

2005

William Moore and Mary Moore v. Dan Smith and Carol Smith : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Moore v. Smith*, No. 20050626 (Utah Court of Appeals, 2005).

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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.

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

Appellate Case No. 20050626-CA

District Ct. No.: 000700142 MI

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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**FILED
UTAH APPELLATE COURTS
MAY 17 2006**

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Spears v. Warr, 2002 UT 24, 44 P.3d 742

Tolle v. Fenley, 2006 UT App 78, 132 P.3d 63

Warren v. Provo City Corp., 838 P.2d 1125 (Utah 1992)

STATUTES

U.C.A. § 78-2a-3

U.C.A. § 78-12-23(2)

U.C.A. § 78-12-21.5 (1999)

U.C.A. § 78-12-21.5 (2003)

U.C.A. § 78-12-25.5 (1991)

U.C.A. § 78-12-25.5 (1997)

STATEMENT OF JURISDICTION

U.C.A. § 78-2a-3 confers jurisdiction on this Court to decide this appeal.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in failing to correctly determine and apply the appropriate version of the relevant statute of limitations?

Standard of Review: Whether the trial court correctly applied the appropriate statute of limitations period and whether the discovery rule applies is a legal question, which is reviewed for correctness, with no deference given to the trial court. See *Estes v. Tibbs*, 1999 UT 52, ¶ 4, 979 P.2d 823; *Tolle v. Fenley*, 2006 UT App 78, ¶ 18, 132 P.3d 63; *Russell Packard Development, Inc., v. Carson*, 2005 UT 14, ¶ 18, 108 P.3d 74.

Issue Preserved at: Defendants' Memorandum in Support of Motion for Summary Judgment (filed February 26, 2001). [Attached hereto as Addendum "1"].

Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment (filed May 6, 2003). [Attached hereto as Addendum "2"].

Memorandum in Support of Oral Motion Under Rule 50 for Directed Verdict (filed March 10, 2004). [Attached hereto as Addendum "3"]. Motion and Memorandum of Points and Authorities in Support of Motion under Rule 50 for Judgment Notwithstanding the Verdict or in the Alternative for Remittitur (filed March 23, 2005). [Attached hereto as Addendum "4"]. Memorandum of Points and Authorities in Support of Motion for Relief from Judgment in Accordance with Utah R. Civ. P. 60(b) (filed April 19, 2005). [Attached hereto as Addendum

“5”].

2. Did the trial court err when it submitted questions of law to the jury for decision in a special verdict?

Standard of Review: The improper submission of a legal question to the jury by a trial court is a question of law that is reviewed under a correction-of-error standard. *Ralston v. Metropolitan Life Ins. Co.*, 62 P.2d 1119, 1123 (Utah 1936).

Issue Preserved at: The issue is one of plain error.

3. Did the trial court err in ruling that the discovery rule extended the period for Plaintiffs’ breach of contract and fraudulent nondisclosure claims against Defendants?

Standard of review: Whether the trial court correctly applied the appropriate statute of limitations period and whether the discovery rule applies is a legal question, which is reviewed for correctness, with no deference given to the trial court. See *Estes v. Tibbs*, 1999 UT 52, ¶ 4, 979 P.2d 823; *Tolle v. Fenley*, 2006 UT App 78, ¶ 18, 132 P.3d 63; *Russell Packard Development, Inc., v. Carson*, 2005 UT 14, ¶ 18, 108 P.3d 74.

Issue Preserved at: Defendants’ Memorandum in Support of Motion for Summary Judgment (filed February 26, 2001). [Attached hereto as Addendum “1”].

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Judgment Notwithstanding the Verdict or in the Alternative for Remittitur (filed March 23, 2005). [Attached hereto as Addendum “4”].

4. Did the trial court err in failing to dismiss Plaintiffs’ fraudulent nondisclosure claim against Defendants pursuant to various motions made by Defendants throughout the course of litigation?

Standard of review: Whether a party is entitled to summary judgment is a question of law reviewed for correctness. See *Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, ¶ 10, 100 P.3d 1200. When reviewing a denial of a motion for directed verdict, this Court must “review the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 12, 82 P.3d 1064, cert. denied, 541 U.S. 960, 124 S.Ct. 1716, 158 L.Ed.2d 401 (2004) (quotations and citation omitted).

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March 23, 2005). [Attached hereto as Addendum “4”]. Memorandum of Points and Authorities in Support of Motion for Relief from Judgment in Accordance with Utah R. Civ. P. 60(b). [Attached hereto as Addendum “5”].

5. Whether the trial court erred in applying the fraud exception to the merger doctrine?

Standard of Review: Whether attorney fees are recoverable is a question of law that is reviewed for correctness. See *Selvage v. J.J. Johnson & Assocs.*, 910 P.2d 1252, 1257 (Utah Ct.App.1996).

Issue Preserved at: This issue will become relevant if this Court reverses and/or remands this case and if Plaintiffs’ claims are dismissed or otherwise disposed of.

STATEMENT OF THE CASE

Defendants appeal the following Orders and the Special Verdict and Judgment entered by Judge Donald J. Eyre, Fourth District Court-Millard, Millard County, State of Utah:

1. the Order partially denying Defendants’ Motion for Summary Judgment entered on August 16, 2001;
2. the Order partially denying Defendants’ Motion for Summary Judgment entered on September 29, 2003;
3. 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. the Order denying Defendants’ Rule 50(b) Motion for Judgment Not Withstanding the Verdict entered on July 6, 2005;

5. the Order denying Defendants' Rule 60(b) Motion to Set Aside the Judgment entered on July 19, 2005;
6. and the Order awarding attorneys' fees to Plaintiff entered on August 25, 2005.

As more fully set forth herein, Defendants assert that the trial court erred in failing to determine and apply the appropriate statute of limitations to Plaintiffs' claims for breach of contract and fraudulent nondisclosure against Defendants. The trial court further erred by incorrectly applying the "discovery rule" to extend the statute of limitations period for Plaintiffs' claims for breach of contract and fraudulent nondisclosure. The trial court erred by submitting questions of law related to the statute of limitations period to the jury for decision. In addition, the trial court failed to apply governing legal precedent to Plaintiffs' fraudulent nondisclosure claim. Finally, the trial court improperly granted Plaintiffs an award of attorney's fees and costs.

STATEMENT OF FACTS

1. Plaintiffs' home ("Home"), which is the subject matter of the litigation, is located at 155 West 300 South, Fillmore City, Millard County, Utah. [R. 442:13-17].¹
2. Defendants built the Home for their residence in 1993 and lived in the Home prior to selling the Home to Plaintiffs in 1994. [R. 440:32; 442:24].
3. The Home's construction was inspected and approved by the Fillmore City Building Inspector, Jack Peterson ("Peterson"), throughout the course of construction. [R.

1. Citations to the trial transcript will be designated by page number followed by a colon and the line number(s).

371:9].

4. Defendants obtained a Certificate of Occupancy and Zoning Compliance (“Certificate of Occupancy”) on or about January 28, 1994. [See Certificate of Occupancy and Zoning Compliance, attached hereto as Addendum “6”].
5. At the time of final inspection, the ground around the home was so muddy that finish grading was impossible. [R. 375:20 through 375:25].
6. Peterson, who conducted the final inspection, and who signed the Certificate of Occupancy, gave Defendants permission to finish the grading in the spring when the weather had cleared. [R. 378:16 through 379:8].
7. An Earnest Money Sales Agreement (“EMSA”) was executed between Defendants and Plaintiffs on February 15, 1994 for the sale of the Home. [See Earnest Money Sales Agreement, attached hereto as Addendum “7”].
8. 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 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; (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.

9. Plaintiffs walked through the Home on February 11, 1994 before executing the EMSA on February 15, 1994. [R. 87:18 through 100:21].
10. Defendants read the “as is”/no warranties clauses with Plaintiffs at the time the EMSA was executed by both parties. [R.462:15-21].
11. On February 15, 1994 Defendant Dan Smith discussed with Plaintiff William Moore the footings and the grading and told Plaintiff Moore that he should avoid moving dirt so as to avoid exposing the footings and that additional dirt was on the property to complete the grading. [R. 448:2 through 449:22].
12. Plaintiffs closed on the Home on or about May 2, 1994. [R. 104:23-25].
13. Plaintiffs had the opportunity, but decided not to have the Home inspected. [R. 198:12-15].
14. Plaintiffs did not request any additional warranties of any kind. [R. 199:16-18].
15. Almost six years later in April 2000 while Plaintiffs were having gate posts installed on the property, Plaintiffs were informed that the footings were not deep enough. [R. 121:5].
16. Plaintiffs subsequently contacted Jason Bullock of Sunrise Engineering in approximately August 2000 who walked through the house as though he were performing a final inspection and discovered the thirty (30) alleged code violations

identified by the Plaintiffs. [R. 128:10-12; 131:11-17].

17. Jason Bullock admitted that he easily discovered the lack of topsoil and grading and the exposed footings by “basically walking around the house.” [R. 137:19]. Jason Bullock admitted that he did not need to do any digging to see the alleged grading violation because “the top of the frame was exposed.” [R. 138:14].
18. An additional twelve (12) alleged code violations identified by the Plaintiffs were later added by Lloyd Steenblik’s inspection.
19. Plaintiffs filed their original complaint on August 24, 2000, more than six years from the May 2, 1994 closing date.
20. Plaintiff William Moore deceased in 2001 and Plaintiff Mary Moore became his successor in interest.
21. Defendants filed their first Motion for Summary Judgment on February 26, 2001 [see Addendum “1”] in which they argued that: (1) Plaintiffs’ breach of contract claim was barred by the statute of limitations; (2) Plaintiffs’ claim of rescission was barred by the statute of limitations; (3) Plaintiffs’ claim for violation of the Consumer Sales Practices Act was barred by the statute of limitations; (4) Plaintiffs failed to plead fraud and misrepresentation; (5) Punitive damages should be dismissed because all underlying claims are subject to summary judgment.
22. On August 16, 2001, the trial court entered a ruling on Defendants’ first Motion for Summary judgment and held that: (1) Plaintiffs’ claim for negligent misrepresentation in this case was precluded as a matter of law by the merger

doctrine ; (2) That the claims of fraudulent nondisclosure and fraudulent misrepresentation had been pled with sufficient particularity to satisfy Rule 9 of the Utah Rules of Civil Procedure; (3) That there were genuine issues of material fact with respect to claims of fraudulent nondisclosure and fraudulent misrepresentation that precluded summary judgment; (4) Defendants may have had a legal duty to disclose to Plaintiffs any latent and material defects in the home or building code violations, of which they were aware; (5) The discovery rule should be applied to toll the statutes of limitations in situations where its application was not otherwise expressly prohibited by law; (6) The discovery rule does apply to those defects that would be considered latent and that there were issues of fact with respect to when the defects should have reasonably been discovered; (7) Plaintiffs elected rescission rather than monetary damages for breach of contract. [See August 16, 2001 Order, attached hereto as Addendum “8”].

23. Defendants filed their next motion for summary judgment on May 6, 2003 arguing that: (1) Plaintiffs’ claims were barred inasmuch as the Plaintiffs failed to have the home inspected and inasmuch as the applicable statute of limitation ran before the suit was filed; (2) Plaintiffs admitted that the majority of their claims were patent defects and should therefore be dismissed. [See Addendum “2”].
24. On August 29, 2003, the trial court held that: (1) the Defendants were only legally obligated to disclose defects that were not discoverable by reasonable care; (2) that summary judgment was appropriate for all admittedly patent items and that

summary judgment was not appropriate for defects 9, 11, 12, 26, 27, 38, and 39; (3) that there were disputed material facts regarding Plaintiffs' claim for fraudulent misrepresentation; (4) that there were disputed material facts regarding Defendants' statute of limitations defense. Accordingly, the trial court granted summary judgment only as to the dismissal of Plaintiffs' claim of fraudulent nondisclosure as to all defects except 9, 11, 12, 26, 27, 38 and 39. [See August 29, 2003 Order, attached hereto as Addendum "9"].

25. Finally in November 2003, Defendants filed four (4) additional motions for summary judgment as to Plaintiffs' claims for breach of contract; Consumer Sales Practice Act; mutual mistake of fact; and fraudulent misrepresentations.
26. On April 26, 2004, the trial court granted Defendants' Motion for Summary Judgment as to Plaintiffs' claims under the Consumer Sales Practice Act and Fraudulent Misrepresentation, but denied the motion as to Plaintiff's breach of contract claim. During the hearing on the motions, Plaintiffs' counsel stipulated to the dismissal of the claim for mutual mistake.
27. In addition, on April 26, 2004, the trial court also denied Plaintiffs' Motion to Reconsider its prior ruling on Plaintiff's Fraudulent Nondisclosure and Negligent Misrepresentation causes of action.
28. At the time of trial the Plaintiffs had dismissed all their claims except their two claims for fraudulent nondisclosure regarding the improper grading and the alleged improper insulation of windows and Plaintiffs' breach of contract claim with

respect to the violation of the building code for grading.

29. Plaintiffs previously elected to proceed on rescission and subsequently changed the remedy they were seeking to seek monetary damages.
30. The case was heard at a three day trial March 7-9, 2005.
31. At the conclusion of trial the jury was asked to respond to special verdict questions. [See Special Verdict, attached hereto as Addendum “10”].
32. The jury found Defendants liable for breach of contract and for fraudulent nondisclosure with respect to the improper grading, but not for the insulation of the windows. The jury awarded \$30,680 in monetary damages. The jury also found the causes of action were not barred by the statute of limitations.
33. During trial on March 9, 2005, Defendants’ counsel made an oral motion for a directed verdict and submitted a memorandum in support of the motion on March 10, 2005. [See Addendum “3”].
34. The trial court entered final judgment against Defendants in the amount of \$30,680 in compensatory damages pursuant to the directed verdict on March 10, 2005. [See Final Judgment, attached hereto as Addendum “11”].
35. On March 23, 2005, Defendants’ counsel file a motion and memorandum for judgment notwithstanding the verdict. [See Addendum “4”].
36. The trial court denied both of Defendants’ Rule 50 motions in an order entered July 6, 2005. [See July 6, 2005 Order, attached hereto as Addendum “12”].
37. Defendants then filed a Memorandum of Points and Authorities in Support of

Motion for Relief from Judgment in Accordance with Utah R. Civ. P. 60(b) on April 19, 2005 [see Addendum “5”] which was denied by the Court in a July 18, 2005 order. [See July 18, 2005 Order, attached hereto as Addendum “13”].

38. The trial court ultimately awarded Plaintiffs attorney’s fees under section “N” of the EMSA in the amount of \$40,000.00 and costs in the amount of \$10,000.00. [See Order on Plaintiffs’ Motion for an Order Awarding Attorney’s Fees, Expenses and Costs, attached hereto as Addendum “14”].

ARGUMENT

- 1. The trial court erred in failing to correctly determine the appropriate version of the relevant statute of limitations.**

The trial court erred by failing to first establish when Plaintiffs knew or should have know of their causes of action against Defendants. Whether a statute of limitations has run on a cause of action and whether the discovery rule applies, are both questions of law. See *Russell Packard Development, Inc., v. Carson*, 2005 UT 14, ¶ 18, 108 P.3d 741 (“The applicability of the statute of limitations and the applicability of the discovery rule are questions of law, which [the appellate court] reviews for correctness.” (citing *Spears v. Warr*, 2002 UT 24, ¶ 32, 44 P.3d 742); *Klinger v. Kightly*, 791 P.2d 868, 869 (Utah 1990) (“Whether the discovery rule applies to a cause of action is, like the statute of limitation, a question of law, not of fact.”))

The applicability of the statute of limitations or the discovery rule to any given cause of action, however, first requires that the fact-finder determine *when* the claimant discovered or should have discovered the facts supporting their alleged cause of action.

See *Sevy v. Security Title Co. of Southern Utah*, 902 P.2d 629, 634 (Utah 1995) (“The issue of when a claimant discovered or should have discovered the facts forming the basis of a cause of action is a question of fact.”)

Accordingly, a trial court’s *legal* determination of the applicability of the statute of limitations and the discovery rule must, by necessity, rely upon the factual determination of “when a claimant discovered or should have discovered the facts forming the basis of a cause of action.” *Id.*

As discussed hereinafter, the trial court’s failure to adhere to the aforementioned tripartite analysis has led the trial court and jury to commit error. The trial court erred by non-discriminately applying the 2004 version of U.C.A. § 78-12-21.5 to Plaintiffs claims. [See Addendum “8”; see Addendum “9”].

Importantly, the trial court’s final Judgment and the Special Verdict are devoid of *any* specific factual finding by the jury concerning the date on which Plaintiffs knew or should have known of their cause of actions for breach of contract or fraudulent nondisclosure as to the grading and windows.

As will be explained, without such a finding, as determined by a trier of fact, the trial court could not properly determine the date on which Plaintiffs’ causes of action “accrued.” Without establishing an “accrual” date, the trial court could not properly determine which version of U.C.A. § 78-12-21.5 to apply (the 2004 version, or one of the three possible earlier versions) to Plaintiffs’ causes of action. As will be demonstrated, application of the *correct* version of U.C.A. § 78-12-21.5 has a determinative impact on

whether Plaintiffs' claims are barred and whether the discovery rule becomes relevant to Plaintiffs' claims.

A. The trial court could not properly determine what version of the statute of limitations applies to Plaintiffs' claims because the trial court failed to instruct the jury to determine when Plaintiffs knew or should have known of their cause of action against Defendants.

The jury in this case should have specifically determined when Plaintiffs knew or should have known of the facts forming the basis for their causes of action before the trial court may make the legal determination concerning what version of U.C.A. § 78-12-21.5 applied.

Several different versions of Utah Code Ann. § 78-12-21.5 existed during the years between the sale of the property to Plaintiffs on May 2, 1994 and the date that Plaintiffs finally filed suit on August 24, 2000; however, only one version of the statute should be applied to Plaintiffs' claims.

The first possible version was enacted in 1991 and was designated Utah Code Ann. § 78-12-25.5. [Attached hereto as Addendum "15"]. Subsection (10) of the 1991 version provides that "[t]his section applies to all claims and causes of action that accrue after April 19, 1991, notwithstanding that the act, error, omission, or breach of duty occurred, or the improvement was completed or abandoned before April 29, 1991."

Relevant to this appeal are Subsections (3) and (4) of the 1991 version which provide:

- (3) An action against a provider shall be commenced within two years from the date of discovery of the act, error, omission, or breach of duty or the date upon which the act, error, omission, or breach of duty should have been discovered through reasonable diligence. If the act, error, omission, or breach of duty is discovered or discoverable before completion of the improvement or abandonment of construction, the

- two year period begins to run upon completion or abandonment.
- (4) Subject to Subsection (3), no action for breach of contract or warranty may be commenced against a provider more than six years after completion of the improvement or abandonment of construction. In the event the act, error, omission, or breach of duty is discovered in the sixth year of the six year period, the injured person has two additional years from the date of discovery to commence an action.

The 1991 version appears to contain an obvious inconsistency that was remedied by the legislature in the 1999 version. Subsection (3) incorporates a two year “discovery rule” provision as to most claims. Subsection (4) specifically carves out an exception for claims based on breach of contract or breach of warranty and requires the filing of the claim within six years after “completion of the improvement or abandonment of the construction” unless the breach is discovered in the sixth year (at which point, the claimant is allowed an additional two years from the date of discovery of the breach). The inconsistency is that Subsection (4) unambiguously sets the date of the “date of completion of the improvement or abandonment of the construction” as the time at which the six year time period begins to run while Subsection (3) (which Subsection (4) is subject to) allows a party two years from the date that the act, error (etc.) was discovered or should have been discovered through reasonable diligence. Thus, whether the six year statute of limitations for breach of contract and breach of warranty claims commences on the date of completion or abandonment (as specifically stated in Subsection (4)) or whether the six years commences at the time the breach was discovered or could have been discovered (as stated in Subsection (3)) is unclear.

The 1991 version was effective until it was superseded in 1997 by U.C.A. § 78-12-

21.5 [Attached hereto as Addendum “16”]. Section 10 the 1997 version states that “This section applies to all claims and causes of action that accrue after April 29 1991.” In the 1997 version, Subsections (3) and (4)

(3)(a) An action against a provider shall be commenced within *five* years from the date of discovery of the act, error, omission, or breach of duty or the date upon which the act, error, omission, or breach of duty should have been discovered through reasonable diligence.

(b) If the act, error, omission, or breach of duty is discovered or discoverable before completion of the improvement or abandonment of construction, the *five* year period begins to run upon completion or abandonment.

(4) Subject to Subsection (3), no action for breach of contract or warranty may be commenced against a provider more than six years after completion of the improvement or abandonment of construction. In the event the act, error, omission, or breach of duty is discovered in *first through the sixth year* of the six year period, the injured person has *five* additional years from the date of discovery to commence an action (emphasis added).

The 1997 version primarily modified the two year period for filing to a five year period and granted claimants five years from the date of discovery (instead of two) if the act, error (etc.) was discovered at any point within the six years on breach of contract/warranty claims. Again, the same internal inconsistency as existed under the 1991 version still exists in the 1997 version.

The 1999 version of Utah Code Ann. § 78-12-21.5 that superseded the 1997 version indicates in Subsection (11) that it applies “to all causes of action that accrue after May 3, 1998, notwithstanding that the improvement was completed or abandoned before May 3, 1999.” [Attached hereto as Addendum “17”]. The 1999 version contains significantly different language than its predecessors. Former Subsections (3) and (4) are combined under a single Subsection (3) in the 1999 version. Furthermore, the caveat for

actions based in contract or warranty is made preeminent as subpart (a) and is no longer “subject to” the codified two-year discovery rule provision as in previous versions:

(3) (a) 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. Where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period.

(b) 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. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

Finally, subsection (11) of the 2003 version which superseded the 1999 version applies “to all causes of actions that accrue after May 3, 2003, notwithstanding that the improvement was completed or abandoned before May 3, 2004.” [Attached hereto as Addendum “18”].

Subsection (3) of the 2003 version retains the exact same language as Subsection (3) of the 1999 version.

It is readily apparent that application of either the 1991 version, the 1997 version, or the 1999 version could result in a very different outcome for Plaintiffs’ claims depending on which version is applied. As will be argued in a subsequent section of this brief, the 1999 version of U.C.A. § 78-12-21.5 plainly rejects the application of the discovery rule for causes of action based on breach of contract or breach of warranty. Furthermore, Plaintiffs fraudulent nondisclosure claim as to the grading and windows could be barred depending on when Plaintiffs discovered or reasonably could have

discovered the alleged fraud and depending on which version of the statute is applied.

As a preliminary matter, the jury (as fact-finders) should have first determined the date on which Plaintiffs knew or should have known of their injuries in order for the court to correctly establish an “accrual” date. Only by establishing an “accrual” date could the trial court have decided which version of U.C.A. § 78-12-21.5 to apply.

“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 citation omitted).

