the “notice” must be received from a third party as Defendants argue. Defendants stated, “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.” *See* Defendants’ Reply Brief pg. 25. Plaintiff is not redefining the definition of “notice” as used in the EMSA. The EMSA does not define “notice”, for that reason Plaintiff went to the logical place in search of a definition, Utah case law and Black’s Law Dictionary. Defendants’ assertion that “notice” must be “received” by a third party or no notice can exist is illogical. Under their definition, Defendants could have had specific actual knowledge of each defect and the standards of the UBC and they would still not have had “notice” pursuant to Paragraph C. Defendants’ definition of notice does not comport with the common usage of the term or with the legal definition of “notice”. The focus should be on the word “notice” and not on the word “receive”. If the Defendants had knowledge of the code violations they should be deemed to have had “notice” of the code violations irrespective of an analysis of how that knowledge was “received”.

Defendants further allege “it is undisputed that Defendants did not ‘receive’ any claim or notice of any building or zoning violation”. *See* Defendants’ Reply Brief pg. 25. This is wholly inaccurate. As demonstrated in Plaintiff’s initial brief, Defendants received notice of the attic ventilation defect and the defect in the stairs by a third party, the building inspector. (R. Transcript Motions Hearing April 1, 2004 pg. 0023-0025).

Therefore, even if Defendants interpretation of the contract was correct, the trial court should not have dismissed these defects.

Lastly, Plaintiff had no duty to marshal the evidence in support of the trial court's ruling as Defendants have claimed. Plaintiff's claim for negligent misrepresentation was dismissed in a motion for summary judgment and thus is reviewed for correctness, granting no deference to the district court. *Swan Creek Vill. Homeowners Ass'n v. Warne*, 2006 UT 22, ¶ 16, 134 P.3d 1122. When reviewing an order granting summary judgment, the appellate court views the facts and all reasonable inferences that can be drawn therefrom in a light most favorable to the party opposing the motion. *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650, 651 (Utah 1990). Consequently, Plaintiff had no duty to marshal any evidence regarding the breach of contract claim.

III. PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM SHOULD BE REINSTATED

Defendants "agree with Plaintiff's analysis of the doctrine of merger". See Defendants' Reply Brief pg. 27. However, Defendants assert that Plaintiff's negligent misrepresentation claim should be barred by the statute of limitations and the doctrine of caveat emptor. The statute of limitations argument has been addressed previously. The doctrine of caveat emptor would not apply to Plaintiff's negligent misrepresentation claim. As argued above, the doctrine of caveat emptor does not apply where there is an actual misrepresentation. *Loveland v. Orem City Corp.*, 746 P.2d 763, 766 (Utah 1987). Therefore, Plaintiff's negligent misrepresentation claim should be reinstated.

IV. DEFENDANTS HAVE MISSTATED THE MAJORITY RULE REGARDING AN EXPERTS TIME SPENT IN PREPARING FOR DEPOSITIONS

The Utah Rules of Civil Procedure state “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). Defendants claim “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 **time spent at the deposition.**” *See* Defendants’ Reply Brief pg. 27. Emphasis added. The mere fact that in this issue of first impression Defendants feel compelled to read into the Rule what they feel it should state, is ample evidence that it needs interpreting by the Court.

First, Defendants have misstated what the majority rule is in interpreting Federal Rules of Civil Procedure Rule 26(b)(4)(C)(i). Defendants wrongfully state that the majority rule holds that an expert’s reasonable time in preparation for deposition is not compensable. Defendants cite no authority supporting their claim. Defendants merely cite to cases that have adopted the minority rule. Plaintiff admits that she has not researched the rule in every single state or jurisdiction and then tallied up how many hold preparation time is compensable and how many hold it is not. However, *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 646 (E.D.N.Y. 1997) states that the majority of courts who have reviewed this issue hold that an experts preparation time is compensable. In her initial brief Plaintiff cited to seven (7) other jurisdictions that agreed with the holding in *Magee*. *See* Brief of the Appellee/Cross-Appellant pg. 45 footnote 5. Plaintiff

recognizes that this dispute regarding which is the majority rule and which is the minority rule is not entirely relevant because this Court can adopt either of these rules.