Because neither the jury nor the trial court ever established a date on which Plaintiffs breach of contract and fraudulent nondisclosure claims accrued, the trial court could not properly determine which version of the statute of limitations should have been applied to Plaintiffs claims. Furthermore, without the factual determination of when Plaintiffs’ knew or should have known of the alleged injuries and their cause(s), no court of law can review whether the trial court applied the proper version of the statute of limitations in the first instance.

Accordingly, the trial court committed reversible error in assuming that the 2003 version of U.C.A. § 78-12-21.5 applied to Plaintiffs’ causes of actions and this Court

should reverse the trial court's rulings and remand the issue for further proceedings.

B. The trial court could not properly determine whether the discovery rule applies to Plaintiffs' claims without a specific determination concerning when Plaintiffs knew or should have known of their cause of action against Defendants.

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 of 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). Therefore, a court cannot properly determine the applicability of the discovery rule without first allowing a factual determination concerning the date a party knew or should have known of the existence of a particular cause of action.

In the instant case, the trial court committed reversible error by deciding to apply the discovery rule to Plaintiffs claims without first allowing the jury to determine when Plaintiffs knew or should have known of their claims. As argued hereinafter, Defendants believe that the trial court committed a fundamental legal error in finding that the discovery rule applied to the six-year statute of limitations on breach of contract claims

under U.C.A. § 78-12-21.5. However, this substantive issue is secondary to the principal concern that the trial court did not even correctly decide which version of the statute to apply.

In addition to the foregoing pertinent discussion, “the discovery rule simply does not apply where the plaintiff, at some point during the limitations period, has knowledge of the facts underlying his claim.” *Burkholz v. Joyce*, 972 P.2d 1235, 1237 (Utah 1998). Accordingly, if Plaintiffs had knowledge of the facts underlying their claims within the appropriate limitations period, Plaintiffs could not invoke any non-statutory extensions under a discovery rule theory.

For the foregoing reasons, the Court should reverse the trial court’s ruling on the application of the statute of limitations to Plaintiffs’ claims, as found in the trial court’s September 29, 2003 Order on Defendants’ Motion for Summary Judgment, in the trial court’s July 6, 2005 Order Denying Defendants Rule 50 Motion. The trial court should also find as reversible error inasmuch as the Special Verdict form contains no finding as to the date on which Plaintiffs knew or should have known of their alleged injuries.

“It has long been the law in this state that conclusions of law must be predicated upon and find support in the findings of fact.” *Gillmor v. Wright*, 850 P.2d 431, 436 (Utah 1993). Otherwise, “[t]he failure to enter adequate findings of fact on material issues may be reversible error.” *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989).

Until there is a specific factual determination made as to when Plaintiffs knew or should have known of the facts creating a cognizable cause of action, an “accrual” date

cannot be determined; nor can the trial court determine which version of the statute of limitations should have applied and whether the non-statutory discovery rule defense is applicable.

2. The trial court erred committed reversible error when it submitted questions of law to the jury for decision in a special verdict.

The trial court committed reversible error when it submitted questions of law to the jury in the Special Verdict. “In the case of a special verdict, the jury only finds the facts, and the court applies the law thereto and renders the verdict.” *Dishinger v. Potter*, 47 P.3d 76, 80 (Utah Ct. App. 2001). In *Dishinger*, this Court quoted Justice Ellett of the Utah Supreme Court in explaining the function of a special verdict.

This Court noted that, “the special verdict was devised to relieve the jury of attempting to apply the law in a complicated case to the facts in arriving at a verdict. Instructions to the jury are thus simplified, and the jurors may, therefore, concentrate upon the functions which belong to them, viz., to find the facts in the case.” *Id.* (quoting *Brigham v. Moon Lake Elec. Ass’n*, 470 P.2d 393, 397 (Utah 1970).

Rather than simply requesting the jury to determine when Plaintiffs knew or should have known of the facts giving rise to their claims for breach of contract and fraudulent nondisclosure, and then make a legal determination concerning applicability of the statute of limitations and the discovery rule, the trial court disregarded the entire function and purpose of a special verdict form by improperly requesting the jury to make complicated legal determinations without first deciding upon the necessary predicate facts.

Utah courts have long held that a jury should not make any determinations

concerning questions of law as such questions are the sole province of the courts. See *Ralston v. Metropolitan Life Ins. Co.*, 62 P.2d 1119, 1123 (Utah 1936) (holding that a question of law submitted to the jury was improper thereby allowing the Utah Supreme Court to reverse and remand the matter to the trial court for a proper determination of the legal issues); *Bailey v. Spalding-Livingston Investments Co.*, 136 P. 962, 964 (Utah 1913) (stating that a court may not require the jury to construe a contract because such determination “is a matter of law for the court”). This Court should follow the rule endorsed by the Utah Supreme Court and hold that the trial court’s submission of the question of law as to whether Plaintiffs’ claims for breach of contract and fraudulent nondisclosure were barred by the statute of limitations constitutes reversible error.

It is further worth noting that the applicability of the discovery rule and the statute of limitations to the instant matter did not concern the jury in any way. In *Beck v. Coalition Mines Co.*, 269 P.2d 867, 871 (Utah 1954), the Utah Supreme Court stated that: “[t]here was no need, however, for the [lower] court’s explanation of the statute of limitations to the jury since it was a matter of law which did not directly concern them, and by the [trial] court’s own admission nothing that he could say to them in explanation of the statute of limitations could aid them in determining the several questions of fact submitted to them.”

The trial court in the instant case committed reversible error and prejudiced Defendants by requiring the jury to decide a complicated question of law pertaining to the statute of limitations and to the discovery rule. Specifically, the trial court prejudiced

Defendants by requiring the jury to make a legal determination beyond the scope of the jury's powers without the necessary findings of fact (i.e. "at what point did Plaintiffs discover or could they reasonably have discovered the alleged breach of contract or the code violations") to support such determination.

Finally, the Court should also reverse the trial court's final Judgment order in the instant matter because "it has long been the law in this state that conclusions of law must be predicated upon and find support in the findings of fact." *Gillmor v. Wright*, 850 P.2d 431, 436 (Utah 1993). Otherwise, "the failure to enter adequate findings of fact on material issues may be reversible error." *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989).

For the foregoing reasons the Court should reverse the trial court's final Judgment order and specifically hold that the trial court committed reversible error when it submitted the legal question of the applicability of the statute of limitations to the jury for determination. This mistake was plain error on the part of the trial court.

3. The trial court erred in finding that the discovery rule extended the period for Plaintiffs' breach of contract and fraudulent nondisclosure claims against Defendants.

The jury in the district court trial ultimately awarded Plaintiffs \$30,680.00 in compensatory damages. The grounds for the damage award are found in the Special Verdict form completed by the jury. Although the Special Verdict form provided three possible bases for Plaintiffs recover (breach of contract, fraudulent nondisclosure as to the footings and fraudulent nondisclosure as to defective windows) the jury found

Defendants liable only under the first two bases and awarded Plaintiffs the amount of \$30,680.00 for breach of contract and fraudulent nondisclosure as to the footings (but not for fraudulent nondisclosure of the window defect). [See Addendum “10”].

Relevant to this section of Defendants’ appeal is the fact that subpart (c) under each of the three enumerated bases on the Special Verdict form specifically requested that the jury determine whether each claim was barred by the statute of limitations. According to the Special Verdict, the jury apparently found that neither Plaintiffs’ breach of contract claim, nor their fraudulent nondisclosure claim as to the footings was barred by the statute of limitations. As argued in the preceding sections of this brief, the jury had no authority to determine whether the statute of limitations barred Plaintiffs’ claims. This question and the question of whether the discovery rule should be applied are both legal questions and outside the purview of the jury. The trial court erred in allowing the jury to determine whether the statute of limitations barred Plaintiffs’ claims.

The question the jury should have answered is “when did Plaintiffs discovery, or when could they have reasonably discovered the facts supporting their alleged causes of action?” Unfortunately, this central question was never asked or answered.

Defendants assert that from the earliest stages of the lawsuit and continuing through the post-trial motion phase, the trial court failed to properly interpret and enforce settled law on the issue of whether Plaintiffs claims were barred by the applicable statutes of limitations. Because application of the appropriate statute of limitations period is a legal question, this Court should review the trial court’s orders for correctness.

As argued in the first sections of this brief, the trial court first and foremost erred in failing to consider which version of U.C.A. § 78-12-21.5 should apply. Nevertheless, because the Court relied upon the 2003 (or possibly 1999) version of the statute as it applied to Plaintiffs' breach of contract claim, Defendants will argue against the trial court's interpretation of U.C.A. § 78-12-21.5 accordingly.

A. The trial court repeatedly failed to correctly interpret and apply the statute of limitations rules to Plaintiffs' breach of contract and fraudulent nondisclosure claims.

Defendants first raised the statute of limitations defense (among other defenses) against Plaintiffs' breach of contract claim in their Motion for Summary Judgment and Memorandum in Support of Summary Judgment (filed February 26, 2001). [See Addendum "1"]. Therein, Defendants argued that U.C.A. § 78-12-23(2) governed the breach of contract claim and that under that provision's six-year statute of limitations period, Plaintiffs were required to bring their action within six years of the date that Plaintiffs closed on their purchase of the home from Defendants. The undisputed closing date was May 2, 1994. Accordingly, Plaintiffs should have filed their complaint no later than May 2, 2000. Because Plaintiffs did not file their complaint until August 24, 2000, Defendants asserted that the Plaintiffs' claim for breach of contract was barred.

Plaintiffs responded in their Memorandum in Opposition (filed March 12, 2001) that the "discovery rule" applied and argued that application of the discovery rule should extend the statute of limitations period for Plaintiffs' breach of contract claim. In their Reply Memorandum (filed March 26, 2001), Defendants argued that in Utah, governing

case law precluded application of the discovery rule for breach of contract claims.

In its final written order, the trial court ordered the following:

...the discovery rule should be applied to toll the statute of limitations, even as to contract-based claims, in situations where its application is not otherwise expressly prohibited by law. Accordingly, the Court concludes, as a matter of law, that the discovery rule does apply in this case with respect to those defects that would be considered latent, and that there remains issues of fact with respect to when those defects would be considered latent, and that there remain issues of fact with respect to when those defects should have been reasonably discovered. Therefore summary judgment is not appropriate with respect to Plaintiffs' claims for breach of contract, rescission, and violations of the Consumer Sales Practices Act. [See Addendum "8"].

After more than two years of additional discovery, Defendants were finally able to submit another Motion for Summary Judgment (filed May 6, 2003). At that juncture, Defendants asserted that the statute of limitations periods set forth in U.C.A. § 78-12-21.5(3) governed Plaintiffs' breach of contract claim.

In the trial court's August 29, 2003 Order on Defendants' Motion for Summary Judgment, the court nebulously ruled: (1) that U.C.A. § 78-12-21.5 did apply; (2) that subsection (3)(a) of that provision imposes a six year statute of limitations on breach of contract claims; and (3) that subsection (3)(b) provides that all other causes of action against a provider be brought within two years of the discovery of a cause of action or the date upon which the cause of action should have been discovered through reasonable diligence. Inexplicably, though, the court refused to grant Defendants' Motion for Summary Judgment as to Plaintiffs' breach of contract claim because "the discovery rule applies in this case." [See Addendum "9"].

Defendants' also attempted to raise the statute of limitations defense on March 10,

2005 on the final day of trial when counsel for Defendant made oral motion under Utah R. Civ. P. 50(a) for a directed verdict. The final judgment was entered later that day pursuant to the Special Verdict. Defendants also filed a written Memorandum in Support of Oral Motion Under Rule 50 for a Directed Verdict (“Rule 50(a) Memorandum”) on that day. [See Addendum “3”]. Defendants subsequently submitted a Motion and Memorandum for a Judgment Notwithstanding the Verdict or in the Alternative for Remittitur on March 23, 2004 (“Rule 50(b) Memorandum”). [See Addendum “4”].

In both the Rule 50(a) and Rule 50(b) memoranda, Defendants again argued that under the plain language of U.C.A. § 78-12-21.5(3)(a), Plaintiffs’ breach of contract claim should have been barred by the six year limitations period running from the earliest of either the date that the original Certificate of Occupancy was issued to Defendants (January 28, 1994) or the closing of the sale/occupancy date by Plaintiffs (May 2, 1994). Because Plaintiffs’ complaint was filed in August of 2000, over six years from either date, the statute of limitations should bar the contract claim.

After a hearing on the matter, the trial court denied Defendants Rule 50 motions. [See Addendum “12”].

B. The trial court erroneously applied the general discovery rule to U.C.A. § 78-12-21.5(3)(a).

The trial court clearly erred in permitting Plaintiffs to invoke the general discovery rule in order to extend the time for the filing of their breach of contract claim. Subsection (3) of both the 2003 and 1999 versions provides:

(3) (a) 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. Where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period.

(b) 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. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

As previously argued by Defendants, the juxtaposition of these two paragraphs clearly implies that only the non-contract claims are subject to the discovery rule.

Contract claims exist for six years and no more. This is to allow builders some certainty and peace of mind that they will not be afflicted with stale contract claims.

Importantly, Subsection (4) of the 2003 version specifically refers *only to* Subsection (3)(b) (*not to Subsection (3)(a) governing breach of contract actions*) in providing a general nine year limit (plus two years if the injury is discovered in the eighth or ninth years) from the date of completion of the improvement or abandonment of construction on all actions other than breach of contract/warranty claims. The exclusion of Subsection 3(a) from the general nine year limitations period indicates that the legislature intentionally meant to preserve a strict six-year limit on all claims based on breach of contract or warranty.

Subsection (4) of the 1999 version is different only in that it allows a maximum of twelve years (plus two) for claims arising under Subsection 3(b). The 1999 version still excludes Subsection 3(a) from the general twelve year limitations period.

The legislative preamble language in both the 2003 and 1999 versions explains the

legislative purpose of drawing definite limitations periods and refers to the fact that “the possibility of injury and damage becomes highly remote and unexpected seven [or “ten” for the 1999 version] years following completion [of the building]. Clearly the intent of this six year: statute of limitations is that it be construed in favor of the builder.

Surprisingly, the trial court submitted Jury Instruction 31 to the jury which provides in relevant part: “Utah law provides that an action for construction defect based in contract or warranty shall be commenced within six years of the date of the closing of the sale of the house.” [See Jury Instruction #31, attached hereto as Addendum “19”]. Such a plain and clear instruction is painfully at odds with the trial courts insistence that the discovery rule applies to U.C.A. § 78-12-21.5 Subsection 3(a).

It is undisputed that Plaintiffs filed their claim more than six years after they closed on the home on May 2, 1994. The trial court’s unsupported extension of the statute of limitations for Plaintiffs’ breach of contract claim was clearly erroneous when considered in light of U.C.A. § 78-12-21.5. Moreover, without a jury finding as to “when” Plaintiffs knew or should have known about the alleged fraudulent disclosure, it is impossible to determine whether that claim, too, is barred by the appropriate statute of limitations.

This Court should reserve the trial court’s numerous incorrect orders extending the statute of limitations in contravention of U.C.A. § 78-12-21.5.

4. The trial court erred in failing to dismiss Plaintiffs' fraudulent nondisclosure claim against Defendants pursuant to various motions made by Defendants throughout the course of litigation.

Whether a party is entitled to summary judgment is a question of law reviewed for correctness. See *Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, ¶ 10, 100 P.3d 1200.

When reviewing a denial of a motion for directed verdict, this Court must “review the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 12, 82 P.3d 1064, cert. denied, 541 U.S. 960, 124 S.Ct. 1716, 158 L.Ed.2d 401 (2004) (quotations and citation omitted).

The trial court erred in failing to grant Defendants' various motions for summary judgment or in the alternative for failing to grant Defendants' Rule 50 Motions on the issue of the viability of Plaintiffs' fraudulent nondisclosure claim.

In all three of the aforementioned motions, Defendants argued that under Utah law, Plaintiffs' fraudulent nondisclosure claim should be dismissed as a matter of law because Plaintiffs failed to obtain a home inspection on a home that was expressly sold “as is” and without any warranty. In its August 29, 2003 Order on Defendants Motion for Summary Judgment, the trial court granted summary judgment in favor of Defendants as to most of the alleged violations except for five of the enumerated defects. [See Addendum “9”]. Ultimately, only two of those violations survived to reach the trial stage (the grading claim and the window claim). Because the jury found Defendants liable only

for fraudulent nondisclosure as to the grading claim, Defendants address only that remaining alleged violation for purposes of this appeal.

Plaintiffs do not dispute that prior to purchasing the Home that they had an opportunity to both inspect the Home and have an inspection performed. Plaintiffs do not dispute that Section 6 of the EMSA expressly disclaimed all seller warranties other than those contained in Section “C” without exception.

Plaintiffs do not dispute that Section “C” of the General Provisions of the EMSA warrants only 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; (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 systems, and appliances shall be sound or in satisfactory working condition at closing.”

Plaintiffs do not dispute that Section “B” of the General Provisions of the EMSA provides in relevant part that “[u]nless 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 to Buyer by Seller or the Listing or Selling Brokerage [...] Buyer accepts the property in “as is” condition subject to Seller’s warranties as outlined in Section 6. In the event Buyer desires any additional inspection said inspection shall be allowed by Seller but arranged for and paid by Buyer.” [See Addendum “7”].

Plaintiff Mary Moore does not dispute that neither she nor her deceased husband

sought a home inspection at the time she purchased the Home.

Plaintiffs do not dispute that most of the alleged code violations including the grading violation was discovered in August 2000 by Jason Bullock who discovered the grading violation by “basically walking around the house” and observing the “footing exposed at grade level” without any intrusive or destructive testing.

Based on the foregoing admitted facts, the trial court should have granted summary judgment in favor of Defendants on their Motion for Summary Judgment filed May 6, 2003.

Maack v. Resource Design and Construction, Inc., 875 P.2d 570 (Ut. App. 1994) is the governing case for this issue on appeal. As the plaintiffs did in *Maack* Plaintiffs in this case alleged (among other things) fraudulent nondisclosure. As with the plaintiffs in *Maack*, Plaintiffs in the present case, did not obtain a home inspection before purchase. *Id.* at 573. Similarly the *Maack* sales agreement and Plaintiffs’ EMSA at issue in this case contained an “as is” clause “without any warranties as to its condition.” *Id.*

In *Maack* this Court assumed for the sake of argument that the plaintiffs had brought a fraudulent nondisclosure claim (although the plaintiffs did not distinguish between fraudulent concealment and fraudulent nondisclosure). In lawsuit at bar, Plaintiffs claim for fraudulent nondisclosure has been explicit pleaded.

Ultimately, this Court found that the plaintiffs in *Maack* were unreasonable in failing to obtain a home inspection or insisting on express rights in the agreement. This Court also found that no duty to disclose exists where the buyer could discover the facts

by exercise of reasonable diligence. *Id.* at 579.

Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994), is also relevant to Defendants' position on appeal inasmuch as it conveys the general application of the rule of *caveat emptor* in Utah:

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. *Id.* at 1390 (emphasis added) (citations omitted).

The *Schafir* court further went on to note:

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. In the case of latent defects, a home buyer's best resort against the seller is to sue for either fraudulent or negligent misrepresentation or nondisclosure. *Id.* at n.12.

In the present case, it is undisputed that in August 2000, Jason Bullock observed the alleged violation related to the grading by mere visual observation.

In *Hermansen v. Tasulis*, 2002 UT 52, ¶ 24, 48 P.3d 235, the Utah Supreme Court cited extensively to its former decision in *Mitchell v. Christensen*, 2001 UT 80, ¶ 9, 31 P.3d 572 in discussing the burden that a plaintiff must meet in proving fraudulent nondisclosure as to reasonably discoverable information:

To support a claim of fraudulent nondisclosure a plaintiff must prove the following three elements: (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*, 2001 UT 80, ¶ 9, 31 P.3d 572.

In *Mitchell*, the plaintiffs alleged that at the time of their purchase of the defendants' home (1) a swimming pool on the property was leaking, (2) the defendants were aware of the leak, and (3) the defendants had a legal duty to disclose these defects prior to selling their property to the plaintiffs, which they failed to do. 2001 UT 80 at ¶ 4, 31 P.3d 572. The defendants defended that they had no duty to disclose defects under the doctrine of caveat emptor. *Id.* at ¶ 5, 31 P.3d 572. We held that sellers of real property owe a duty to disclose material known defects that cannot be discovered by a reasonable inspection by an ordinary prudent buyer. *Id.* at ¶ 12, 31 P.3d 572.

With this holding, we issued some specific precautions. We first cautioned that “if a defect can be discovered by reasonable care, the doctrine of caveat emptor prevails and precludes recovery by the vendee.” *Id.* at ¶ 11, 31 P.3d 572. We next instructed that an ordinary prudent buyer would not be required to “hire numerous expert home inspectors to search for hidden defects,” but this does not mean that inspection by an expert will never be required. *Id.* at ¶¶ 12-13, 31 P.3d 572.

Plaintiffs in the instant case 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 Section “C.” The alleged defects were discovered by a non-destructive inspection in the year 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. Plaintiffs did not exercise ordinary diligence to discover the alleged defects and, therefore, the doctrine of caveat emptor applies to preclude the Plaintiffs from bringing suit for the alleged defects in the Home.

Defendants again raised these arguments in their Rule 50 motions [See Addendum

“3”; see Addendum “4”]; the trial court again denied Defendants’ motions on the issue. [See Addendum “12”]. Defendants again argued that the fraudulent nondisclosure claim should be dismissed pursuant to Utah case law when Defendants made their Rule 60(b) Motion. [See Addendum “5”]. The court again refused to accept Defendants’ argument. [See Addendum “13”].

Even applying the standard of review which requires this Court to take view the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to Plaintiffs, it is clear that the trial court erred in refusing to grant a directed verdict and/or judgment notwithstanding the verdict in favor of Defendants.

Even admitting that Plaintiffs were unsophisticated buyers, that Defendant Dan Smith was an experienced home-builder, and that the Defendants had only lived in the home a few months before selling it, Plaintiffs still knew they were buying the home “as is,” and that they were entitled to have an inspection performed. Even assuming that Defendant Dan Smith did not discuss with Plaintiff William Moore that the topsoil grading would need to be completed in the spring of 1994, Jason Bullock’s easy visual discovery the problem in August 2000 demonstrates that Plaintiffs could have discovered the grading violation through a reasonable inspection.

This Court should reverse the trial court’s September 29, 2003 Order and the trial court’s July 6, 2005 Order on the basis that the trial court erred as a matter of law in finding that Plaintiffs claim for fraudulent nondisclosure could survive summary judgment or a directed verdict based on the undisputed facts of the case.

5. The trial court erred in granting Plaintiffs an award of \$40,000.00 in attorney's fees and \$10,000.00 in costs.

Whether attorney fees are recoverable is a question of law that is reviewed for correctness. See *Selvae*, 910 P.2d 1252, 1257 (Utah Ct.App.1996). Defendants do not dispute that paragraph "N" of the EMSA permits a prevailing party to recover attorney's fees in an action under brought to enforce the EMSA. [See Addendum "7"]. However, should this Court reverse the trial court and should further proceedings exonerate Defendants, or result in a dismissal of Plaintiffs' claims, Defendants would be entitled to recover their attorney's fees and costs from Plaintiff.

CONCLUSION AND REQUEST FOR RELIEF


For the reasons set forth herein, Defendants respectfully request that this Court reverse the following Orders of the trial court and remand those matters requiring further proceedings:

1. the Order partially denying Defendants' Motion for Summary Judgment entered on August 16, 2001;
2. the Order partially denying Defendants' Motion for Summary Judgment entered on September 29, 2003;
3. 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. the Order denying Defendants' Rule 50(b) Motion for Judgment Not Withstanding the Verdict entered on July 6, 2005
5. the Order denying Defendants' Rule 60(b) Motion to Set Aside the Judgment

entered on July 19, 2005;

6. the Order entered on August 25, 2005 awarding attorneys' fees to Plaintiffs.

Respectfully submitted this 17 day of May, 2006.



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

ADDENDA

1. Defendants' Memorandum in Support of Motion for Summary Judgment (filed February 26, 2001).
2. Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment (filed May 6, 2003).
3. Memorandum in Support of Oral Motion Under Rule 50 for Directed Verdict (filed March 10, 2004).
4. Motion and Memorandum of Points and Authorities in Support of Motion under Rule 50 for Judgment Notwithstanding the Verdict or in the Alternative for Remittitur (filed March 23, 2005).
5. Memorandum of Points and Authorities in Support of Motion for Relief from Judgment in Accordance with Utah R. Civ. P. 60(b)
6. Certificate of Occupancy and Zoning Compliance
7. Earnest Money Sales Agreement
8. August 16, 2001 Order
9. August 29, 2003 Order
10. Special Verdict
11. Final Judgment
12. July 6, 2005 Order
13. July 18, 2005 Order
14. Order on Plaintiffs' Motion for an Order Awarding Attorney's Fees, Expenses and Costs
15. Utah Code Ann. § 78-12-25.5 (1991)

16. Utah Code Ann. § 78-12-25.5 (1997)
17. Utah Code Ann. § 78-12-21.5 (1999)
18. Utah Code Ann. § 78-12-21.5 (2003)
19. Jury Instruction # 31

ADDENDUM 1

COUNTY CLERK
OF TARRANT COUNTY
FEB 26 2001
TARRANT COUNTY
CLERK
RECORD

WILLIAM MOORE and MARY MOORE,)	
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM IN SUPPORT
)	OF DEFENDANTS' MOTION
)	FOR SUMMARY JUDGMENT
)	
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.)	Case No. 000700142 MI
)	Judge
)	

POINTS AND AUTHORITIES

INTRODUCTION

1006

Construction was completed on the subject home in early November 1993. The Smiths constructed the house for their own residence and thus moved into the subject home in mid-November, 1993. The Smiths obtained the Certificate of Occupancy and Zoning Compliance on or about January 28, 1994, a copy of which is attached hereto as Exhibit "1." Although Mr. Smith had a general contractors license, he did not work in this capacity at all during the period of time in which the transaction with the Moores was consummated.

In February of 1994 the Plaintiffs contacted the Smiths about the possible purchase of the subject home. An Earnest Money Sales Agreement was entered into between the parties on or about February 15, 1994. A copy of the Agreement is attached hereto as Exhibit "2." The transaction closed on May 2, 1994. At this point the Plaintiffs were legally entitled to move into the subject home. Copies of the closing documents are attached hereto as Exhibit "3."

The Smiths were not notified of any problems regarding the subject home until December, 2000. This was over six years after the Smiths sold the home to the Plaintiffs. The Plaintiffs filed their Complaint for damages on August 24, 2000. The Smiths were not served, however, until December 13, 2000.

II.

UNDISPUTED FACTS

1. Dan and Carol Smith, built the subject home for their own residence. (See, Affidavit of Dan Smith, ¶ 4).
2. Construction was completed on the subject home in early November of 1993 and the Smiths moved into the home in mid-November of 1993. (See, Affidavit of Dan Smith, ¶ 5).
3. Dan Smith was not actively working as a general contractor at the time of the construction of the subject home or the sales transaction. (See, Affidavit of Dan Smith, ¶ 6).

4. The City of Fillmore issued a Certificate of Occupancy and Zoning Compliance for the subject home on or about January 28, 1994. (See, Affidavit of Dan Smith, ¶ 7).

5. On or about February 15, 1994, an Earnest Money Sales Agreement was entered between the Smiths and William and Mary Moore (hereinafter “the Moores”) for the sale of the subject home. (See, Affidavit of Dan Smith, ¶ 9).

6. The Smiths moved out of the subject home by the end of March, 1994. (See, Affidavit of Dan Smith, ¶ 11).

7. Dan Smith never went to the subject home to perform any type of construction services or repairs any time after the Earnest Money Sales Agreement was entered between the Smiths and the Moores. (See, Affidavit of Dan Smith, ¶ 12).

8. The transaction between the Smiths and Moores for the sale and purchase of the subject home closed on May 2, 1994. (See, Affidavit of Dan Smith, ¶ 13).

9. The Smiths were not made aware of any alleged construction defects until December of 2000. (See, Affidavit of Dan Smith, ¶ 15).

10. The Moores filed their Complaint for damages on August 24, 2000. (See, Affidavit of Dan Smith, ¶ 16).

III.

LEGAL ARGUMENT

Summary judgment is appropriate only "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 a judgment as a matter of law." Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, the court views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.

Surety Underwriters v. E & C Trucking, 10 P.3d 338 (Ut. 2000). As will be explained more fully below, there is no issue to be adjudicated at trial and the Smiths are therefore entitled to judgment as a matter of law.

A. THE PLAINTIFFS' BREACH OF CONTRACT CAUSE OF ACTION IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

Among the causes of action asserted in the Plaintiffs' Complaint is one for breach of contract. Since the contract between the Plaintiffs and the Smiths was a written contract and the sale of the home was not in Mr. Smith's capacity as a general contractor, the relevant statute of limitations is six years as set forth in § 78-12-23(2). Specifically, the statute provides: "An action may be brought within six years . . . upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22." The question then, is when did the six year period begin to run.

The general principle regarding when a cause of action accrues and the relevant statute of limitations begins to run is "upon the happening of the last event necessary to complete the cause of action [and that] mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations." O'Neal v. Division of Family Servs., 821 P.2d 1139, 1143 (Ut. 1991) (quoting Myers v. McDonald, 635 P.2d 84, 86 (Ut. 1981)). The generally accepted rule with regard to a claim for breach of contract is that it "accrues, thus causing the statute of limitations to commence, only upon breach of the contract." Upland Indus. Corp. v. Pacific Gamble Robinson Co., 684 P.2d 638, 643 (Ut. 1984). In the instant case, the Plaintiffs' breach of contract claim is premised on the alleged defective construction of the subject home. Therefore, the alleged breach occurred, thus causing the statute of limitations to commence, at the very latest, on the date the transaction between the parties closed.

The Earnest Money Sales Agreement was entered into between the parties on or about February 15, 1994. (See, Exhibit “2”). According to the escrow documents, the closing date was May 2, 1994. (See, Exhibit “3”). Furthermore, at no time following May 2, 1994, did the Smiths perform any type of construction services or repairs on the home. Therefore, the statute of limitations began to run, at the very latest, on May 2, 1994, and the Plaintiffs had until May 2, 2000 by which to file their Complaint.

It is undisputed that the Plaintiffs did not file their Complaint for damages until August 24, 2000. As is readily apparent, this is beyond the six year statute of limitations prescribed by § 78-12-23(2). Therefore, the Plaintiffs’ breach of contract claim is precluded by the applicable statute of limitations and summary judgment is appropriate.

B. THE PLAINTIFFS’ CLAIM OF RESCISSION IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The claim of rescission is an equitable remedy. Acton v. Deliran, 737 P.2d 996 (Ut. 1987). A cause of action that is not subject to a specific statutory limitations period is governed by the residual four-year limitations period found in § 78-12-25(3). Olsen v. Hooley, 865 P.2d 1345 (Ut. 1993). § 78-12-25(3) provides: “An action may be brought within four years . . . for relief not otherwise provided for by law.” Since rescission in a form of equitable relief “not otherwise provided for by law,” it by default falls into the residual four year limitation period.

As explained above, typically a statute of limitations begins to run upon the occurrence of the last act of negligence or other type of act that would then constitute a cause of action. In the instant case, any such act, if it occurred at all, occurred no later than May 2, 1994, the date of closing. As the Plaintiffs did not file their Complaint until August 24, 2000, it is patently obvious that the applicable statute of limitations has long since expired on the Plaintiffs claim for rescission.

Therefore, the Smiths are entitled to judgment as a matter of law as to the Plaintiffs' claim for rescission.

C. THE PLAINTIFFS' CLAIM FOR VIOLATION OF THE CONSUMER SALES PRACTICES ACT IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The Plaintiffs allege in their Complaint that the Smiths violated § 13-11-4 and § 13-11-5 of the Consumer Sales Practices Act. This particular Act has its own statute of limitations as prescribed by § 13-11-19(8). The statute reads in relevant part: "An action under this section must be brought within two years after occurrence of a violation of this chapter[.]" Once again, any alleged violation must necessarily have occurred by May 2, 1994, the closing date of the transaction. Therefore, the statute of limitations expired, at the very latest, on May 2, 1996. The Plaintiffs' Complaint was not filed until August 24, 2000. As is readily apparent, this is well after the expiration of the limitations period. Therefore, this Court should grant the Smiths' Motion for Summary Judgment as to Plaintiffs' claim for violation of the Consumer Sales Practices Act.

D. THE PLAINTIFFS HAVE FAILED TO PLEAD THEIR ALLEGATIONS OF FRAUD AND MISREPRESENTATION WITH SUFFICIENT PARTICULARITY AND THE SMITHS ARE THEREFORE ENTITLED TO SUMMARY JUDGMENT

Rule 9(b) of the Utah Rules of Civil Procedure states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This rule applies to a cause of action for misrepresentation as well. See e.g., Williams v. State Farm Ins. Co., 656 P.2d 966, 972 (Ut. 1982). Utah courts have stressed, and continue to hold, that "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment." Chapman v. Primary Children's Hospital, 784 P.2d 1181, 1186 (Ut. 1989). See also, Norton v. Blackham, 669 P.2d 857, 859 (Ut. 1983).

To plead fraud with particularity, a plaintiff must allege that there was a false representation regarding a material fact which was known to be false or made recklessly without sufficient knowledge by the person making the statement. Fraud can also be shown by pleading the omission of a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance resulting in damage to that party. Taylor v. Gasor, Inc., 607 P.2d 293, 294 (Ut. 1980). The reason for the specific pleading requirement is that "[f]raud is a wrong of such nature that it must be shown by clear and convincing proof and will not lie in mere suspicion or innuendo." Lundstrom v. Radio Corporation of America, 405 P.2d 339, 341 (Ut. 1965).

A good example of the application of U.R.C.P. 9(b) is Heathman v. Fabian & Clendenin, 377 P.2d 189 (1962). In Heathman, the plaintiff brought suit against the law firm who had represented a defendant in another case the plaintiff had previously filed. One of the allegations in his complaint against the law firm was that the law firm fraudulently stopped his ability to obtain a default judgment against the defendant in that prior case. In support of his claim for fraud he alleged that a secretary at the law firm had filed a false affidavit, that the law firm filed false pleadings in connection with the affidavit, and that members of the law firm discussed the default judgment with judges of the court. Id. at 190. Nevertheless, the district court dismissed the action based upon the law firm's motion to dismiss.

On appeal, the court noted that the plaintiff's complaint contained "no allegation whatever of the contents, nature or substance of any alleged false statement in the affidavit or in the pleadings[.]" The court further observed that there were not any allegations in the plaintiff's complaint of "what was said, or the nature or substance of any conversation between the law firm members and any judge or judges." Id. The court concluded that the allegations contained "merely

broad and general statements that a false affidavit and false pleadings were filed and judges were contacted[.]” Id. Accordingly, the court held that the pleading was insufficient and affirmed the ruling of the district court.

Similarly, in the instant case, the Plaintiffs have failed to plead fraud with sufficient particularity to withstand a motion for summary judgment. A review of the Plaintiffs’ Complaint reveals that it contains broad accusations unsupported by any specific facts just as in Heathman. For instance, paragraph 23 of Plaintiffs’ Complaint states: “Defendants were aware that the **Home had not been built to code**, that **certain requirements** for occupancy had not been met, and that **false information** had been provided to the city inspector in order to obtain the certificate of occupancy.” (emphasis supplied).

No explanation is provided as to how the Smiths were aware the home had not been built to code or in what ways the home was code deficient. Such information is vital to the establishment of the Plaintiffs’ claim of fraud and therefore must be plead with specificity. Instead of providing specific facts necessary to establish a claim of fraud, the Plaintiffs have provided a blanket assertion that clearly does not meet the specific pleading requirement of U.R.C.P. 9(b).

Likewise, the Plaintiffs’ assertion that “certain requirements” were not met for occupancy is clearly lacking. No indication is given as to what these “requirements” were or in what way they were not met. Once again, it is a bare bones allegation similar to the ones the court ruled inadequate in Heathman.

Finally, as for the allegation regarding “false information” being supplied to the city inspector, no indication is given as to what information was actually provided or how it was false. Rather than providing specific detail as required by U.R.C.P. 9(b), Plaintiffs once again make a bare bones allegation unsupported by any specific facts.

As is readily apparent, Plaintiffs have made the type of general accusations that are essentially conclusions of the pleader without setting out the basic facts that would constitute the charged actions. This is clearly improper under the rules and is legally insufficient to withstand a motion for summary judgment. It is not enough to make a few general statements when pleading fraud in the hope that it will pass muster. Therefore, the Smiths' Motion for Summary Judgment as to Plaintiffs' claims for fraud and misrepresentation should be granted.

E. THE PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES SHOULD BE DISMISSED BECAUSE ALL OF THE PLAINTIFFS' UNDERLYING CLAIMS ARE SUBJECT TO SUMMARY JUDGMENT

The Plaintiffs' final cause of action is for punitive damages. It is well settled in Utah that if all of a party's underlying substantive claims are dismissed, a claim for punitive damages must then be dismissed as well. See e.g., U.P.C. v. R.O.A. Gen., Inc., 990 P.2d 945 (Ut. 1999). Indeed, a claim for punitive damages is dependent on the validity of the underlying claims. Because all of the Plaintiffs' claims are subject to summary judgment, the Plaintiffs' claim for punitive damages must be dismissed as well.

IV.

CONCLUSION

For the foregoing reasons, Defendants, Dan and Carol Smith, respectfully request that this Court grant their Motion for Summary Judgment as to the Plaintiffs' claims for breach of contract, rescission, and violation of the Consumer Sales Practices Act on the basis of the expiration of the statute of limitations. The Defendants further request that this Court grant their Motion for Summary Judgment as to the Plaintiffs' claims for fraud and misrepresentation on the basis that the Plaintiffs have failed to plead those causes of action with sufficient particularity in accordance with U.R.C.P. 9(b). Finally, the Defendants request that this Court grant their Motion for Summary

Judgment as to the Plaintiffs' claim for punitive damages on the basis that there is no underlying claim left to adjudicate and therefore the punitive damages claim must be dismissed.

DATED this 23 day of February, 2001.

DIXON & TRUMAN, a P.C.

 for

A. BRYCE DIXON, ESQ.

Attorney for Defendants

A. BRYCE DIXON, ESQ. (#889)
NATHAN K. FISHER, ESQ. (#7522)
DIXON & TRUMAN, a P.C.
 192 East 200 North Suite 203
 St. George, Utah 84770
 Telephone: (435) 652-8000
 Facsimile: (435) 652-9000
 Attorneys for Defendant

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

WILLIAM MOORE and MARY MOORE.

Plaintiff,

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 DAN SMITH

Case No. 000700142 MI
Judge

STATE OF UTAH

COUNTY OF WASHINGTON

DAN SMITH, having been duly sworn on oath, deposes and states as follows:

1. I am one of the Plaintiffs in the above-entitled case.
2. I am of adult years and competent to make this Affidavit. All the statements hereinafter set forth in this Affidavit are made by me on the basis of my personal and direct knowledge of the matter to which said statements pertain. If called as a witness by a Court of competent jurisdiction, I am able and shall testify as to each and all of said matters in the manner hereinafter set forth in this Affidavit.

3. I am a citizen of the United States and a resident of the State of Utah and am over the age of 18 years.
4. I built the home located in Millard County, Utah that is the subject of this dispute (hereinafter “the subject home”), for the residence of my wife and me.
5. Construction was completed on the subject home in early November of 1993 and we moved into the home in mid-November of 1993.
6. At the time of the construction and sale of the subject home I was not working as a general contractor.
7. I obtained the Certificate of Occupancy and Zoning Compliance for the subject home from the City of Fillmore on January 28, 1994.
8. I affirm that the copy of the Certificate of Occupancy and Zoning Compliance attached to the Memorandum in Support of Defendants’ Motion for Summary Judgment is a true and correct copy of the said original document.
9. On or about February 15, 1994, an Earnest Money Sales Agreement was entered between my wife and me and William and Mary Moore (hereinafter “the Moores”) for the sale of the subject home.
10. I affirm that the copy of the Earnest Money Sales Agreement attached to the Memorandum in Support of Defendants’ Motion for Summary Judgment is a true and correct copy of the said original document.
11. We moved out of the subject home by the end of March, 1994.
12. Never at any time after the Earnest Money Sales Agreement was executed, did I

perform any type of construction or repair services on the subject home.

13. The transaction between my wife and I and the Moores for the sale and purchase of the subject home closed on May 2, 1994.
14. I affirm that the copies of the closing documents attached to the Memorandum in Support of Defendants' Motion for Summary Judgment are true and correct copies of the said original documents.
15. I was not made aware of any alleged construction defects regarding the subject home until December of 2000.
16. The Moores filed their Complaint for damages on August 24, 2000.

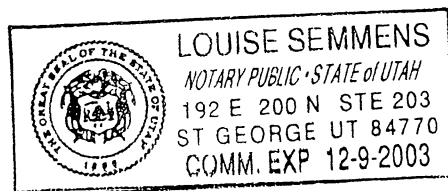
FURTHER AFFIANT SAYETH NOT.

DATED this 23 day of February, 2001.

Dan Smith
DAN SMITH

SUBSCRIBED and SWORN to before me this
23 day of February, 2001.

Louise Semmens
NOTARY PUBLIC in and for said
County and State.



RESIDENTIAL

Certificate of Occupancy and Zoning Compliance

CITY OF FILLMORE

Name of Owner: Dan Smith Building Permit No.: 1143
Address of Owner: 155 W 300 S Telephone No.: 743-5170
Property described as: _____ Zone: _____
Legal description

Otherwise known as: _____
Street address

Architect/Engineer: _____ Occupancy Group: _____
Contractor: Dan Smith Altered _____ New ☒
____ No. of buildings on lot _____ Building No. _____ No. of Units

TYPE OF OCCUPANCY

- ☒ FAMILY OCCUPANCY
____ Number of families approved to reside per building
____ Number of boarders or roomers with automobiles approved to reside on premises with a family
____ Number of legal-sized off-street parking spaces
- ____ BACHING SINGLES OCCUPANCY
____ Number of baching singles approved to reside per unit
____ Number of legal-sized off-street parking spaces. The number of occupants owning or operating vehicles cannot exceed this number.

I declare under penalty of perjury that I am the owner or authorized agent of the property subject of this request, that the foregoing statements and answers are true and correct, and that the stated conditions will be maintained on the premises.

Signature

Date

Any change in intensity of use on the building or premises, or an increase of more than five percent (5%) in the number of occupants in an apartment or multiple residential building will require the issuance of a new certificate.

Dale A. Smith
Zoning Administrator

January 28, 1994
Date

Dale Peterson
Chief Building Inspector

Jan 26 1994
Date

Remarks: _____

Section 4-4 Zoning Ordinance No. 77-3 Certificate of Occupancy and Zoning Compliance. It shall be unlawful to use or occupy or to permit the use or occupancy of any building or premises until a certificate of occupancy and zoning compliance shall have been issued for the premises and/or building by Fillmore City.

Failure to comply with any section of this ordinance is a misdemeanor and is punishable by a fine of not more than \$1000 or imprisonment for not more than six (6) months or both as is set forth in Chapter 1 Sec. 11-100.