Secondly, Defendants argue that if the majority rule is adopted as proposed by the Plaintiff, it would provide an “incentive for plaintiffs to educate themselves and prepare for trial at the expense of the party deposing their expert... the defendant will in effect pay a substantial amount of the plaintiff’s trial preparation costs and plaintiffs’ counsel’s education.” *See* Defendants’ Reply Brief pg. 28. Defendants’ fears are unfounded. The majority rule does not allow a party to be compensated “for the time the expert spent preparing the attorney who retained him” neither would the party be compensated for time the attorney spent preparing the expert for questions. *Magee* at 647. The purpose of the majority rule is to allow the expert a reasonable amount of time to review his findings, notes, reports, etc. thus eliminating the need the expert has to turn repeatedly to relevant records in order to refresh his memory during depositions. *Hose v. Chicago & N.W. Transp. Co.*, 154 F.R.D. 222, 228 (S.D. Iowa 1994). Thus, the time an expert spends in preparing ultimately saves deposition time, time that is unquestionably paid for by the deposing party. In *Collins v. Vill. Of Woodridge*, 197 F.R.D. 354, 357-358 (N.D. Ill. 1999) the court held that “it is entirely fair, and authorized by Rule 26(b)(4)(C)(i) ... to require a party who seeks to depose an expert from whom he has received a written report ... to pay the reasonable fees associated with the expert’s time reasonably spent preparing for the deposition.”

Defendants cite to *Rhee v. Witco*, 126 F.R.D. 45, 47 (N.D. Ill. 1989) to support their argument that a case between one plaintiff and one defendant is not a complex case.

Rhee does state that particular case was not complex and one of the factors it listed was that there was only one plaintiff and one defendant. However, there is no other discussion as to the facts and complexity of the case. Surely a case would not automatically be considered complex because there were more than two parties to the suit and surely it would not automatically be considered simple because there were only two parties to the litigation. If this were the case, then a case like *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Texas App. 1987) would not be considered complex even though the case was extremely complicated and \$11,100,000,000.00 in damages ultimately awarded. The number of parties to a suit should not influence the need the expert would have in reviewing his/her documents.

Lastly, Defendants claim that the time that elapsed between the time the experts did their reports and the time depositions were taken were caused by the Plaintiff. *See* Defendants' Reply Brief pg. 29. Defendants have not cited to the record to support this allegation. Plaintiff had four expert witnesses who did reports and were deposed by the Defendants. Rex Radford and Lloyd Steenblik finished their expert reports on December 14, 2001 and were deposed on February 18 and March 17, 2003. (R. 563). Jason Bullock finished his report on August 7, 2000 and was deposed on February 20, 2003. (R. 538). Mark O'Barr finished his expert on October 9, 2000 and was deposed on February 19, 2003. (R. 655). Defendants' Motion to Compel was not the reason for the delay in the depositions and even without the Motion to Compel Plaintiff's experts would have had to review their reports to refresh their memories. Therefore, this court should award Plaintiff her costs in having her experts prepare for the depositions.

V. ATTORNEYS' FEES AND COSTS

A. Plaintiff is Entitled to all of Her Attorneys' Fees and Costs Because of the Express Language in the EMSA.

Paragraph "N" of the EMSA states in the 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.

(See Appellants' Addendum No. 7) (Emphasis added). Defendants do not dispute that they defaulted on the EMSA or that the language of the EMSA "does not require there to be a successful or prevailing party in order for attorney's fees to be awarded." See Defendants' Reply Brief pg. 35. If the successful party standard is inapplicable to this case so is the requirement that Plaintiff should have separated her claims between successful and unsuccessful claims.

It is true that a party seeking an award of attorneys' fees under a contract must establish that the contract's terms anticipated such an award. *Maynard v. Wharton*, 912 P.2d 446 (Utah App. 1996). The EMSA specifically states that attorney's fees and costs should be awarded for "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.**" Emphasis added. This language anticipates that the defaulting Party should pay all fees and costs. The contract did not anticipate that only fees in pursuing a breach of contract claim could be recoverable. If that was the meaning of the language in the EMSA then why would it state "in pursuing any remedy" provided under

applicable law “whether such remedy is pursued by filing suit or otherwise”? The EMSA could have simply stated that attorneys’ fees are only recoverable in pursuing a breach of contract claim. That is not what the plain language of the EMSA says. The plain language of the EMSA supports Plaintiff’s contention that all fees and costs incurred by Mrs. Moore in pursuing any remedy are recoverable. Any other interpretation of the EMSA would make the remaining language superfluous. Therefore, the trial court erred in limiting Mrs. Moore's attorney's fees to solely her breach of contract cause of action.