Legend Yes(X) No(O)

DATE February 15, 1994

The undersigned Buyer William K Moore & Mary J. Moore hereby deposits with Brokerage
EARNEST MONEY, the amount of Four Thousand no/100 Dollars (\$ 4000.00)
the form of check
which shall be deposited in accordance with applicable State Law
none
Brokerage Phone Number Received by Dan J. Smith

OFFER TO PURCHASE

1 PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 155 W 300S
in the City of Fillmore County of Millard, Utah,
subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in
accordance with Section G. Said property is owned by Dan J & Carol L Smith as sellers and is more particularly described

CHECK APPLICABLE BOXES

☒ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other _____
☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other _____

(a) Included Items Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property.
The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title _____

(b) Excluded Items The following items are specifically excluded from this sale living room lamp & shower curtain
main bath

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS Seller represents that the property includes the following improvements in the purchase price
☒ public sewer ☒ connected ☐ well ☐ connected ☐ other _____ ☒ electricity ☒ connected
☒ septic tank ☒ connected ☒ irrigation water / secondary system ☐ ingress & egress by private easement
☐ other sanitary system _____ # of shares to be determined ☒ dedicated road ☒ paved
☒ public water ☒ connected ☐ TV antenna ☐ master antenna ☐ prewired ☐ curb and gutter
☐ private water ☐ connected ☒ natural gas ☒ connected ☐ other rights _____

(d) Survey A certified survey ☐ shall be furnished at the expense of _____ prior to closing ☒ shall not be furnished

(e) Buyer Inspection 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 _____

2 PURCHASE PRICE AND FINANCING The total purchase price for the property is Eighty Three Thousand
no/100 Dollars (\$ 83,000.00) which shall be paid as follows

4,000.00 which represents the aforescribed EARNEST MONEY DEPOSIT
79,000.00 representing the approximate balance of CASH DOWN PAYMENT at closing
0 representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer,
which obligation bears interest at 0 % per annum with monthly payments of \$ 0
which include ☐ principal ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees, ☐ other _____
0 representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be
assumed by Buyer, which obligation bears interest at _____ % per annum with monthly payments of \$ _____
which include ☐ principal, ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees ☐ other _____
0 representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows _____
0 _____
Other _____

83,000.00 TOTAL PURCHASE PRICE

If Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best efforts
to assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer agrees
to make application within N/A days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at
an interest rate not to exceed N/A %. If Buyer does not qualify for the assumption and/or financing within N/A days after Seller's acceptance
of this Agreement, this Agreement shall be voidable at the option of the Seller upon written notice. Seller agrees to pay up to N/A mortgage loan discount
points, not to exceed \$ N/A. In addition, seller agrees to pay \$ N/A to be used for Buyer's other loan costs.

three of a four page form



EXHIBIT

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

Form Approved OMB No. 2502-0265

Type of Loan <input checked="" type="checkbox"/> FHA <input type="checkbox"/> FmHA <input type="checkbox"/> Conv. Unins. <input type="checkbox"/> VA <input type="checkbox"/> Conv. Ins.		6. File Number 29827-M	7. Loan Number	8. Mortgage Insurance Case Number
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 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 situated in Fillmore, Ut. 84631 of Lot 6, Blk. 32, Plat A, Fillmore 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		K. Summary of Seller's Transaction		
Gross Amount Due From Borrower		400. Gross Amount Due To Seller		
Contract sales price	83,000.00	401. Contract sales price	83,000.00	
Personal property		402. Personal property		
Settlement charges to borrower (line 1400)	164.60	403.		
		404.		
		405.		
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance		
City/town taxes to		406. City/town taxes to		
County taxes to		407. County taxes to		
Assessments to		408. Assessments to		
		409.		
		410.		
		411.		
		412.		
1. Gross Amount Due From Borrower	83,164.60	420. Gross Amount Due To Seller	83,000.00	
1. Amounts Paid By Or In Behalf Of Borrower		500. Reductions In Amount Due To Seller		
Deposit or earnest money	4,000.00	501. Excess deposit (see instructions)	4,000.00	
Principal amount of new loan(s)		502. Settlement charges to seller (line 1400)	629.00	
Existing loan(s) taken subject to		503. Existing loan(s) taken subject to		
		504. Payoff of first mortgage loan		
		505. Payoff of second mortgage loan		
		506.		
		507.		
		508.		
		509.		
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller		
City/town taxes to		510. City/town taxes to		
County taxes 1/01/94 to 5/02/94	193.71	511. County taxes 1/01/94 to 5/02	193.71	
Assessments to		512. Assessments to		
		513.		
		514.		
		515.		
		516. Funds Applied to 29827-M	9,758.17	
		517.		
		518.		
		519.		
2. Total Paid By/For Borrower	4,193.71	520. Total Reduction Amount Due Seller	14,580.88	
3. Cash At Settlement From/To Borrower		600. Cash At Settlement To/From Seller		
Gross amount due from borrower (line 120)	83,164.60	601. Gross amount due to seller (line 420)	83,000.00	
Less amounts paid by/for borrower (line 220)	(4,193.71)	602. Less reductions in amt. due seller (line 520)	(14,580.88)	
3. Cash <input checked="" type="checkbox"/> From <input type="checkbox"/> To Borrower	78,970.89	603. Cash <input checked="" type="checkbox"/> To <input type="checkbox"/> From Seller	68,419.12	

BRS: William K. Moore
Mary J. MooreSELLERS: Dan Irvin Smith, Trustee
Carol L. Smith, Trustee

21-1 (Rev. 7/8)

Settlement Charges

Total Sales/Broker's Commission based on price \$	@	% =		
Division of Commission (line 700) as follows				
\$	to		Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
\$	to			
Commission paid at Settlement				

Items Payable in Connection With Loan

Loan Origination Fee	%			
Loan Discount	%			
Appraisal Fee	to			
Credit Report	to			
Lender's Inspection Fee				
Mortgage Insurance Application Fee to				
Assumption Fee				

Items Required By Lender To Be Paid In Advance

Interest from	to	@ \$	/day		
Mortgage Insurance Premium for	months to				
Hazard Insurance Premium for	years to				
	years to				

9. Reserves Deposited With Lender

1. Hazard Insurance	months @ \$	per month		
2. Mortgage Insurance	months @ \$	per month		
3. City property taxes	months @ \$	per month		
4. County property taxes	months @ \$	per month		
5. Annual assessments	months @ \$	per month		
6.	months @ \$	per month		
7.	months @ \$	per month		
8.	months @ \$	per month		

9. Title Charges

1. Settlement or closing fee	to	Security Title Company	75.00	75.00
2. Abstract or title search	to			
3. Title examination	to			
4. Title insurance binder	to			
5. Document preparation	to	Security Title Company	25.00	25.00
6. Notary fees	to			
7. Attorney's fees	to			
(Includes above items' numbers:				
8. Title insurance	to	Security Title Company		529.00
(Includes above items' numbers:				
9. Lender's coverage	\$			
10. Owner's coverage	\$	83,000.00		
1.				
2.				
3.				

9. Government Recording and Transfer Charges

1. Recording fees	Deed \$ 15.00	; Mortgage \$0.00	; Release \$0.00	15.00	
2. City/county tax/stamps	Deed \$	; Mortgage \$			
3. State tax/stamps	Deed \$	; Mortgage \$			
4.					
5.					

9. Additional Settlement Charges

1. Survey	to			
2. Pest inspection to				
3. Water Stock Re-Issue Fee	Fillmore Water Users Assoc	10.00		
4. 1994 Water Assessments	Fillmore Water Users Assoc	39.60		
5.				
10. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)		164.60	629.00	

ERS INITIALS: WJM

SELLERS INITIALS: _____

1121-2 (Rev. 7/87)

WJM

Order No. 29827-M DATE 5/02/94

TO: Security Title Company of Millard County
180 South Main
P.O. Box 658
Fillmore, Utah 84631

These instructions submitted this date, to you as ESCROW AGENT, by the undersigned Seller(s) and Buyer(s), of the following real estate situated in Millard County, State of Utah, to-wit:

Beginning 20 feet West of the Northeast corner of Lot 6, Block 32, Plat A, Fillmore City Survey, thence West 89 feet; thence South 128 feet; thence East 27 feet; thence South 202 feet more or less to the South line of said Lot 6; thence East 82 feet; thence North 165 feet more or less to a point 165 feet South of the North line of said Lot 6; thence West 20 feet; thence North 165 feet to the point of beginning.

TOGETHER WITH all rights, privileges, easements, rights of way, improvements and appurtenances thereunto belonging or in anyway appertaining thereto.

SUBJECT TO covenants, conditions, restrictions, reservations, easements and rights of way of record.

COPY
Located in, Fillmore, Ut 84631

Property Address: _____

WITNESSETH:

The undersigned parties hereby employ you as ESCROW AGENT to complete the closing of this escrow (sale) in accordance with the following instructions. The parties agree to deliver to you all properly executed instruments, documents, and funds necessary to comply with the terms hereof; and which you may use when you have satisfied the terms and provisions of this agreement, or are in position to do so, on or before the 2 day of May, 191994 and:

You can issue your Standard Coverage Form Policy of Title Insurance with liability of \$ 83,000.00 (fee: \$ 529.00 charged to Seller) covering the hereinafter described property showing title vested in:

William K. Moore and Mary J. Moore, husband and wife, as joint tenants

To be free of all liens and encumbrances, except as follows:

1. Taxes: for the year 1994 now a lien not yet due.
2. Special assessments:-----
3. Easements: in existence and/or of record.
4. Other: -----

The SALES PRICE IS \$ 83,000.00 to be paid as follows:

EARNEST MONEY \$ 4,000.00

DOWN PAYMENT \$ 79,000.00 plus closing costs to be paid in full at the time of closing.

DEFERRED BALANCE: \$
0.00

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.

POSSESSION DATE: CLOSE OF ESCROW

PRORATE AND/OR ADJUST THE FOLLOWING AS OF May 2, 1994
(See General Conditions on reverse side for details.)

1. Taxes and special assessments.
2. Fire and casualty insurance and FHA insurance, if applicable.
3. Interest on all encumbrances.
4. Rents, if any, per rent statement.
5. Charge the Buyer and credit the Seller for funds held in impound account, if any, pertaining to any loans assumed by Buyer.

WATER STOCK AND/OR WATER RIGHTS: .32 shares of F.W.U.A. water stock

General instructions and conditions set forth on the reverse side hereof are hereby incorporated in and made a part of the following instructions.

At the close of ESCROW you are to deliver or mail all documents, checks, etc. by regular mail to the persons entitled thereto at the addresses provided below.

Failure to close this ESCROW within the period of time hereinabove provided shall not automatically terminate or cancel the same. You may continue to regard it as executory until canceled by notice from any of the parties hereto in writing.

The SELLER agrees to sell, and the BUYER agrees to buy the above described property upon the terms and conditions herein contained.

Dan Irvin Smith
SELLER

Dan Irvin Smith

William K Moore
BUYER

William K. Moore

Carol L Smith
SELLER

Carol L. Smith

Mary J Moore
BUYER

Mary J. Moore

Address: P.O. 985

Fillmore, Ut 84631

Phone Number: 743-5170

Social Security Number:

Address: Star Rt. Box 234

Fillmore, Ut 84631

Phone Number: 743-6834

Social Security Number:

ACCEPTED THIS 2 day of May, 191994

SECURITY TITLE COMPANY
OF MILLARD COUNTY

BY: R. Kent Dalton
R. Kent Dalton

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.

CERTIFICATE OF MAILING

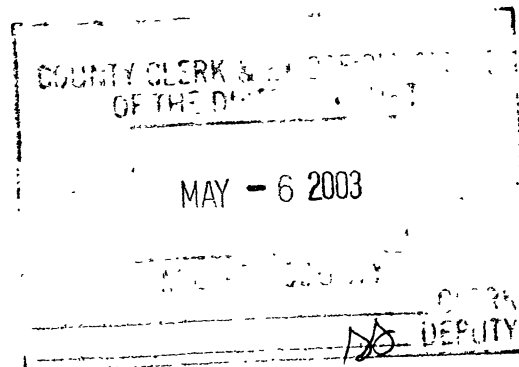
I hereby certify that I am an employee of DIXON & TRUMAN, a P.C. and that on the 23
day of February, 2001, I placed a true and correct copy of the foregoing Memorandum in Support
of Defendants' Motion for Summary Judgment in the United States mails at St. George, Utah, with
1st class postage prepaid 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

ADDENDUM 2

A. BRYCE DIXON, ESQ (#889)
AARON M. WAITE, ESQ (#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



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

WILLIAM MOORE and MARY MOORE,	)	MEMORANDUM IN SUPPORT OF
Plaintiffs,	)	DEFENDANTS' MOTION FOR
	)	SUMMARY JUDGMENT
vs.)	
)	
DAN SMITH, individually and as Trustee of)	
the Dan Irvin Smith Inter Vivos Trust, and	)	Oral argument requested
CAROL SMITH, individually and as Trustee)	
of the Carol L. Smith Inter Vivos Trust,	)	Civil No.: 000700142 MI
Defendants.	)	Judge: EYRE

I.
INTRODUCTION

In August, 2000, after living in a home for about 6 ½ years, the Plaintiffs sued the Defendants alleging DAN SMITH and CAROL SMITH sold them the home in February, 1994, with construction defects. A previous motion for summary judgment was filed by the Smiths. The court granted the motion partially and allowed discovery to proceed on the following two issues: 1) whether the Smiths failed to disclose "latent and material defects in the home, or building code violations, of which [the Smiths] were aware," and 2) "when those defects should have reasonably

been discovered” by the Plaintiff.

The Plaintiff's own testimony and discovery responses show that all of the 30-42 construction defects that they allege in this case could have been discovered by a home inspection before they bought the house. The Utah law of caveat emptor, therefore, demands dismissal of all claims based on said defects.

Moreover, Utah Code Ann. §78-12-21.5, the applicable statute of limitations, bars all claims brought by the Plaintiffs. Pursuant to Section 21.5, the period for commencing an action for breach of a written contract is six years and the date for commencing an action for all other claims is two years from the date Plaintiffs discovered or should have discovered, through the exercise of reasonable diligence, the alleged defects. Here, Plaintiffs commenced their lawsuit more than six years after the completion of construction and the date of contract. In addition, discovery has revealed that Mary Moore had notice of the major alleged defects some five and six years before she filed suit, though she chose not to exercise reasonable diligence to discover the defects until the year 2000.

At Plaintiffs' request, in August, 2000, Jason Bullock inspected the home and prepared a list of 30 alleged defects. Most of these alleged defects, even if proven, are too insignificant to warrant discussion. For example, item number 7 in Bullock's list alleges that an electrical outlet that was covered by kitchen cabinetry had no cover plate. Even the Plaintiffs' own experts acknowledge that the cost of an outlet cover plate is merely a dollar—although Plaintiffs' expert, Lloyd Steenblik, thinks

it would take an electrician one hour, at \$45 an hour, to screw the cover plate onto the outlet (See page 8, Item #7, of the report of Project Analysts, one of Plaintiffs' experts. Copies of the pages of Project Analysts report cited herein are annexed as Exhibit 1.) In addition, item number 25 alleges that the electrical control panel was not labeled, although the wires next to the panel were labeled. It would take mere minutes for any person to fix this so called "defect" by transferring the information from the labels on the wires to the stickers on the panel. However, Plaintiffs' expert Lloyd Steenblik estimated that it would take an electrician 6 hours at \$45 an hour to label the electrical panel. See page 30 of Exhibit 1. A third example is item number 29 which alleges that outlets in the garage are not GFCI. This could have been remedied by the installation of an outlet costing a few dollars according to the Smiths' expert, Michael Barrett.¹ See Item 29 of Michael Barrett's report, the pertinent pages of which are annexed hereto as Exhibit 2. Most importantly, every one of these alleged defects were obvious and not latent.

The house is not threatened by the alleged defects. The roof does not leak. There is no known damage to footings or foundation. The best the Plaintiffs' experts can do is say that these are, technically, building code violations and, if not corrected, might do harm in the future despite the fact that the Plaintiffs lived in the home contentedly for over six years without a single complaint to the Smiths.

¹ These are just a few of the many examples of how the Plaintiffs' experts have inflated the repair costs of alleged defects. It is not necessary for this motion for summary judgment to treat that issue, however.

II. PROCEDURAL HISTORY

1. The Plaintiffs filed their Complaint for damages on August 24, 2000, alleging separate causes of action for: (1) Breach of Contract; (2) Rescission; (3) Fraudulent Nondisclosure; (4) Misrepresentation; (5) Violation of Consumer Sales Practices Act; and (6) Punitive Damages. See Complaint. They amended the complaint to mutual mistake.

2. Plaintiffs' Complaint alleges that the Smiths knew their home was not built to code when they sold it to the Plaintiffs. They call this "fraudulent nondisclosure." See Complaint, at Third Cause of Action, p. 4.

3. The fourth cause of action of Plaintiff's complaint alleges that the Smiths misrepresented that their home was "built in compliance with applicable building codes," was "safe for occupancy, and able to be lawfully occupied." See Complaint, at p. 5.

4. Soon after the Smiths were served with the Complaint they submitted their first Motion for Summary Judgment. See Defendants' Motion for Summary Judgment.

5. On August 16, 2001, the Court entered an Order on The Smiths' Motion for Summary Judgment. See Court's August 16, 2001, Order annexed hereto as Exhibit 3.

6. The Court dismissed the Plaintiffs' negligent misrepresentation claim. See Court's August 16, 2001, Order at p. 2.

7. The Court's Order also reflects that the Plaintiffs were required to elect their remedies between the breach of contract claim and the rescission claim. See Court's August 16, 2001, Order

at p. 3.

8. Plaintiffs elected the remedy of rescission as their sole remedy in this action and the Court ordered that the Plaintiffs could not seek damages under their breach of contract claim. See Court's August 16, 2001, Order at pp. 3 – 4.

9. The Court concluded "that the Smiths . . . may have a legal duty to disclose to Plaintiffs any latent and material defects in the home, or building code violations, of which [the Smiths] were aware." See Court's August 16, 2001, Order at pp. 2–3.

III. **STATEMENT OF UNDISPUTED MATERIAL FACTS**

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

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. D

3. The Smiths obtained a building permit for the construction of the Home. See Building Permit and Building Permit Application annexed hereto as Exhibit 5. A

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. D

5. The Fillmore City Building Inspector, Jack Peterson, discussed the amount 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.

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.

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.

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.

9. The City Building Inspector signed off on the certificate of occupancy and the final inspection. See Peterson Deposition. at p. 88, Exhibit 7.

10. An Earnest Money Sales Agreement ("Agreement") was entered into between the parties on or about February 15, 1994. See Agreement annexed hereto as Exhibit 9.

11. The Agreement states 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: _____ (this space was intentionally left blank by the parties).

See Agreement at ¶ 1(e).

SELLER'S WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: none (handwritten).

See Agreement at ¶ 6

SPECIAL CONSIDERATIONS AND CONTINGENCIES This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing closing fees to be paid half by buyer + half by seller (handwritten)

See Agreement at ¶ 7

GENERAL PROVISIONS UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISIONS SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE

See Agreement at ¶ 11

12 The General Provisions (also Exhibit 9) 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 to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom 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

See General Provisions at ¶ B

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, (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing

See General Provisions at ¶ C

COMPLETE AGREEMENT – NO ORAL AGREEMENTS This instrument

constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agreement.

See General Provisions at ¶ L

13 Plaintiffs did not condition the purchase of the property on the outcome of a home inspection. See Agreement (Exhibit 9) at ¶ 6.

14 Plaintiffs did not have an independent home inspection performed prior to purchasing the Home. See Plaintiffs' Responses to Defendants' First Set of Requests for Admissions to Plaintiffs, Response Number 6, and the Smiths First Set of Requests for Admission, Request Number 6. The pertinent request and their responses are annexed hereto as Exhibit 10.

15 Plaintiffs walked through the house before purchasing it but never considered hiring a home inspection to determine whether there were any unsatisfactory conditions. See Moore Deposition, Vol. I, pp 72-73.

16 Plaintiffs had the opportunity to have a home inspection conducted and the Smiths did not prevent them from doing so. See Plaintiffs' Answers to Defendants Second Set of Requests for Admission dated February 14, 2003, Response Number 2, 3 and 4, and the Smiths Second Set of Requests for Admission, Request Number 2, 3 and 4. Annexed as Exhibit 10.

17 Since May 2, 1994, the Plaintiffs made improvements to the Home and the lot, including landscaping, and installation of water softener, air conditioning, doors and water line, and enjoyed the benefit of living in the Home and complete control over the Home and lot. See

Deposition of Mary Moore, pp 50-52, 144-151. (Exhibit 11)

18. Plaintiff admits that:

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

See Affidavit of Mary Moore (Exhibit 12) at ¶ 7.

19. The alleged code violations identified by Plaintiffs were all discovered in the year 2000 by a home inspection, which did not involve destructive testing. See Exhibit 10, Response Number 5, Request Number 5. See Deposition of Jason Bullock p. 33, Exhibit 13. See Deposition of Lloyd Steenblik p. 77-78, copies of the pages cited herein are attached hereto as Exhibit 14. See Project Analysts report (Exhibit 1) at p. 3.

20. Jason Bullock prepared a list of 30 alleged code violations that he found upon performing the home inspection in the year 2000, for which Mary Moore was charged merely \$60. See Deposition of Jason Bullock, p. 31-33. Exhibit 13.

21. Jason Bullock discovered all of the alleged defects as he walked through the house as though he were performing a final inspection. See Bullock Deposition, p. 30. Exhibit 13.

22. Steenblik's inspection added 12 minor items to the list but the major alleged defects were all in Bullock's original list. See Project Analysts report, summary sheet, Exhibit 1, p. 2.

23. 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.

24. Plaintiffs have admitted that all of the 42 alleged defects could have been discovered by a home inspection before they bought the house. See Plaintiffs' Answers to Second Set of Admission, Exhibit 10, Response Number 7, and the Second Set of Requests for Admission, Exhibit 10, Request Number 7.

25. Plaintiffs have admitted that all of the alleged defects are patent except items 9, 12, 26, 27, 38 and 39.² See Plaintiffs' Answers to Second Set of Admission, Response Number 9, and the Second Set of Requests for Admission, Request Number 9. Exhibit 10.

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.

27. Lloyd Steenblik at first alleged that Dan Smith attached the window flashing to the outside of the aluminum siding. Exhibit 1, Project Analysts report, item 9 at p. 10. Later his superior showed him that he was mistaking a molding strip for the window nailing fin and that he was wrong on that opinion. Steenblik depo. p. 45. Exhibit 14.

28. Jack Peterson says he saw on inspection the felt paper that served as flashing for the windows. Peterson depo. p. 54. Exhibit 7. He also testified that the slight water damage is caused by mere condensation that sometimes forms on cold days because of the thin aluminum on the windows. Pp. 57-58, Exhibit 7.

² 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.

29. **Allegation of Overspanning of Floor Joists.** Peterson testified that the code calls 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.

30. **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 impossible.” Peterson depo. p. 148. Exhibit 7. With Jack Peterson’s permission and the expectation that they would do the finish grading in the spring when the weather cleared up, the Smiths were given a final inspection approval. Depo. Peterson, p. 77. Exhibit 7.

31. **Allegation of Inadequate Roof Ventilation.** The undisputed evidence is that Dan Smith and the building inspector, Jack Peterson, had a discussion about the roof ventilation. Jack Peterson testifies that he accepted Dan Smith’s opinion that the amount of ventilation was adequate. He did not “red tag” the ventilation. In Exhibit 5 to his deposition he said, “I also visited the job site another occasion and Dan and I discussed the venting of the attic. Dan felt that it was adequate.” Exhibit 7A. Thus, Peterson “accepted it.” Peterson depo. p. 111. Exhibit 7.

IV.
ARGUMENT

**PLAINTIFFS' CLAIMS ARE BARRED INASMUCH AS THE PLAINTIFFS FAILED
TO HAVE THE HOME INSPECTED AND INASMUCH AS THE APPLICABLE
STATUTES OF LIMITATION RAN BEFORE SUIT WAS FILED.**

This case is ripe for adjudication and disposal through summary judgment. Summary judgment is appropriate only "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 a judgment as a matter of law." URCP 56(c). In this case, there are no latent defects because all of the defects alleged by Plaintiff were discoverable by a home inspection. Indeed, all of the alleged defects in this case were literally discovered by a home inspection. Utah law clearly holds that failure to obtain a home inspection in these circumstances requires dismissal. Moreover, the applicable statutes of limitation ran before Plaintiffs filed their Complaint in this case. The Smiths should no longer be required to defend themselves and incur attorney fees because "there is no genuine issue as to any material fact" and the Smiths are "entitled to a judgment as a matter of law."

A. The doctrine of caveat emptor applies to preclude Plaintiffs' claims inasmuch as Plaintiffs had a duty to have the home inspected and had they done so, the alleged defects could have been discovered before the sale.

Plaintiffs walked through the house before purchasing it but never considered hiring a home inspection to determine whether there were any unsatisfactory conditions. They admit having the opportunity to do so and that the Smiths did not prevent them from doing so. Plaintiffs also admit

that the defects could have been discovered by a home inspection before they bought the house.

The alleged code violations were discovered in the year 2000 by a home inspection which did not involve destructive testing. Jason Bullock created a list of 30 alleged code violations that he found upon performing a \$60 home inspection.

Maack v. Resource Design and Construction, Inc. 875 P.2d 570 (Ut. App. 1994) disposes of this case. It holds that where a home inspection would have revealed the defects, failure to obtain a home inspection is fatal to the plaintiff's case.

In Maack the plaintiff alleged fraudulent concealment, nondisclosure, and negligent misrepresentation. (Footnote of causes of action alleged by Plaintiffs here) P. 574. As here, Maack did not obtain a home inspection before purchase. P. 573. As here, the Maack sales agreement contained an "as is" clause "without any warranties as to its condition." P. 573. In Maack the trial court found that the plaintiffs' failure to ask for a warranty and to have a home inspection performed "fell below the level of ordinary diligence." P.574. The trial court granted summary judgment. P. 574.

Similarly, in this case, Plaintiffs alleged fraud, fraudulent nondisclosure, and negligent misrepresentation.³ Plaintiffs knew when they purchased the Home that they lacked knowledge concerning construction and, therefore, would need assistance to reasonably determine the condition of the home. As in Maack, Plaintiffs chose to forego a home inspection, even though the sales

³ The Court dismissed Plaintiffs' negligent misrepresentation claim in 2001.

contract expressly permitted the Plaintiffs to do so. As in Maack, the sales contract contained an “as is” clause.

The Maack court, discussing the fraudulent concealment claim, quoting Atherton Condominium Bd. v. Blume Dev., 115 Wash. 2d 506, 799 P.2d 250, 261 (Wash. 1990) stated that a “fraudulent concealment cause of action requires, inter alia, that ‘a careful, reasonable inspection on the part of the purchaser would not disclose the defect’.” P. 578. Then the Maack court disposed of the nondisclosure claim, noting that the Maacks were unreasonable in failing to obtain a home inspection and, quoting from Horsch v. Terminix Int’l Co., 19 Kan. App. 2d 134, 865 P.2d 1044, 1048 (Kan. App. 1993), held that a “party to [a] contract has [a] duty to disclose facts material to [the] transaction and not within [the] reasonable reach of the other party if the other party could not discover these facts by exercise of reasonable diligence.” P. 579.⁴

Therefore, Maack holds that failure to obtain a home inspection disposes of both fraudulent concealment and nondisclosure. In this case, a \$60 home inspection prompted this lawsuit which is based strictly on allegations of technical code violations. Mary Moore’s deposition and the reports of the Plaintiffs’ experts annexed hereto show that the alleged defects were **not** discovered by a precipitous event. For over six years, Plaintiffs lived contentedly in the Home without a single complaint to the Smiths. There was no subsidence causing cracking of stucco or instability of the

⁴ The Maack court observed at footnote 8 that twice in their appellate brief plaintiffs admitted that an inspection by a general contractor ... would have revealed the defects in the stucco and other parts of the residence." Similarly, in this case Plaintiffs admit that a home inspection would have revealed the alleged defects before the sale of the Home.

foundation. There was no roof leak that made the home suddenly uninhabitable. The ceiling did not cave in. A review of Plaintiffs' expert report says almost nothing of damage caused by any of the alleged defects. Every alleged defect was discovered by a very basic home inspection performed over six years after the sale of the Home—a home inspection which, had it been done before purchase, would have disclosed the alleged defects to the Plaintiffs.

There are many issues as to whether the alleged defects were caused by the Plaintiff inasmuch as numerous construction and remodeling changes were done by the Plaintiffs. There are issues whether the alleged defects actually complied with the building code applicable in 1993. Nonetheless, there is no issue but that every alleged defect could have been discovered by a home inspection before the Plaintiffs purchased the Home because that is how these alleged defects were discovered over 6 years later.

Maack is **not** the only Utah case on this point. In Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994), plaintiff home-buyers sued the sellers of the subject home, among others, for defects in the home. The trial court granted the defendant sellers' motion for summary judgment, and the plaintiffs appealed. The Schafir opinion is replete with statements of law regarding Utah's *caveat emptor* doctrine and the duties of home buyers to have the homes inspected prior to purchasing the homes.

The Schafir court held that:

The general rule in this state is that the doctrine of caveat emptor still applies to the sale of real estate. The Utah Supreme Court has stated that the "doctrine [of caveat

emptor] has eroded in the sale of new residential housing. **However, the doctrine appears to prevail in the sale of used property whether homes or commercial.**" Utah State Medical Ass'n v. Utah State Employees Credit Union, 655 P.2d 643, 645 (Utah 1982). Additionally, **"one of the reasons for retaining the doctrine of caveat emptor in the area of real estate transactions is the assumption that the vendee has a reasonable opportunity to inspect the premises."** Loveland v. Orem City Corp., 746 P.2d 763, 779 (Utah 1987) (Durham, J., concurring and dissenting).

Schafir at 1389 (emphasis added) . The Schafir court further stated that:

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. See Utah State Medical Ass'n v. Utah State Employees Credit Union, 655 P.2d 643, 645 (Utah 1982). 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 at 1390 (emphasis added). Even in its footnotes, the Schafir court restated its position, stating that:

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. In the case of latent defects, a home buyer's best resort against the seller is to sue for either fraudulent or negligent misrepresentation or nondisclosure.

Schafir at n.12 (emphasis added).

The Schafir court affirmed the trial court's entry of summary judgment for the defendant home-sellers. Schafir clearly places the responsibility to discover defects on the buyer, not the seller. Schafir holds that defects discoverable by a home inspection are not actionable. In the case at bar,

since all defects are of the discoverable type, summary judgment should be granted

In accord is a recent Utah Supreme Court opinion Hermansen v. Tasulis, 2002 UT 52, 48 P 3d 235 (citing Mitchell v. Christensen, 2001 UT 80 at P11, 31 P3d 572 held “With this holding, we issued some specific precautions. We first cautioned that **‘if a defect can be discovered by reasonable care, the doctrine of caveat emptor prevails and precludes recovery by the vendee’**” The Hermansen case noted that numerous home inspectors are not required but a basic home inspection is required to exercise ordinary diligence. *Id.* at P 26. Neither Hermansen nor Mitchell overrule this requirement laid down in Maack and Schafir.

In the instant case, the alleged defects were discovered by a non-destructive inspection in the year 2000, and could have been discovered in similar fashion before the sale of the Home in 1994. The Maack, Schafir, and Hermansen decisions all make it clear that the Plaintiffs had a duty 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.⁵ In this case, Plaintiffs did not exercise ordinary diligence to discover the alleged defects and, therefore, the doctrine of caveat emptor applies to preclude the Plaintiffs from bringing suit for the alleged defects in the Home.

⁵ If “reasonable diligence” were construed to permit a person to wait as long as the person wanted before having a home inspected, these types of lawsuits could be brought at any time after the closing of the sale, even fifty years later.

B. Plaintiffs claims are also barred by the applicable statutes of limitation.

This is a construction defect case. Plaintiffs allege that Defendant Dan Smith constructed the house in violation of building code provisions, thus making the house unfit for human occupation.⁶ The Plaintiffs contend that these code violations constitute defects. Construction defect cases are governed by UCA §78-12-2.5. Subsection (3) provides

(a) An action by or against a provider (builder) based in contract or warranty shall be commenced within six years of the date of completion of the improvement or abandonment of construction. Where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period.

(b) 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. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

The Plaintiffs have alleged breach of contract as their first cause of action. Thus, the six year time limitation established by subsection 3(a) applies to bar Plaintiffs' claim. The cause of action accrues when the house is completed. In this case the house was built in November of 1993. The complaint was initially filed on August 24, 2000, well over six years later. While subsection 3(b) allows for all other causes of action a tolling of the limitations period until the plaintiff should have

⁶ Plaintiffs make this argument notwithstanding the obvious fact that they have lived in the house for 9 years, the last three after the home inspection which purportedly revealed that the house was not fit to inhabit. They also ignore the fact that the building official signed a Certificate of Occupancy.

discovered the alleged defects, subsection 3(a), covering breaches of contract, does not. Subsection 3(a) clearly states that a cause of action for construction defect arising from contract accrues on the completion of the construction or the date of the contract. It does not accrue upon discovery of the defect.

In Brigham Young University v. Paulsen Construction, 744 P.2d 370 (Ut. Sup. Ct. 1987) the court held in a construction defect case that the six year limitation barred BYU's claim. But BYU argued for tolling of the period. BYU claimed "that it is entitled to have the statute tolled until BYU discovered that it had a claim against Paulsen." Id. at p. 1373. The court rejected that argument holding "In construction contract cases [that is, breach of contract cases], an owner's claim of defective construction against a general contractor is generally considered to accrue on the date that construction is completed. We adopt this general rule and hold that BYU's causes of action accrued upon completion." Thus, this case, though decided before UCA §78-12-21.5, holds in accordance that the six year period for written contracts is not subject to discovery tolling.⁷

Subsection 3(b) provides that all other claims for relief against a builder for construction defect are to be brought within two years of the time when a plaintiff should have discovered the defects. The limitations period began to run on Plaintiffs' second claim, fraudulent non-disclosure, its third claim, fraud, its fourth claim rescission based on mistake, and its fifth claim based on the

⁷ In any event, assuming arguendo, that the discovery rule applied to the six year statute of limitations for breach of contract, as set forth above, had Plaintiffs exercised reasonable diligence, the alleged defects could have been discovered prior to their purchase of the home. Therefore, the six year statute of limitation would have accrued upon the closing of the sale.

Consumer Sales Practices Act when Plaintiffs should have, by exercising reasonable diligence, discovered the alleged defects. Thus, the question is whether Plaintiffs can raise a genuine issue as to when Plaintiffs should have reasonably discovered the alleged defects. The Smiths assert that there are no genuine issues of fact for the following reasons:

1. The Plaintiffs could have had a home inspection performed prior to buying the Home. This is essentially the same argument as made above but with application to the statute of limitations as distinguished from reasonable reliance in the nondisclosure context. A home inspection would have discovered all of the alleged defects because there were none hidden from a non-destructive modest home inspection performed by Jason Bullock for \$60. If the exercise of reasonable diligence demanded an inspection, then all claims are barred. Certainly, “reasonable diligence” cannot be construed to allow a buyer to toll the running of the limitations period while that buyer waits as long as he/she wants before having a home inspected.

2. Even though they waited until 2000 to get a home inspection, Plaintiffs received notice of the alleged defects long before the inspection and shortly after moving into the house. For example, Mary Moore knew of the alleged window defects almost immediately upon moving into the house. She saw flaking of paint caused by water at the end of the first winter. Mary Moore also saw exposed footings the first spring when she moved into the house while doing landscaping. Defect Number 4 in Steenblik’s list notes alleged water damage and cracking to the southeast corner of the foundation. Mrs. Moore said she noticed this the first spring after she moved into the house.

In addition, some allegedly bad shingles on the garage roof were called to her 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. In relation to Defect Number 41 in Plaintiffs' list of defects, alleging plumbing defects, Mary Moore testified she had toilet problems six months after she moved into the Home. Defect number 12 alleges that smoke detectors were omitted from the bedrooms. Mary Moore testified that she discovered this alleged code violation about a year after moving into the Home. In addition, Plaintiffs allege various minor electrical problems; but Mary Moore admits that in December, 1997, when the furnace quit, she was given notice of the need to check the circuit breaker.

All of these alleged defects were discovered more than 2 years before Plaintiffs filed suit. Thus, these alleged defects are barred by the applicable two year statute of limitation contained in UCA §78-12-2.5 (3)(b).

Moreover, knowledge of these defects placed Plaintiffs on notice as early as 1995 that there may be other unsatisfactory conditions in the Home. Accordingly, Subsection 3(b) required that Plaintiffs exercise reasonable diligence to discover the other alleged defects.⁸ Instead, Plaintiffs were dilatory and refrained from hiring a home inspection until five years later. Defendants should have had an inspection done earlier that would have revealed the remaining alleged code violations. Thus, all alleged defects are barred, not just those that were actually discovered more than two years before

⁸ As we know, a \$60 home inspection would have discovered the alleged defects.

the filing of suit. The statute provides that if, through reasonable diligence, the defects could have been discovered, they are barred. Plaintiffs are not entitled to willful ignorance in order to toll the limitation period.

**C. PLAINTIFFS CLAIMS ARE BARRED BECAUSE THEY HAVE NOT
COMPLIED WITH THE ELEMENTS OF THEIR CASE REQUIRED BY THE ORDER ON
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Soon after the Smiths were served with the Plaintiffs' Complaint, they submitted their first Motion for Summary Judgment. On August 16, 2001, the Court entered an Order granting, in part, the Smiths' Motion, and limiting the issues remaining for trial. With respect to Plaintiffs' remaining claims, the Court "conclud[ed] that the Smiths . . . may have a legal duty to disclose to Plaintiffs any latent and material defects in the home, or building code violations, of which [the Smiths] were aware." The Court also stated that "the discovery rule does apply in this case with respect to those defects that would be considered latent, and that there remain issues of fact with respect to when those defects should have reasonably been discovered" by Plaintiffs. A copy of the Order is attached hereto as Exhibit 3, for the Court's convenience.

In other words, Plaintiffs must show that the alleged defects were 1) latent, 2) material, 3) known to the Defendants, and 4) not discoverable through the exercise of reasonable diligence by the Plaintiffs. Smiths in this section intend to show that irrespective of the arguments made above,

Plaintiffs case fails to satisfy these four elements. As to the latency requirement, Plaintiffs have admitted under rule 36 that all but six of the defects are patent.

The Plaintiffs have admitted expressly that most of the alleged defects were not latent.

The Smiths propounded the following request for admission to Plaintiffs: “Request number 9: 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 latent defects as the phrase ‘latent defect’ is used in the court’s order regarding the Smiths’ motion for summary judgment.” As shown in the annexed Exhibit 10, Plaintiffs admitted that all defects were not latent except numbers 9 (no counter flashing at windows or doors), 26 (overspanned joists), 27 (Footings do not meet minimum 30" frost line depth) and 38 and 39 are obviously not material. The other item was 12 which is also deemed not material: whether the smoke detectors were hard wired or battery operated. Thus, by Plaintiffs own express and binding admissions, even if there were no issue as to a reasonable home inspection or as to the statute of limitation, only these alleged three defects can be raised at trial.

The Plaintiffs have no proof of the requisite knowledge that the Smiths were aware that the alleged condition was defective.

1. Windows. Item 9 (no counter flashing at windows or doors).

The Plaintiffs’ experts have been confused about this issue. Lloyd Steenblik at first alleged that Dan Smith attached the window flashing to the outside of the aluminum siding. Exhibit 1. Project Analysts report, item 9 at p. 10. Later his superior showed him that he was mistaking a

molding strip for the window nailing fin and that he was wrong on that opinion. Exhibit 14, p. 45. The other experts still insist that something must be wrong with the flashing or else water would not get on the sills. However, as shown above, they have done no destructive testing to show whether the flashing exists or how it was installed incorrectly. Jack Peterson says he saw on inspection the felt paper that served as flashing for the windows. Peterson depo. p. 54. Exhibit 7. Both Dan Smith and Jack Peterson testify that the slight water damage is caused by mere condensation that sometimes forms on cold days because of the thin aluminum on the windows. The only evidence of defect here is speculation based on slight water damage. There is simply no evidence that Dan Smith knew there was a defect in the flashing.

2. Item 26. Alleged Overspanning of Floor Joists.

Here again, the code calls for a 13 foot one inch span. That was what the building inspector, Jack Peterson, required. Peterson measured the span and found in his report , Exhibit 4 to his deposition, that no joists exceeded that span. P. 75. Exhibit 7. How then would Dan Smith be aware of a building code violation?

3. Item 27. 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 impossible.” Peterson depo. p. 148. Exhibit 7. With Jack Peterson’s permission and the expectation that they would do the finish grading in the spring when the weather cleared up, the Smiths were given a final inspection approval. Depo. Peterson, p. 77. Id. Once

again, this alleged defect (which, by the way, has caused no damage to the house) was approved by the building inspector.

Other Alleged Defective Items That the Building Inspector Passed off.

By way of further illustration to show what total lack of evidence supports the Plaintiffs' bad faith allegations against the Smiths the following defects are mentioned in connection with this requisite element of knowledge.

Allegation of Inadequate Roof Ventilation. The undisputed evidence is that Dan Smith and the building inspector, Jack Peterson, had a discussion about the roof ventilation. Jack Peterson testifies that he accepted Dan Smith's opinion that the amount of ventilation was adequate. He did not "red tag" the ventilation. In Exhibit 5 to his deposition he said, "I also visited the job site another occasion and Dan and I discussed the venting of the attic. Dan felt that it was adequate." Thus, Peterson "accepted it." Peterson depo. p. 111. Exhibit 7.

If the building inspector passes off an item, how can Plaintiffs in good faith claim that Dan Smith knows that the item was in violation of the code?

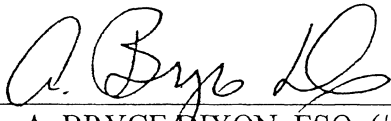
V.
CONCLUSION

The Plaintiff's own testimony and discovery responses undeniably demonstrate that all of the 42 construction defects that they allege in this case could have been discovered by a home inspection before they bought the house. Accordingly, not only does the doctrine of caveat emptor apply to

preclude Plaintiffs' claims in this case, but the six year and two year statutes of limitation bar recovery for Plaintiffs' claims. Moreover, Plaintiffs cannot prove that the Smiths knew of any code violations because the building inspector approved the very items alleged as code violations.

DATED this 5th day of May, 2003.


DIXON, TRUMAN & FISHER, a P.C.

By: 
A. BRYCE DIXON, ESQ. (#889)
AARON M. WAITE (#8992)

CERTIFICATE OF MAILING

I hereby certify that I am an employee of DIXON, TRUMAN & FISHER and that on this 5th day of May, 2003, I placed a true and correct copy of the foregoing in the United States mails at St. George, Utah, with 1st 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 & Fisher, a P.C.

Introduction

Engagement

Project Analysts was engaged to determine the costs to correct code violations in the residence of Mary Moore 155 West 300 South, Fillmore, Utah 84631. Project Analysts reviewed documents, correspondence, reports, exhibits, and bids relative to the construction of the home. Project Analysts visited the home and observed the actual construction conditions. We reviewed the appropriate Uniform Building Codes. Project Analysts determined the estimated cost of making repairs to code violations we confirmed. Project Analysts has not reviewed the contract between Mary Moore and Dan Smith to determine or assign contractual responsibility for any code deficiency correction costs.

Background

Mary Moore purchased the home from Dan Smith in 1994. Defects in the home construction were discovered six years after the home was purchased. Mary Moore requested an inspection of her home by Jason Bullock of Sunrise Engineering (“Sunrise”). Jason Bullock inspected the home on August 8, 2000. Mark O. Barr, also of Sunrise, conducted an additional inspection of the home, on October 9, 2000. Project Analysts was asked in October 2001 to estimate the cost of repairs to items found not to comply with building codes that were in effect when the home was constructed. Project Analysts performed an on site inspection of the home November 20, 2001.

Summary Conclusion

Project Analysts has determined that there are several building code violations that require correction and repair in the Mary Moore residence.

The estimated total cost to repair the listed defects is \$110,730 as itemized in Table 01 - Summary of Repair Costs.

Mary Moore
Summary of Repair Costs
Table 01

Item #	Description	Est. Repair Cost
2	Ledger to rear deck has not been fastened properly with bolts.	\$ 128
3	Joists that bear over header for deck have not been anchored.	\$ 94
4	Foundation on SE Corner is cracked and breaking apart.	\$ 428
5	All handrails must return to wall at top and bottom.	\$ 776
6	No soffit venting has caused roof shingles to deteriorate	\$ 11,466
7	Open outlet box under kitchen cabinets with exposed electrical wiring.	\$ 58
8	Attic opening does not meet required code opening of 22" X 30".	\$ 470
9	No counter-flashing at windows or doors, has caused water damage.	\$ 18,611
10	Bathroom Fixtures not caulked	\$ 315
12	No smoke detectors in bedrooms, smoke det. in home not compliant.	\$ 2,002
13	Stair risers exceed 8" max with 3/8 variance. (Interior)	\$ 8,800
13a.	Concrete Entrance Stairs. Stair rise exceed 7" max & 3/8" variance.	\$ 2,790
14	No 5/8 type X sheetrock under stair lids.	\$ 750
15	No pressure reducing valve has been installed.	\$ 285
16	Copper lines in house are not grounded.	\$ 470
17	2x6 window header in basement bedroom is over spanned.	\$ 655
17a	2x6 headers @ interior doorway is over spanned.	\$ 598
18	Missing nuts and washers on anchor bolts for sill plate in basement.	\$ 6
19	4' cantilever at front of house requires doubled up end joists.	\$ 1,031
20	No combustion air, vent clearance problems.	\$ 245
22	Water heater is not seismically strapped to foundation.	\$ 124
23	Kitchen required to be on 2 - 20 amp GFCI circuits w/ 12/2 AWG.	\$ 437
24	Bathrooms required to be on separate 20 AMP circuits for GFCI's.	\$ 437
25	Electrical panel has not been labeled.	\$ 338
26	House has over spanned joists throughout the house.	\$ 6,397
27	Footings do not meet minimum 30" frost line depth.	\$ 30,680
28	Grading not 2% slope for first 10 feet away from house (Incl. in 27)	\$ -
29	Outlets in garage are not on GFCI.	\$ 218
30	No GFCI in basement.	\$ 218
31	Exhibit C: Item 2 Add duplex for peninsular cabinet.	\$ 245
32	Exhibit C: Item 3. Add duplex for garbage disposal.	\$ 765
33	Exhibit C: Add outlet in master bedroom, dining room.	\$ 377
34	Exhibit C: Ground natural gas to grounding circuit.	\$ 126
35	Exhibit C: Item 6. Add grounding kit to circuit breaker box.	\$ 460
36	Exhibit C: Add smoke detector to basement. (Incl. In 12)	\$ -
37	Exhibit C: Item 9. Correct wiring at main breaker.	\$ 238
38	Install insulations baffles to allow ventilation at exterior walls.	\$ 600
39	Add beam at bearing partition offset from garage beam.	\$ 2440
40	Plates and sills on concrete in basement are not treated lumber.	\$ 3,093
41	Costs to implement plumbing code repairs listed by Cox Plumbing	\$ 6,250
42	Cost to restore finishes in rooms where plumbing work done	\$ 7,625
Grand Total		\$ 111,045

Site Visit

Project Analysts conducted an onsite inspection of the home on November 20, 2001. We reviewed the listings of items reported as found not to be in code compliance prepared by Sunrise from their previous inspections of the home on August 7, 2000 and October 9, 2000. During our inspection we observed the existing conditions at the home relative to each item listed by Sunrise as, “found not to be in code compliance”, throughout the remainder of this report the listed items found not to be in code compliance will be referred to as “defects”.

Project Analysts took measurements, quantified the existing conditions, observed the materials used, and determined the actual conditions at the home relative to the each listed defect, and performed non-destructive visual examinations only. We did not do an exhaustive inspection looking for additional non-compliant work. However, in the course of examination of the defects list prepared by Sunrise, three potential additional code compliance problems were observed. The three additional defects Project Analysts observed, evaluated and subsequently determined to be violations of the 1991 building codes are:

Item 38. Insulation baffles to allow ventilation at exterior walls.