Defendants rely on *Foote v. Clark*, 962 P.2d 52 (Utah 1998) and *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667 (Utah 1982) for their argument that Plaintiff is only entitled to fees on her breach of contract cause of action. In *Foote* the language in the EMSA that allowed for attorneys fees is virtually identical to the language of the EMSA in the present case. In *Turtle* the contract also provided that the defaulting party should bear the costs of attorneys fees. *Turtle* at 671. Although both of these cases had a defaulting party attorney’s fees clause, they are both completely distinguishable from the present case. In *Foote* the plaintiff suffered no actual harm and was just awarded minimal damages. Further, the plaintiff was seeking attorney's fees against the Clarks on causes of action that were solely brought against another defendant, the real estate agent Hatch. Plaintiffs in *Foote* had no statutory or contractual right to seek fees against Hatch and therefore they argued that the Clarks should have to pay all of their fees, even those fees expended against Hatch. The Utah Supreme Court noted that “When a plaintiff has a substantial claim against one defendant, he should not have a free ride to assert claims against other defendants with the expectation that the target

defendant will end up paying all attorney's fees." *Foote* at 56 quoting *Turtle* at 671. In *Turtle* the Plaintiff was also seeking attorneys fees against parties not found to be in default. In both of these cases the court held that attorneys' fees against the defaulting party were permissible but attorneys' fees against another defendant who was not in default are not. In this case there is only one defaulting party, the Smiths. Plaintiff is not seeking attorneys fees against any other defendant such as in *Foote* and *Turtle* and therefore Plaintiff should be allowed to recover all of her reasonable attorneys' fees against the defaulting party, the Smiths.

B. Plaintiff is Entitled to all her Attorneys' Fees and Costs Because the Claims are so Closely Related and Intertwined as to be Indistinguishable.

Even if this Court should hold that Plaintiff should have separated out her fees and costs pursuant to which claims she was successful on, Plaintiff should still recover all fees and costs requested. It is well established law that when a "plaintiff brings multiple claims involving a common core of facts and related legal theories, and prevails on at least some of its claims, it is entitled to compensation for all attorneys fees reasonably incurred in the litigation." *Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, ¶20, 993 P.2d 222; *see also Kurth v. Wiarda*, 1999 UT App 335, ¶12, 991 P.2d 1113 and *Winters v. Schulman*, 2001 WL 357124 (Utah App. 2001). There is no doubt that all of Plaintiff's causes of action arose from a common core of facts and related legal theories. In fact, every cause of action stemmed from the exact same core of facts, namely, that the Defendants built the house with many defects in it; that Defendants knew or should have known of these defects; and that they did not inform Mrs. Moore of the defects in the

home or repair the defects as they warranted in the EMSA. Plaintiff would not have litigated this case any differently even if she had brought a single breach of contract cause of action.

Defendants cite to *Winters v. Schulman*, 2001 WL 357124 (Utah App. 2001) to support their argument that the trial court did not err in allowing Plaintiff to only recover fees and costs on her breach of contract claim. In *Winters*, the court does recognize that all fees and costs are recoverable if they involve a common core of facts and legal theories. However, in *Winters* the trial court did not award the plaintiff all of their fees and costs. The trial court made a specific finding that the causes of action and facts are not “so intertwined that they could not be categorized according to the theory at issue.” Further, the trial court provided a method for the attorneys to use to separate the different claims. In Mrs. Moore’s case the trial court did not make a specific finding that the causes of actions and facts were not so intertwined as to be indistinguishable. Indeed, the trial court held that the opposite stating it was “difficult to differentiate between what legal services were necessary for the prosecution of the subject of breach of contract claim and the Plaintiffs other causes of action.” (R. 2403). Plaintiff did a sincere effort to follow the trial courts directive and separated the fees under successful and unsuccessful claims. See Addendum #4 in Defendants’ Reply Brief. Plaintiff removed every single fee that could be determined to not associate with Plaintiff’s pursuit of her breach of contract cause of action. (R. 2308). As to the expenses and costs, it is impossible to determine if any of these items did not relate to the breach of contract claim. It is most probable that all the fees and costs relate to the breach of contract claim

since all the causes of action stem from the same core facts. Therefore, even under a successful party analysis Plaintiff should be awarded all the fees and costs she requested.