Item 39. Add beam at bearing partition offset from garage beam

Item 40. Plates and sills on concrete in basement are not treated lumber.

Project Analysts evaluated a repair method and estimated the cost to repair these three additional defects to comply with building codes.

During our site visit we performed the following evaluations:

- Evaluated the size, span and type of material used for visible joists and headers.
- Sampled the distance from the top of the existing soil to the top of the existing footing on each side of the home.
- Landscaping and grading conditions and materials were noted
- Examined the orientation of the home on the property.
- Observed the unfinished basement areas.
- Reviewed structural, mechanical, plumbing and electrical systems.
- Observed and quantified the outside dimensions of the home.

Mary Moore Property

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Schedule 01 - Repairs Cost Estimate

December 11, 2001

7 Open outlet box under kitchen cabinets with exposed electrical wiring.

Comment: From Exhibit C Item 1 NEC Section 370-28 -(C) Page 70-286

Repair Method: A cover plate needs to be installed on this open rough-in box. The cover plate will need to be modified as there is a cabinet frame member covering part of the open rough in box.

Work Description		QTY	UNITS	\$ / Unit	L M E S	LABOR \$	Mat \$	EQUIP. \$	SUB \$	TOTAL \$
Modify Cover Plate & Install	Electrician	1	Hr	\$ 45.00	S	\$ -	\$ -	\$ -	\$ 45	\$ 45
Cover Plate		1	Ea	\$ 1.00	M	\$ -	\$ 1	\$ -	\$ -	\$ 1
						\$ -	\$ -	\$ -	\$ -	\$ -
Subtotal						\$ -	\$ 1	\$ -	\$ 45	\$ 46
Sales Taxes @ 5.75%		0.0575								\$ 0
Profit & Overhead @ 25%		0.25								\$ 12
Total										\$ 58

Mary Moore Property

am

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Schedule 01 - Repairs Cost Estimate

December 11, 2001

15 Electrical panel has not been labled.

Comment: NEC Section 384-13 Page 70-303.

Repair Method: Determine the function of each circuit and label existing electrical panel

Work Description	QTY	UNITS	\$ / Unit	L M E S	LABOR \$	Mat \$	EQUIP. \$	SUB \$	TOTAL \$
Electrician	6	Hr	\$ 45.00	L	\$ 270	\$ -	\$ -	\$ -	\$ 270
					\$ -	\$ -	\$ -	\$ -	\$ -
Subtotal					\$ 270	\$ -	\$ -	\$ -	\$ 270
Sales Taxes @ 5.75%	0.0575								\$ -
Profit & Overhead @ 25%	0.25								\$ 68
Total									\$ 338

Mary Moore Property

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Schedule 01 - Repairs Cost Estimate

December 11, 2001

29 Outlets in garage are not on GFCI.

Comment

NEC Section 210-8(A) (2) Page 70 - 39

Repair Method

Replace existing garage circuit breaker with a GFCI circuit breaker and reconnect the electrical for Garage to panel

Work Description	QTY	UNITS	\$ / Unit	L M E S	LABOR \$	Mat \$	EQUIP. \$	SUB \$	TOTAL \$
Add 1- 20Amp circuit breaker to Electrician the Panel Box	1	Hr	\$ 45 00	L	\$ 45	\$ -	\$ -	\$ -	\$ 45
Wire garage electrical to new Electrician circuits	2	Hr	\$ 45 00	L	\$ 90	\$ -	\$ -	\$ -	\$ 90
1 - 20 Amp GFCI Breakers	1	Ea	\$ 38 00	M	\$ -	\$ 38	\$ -	\$ -	\$ 38
					\$ -	\$ -	\$ -	\$ -	\$ -
Subtotal					\$ 135	\$ 38	\$ -	\$ -	\$ 173
Sales Taxes @ 5.75%	0.0575								\$ 2
Profit & Overhead @ 25%	0.25								\$ 43
Total									\$ 218

29. 1993 NEC Articles 210-8, 210-52 (g)

Additionally, Article 210-8 only requires the **OUTLET** to be **GFCI** protected, not the circuit. The garage outlet could be easily replaced with a **GFCI** receptacle.

210-7. Receptacles and Cord Connectors.

(a) **Grounding Type.** Receptacles installed on 15- and 20-ampere branch circuits shall be of the grounding type. Grounding-type receptacles shall be installed only on circuits of the voltage class and current for which they are rated, except as provided in Tables 210-21(b)(2) and (b)(3).

Exception: Nongrounding-type receptacles installed in accordance with Section 210-7(d), Exception.

(b) **To Be Grounded.** Receptacles and cord connectors having grounding contacts shall have those contacts effectively grounded.

Exception No. 1: Receptacles mounted on portable and vehicle-mounted generators in accordance with Section 250-6.

Exception No. 2: Ground-fault circuit-interrupter replacement receptacles as permitted by Section 210-7(d), Exception.

(c) **Methods of Grounding.** The grounding contacts of receptacles and cord connectors shall be grounded by connection to the equipment grounding conductor of the circuit supplying the receptacle or cord connector.

(FPN): For installation requirements for the reduction of electrical noise, see Section 250-74, Exception No. 4.

The branch circuit wiring method shall include or provide an equipment grounding conductor to which the grounding contacts of the receptacle or cord connector shall be connected.

(FPN No. 1): Section 250-91(b) describes acceptable grounding means.

(FPN No. 2): For extensions of existing branch circuits, see Section 250-50.

(d) **Replacements.** Grounding-type receptacles shall be used as replacements for existing nongrounding types and shall be connected to a grounding conductor installed in accordance with Section 210-7(c).

Ground-fault circuit-interrupter protected receptacles shall be provided where replacements are made at receptacle outlets that are required to be so protected elsewhere in this Code.

Exception: Where a grounding means does not exist in the receptacle enclosure, either a nongrounding or a ground-fault circuit-interrupter-type of receptacle shall be used. A grounding conductor shall not be connected from the ground-fault circuit-interrupter-type receptacle to any outlet supplied from the ground-fault circuit-interrupter-type receptacle. Existing nongrounding-type receptacles shall be permitted to be replaced with grounding-type receptacles where supplied through a ground-fault circuit-interrupter. These receptacle locations shall be marked "GFCI protected."

(e) **Cord- and Plug-Connected Equipment.** The installation of grounding-type receptacles shall not be used as a requirement that all cord- and plug-connected equipment be of the grounded type.

(FPN): See Section 250-45 for type of cord- and plug-connected equipment to be grounded.

(f) **Noninterchangeable Types.** Receptacles connected to circuits having different voltages, frequencies, or types of current (ac or dc) on the same premises shall be of such design that the attachment plugs used on these circuits are not interchangeable.

210-8. Ground-Fault Circuit-Interrupter Protection for Personnel.**(a) Dwelling Units.**

(1) All 125-volt, single-phase, 15- and 20-ampere receptacles installed in bathrooms shall have ground-fault circuit-interrupter protection for personnel.

(2) All 125-volt, single-phase, 15- or 20-ampere ~~receptacles~~ installed in ~~garages~~ shall have ground-fault circuit-interrupter protection for personnel.

Exception No. 1 to (a)(2): Receptacles that are not readily accessible.

Exception No. 2 to (a)(2): A single receptacle or a duplex receptacle for two appliances located within dedicated space for each appliance that in normal use is not easily moved from one place to another, and that is cord- and plug-connected in accordance with Section 400-7(a)(6), (a)(7), or (a)(8).

Receptacles installed under exceptions to Section 210-8(a)(2) shall not be considered as meeting the requirements of Section 210-52(g).

(3) All 125-volt, single-phase, 15- and 20-ampere receptacles installed outdoors where there is direct grade level access to the receptacles shall have ground-fault circuit-interrupter protection for personnel.

(FPN): See Section 215-9 for feeder protection.

For the purposes of this section, "direct grade level access" is defined as being located not more than 6 feet, 6 inches (1.98 m) above grade level and being readily accessible.

(4) All 125-volt, single-phase, 15- and 20-ampere receptacles installed in crawl spaces at or below grade level and in unfinished basements shall have ground-fault circuit-interrupter protection for personnel.

For purposes of this section, unfinished basements are defined as portions or areas of the basement not intended as habitable rooms and limited to storage areas, work areas, and the like.

Exception No. 1: A single receptacle supplied by a dedicated branch circuit that is located and identified for specific use by a cord- and plug-connected appliance, such as a refrigerator or freezer.

Exception No. 2: The laundry circuit as required by Sections 210-52(f) and 220-4(c).

Exception No. 3: A single receptacle supplying a permanently installed sump pump.

(5) All 125-volt, single-phase, 15- and 20-ampere receptacles to serve counter top surfaces, installed within 6 feet (1.83 m) of a wet bar sink or kitchen sink, shall have ground-fault circuit-interrupter protection for personnel.

(FPN): The intent of this subsection is to permit the exemption of receptacles that are located specifically for appliances such as refrigerators and freezers from ground-fault circuit-interrupter protection for personnel.

(6) All 125-volt, single-phase, 15- or 20-ampere receptacles installed in boathouses shall have ground-fault circuit-interrupter protection for personnel.

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Exception No. 3: In addition to the required receptacles specified by Section 210-52, switched receptacles supplied from a general-purpose branch circuit as defined in Section 210-70(a), Exception No. 1 shall be permitted.

Exception No. 4: A receptacle served by a circuit supplying only motor loads.

Exception No. 5: Receptacles installed to provide power for electric ignition systems or clock timers for gas-fired ranges, ovens, or counter-mounted cooking units.

(2) Receptacles installed in the kitchen to serve counter top surfaces shall be supplied by not less than two small appliance branch circuits, either or both of which shall also be permitted to supply receptacle outlets in the kitchen and other rooms specified in Section 210-52(b)(1). Additional small appliance branch circuits shall be permitted to supply receptacle outlets in the kitchen and other rooms specified in Section 210-52(b)(1).

(c) **Counter Tops.** In kitchens and dining areas of dwelling units, a receptacle outlet shall be installed at each wall counter space 12 inches (305 mm) or wider. Receptacle outlets shall be installed so that no point along the wall line is more than 24 inches (610 mm), measured horizontally from a receptacle outlet in that space.

A receptacle outlet shall be installed at each island or peninsular counter top with a long dimension of 24 inches (610 mm) or greater and a short dimension of 12 inches (305 mm) or greater. Receptacle outlets to serve island or peninsular counter tops shall be installed above, or within 12 inches (305 mm) below the counter top. Receptacle outlets shall be installed so that no point along the centerline of the long dimension is more than 24 inches (610 mm), measured horizontally from a receptacle outlet in that space. A peninsular counter top is measured from the connecting edge.

Counter top spaces separated by range tops, refrigerators, or sinks shall be considered as separate counter top spaces. Receptacle outlets rendered not readily accessible by appliances fastened in place or appliances occupying dedicated space shall not be considered as these required outlets.

Receptacle outlets shall not be installed in a face-up position in the work surfaces or counter tops in a kitchen or dining area.

(FPN): The 24-inch (610-mm) dimension is measured along the wall line or centerline, and the intent is that there be a receptacle outlet for every 4 linear feet (1.2 m) or fraction thereof of counter length.

(d) **Bathrooms.** In dwelling units, at least one wall receptacle outlet shall be installed in the bathroom adjacent to each basin location. See Section 210-8(a)(1).

(e) **Outdoor Outlets.** For a one-family dwelling and each unit of a two-family dwelling that is at grade level, at least one receptacle outlet accessible at grade level shall be installed at the front and back of the dwelling. See Section 210-8(a)(3).

(f) **Laundry Areas.** In dwelling units, at least one receptacle outlet shall be installed for the laundry.

Exception No. 1: In a dwelling unit that is an apartment or living area in a multifamily building where laundry facilities are provided on the premises that are available to all building occupants, a laundry receptacle shall not be required.

Exception No. 2: In other than one-family dwellings where laundry facilities are not to be installed or permitted, a laundry receptacle shall not be required.

(g) **Basements and Garages.** For a one-family dwelling, at least one receptacle outlet, in addition to any provided for laundry equipment, shall be installed in each basement and in each attached garage, and in each detached garage with electric power. See Sections 210-8(a)(2) and (a)(4).

(h) **Hallways.** In dwelling units, hallways of 10 feet (3.05 m) or more in length shall have at least one receptacle outlet.

As used in this subsection, the hall length shall be considered the length along the centerline of the hall without passing through a doorway.

210-60. Guest Rooms. Guest rooms in hotels, motels, and similar occupancies shall have receptacle outlets installed in accordance with Section 210-52. See Section 210-8(b)(1).

Exception: In rooms of hotels and motels, the required number of receptacle outlets determined by Section 210-52(a) shall be permitted to be located convenient for permanent furniture layout.

210-62. Show Windows. At least one receptacle outlet shall be installed directly above a show window for each 12 linear feet (3.66 m) or major fraction thereof of show window area measured horizontally at its maximum width.

210-63. Rooftop Heating, Air-Conditioning, and Refrigeration Equipment Outlet. A 125-volt, single-phase, 15- or 20-ampere-rated receptacle outlet shall be installed at an accessible location for the servicing of heating, air-conditioning, and refrigeration equipment on rooftops and in attics and crawl spaces. The receptacle shall be located on the same level and within 25 feet (7.62 m) of the heating, air-conditioning, and refrigeration equipment. The receptacle outlet shall not be connected to the load side of the equipment disconnecting means.

Exception: Rooftop equipment on one- and two-family dwellings.

210-70. Lighting Outlets Required. Lighting outlets shall be installed where specified in Sections 210-70(a), (b), and (c) below.

(a) **Dwelling Unit(s).** At least one wall switch-controlled lighting outlet shall be installed in every habitable room; in bathrooms, hallways, stairways, attached garages, and detached garages with electric power; and at outdoor entrances or exits.

(FPN): A vehicle door in a garage is not considered as an outdoor entrance.

At least one lighting outlet controlled by a light switch located at the point of entry to the attic, underfloor space, utility room, and basement

29,

FILED
Fourth Judicial District Court of
Millard County, State of Utah
CARMA B. SMITH, Clerk
8/16/01 Deputy

Gregory B. Hadley (3652)
James K. Haslam (6887)
HADLEY & ASSOCIATES
Attorneys for Plaintiffs
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Provo Utah 84604
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,

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.

ORDER

Civil No. 000700142 MI

Judge Fred Howard

Defendants' Motion for Summary Judgment came before this Court for decision pursuant to a Notice to Submit for Decision filed by the Defendants, and a hearing was held before the Court on May 31, 2001, concerning this motion and Plaintiffs' Alternative Motion for Leave to Amend Complaint. Appearing at the hearing were James K. Haslam, of Hadley & Associates, on behalf of Plaintiffs, and A. Bryce Dixon, of Dixon & Truman, on behalf of Defendants. The Court, having reviewed the motions and all memoranda, objections, and other materials filed in support and in opposition

thereto, and having heard oral arguments from the parties on the motions, and for good cause shown, hereby makes the following findings, conclusions, and rulings:

Pursuant to the common-law merger doctrine, execution and delivery of a deed by a seller usually renders any prior contractual terms extinguished and unenforceable. Although certain specific exceptions allow a party to avoid application of the merger doctrine, a claim for negligent misrepresentation relating to alleged construction defects in a building does not fall within any such exception. Accordingly, Plaintiffs' claim for negligent misrepresentation in this case is precluded as a matter of law by the merger doctrine as set forth in the case of Robinson v. Tripco Inv., Inc., 2000 UT App 200, 21 P.3d 219.

With respect to Plaintiffs' claims for fraudulent nondisclosure and fraudulent misrepresentation, the Court concludes that those causes of action, though not pleaded with great detail, have been pleaded in the Complaint with sufficient particularity by Plaintiffs satisfy the requirements of Rule 9 of the Utah Rules of Civil Procedure. In any event, the Court would grant Plaintiffs' motion to amend the Complaint to plead these causes of action with greater detail if Plaintiffs desired to do so. Moreover, the Court concludes that there are genuine issues of material fact with respect to these claims that precludes the granting of summary judgment. Finally, the Court further concludes that Defendants, as the sellers of the home in question, may have had a legal duty to

disclose to Plaintiffs any latent and material defects in the home, or building code violations, of which they were aware.

With respect to the remaining claims, the Court believes that the discovery rule should be applied to toll the statute of limitations, even as to contract-based claims, in situations where its application is not otherwise expressly prohibited by law. Accordingly, the Court concludes, as a matter of law, that the discovery rule does apply in this case with respect to those defects that would be considered latent, and that there remain issues of fact with respect to when those defects should have reasonably been discovered. Therefore, summary judgment is not appropriate with respect to Plaintiffs' claims for breach of contract, rescission, and violations of the Consumer Sales Practices Act.

The Court will consider, at the close of all discovery, a motion for summary judgment by Defendants, based on their limitations defense.

Finally, over Plaintiffs' objection, the Court required Plaintiffs to make an election of remedies at the hearing between their contract-based claims asserting both a right to contractual damages and a right to rescission of the transaction. Plaintiffs elected to pursue the remedy of rescission.

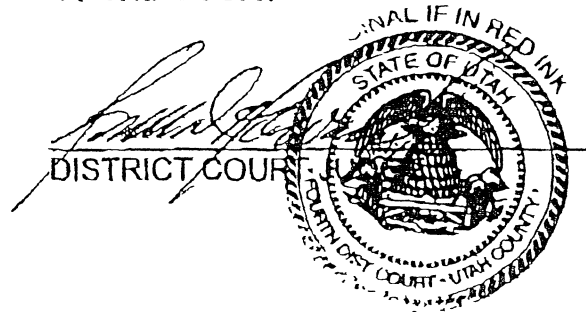
On the basis of the foregoing, the Court HEREBY ORDERS AS FOLLOWS:

1. Defendants' motion for summary judgment is granted as to Plaintiffs' claim of negligent misrepresentation, and that claim is hereby dismissed;

2. Defendants' motion for summary judgment is denied as to all other claims;
3. Plaintiffs may not seek monetary damages for breach of contract, but may pursue the remedy of rescission; and
4. No further motions for summary judgment will be considered by the Court until after the close of discovery.

DATED this 16th day of August, 2001.

BY THE COURT:



1 Q. Did you get tired of building houses?

2 A. No.

3 Q. So what is very little, how many homes or let me ask
4 this.

5 A. Okay.

6 Q. In the Fillmore area since 1979 have you built other
7 things in this area besides homes?

8 A. I built two homes for myself. One home out in Flowell.
9 In this area.

10 Q. Yes.

11 A. I think that is it.

12 Q. So you built nothing else other than homes in this
13 area since 1979?

14 A. Well, now since 1979?

15 Q. That is my question.

16 A. Yes, but I built the home that she is living in for
17 ourselves and this one over here, the other home we built here
18 in town.

19 Q. The one that we talked about that you built after you
20 came back from Cedar City?

21 A. Yes.

22 Q. So that is two.

23 A. And we built the cement block building.

24 Q. Is that the shop?

25 A. Yes.

BUILDING PERMIT APPLICATION

Application No. 93-35 Date Received 8-13-93 Date Issued _____
 Permit No. 1143 Payment Receipt No. _____ Date _____
 Total Fees \$ 213.72 Diagram attached ☒

APPLICANT NAME Dan I. Smith PHONE NO. 743-5170
 MAILING ADDRESS P.O. Box 985
 JOB SITE ADDRESS 155 W 300 S
 Lot No. 6(part) Block No. 32 Subd Name & No. _____
 TYPE OF BLDG Residence New ☒ Remodel ☐ Repair ☐ Addition ☐ Other ☐
 BLDG DIMENSIONS _____ Sq. Ft. _____ Approx. Cost \$53,000.00
 TYPE OF CONSTR: Frame ☒ Brick Vnr ☒ Brick ☐ Conc ☐ Steel ☐ Other ☐
 LOT DIMENSIONS _____ SETBACKS IN FT: Front _____ Side _____ Side _____ Rear _____
 BLDG FEES _____ ELEC FEES _____ WATER FEES _____ SEWER FEES _____

ARCHITECT OR ENGINEER _____ PHONE NO. _____

GENERAL CONTRACTOR Same PHONE NO. _____
 Business Address _____
 City License No. _____ State License No. _____

ELECTRIC CONTRACTOR Same PHONE NO. _____
 Business Address _____
 City License No. _____ State License No. _____

PLUMBING CONTRACTOR Same PHONE NO. _____
 Business Address _____
 City License No. _____ State License No. _____

APPLICANT PLEASE READ CAREFULLY

This permit becomes null and void if work or construction authorized is not commenced within 180 days, or if construction or work is suspended or abandoned for a period of 180 days at any time after work is commenced. I hereby certify that I have read and examined this application and know the same to be true and correct. All provisions of laws, and ordinances governing this type of work will be complied with whether specified herein or not. The granting of a permit does not presume or give authority to violate or cancel the provisions of any other state or local law regulating construction or the performance of construction. I make this statement under penalty of perjury.

APPLICANT'S SIGNATURE Mrs Dan I. Smith DATE 8-13-93

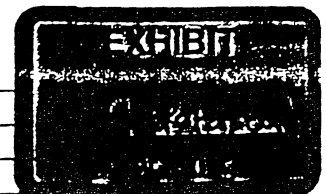
APPROVAL: BLDG INSPECTOR [Signature]
 CITY COUNCIL Keith S. Hollins DATE 8-17-93

NOTE: THIS APPLICATION BECOMES A VALID PERMIT WHEN FULLY APPROVED AND FEES ARE PAID.

BUILDING PERMIT CHECKLIST:

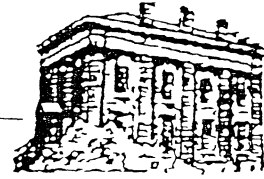
Property Zone _____ Plan Reviewed _____
 Setbacks: Front _____ Side _____ Rear _____
 Reasonable Estimated Cost _____

Building Inspector's Comments



Fillmore City

75 West Center PO Box 587
Fillmore Utah 84631
(435) 743-5233



Utah's First Capital

May 4, 2001

To Whom It May Concern

Fillmore City issues a Certificate of Occupancy for a building permit after the final inspection has been completed and I find that the construction meets the intent of the building code in place at the time of construction

Sincerely,

Jack Peterson, Building Inspector
Fillmore City



1 getting in there and looking?

2 A. The only way I know is you take some of the
3 siding off.

4 Q. Did you actually see the windows and inspect
5 them?

6 A. Yes. I was there when they were putting the
7 siding on. We had to put a vacuum behind the siding,
8 which went under that.