C. The Trial Court Inappropriately Reduced Plaintiff's Requested Fees and Costs Without Supporting Findings of Fact.

If the trial court awards less than the amount of fees requested, when there is adequate evidence to support that amount, the trial court must “offer an explanation for the reduction.” Plaintiff provided all necessary evidence to support her request for attorneys’ fees and costs pursuant to U.R.C.P. Rule 73(b). (R. 2148). Defendants failed to present any evidence in opposition to Plaintiff’s reasonableness of their fees and costs. The trial court found that a few of the items billed by Plaintiff were not reasonable and the majority of those items were removed by Plaintiff in their request for fees. *See* Brief of the Appellee/Cross-Appellant pg. 55-57.

Further, Plaintiff’s attorneys’ fees were increased many times by the litigation tactics employed by the Defendants. Defendants should not be able to claim that Plaintiff’s attorneys’ fees are unreasonably high when their own tactics were the cause of it. *See Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998). Further, the trial court states that the “\$120,000 plus requested attorney’s fee is more than four times the monetary award given the Plaintiff by the jury and is substantially more than the \$83,000.00 total purchase price for the subject home.” (R. 2403). This is not a justification in a reduction of the award of fees. The *Footte* case specifically stated that “the amount of plaintiffs’ recovery in this case is irrelevant under the language of the contract.” *Footte* at 54. The purchase price of the home did not consider that the home was purchased twelve (12)

years ago and that the value of the home has substantially appreciated. Neither the trial court nor the Defendants have presented any evidence or findings to support a reduction in attorney's fees from \$123,639.64 to \$40,000.00 and costs and expenses from \$35,288.08 to \$10,000.00. No adequate explanation for this reduction was given by the trial court because no basis for such a reduction exists and Plaintiff should be awarded all attorneys' fees and costs she requested because they were reasonably incurred.

CONCLUSION AND PRECISE RELIEF SOUGHT

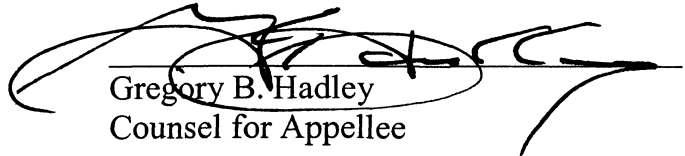
Plaintiff respectfully requests this Court to deny Defendants' claims on appeal. Indeed, Defendants have not responded to the fact of their (1) failure to preserve numerous issues below, (2) invited errors now complained of, and (3) failure to marshal the evidence in support of their positions. For these reasons alone, their appeal should fail.

Additionally this Court should reverse the trial court's Orders (1) dismissing Plaintiff's Negligent Misrepresentation claim entered on August 16, 2001 (R. 152); (2) denying Plaintiff's request for expert fees entered on August 20, 2003 (R. 1263); (3) dismissing 37 of the 42 original defects relating to Plaintiff's Fraudulent Nondisclosure claim entered on October 1, 2003 (R. 1293); (4) Dismissing 41 of the 42 original defects relating to Plaintiff's Breach of Contract claim entered on June 23, 2004 (R. 1749); and (5) partially granting Plaintiff's attorney's fees and costs entered on August 25, 2005. (R. 2411).

Further, Mrs. Moore requests this Court to Order a reinstatement of (1) her negligent misrepresentation cause of action; (2) her 37 and 41 defects respectively under

her fraudulent nondisclosure and breach of contract claims; (3) her expert fees incurred in preparing for Defendants' discovery and (4) all of her reasonable attorney fees, costs and expenses incurred before the trial court including those for defending and prosecuting this appeal.

RESPECTFULLY SUBMITTED this 18th day of October 2006.


Gregory B. Hadley
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered two (2) true and correct copies of the foregoing Brief of Appellee/Cross-Appellants, on this, 2006 to the following:
October 18, 2006

Justin D. Heideman (USB 8897)
Justin R. Elswick (USB 9153)
ASCIONE, HEIDEMAN & MCKAY, L.L.C.
Attorneys for Appellants
2696 N. University Ave. Suite 180
Provo, Utah 84604