9 Q. So you actually saw that there was --

10 A. Well, the felt that goes over to the
11 windows.

12 Q. You saw the felt?

13 A. On the siding it goes over to the windows.

14 Q. And the felt is sometimes called a
15 weather-resistant membrane?

16 A. Yes. Yeah.

17 Q. And you saw that these windows had the
18 weather-resistant membrane, correct?

19 A. We're talking about two different issues.
20 Now under the new code they're putting a piece of
21 material out about this far out from the windows all
22 the way around, and then they're going in with felt.
23 But at that time --

24 Q. When you say that far, you were talking
25 about nearly 12 inches?

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1 Q And it still hasn't been covered as of this
2 day?
3 A Probably not. It's not where anybody's
4 going to get into it, I'll tell you. You have to work
5 at it to get there.
6 Q All right. Let's go to No. 8, then, the
7 attic access was brought to Mr. Smith's attention on
8 the final inspection.
9 Okay. What's your recollection of that?
10 A. Basically it's like -- it's a little
11 smaller. This was a new thing in the code that year,
12 the 22 by 30. It's still effective today, 22 by 30.
13 It's not a life safety issue, and there was nothing in
14 the attic, as far as anything that needed to be
15 serviced of that nature. So I didn't really consider
16 it at the time as being a real issue.
17 Q. So you passed it off?
18 A. I passed that part of it.
19 Q. All right. And then let's go to No. 9, the
20 windows.
21 Now, I think it's a stipulated fact in this
22 case that there are -- that nobody has done any
23 destructive testing around the windows. Do you know
24 how a person would be able to determine that there was
25 no counter flashing around the windows without actually

Page 55

1 A. It's about a foot strip that goes around the
2 window. And they were using felt as the same
3 situation, they were running it over to the window.
4 But that's an interpretation, I guess, whether that
5 would be acceptable or not.
6 Q. Okay.
7 A. But it was required on the siding.
8 Q. So what I just want to make sure is the
9 felt, which was the weather resistive membrane that was
10 in use at that time, did you actually see that it was
11 installed in the windows at this house?
12 A. I saw the felt go along for the siding,
13 yeah.
14 Q. Okay. When he says counter flashing, there
15 is no counter flashing, do you have an understanding of
16 what he means? Do you think he means this one foot
17 strip?
18 A. I think he's talking about the one foot
19 strip that is required now. And a lot of places still
20 are not enforcing that. So I don't know.
21 Q. All right. But the one foot weather
22 stripping was not required by the 1991 building code,
23 was it?
24 A. I would have to research it a little more.
25 But I don't --

Page 54

1 getting in there and looking?
2 A. The only way I know is you take some of the
3 siding off.
4 Q. Did you actually see the windows and inspect
5 them?
6 A. Yes. I was there when they were putting the
7 siding on. We had to put a vacuum behind the siding,
8 which went under that.
9 Q. So you actually saw that there was --
10 A. Well, the felt that goes over to the
11 windows.
12 Q. You saw the felt?
13 A. On the siding it goes over to the windows.
14 Q. And the felt is sometimes called a
15 weather-resistant membrane?
16 A. Yes. Yeah.
17 Q. And you saw that these windows had the
18 weather-resistant membrane, correct?
19 A. We're talking about two different issues.
20 Now under the new code they're putting a piece of
21 material out about this far out from the windows all
22 the way around, and then they're going in with felt.
23 But at that time --
24 Q. When you say that far, you were talking
25 about nearly 12 inches?

Page 56

1 MR. HADLEY: I'm sorry, I didn't hear your
2 question.
3 MR. DIXON: I didn't hear his answer.
4 MR. HADLEY: Okay.
5 MR. DIXON:
6 Q. Your answer was I don't think so?
7 A. I would really have to research that to make
8 sure whether it was or wasn't.
9 MR. HADLEY: Robert, would you read me --
10 I'm sorry, are you talking? I was talking over you.
11 What was Bryce's question, Robert?
12 (Whereupon, the record was
13 read back as follows:
14 "QUESTION. All right. But the one
15 foot weather stripping was not
16 required by the 1991 building code,
17 was it?")
18 MR. HADLEY: Okay.
19 MR. DIXON:
20 Q. Let me see what you're talking about,
21 Mr. Peterson. When you're talking about a one foot
22 strip, is this a nailing fin that you're talking about,
23 or is this something in the nature of a
24 weather-resistant membrane?
25 A. It's a weather-resistant membrane.

1 inspection on the house at 155 West 300 South, the
2 house we're talking about here today?

3 A. Yes.

4 Q. And this is the inspection that would have
5 been checked off all 33 items in order to approve the
6 final --

7 A. It would have either marked okay or not
8 applicable, depending on the situation.

9 Q. Okay. Let's see, I think I have just one
10 little thing here. Oh, Exhibit 7 I'll call -- this
11 will be the certificate of occupancy.

12 It appears you signed this certificate of
13 occupancy, a copy of which is Exhibit 7, correct?

14 A. Yes.

15 MR. HADLEY: Do you have another copy of
16 that?

17 MR. DIXON: Yes.

18 Q. And this is for the home at 155 West 300
19 South that we've been discussing during this
20 deposition, correct?

21 A. Yes.

22 Q. Now, what must a person do in order to
23 qualify to receive a certificate of occupancy, pass the
24 final inspection?

25 A. Yes.

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1 MR. DIXON

2 Q Well, the only reason I ask that question is
3 this, did you ever hear her say she didn't want a smoke
4 detector because she smoked and that set this smoke
5 detector off?

6 A No. I don't recall that at all.

7 Q I'm not saying that she did. I'm just
8 asking questions. You understand that, I'm just trying
9 to find out.

10 In any event, you didn't red tag the smoke
11 detector issue on the final inspection, did you?

12 A No. As I say, I thought at that time that
13 would probably be taken care of. I mentioned the
14 deficiencies. They were in the house when I made the
15 inspection. I figured it was their home and they would
16 correct those on the deficiencies

17 Q All right. Now, on October -- let's see,
18 No 13. We're slowly getting there.

19 Do you need to take a break, sir?

20 A No. I want to get this over with.

21 Q Okay. Now, we're talking about the stairs.
22 Tell me what you remember about the stair issue. First
23 of all, tell me about what you remember with Dan Smith,
24 and then I'll ask you about what you remember about
25 Mary Moore

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1 A Well, the stairs were becoming an issue
2 after the stairs were put in, and Dan called me over
3 and said the stairs were maxed. I have a deal here on
4 the code that says they can be at eight and nine. But,
5 anyway, the problem it's not even addressed in any of
6 these issues was the fact that it did not have the six
7 foot six head room, and one more tread in the stair
8 would have made it even worse. I mean, it was just --
9 it was one of those things that there had to be some
10 give and take where we had an eight, nine required
11 minimum in residential.

12 So a seven, seven eleven, is the best, but
13 there's no way to put it in without a real problem.

14 So at that time we told Dan that the
15 stairs -- that would work rather than shrink that -- I
16 think we were minus about -- on each, or something --
17 maybe it might have been a couple of inches on the head
18 room, and if we went one more tread you would be
19 bumping your head going down the stairs.

20 Q So you went ahead and passed that off?

21 A I went ahead and passed that off. That was
22 before the final. It was one of those special days,
23 and I don't remember which day it was

24 Q Now, do you remember Mary Moore ever
25 complaining to you about the stairs ever after she

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1 bought the house?

2 A The stair issue didn't come up. I think
3 Bill fell down the stairs one time.

4 THE WITNESS. Didn't he? Or something. But
5 it was brought up later when this thing was measured.
6 I got the impression that Jason was looking at a lot
7 shorter rise. He put a seven something rise, instead
8 of the eight, nine that it can be.

9 MR. DIXON:

10 Q Okay. So the first time you remember Mary
11 Moore complaining about the stairs is after Jason
12 Bullock inspected them, correct? Is that correct?

13 A I don't recall whether it was or wasn't.

14 Q Okay. Let's go on to 14.

15 A 14, 14.

16 Q You just say -- that's sheet rock under the
17 stair ledge, and you just say it's not required.

18 A It wasn't required. I've got a code sheet
19 on that here somewhere. It wasn't required at that
20 time. That's been a major -- I've got that in here. I
21 put it where it was on these sheets here.

22 Q You're looking through the Project Analysts
23 report?

24 A Yeah. This one here I think is it. That's
25 the one, the code issue on that one.

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1 Q Well, I don't think we're going to spend
2 much time on that. You don't think it was required and
3 that's fine.

4 A I don't think it was required

5 Q Now, let's go to 15, Jason Bullock says
6 there was no pressure reducing valve and you also say
7 that it's not required. The water pressure wasn't that
8 high, correct?

9 A I've got a deal on that, too. It says right
10 in the code book if it's over 80 pounds, then it's
11 required. And our city water pressure in the area that
12 she's in is about 70 pounds

13 Q And that's the reason why a water --

14 A Yeah, we don't have -- we're not putting
15 them in town most areas, because it is less than --
16 than is required. Less than 80 pounds.

17 Q Okay. And you say that the copper lines
18 were grounded, correct?

19 A Well, the electrical boxes was grounded to
20 copper. I tested all the outlets, and they all show
21 ground. So I don't know where they're coming from.

22 Q All right. And No 18, missing nuts and
23 washers on anchor bolts for sill plate. Did you see
24 any --

25 A I have never been able to find that. I

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1 Q Are there any additional requirements
2 besides passing the final inspection?
3 A No.
4 Q And then the last exhibit is Exhibit 8, it's
5 another to whom it may concern letter dated May 4th,
6 2001. Was this letter signed by you, sir?
7 A Yes. I can see that from here.
8 Q Do you know why you wrote this letter?
9 A No, I do not at this time.
10 Q Is it true that you felt that the -- or
11 found, rather, that the construction of the house at
12 155 West 300 North meant the intent of the building
13 code -- 300 South, excuse me. Let me start over again.
14 Strike that.
15 Is it true, sir, that you found that the
16 construction of the house at 155 West 300 South met the
17 intent of the building code in place at the time of
18 construction?
19 A I would say yes at this point.
20 Q Okay.
21 MR. DIXON: I'll pass the witness.
22 MR. HADLEY: Okay.
23 / / /
24 / / /
25 / / /

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1 EXAMINATION
2 BY MR. HADLEY:
3 Q Good morning, Jack.
4 A Good morning. It's still morning
5 Q I've been sitting alongside you here for a
6 couple of hours. Am I sitting too close for you?
7 A No.
8 Q Am I in your space?
9 All right. You can reach over and pop me
10 one if you think I get out of line.
11 Why do you think you're here? You've been
12 here two hours testifying. What's going on? Why are
13 you sitting in this chair and Bryce Dixon has been
14 asking questions of you?
15 MR. DIXON: Objection to the form of the
16 question. Irrelevant. Not likely to lead to the
17 discovery of admissible evidence. Broad.
18 MR. HADLEY:
19 Q When he's done go ahead.
20 A I would say because two people have a
21 problem.
22 Q You understand that?
23 A Yes.
24 Q You heard the saying the truth shall make
25 you free? Have you heard of that before?

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1 A Yes.
2 Q Do you believe that?
3 A Yes, I do
4 Q Do you understand there's a little tussle
5 that's developed between Mary and the Smiths, and we're
6 here to kind of unravel that? You understand that?
7 A (Nods head).
8 Q Okay. What I want to do is I'm going to
9 have to repeat and go through a few of the things that
10 you have discussed with Bryce. And I want you to know
11 so you know that I feel that you've been truthful, but
12 I want to dig a little bit and get into the code some.
13 Is that okay with you?
14 A Yes.
15 Q Okay.
16 MR. DIXON: I don't mean to distract you, I
17 sometimes worry about the exhibits.
18 THE WITNESS: I thought that was an extra
19 copy of that one
20 MR. DIXON: Okay. I just want to make sure
21 I haven't -- I want to get them all over in the court
22 reporter's corner to make sure I haven't kept any. And
23 that's all I was doing.
24 MR. HADLEY:
25 Q Do you mind if I look at your Exhibit 1

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1 which is your little --
2 A This?
3 Q Yes.
4 A There's not much on there.
5 Q That's right. When was that first entry? I
6 think you said it was July 29?
7 A I had the corners down.
8 Q Okay If you don't mind I'm going to rattle
9 off some dates. You and I are going to look at this
10 and I'm going to rattle off some dates. I'm going to
11 have to put them in the form of the question, otherwise
12 I'm going to blow some hot air and Bryce is going to
13 take me to task on it.
14 It has an entry for Dan Smith on the 29th of
15 July; is that correct?
16 A Yes.
17 Q We'll copy that page; is that okay?
18 A Yes.
19 Q Okay. We have another one on Friday the
20 13th, August, of '93, correct?
21 A Yeah.
22 Q Okay. And we'll copy that one. Is that
23 agreed?
24 A Yes.
25 Q Okay. Again on Monday the 16th of August,

23 (Pages 89 to 92)

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1 A. Yes, I would say that.
2 Q. Okay.
3 A. Reputation, too.
4 Q. Let's talk about item 6. And I think I'm
5 going to refer here to -- I believe it's Exhibit 8. Do
6 you still have a copy of your letter there?
7 A. No, he took them all back there.
8 Q. You didn't get a copy?
9 MR. DIXON: You want the inspection final?
10 MR. HADLEY: No. If I wrote this right,
11 Exhibit 8.
12 MR. DIXON: I thought you said 6.
13 Exhibit 8.
14 THE WITNESS: No, that's different than what
15 he's got. It's the other one.
16 MR. HADLEY: Maybe it isn't 8.
17 MR. DIXON: This is Exhibit 5.
18 MR. HADLEY: Sorry. All right, Exhibit 5.
19 Exhibit 5.
20 Q. Exhibit 5 refers to -- is your letter,
21 correct?
22 A. That's right.
23 Q. And No. 6 of Exhibit 4 talks about no soffit
24 venting, lack of attic ventilation has caused roof
25 shingles to deteriorate, okay? Hang on just one

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1 second.
2 Do you know offhand just what the standard
3 is for a ventilation?
4 A. Yes.
5 Q. Kind of the ratio?
6 A. It's one to one fifty. You got to know what
7 the inches of the vents are, and that is put out by the
8 manufacturer. You have to reduce it by the fins. You
9 have to reduce it by the grill.
10 Q. Okay. And I'm referring now to your
11 Exhibit 5, your letter, you're saying -- I'm looking at
12 the last two sentences of your paragraph there of the
13 first paragraph. I also visited the job site -- the
14 job site another occasion and Dan and I discussed the
15 venting of the attic.
16 A. Yeah.
17 Q. Dan felt that it was adequate, period.
18 Did you feel it was adequate?
19 A. I questioned it at the time, I did. But I
20 didn't know what the space was for those vents.
21 Q. Why didn't you know the space?
22 A. Because they weren't written on the --
23 there's no specifications on the manufacturer what
24 they -- they didn't put on it how many square inching
25 of venting it would produce.

Page 111

1 Q. Okay. Why did you then -- what was it that
2 caused you to discuss the venting of the attic? Why
3 did you bring it up to Dan?
4 A. I think I -- that's a long time ago. But,
5 as I recall, I asked him if he thought that was -- if
6 he calculated or what it needed for the attic, and he
7 thought that what he had was adequate.
8 Q. And you accepted that?
9 A. And I accepted that at the time.
10 Q. All right. Now, you raise a little point.
11 When you say "at the time," was there a time that you
12 thought maybe I shouldn't --
13 A. It started to curl.
14 Q. Which, of course, was after Mary had bought
15 it?
16 A. Yeah.
17 Q. Do you believe that the fact that there
18 was -- I should ask you this: Today now as you sit
19 here was there inadequate ventilation back when --
20 during October of 1993? Was there inadequate
21 ventilation at that time?
22 A. The evidence points, yes, there was.
23 Q. Do you believe Jack -- excuse me, do you
24 believe that Mr. Smith knew that the ventilation was
25 inadequate?

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1 A. I don't -- that's -- I don't know. I would
2 say --
3 Q. Excuse me, did you ask him what the
4 measurements were of the -- of the attic, of the floor
5 space, as it pertains to the ventilation? Did you ask
6 him that?
7 A. No. But I -- but we still went back to the
8 grills as to how big they were.
9 Q. Did you measure them? Did you go measure
10 those grills?
11 A. You can measure them, yeah. That doesn't
12 tell you. It's less than that measurement.
13 Q. I know that. But I'm just asking if you
14 measured it?
15 A. Yeah, we measured at the time what they
16 were. Yeah.
17 Q. Okay. Well, then, if you measured them, did
18 you run a calculation so you would know exactly how
19 much ventilation --
20 A. I did not.
21 Q. You didn't?
22 A. I didn't.
23 Q. Do you think Mr. Smith had a duty to measure
24 and run the calculation so that he could ensure that
25 the ventilation was to code? Do you think he had a

<p style="text-align: right;">Page 57</p> <p>1 Q Okay So the nailing fin -</p> <p>2 A The nailing fin goes over the top of that</p> <p>3 Q Okay And instead of using this one foot</p> <p>4 strip that you see used nowadays, Dan Smith used felt?</p> <p>5 A Yeah</p> <p>6 Q And at the time you felt that was</p> <p>7 appropriate, at the time he was building the house,</p> <p>8 correct?</p> <p>9 A Yes</p> <p>10 Q All right Now, you say that the problem</p> <p>11 has nothing to do with counter flashing, the windows</p> <p>12 are cheap aluminum and they are sweating because the</p> <p>13 frames are very cold, correct?</p> <p>14 A That's right</p> <p>15 Q Now, when did you make that observation</p> <p>16 first, the first time?</p> <p>17 A Well, when you have a window there's no</p> <p>18 thermal break between the outside part of the frame and</p> <p>19 the inside part of the frame It condenses -- it</p> <p>20 brings the cold right in on the frame and then it</p> <p>21 condenses water on the frame, the window frames itself,</p> <p>22 and would come off</p> <p>23 Q Did you actually see that -</p> <p>24 A Any humidity in the house would collect on</p> <p>25 the windows Yes, I did see that</p>	<p style="text-align: right;">Page 59</p> <p>1 MR DIXON</p> <p>2 Q All right And you say the reason why it</p> <p>3 was constantly plugging up because they were low flush</p> <p>4 toilets, designed to save some water, is that right?</p> <p>5 A That's right</p> <p>6 Q If I understand you correctly, you</p> <p>7 actually -</p> <p>8 A I pulled it out for her twice and unplugged</p> <p>9 it</p> <p>10 Q Now, when you did that, how did she happen</p> <p>11 to call you? Did she know that you were a construction</p> <p>12 contractor? Or did she call you because you were the</p> <p>13 building inspector? Do you know what I mean?</p> <p>14 A We've been friends for a long time, and I've</p> <p>15 built one other home before this one</p> <p>16 Q I see</p> <p>17 A We've been acquainted for a long time</p> <p>18 Q Okay Before she purchased this house of</p> <p>19 the Smiths, did she ever go to you to talk to you about</p> <p>20 the house and whether she should buy it?</p> <p>21 A No</p> <p>22 Q Did you know she was going to buy this house</p> <p>23 before she did?</p> <p>24 A No</p> <p>25 Q How did you meet Mary Moore in the first</p>
<p style="text-align: right;">Page 58</p> <p>1 Q You saw that on Mary Moore's house?</p> <p>2 A Yes</p> <p>3 Q When did you first see that in her house?</p> <p>4 A When I was helping her fix the bathroom</p> <p>5 Q When was that, approximately?</p> <p>6 A I don't know dates Mary's got dates on</p> <p>7 that someplace</p> <p>8 Q I think she said, I think, that was within</p> <p>9 the first two or three years after she moved into the</p> <p>10 house Would that seem right to you?</p> <p>11 A I really don't recall</p> <p>12 Q Okay</p> <p>13 MR DIXON I don't want to misrepresent</p> <p>14 her Didn't she say the bathrooms were the first</p> <p>15 couple or three years? Is that what you remember</p> <p>16 yesterday?</p> <p>17 MR HADLEY Within the first two or three</p> <p>18 years?</p> <p>19 MR DIXON Yeah, the toilets</p> <p>20 MS MOORE I don't remember what I said</p> <p>21 yesterday</p> <p>22 MR HADLEY She did have problems with the</p> <p>23 toilets within the first two or three years</p> <p>24 THE WITNESS The toilet is the next one on</p> <p>25 your list, and it was constantly plugging up</p>	<p style="text-align: right;">Page 60</p> <p>1 place?</p> <p>2 A Well, her husband and they were farmers,</p> <p>3 raised potatoes down here in the lower sink area</p> <p>4 Flowell, yeah I was acquainted with all her family,</p> <p>5 both Bill and his brother</p> <p>6 Q Okay And you were acquainted with them</p> <p>7 You said friends, but did you go out socially, that</p> <p>8 close a friend?</p> <p>9 A No I mean, they were there and we were up</p> <p>10 here</p> <p>11 Q So because you were that kind of friend</p> <p>12 acquaintance, she would call you to help her on this</p> <p>13 around the house, is that correct?</p> <p>14 A She called and I volunteered to go help her</p> <p>15 Q And you didn't charge her for those</p> <p>16 services?</p> <p>17 A No</p> <p>18 Q And you didn't go because you were the</p> <p>19 building inspector?</p> <p>20 A No</p> <p>21 Q You did that because you were her friend,</p> <p>22 right?</p> <p>23 A We were trying to see if we could solve the</p> <p>24 problems</p> <p>25 Q Okay Now, what kind of construction</p>

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1 box, correct?

2 A I can't confirm that because I don't really
3 recall But I have a tester that tests, and I push the
4 button to make sure when I'm checking GFI's I know
5 the garage, and that's coming up later here, I think,
6 anyway, Dan said he was going to put woodworking tools
7 in there so he didn't want them Then at the time I
8 thought, well, you know, he can put the plugs in if
9 it's necessary

10 When the GFI's first came out, people used
11 to pull the plug out and pulled because they tripped so
12 many times Nowadays it's not a problem with the GFI's
13 the way they are

14 Q There's been a lot of improvements in the
15 GFI's?

16 A Yes And the new GFI plugs are inexpensive,
17 like I say, \$6 But the breaker is still about \$30, I
18 think, for each one

19 Q And then you say the two 20 amp circuits
20 GFCI protected is a later code change What do you
21 mean by that?

22 A In the kitchen That's the kitchen, we
23 require two separate circuits That came in

24 Q Okay Are you talking about the 20 amp
25 circuits, they could have been 15 amp circuits?

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1 not a big issue, as far as getting it done It should
2 be labeled so that they're not trying to figure out
3 which switch went where

4 Q Sure No 26 he says the house has over
5 house has over spanned headers and joists throughout
6 the house What's your response to that?

7 A Well, that goes back to this He's saying
8 that the long span in this report I got here, and I
9 haven't - I haven't got the blueprints anymore, and I
10 have no way of measuring the things He said the
11 longest span was 13 feet And when I we did it, we
12 did it on this span chart, which allows 13 foot plus
13 just a little They were fine, as far as I was
14 concerned

15 Q Okay

16 A -- on the spans

17 Q All right

18 A He mentions a header in one of these It's
19 been cut down, or something I don't recall anything
20 like that

21 Q Let me ask you about that There is a
22 header for a basement window that faces to the north
23 Do you remember that basement window?

24 A Not particularly There is a basement
25 window heads the north on that side

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1 A No, they were still 20 amps before They
2 required two separate circuits A minimum of two
3 separate circuits in the kitchen

4 Q Okay Well, didn't this house have two
5 separate circuits in the kitchen?

6 A I thought it did I don't know I would
7 have to go - it's been they made this after I made
8 that final, and I'm not sure If it was my mistake, if
9 I overlooked that, I don't know

10 Q Well, I don't think you did, because I think
11 we saw two separate circuits But that's something we
12 can hash out But I don't want to leave you with the
13 impression that you made a mistake, because our
14 expert --

15 A Well --

16 Q -- saw two separate circuits

17 A -- I don't pretend to be perfect I try to
18 oversee anything

19 Q Let's go to 24, and that's the bathrooms

20 A That's basically the same thing

21 Q Okay And No 25 -

22 A And

23 Q The electrical panel had not been labeled

24 A And I don't think it is yet That is one
25 thing on the final, I don't think it's labeled It's

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1 Q All right Do you remember ever finding out
2 that either Mr Moore or Mary Moore or somebody after
3 they took over the house, cut that header back?

4 A I wouldn't -- I don't know anything about
5 any of that

6 Q Okay

7 A I couldn't say one way or another

8 Q All right I only ask you that because you
9 did help her out for some things

10 A I had nothing to do with anything like that,
11 if that was done

12 Q Okay And when you said you made a
13 reference to this -- that chart that you were working
14 on that said that there was an allowable span of 13
15 foot 1 inches, you were talking about --

16 A The floor joists

17 Q You were talking about --

18 A Yeah, Exhibit 4?

19 Q The handout sheet to the contractors, which
20 was Exhibit 3, correct?

21 A Uh huh

22 Q Is that yes?

23 A Yes

24 Q All right So now we're at the footings
25 appear to be at grade level in some places

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1 Now, when you passed final inspection, the
2 final grading to this house had not been done, correct?
3 A That's right
4 Q And that was because it was -- it was
5 November and it was muddy and it wasn't a good time to
6 be doing final grading, correct?
7 A That's right
8 Q And you expected that the final grading
9 would be done the next spring when the weather cleared
10 up, correct?
11 A Yes
12 Q And that's what you and Mr Smith agreed
13 upon, correct?
14 A Yes
15 Q Okay At that point in time, to your
16 knowledge, neither Mr Smith -- Mr Smith had no
17 intention of selling the house to Mrs Moore, because
18 Mrs Moore hadn't even come into the picture, right?
19 A Yes
20 Q And you state in here that the Moores were
21 not aware of the 30 inch depth requirement I'm not
22 following that How do you know that the Moores were
23 not aware of the 30 inch depth requirement?
24 A Well, I didn't discuss it with them I
25 don't know if they knew or not I don't think that she

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1 did because she didn't realize they were that shallow
2 until later on, and she showed me one day when we had
3 to put a fence in, was trying to put a post in
4 Q That was the first time that Mrs Moore ever
5 mentioned to you any problem that she had with the
6 footings of the house, correct?
7 A That's when it came up, yeah
8 Q Now, when you were out there at the house at
9 the time that -- or at the time that the inspection --
10 final inspection was done, was there dirt that could
11 have been used to accomplish the final grading?
12 A He had some dirt around the house I don't
13 know how much
14 Q Do you remember ever seeing any piles of
15 dirt around the house, in the back?
16 A He had dirt piled up when they poured the
17 footings He had to dig out and for the basement I
18 don't remember how much
19 Q Do you remember him ever bringing in a load
20 of dirt?
21 A Not to my knowledge I wasn't around for
22 that
23 Q He could have, but you just don't remember?
24 A He could have done and I wouldn't have known
25 about it, that's right The grading and that stuff I

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1 was never around the house when it was done
2 Q Okay Do you know whether the Moores, after
3 they moved in, moved any dirt?
4 A I couldn't -- I didn't witness that
5 Q Okay Did you ever see them doing any --
6 any of the finish grading that was expected to be done?
7 A No
8 MR HADLEY Object Well, strike that Go
9 ahead
10 MR DIXON
11 Q Did Mrs Moore ever, or Mr Moore, the late
12 Mr Moore, ever tell you that they had taken some dirt
13 away from part of the house in order to make a
14 driveway, or something like that?
15 A He had a driveway around the east part of
16 the house, but he didn't talk to me about that
17 driveway He had an access to go back to his corral
18 So that was his way of getting back there was on the
19 east side of the house
20 Q Okay Did you ever notice any changes in
21 the grade of the house from the time you did the final
22 inspection until during the time that you would go back
23 and visit that house periodically to see Mrs Moore?
24 A When we did the final inspection, it was a
25 mess It was muddy, muddy, garbagey (sic) There was

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1 a lot of change in it after that
2 Q Okay So it was such a mess that there was
3 obviously some changes made?
4 A Obviously pictures would be better than
5 words on that
6 Q Okay
7 A But we don't have them
8 Q Have you ever told -- let's see, have you
9 ever told anybody that the Moores had done some
10 movement or some alteration of dirt levels, or anything
11 like that?
12 A No
13 Q Okay All right Well, tell me how you
14 expected the Smiths that following spring to have
15 complied with the 30 inch depth requirement?
16 MR HADLEY Objection Objection, in that
17 you're clearly leading the witness and you're assuming
18 a fact that has not been at issue, that the Smiths were
19 expected to do the landscaping
20 MR DIXON No, that's a
21 mischaracterization He did say that he expected the
22 Smiths to do the finish grade the following spring when
23 the weather cleared up
24 MR HADLEY Let me voir dire
25 / / /

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1 Q. Okay. So having stated that -- shall we go
2 to the code, UBC 2517? Because your position was that
3 is not out of code. I mean, what is your position
4 regarding this wall and window that are cantilevered
5 out?
6 A. I would need to go measure those to make
7 sure what they are right now. But if they're 4 feet,
8 whether that's been rated or whether that's correct.
9 Q. Keep talking to me. What does that mean you
10 start saying about 4 foot, what are you addressing?
11 A. Well, there was a formula that the old
12 contractors used that had a distance of so much back
13 and so much over you go.
14 Q. Right.
15 A. And I don't know what that -- I don't
16 remember what it was. I know I've been told and heard,
17 use that, because we went back to the 3 foot.
18 Q. Okay. Are you prepared --
19 A. It was more than that. I mean, it was more
20 than three. It was allowed more than three.
21 Q. Are you prepared to say definitely one way
22 or another that it is within code or outside the code?
23 A. At this point, no, I'm not. I haven't
24 really checked out on that.
25 Q. Okay. Let's bypass it, okay?

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1 A. Yeah.
2 MR. HADLEY: Robert, you're going to get a
3 longer lunch than maybe needed.
4 Q. Whoa, do you think I'm just getting picky to
5 go to No. 25 of Exhibit 4 and say that that electrical
6 panel has not been labeled?
7 A. It hasn't been labeled. I know what you
8 could do.
9 Q. Do you think I'm being real picky?
10 A. Brought up on my inspection sheet it says
11 panel not labeled and that there.
12 Q. And it's required?
13 A. It's required for the switches.
14 Q. What if I built that home for me to live in,
15 would you still say it's required that I label that
16 thing?
17 A. I think at the time of the final -- I don't
18 know -- I can't remember if it was positive, but I
19 thought I talked about that and it was gonna be done.
20 But I don't know if it was forgotten. It isn't a big
21 job, but it needs to be done.
22 Q. Would it -- it isn't a big job, you say?
23 A. Not really big.
24 Q. How big a job would it be for a licensed
25 master electrician to label an electrical panel?

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1 A. Most of them do it in about 10 minutes.
2 Q. What if we were in a hurry to get the home
3 sold, may not label it?
4 A. I don't know. I would be speculating.
5 MR. DIXON: I sustain the objection.
6 (Laughter.)
7 MR. HADLEY:
8 Q. Did you ever consider law school, Jack?
9 A. No. I don't want to go to law school.
10 Q. Okay. I'm trying to just move on here.
11 Man, here it is No. 27, footings do not meet minimum 30
12 inch frost line depth. You and Bryce kind of talked
13 about that one, didn't you?
14 A. Yeah. I really can't give you the -- I know
15 at the time the footings were poured, I mentioned to
16 Dan that they were not deep enough, the whole --
17 Q. Right when they were pouring you mentioned
18 it?
19 A. Right when it was poured. And he told me it
20 was going to be backfilled. And, of course, that
21 wasn't done in November when we did that. So that's
22 basically it. I mean --
23 Q. Why didn't he do it right back when he had
24 got them poured and --
25 A. Well, if they planned on filling them out, I

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1 have that quite a bit, they'll backfill to get their
2 slope away from the house.
3 Q. Okay. Is the milk pale spilled over as
4 pertained to these footings, Jack?
5 MR. DIXON: Objection to the form of the
6 question.
7 MR. HADLEY:
8 Q. Do you follow my drift?
9 MR. DIXON: No, I don't. Objection to the
10 form of the question.
11 THE WITNESS: The grading was impossible at
12 the time I went through there. It was November. It
13 was muddy. But I don't know whose responsibility it
14 was. I don't know what the -- I don't know what the
15 deals were between the two parties. I have -- I really
16 can't answer.
17 MR. HADLEY:
18 Q. Are you aware of when Mary Moore first
19 contacted the Smiths about potentially buying the home?
20 A. No.
21 Q. Okay. What if I told you it was in February
22 of 1994, some three months after your November 8th
23 final inspection?
24 A. February of that year was --
25 Q. February of '94, yeah.

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1 A. Yes, I would say that.
2 Q Okay.
3 A. Reputation, too.
4 Q Let's talk about item 6. And I think I'm
5 going to refer here to -- I believe it's Exhibit 8. Do
6 you still have a copy of your letter there?
7 A. No, he took them all back there.
8 Q. You didn't get a copy?
9 MR. DIXON: You want the inspection final?
10 MR. HADLEY: No. If I wrote this right,
11 Exhibit 8.
12 MR. DIXON: I thought you said 6.
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14 THE WITNESS: No, that's different than what
15 he's got. It's the other one.
16 MR. HADLEY: Maybe it isn't 8.
17 MR. DIXON: This is Exhibit 5.
18 MR. HADLEY: Sorry. All right, Exhibit 5.
19 Exhibit 5.
20 Q. Exhibit 5 refers to -- is your letter,
21 correct?
22 A. That's right.
23 Q. And No. 6 of Exhibit 4 talks about no soffit
24 venting, lack of attic ventilation has caused roof
25 shingles to deteriorate, okay? Hang on just one

Page 110

1 second.
2 Do you know offhand just what the standard
3 is for a ventilation?
4 A. Yes.
5 Q. Kind of the ratio?
6 A. It's one to one fifty. You got to know what
7 the inches of the vents are, and that is put out by the
8 manufacturer. You have to reduce it by the fins. You
9 have to reduce it by the grill.
10 Q. Okay. And I'm referring now to your
11 Exhibit 5, your letter, you're saying -- I'm looking at
12 the last two sentences of your paragraph there of the
13 first paragraph. I also visited the job site -- the
14 job site another occasion and Dan and I discussed the
15 venting of the attic.
16 A. Yeah.
17 Q. Dan felt that it was adequate, period.
18 Did you feel it was adequate?
19 A. I questioned it at the time, I did. But I
20 didn't know what the space was for those vents.
21 Q. Why didn't you know the space?
22 A. Because they weren't written on the --
23 there's no specifications on the manufacturer what
24 they -- they didn't put on it how many square inching
25 of venting it would produce.

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1 Q. Okay. Why did you then -- what was it that
2 caused you to discuss the venting of the attic? Why
3 did you bring it up to Dan?
4 A. I think I -- that's a long time ago. But,
5 as I recall, I asked him if he thought that was -- if
6 he calculated or what it needed for the attic, and he
7 thought that what he had was adequate.
8 Q. And you accepted that?
9 A. And I accepted that at the time.
10 Q. All right. Now, you raise a little point.
11 When you say "at the time," was there a time that you
12 thought maybe I shouldn't --
13 A. It started to curl.
14 Q. Which, of course, was after Mary had bought
15 it?
16 A. Yeah.
17 Q. Do you believe that the fact that there
18 was -- I should ask you this: Today now as you sit
19 here was there inadequate ventilation back when --
20 during October of 1993? Was there inadequate
21 ventilation at that time?
22 A. The evidence points, yes, there was.
23 Q. Do you believe Jack -- excuse me, do you
24 believe that Mr. Smith knew that the ventilation was
25 inadequate?

Page 112

1 A. I don't -- that's -- I don't know. I would
2 say --
3 Q. Excuse me, did you ask him what the
4 measurements were of the -- of the attic, of the floor
5 space, as it pertains to the ventilation? Did you ask
6 him that?
7 A. No. But I -- but we still went back to the
8 grills as to how big they were.
9 Q. Did you measure them? Did you go measure
10 those grills?
11 A. You can measure them, yeah. That doesn't
12 tell you. It's less than that measurement.
13 Q. I know that. But I'm just asking if you
14 measured it?
15 A. Yeah, we measured at the time what they
16 were. Yeah.
17 Q. Okay. Well, then, if you measured them, did
18 you run a calculation so you would know exactly how
19 much ventilation --
20 A. I did not.
21 Q. You didn't?
22 A. I didn't.
23 Q. Do you think Mr. Smith had a duty to measure
24 and run the calculation so that he could ensure that
25 the ventilation was to code? Do you think he had a

Ex 5

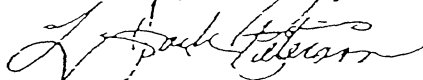
L Jack Peterson
95 East 500 South
P O Box 84
Fillmore, Utah 84631

To whom it may concern

I was contacted by Dan Smith and went over the property and the layout of the home on the 11th of August 1993, and inspected the footings on Friday 13th. 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 16th and the rough plumbing on the 18th. The rough electrical and plumbing, along with the framing inspection, was done on the 8th and 9th of September 1993. I checked the building progress on both the 28th and the 29th 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 8th 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



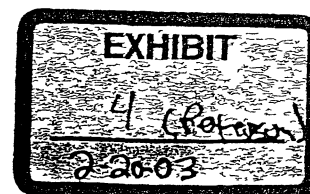
Ex 4

FILLMORE CITY

City Building Inspectors response to 30 items from Sunrise Engineering's inspector.

The home in question was built under the 1991 Building Code

1. The fascia that wasn't completed was done by Tom's Roofing when a cold roof was put on that section in August of 1998. It had noting to do with the original construction.
2. The rear deck was constructed after my last inspection and was not anchored properly.
3. Same as #2.
4. The south east corner of the foundation is not cracking. The stucco finish on the foundation is cracking where it meets the sheeting on the upper floor. It is not a structural problem.
5. Not applicable.
6. The gable end vents and turtle vents were installed later.
7. There is a junction box under the kitchen cabinets up next to the counter top. Not easy access. Needs a cover. This item was missed on the final inspection.
8. The attic access was brought to Mr. Smith's attention when the final inspection was made.
9. This problem has nothing to do with counter flashing. The windows are cheap aluminum frames with no thermal break and they are sweating because the frames are very cold.
10. Bathroom fixtures have been removed many times because of the water saver toilets that are plugging and not flushing. I can not confirm if they were not caulked in the beginning.
11. Can not confirm in attic.
12. At the time of the final inspection it was noted that smoke detectors were lacking. Mr. Smith was going to take care of the problem. After the Moore's moved in the battery detector was installed.
13. On October 29, 1993, Mr. Smith called me and wanted me to look at the stairs. The treads measured about 3/8 inch over, but there wasn't enough ceiling height, and one more tread would make the clearance far below the 6'6" head room clearance. It would take major reconstruction to change it, and I felt that the 3/8 inch over height was the lessor of the two problems.



14. Not required in an unfinished basement.
15. Not required. Water pressure is not that high.
16. To my knowledge, the copper lines were grounded.
17. The spans for 2 x 6 headers in the 1991 code was up to six feet. None exceed that.
18. Can not confirm.
19. Cantilever has a 2 to 1. There is 13 feet back and 4 feet over. 1991 code did not require to be double.
20. Combustion air for water heater not required from outside. Plenty of room in basement to meet needs of 50 cubic feet, 1000 BTU. Female is 90 plus bringing its own combustion air from outside.
21. Dishwasher is plumbed right and works fine.
22. In the 1991 Building Code only water heaters in seismic zone 3-4 were required to be anchored. Fillmore is in a 2 B Zone. (1 code 1310 (e))
23. Kitchen circuits under the 91 code 210-8 (5) Electric Code, with receptacles installed within 6 feet of kitchen sink to service counter tops shall be GFI protected. This was done with a GFCI breaker in panel box. The two 20 amp circuits GFCI protected is later code change.
24. Bathrooms under 210-8-6 also 15 or 20 amps and are GFCI protected. There were also on a GFCI breaker in panel box.
25. Mr. Smith told me at the time of the final inspection that he would take care of this item.
26. In 91 code, 2 x 8 46 inch on center were allowed 13 feet 1 inch - max. The longest spans in the house do not exceed this. The headers have already been addressed in #17.
27. When the footings were inspected, Mr. Smith assured me the grading would be adequate. When he moved in, in November, it was muddy and the grading had not been done. When the home was sold to the Moore's, the grading and landscaping were not done, the Moore's were not aware of the 30 inch dept. _____
28. This also was done by Moore's and was part of the land scraping.
29. Outlets in the garage were checked on final inspection with Mr. Smith. He said he was going to use his power tools in the garage and didn't want GFI.

30. I missed this item on final inspection.

Ex 7

EXHIBIT
J. (Peterson)
2-20-05

TYPE OF OCCUPANCY

I declare under penalty of perjury that I am the owner or authorized agent of the property subject of this request, that the foregoing statements and answers are true and correct, and that the stated conditions will be maintained on the premises.

Any change in intensity of use on the building or premises, or an increase of more than five percent (5%) in the number of occupants in an apartment or multiple residential building will require the issuance of a new certificate.

Remarks: _____

Failure to comply with any section of this ordinance is a misdemeanor and is punishable by a fine of not more than \$1000 or imprisonment for not more than six (6) months or both as is set forth in Chapter 1 Sec. 11-100.

EARNEST MONEY RECEIPT

Legend Yes(X) No(O)

DATE February 15, 1994

he undersigned Buyer William K Moore & Mary J. Tilmore hereby deposits with Brokerage
 EARNEST MONEY, the amount of Four Thousand no/100 Dollars (\$4,000.00)
 he form of check
 which shall be deposited in accordance with applicable State Law

None Brokerage Received by Mar S. Smith
 Phone Number _____

OFFER TO PURCHASE

1 PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 155 W 300S
 in the City of Fillmore County of Millard Utah
 subject to any restrictive covenants zoning regulations utility or other easements or rights of way government patents or state deeds of record approved by Buyer in
 accordance with Section G Said property is owned by Dan S & Carol L Smith as sellers and is more particularly described

CHECK APPLICABLE BOXES

☒ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other _____
☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other _____

(a) Included items Unless excluded below this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property
 The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title _____

(i) Excluded items The following items are specifically excluded from this sale living room lamp & shower curtain
main bath

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS Seller represents that the property includes the following improvements in the purchase price
☒ public sewer ☒ connected ☐ well ☐ connected ☐ other _____ ☒ electricity ☒ connected
☒ septic tank ☐ connected ☒ irrigation water / secondary system ☐ ingress & egress by private easement
☒ other sanitary system _____ # of shares to be determined Company _____ ☒ dedicated road ☒ paved
☒ public water ☒ connected ☐ TV antenna ☐ master antenna ☐ prewired ☐ curb and gutter
☒ private water ☐ connected ☒ natural gas ☒ connected ☐ other rights _____

(d) Survey A certified survey ☐ shall be furnished at the expense of _____ prior to closing ☒ shall not be furnished

(e) Buyer Inspection 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 _____

2 PURCHASE PRICE AND FINANCING The total purchase price for the property is Eighty Three Thousand
no/100 Dollars (\$ 83,000.00) which shall be paid as follows

\$ 4,000.00 which represents the aforescribed EARNEST MONEY DEPOSIT
 \$ 4,000.00 representing the approximate balance of CASH DOWN PAYMENT at closing
 \$ 0 representing the approximate balance of an existing mortgage trust deed note real estate contract or other encumbrance to be assumed by buyer
 which obligation bears interest at 0 % per annum with monthly payments of \$ 0
 which include ☐ principal ☐ interest ☐ taxes, ☐ insurance, ☐ condo fees ☐ other _____
 \$ 0 representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be
 assumed by Buyer which obligation bears interest at _____ % per annum with monthly payments of \$ _____
 which include ☐ principal, ☐ interest ☐ taxes ☐ insurance, ☐ condo fees ☐ other _____
 \$ 0 representing balance, if any, including proceeds from a new mortgage loan, or seller financing to be paid as follows _____
 \$ 0 Other _____
 \$ 83,000.00 TOTAL PURCHASE PRICE

EXHIBIT

2 (Moore)

2-19-03

If Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing Buyer agrees to use best efforts to assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing Buyer agrees to make application within N/A days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed N/A % If Buyer does not qualify for the assumption and/or financing within N/A days after Seller's acceptance of this Agreement this Agreement shall be voidable at the option of the Seller upon written notice Seller agrees to pay up to N/A mortgage loan discount points not to exceed \$ N/A In addition, seller agrees to pay \$ N/A to be used for Buyer's other loan costs

FILLMORE

Date _____

EARNEST MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.

GENERAL PROVISIONS

(Sections)

I INCLUDED ITEMS. Unless excluded herein, this sale shall include all fixtures and any of the following items if presently attached to the property, plumbing, heating, air conditioning and ventilating fixtures and equipment, water heater, built in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs.

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 to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any 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 nor notice of any building or zoning violation concerning the property which has not 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.

D CONDITION OF WELL. Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

E CONDITION OF SEPTIC TANK. Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

F ACCELERATION CLAUSE. Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, the earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are, under Section 7 herein, alternatives allowed herein shall become null and void.

G TITLE INSPECTION. Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. Hereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

H TITLE INSURANCE. If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and no encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

I EXISTING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing a copy of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

J CHANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

estate contract. Transfer of Seller's ownership interest shall be made as set forth in Section S. Seller agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein, evidenced by ☒ a current policy of title insurance in the amount of purchase price ☐ an abstract of title brought current, with an attorney's opinion (See Section H).

4. **INSPECTION OF TITLE.** In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☐ has not reviewed any condominium CC & R's prior to signing this Agreement.

5. **VESTING OF TITLE.** Title shall vest in Buyer as follows: as directed at closing

6. **SELLERS WARRANTIES.** In addition to warranties contained in Section C, the following items are also warranted: none

Exceptions to the above and Section C shall be limited to the following: none

7. **SPECIAL CONSIDERATIONS AND CONTINGENCIES.** This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: closing fees to be paid half by buyer & half by seller

8. **CLOSING OF SALE.** This Agreement shall be closed on or before May 2, 1994 at a reasonable location to be designated by Seller, subject to Section Q. Upon demand, Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Section R shall be made as of ☐ date of possession ☒ date of closing ☐ other _____

9. **POSSESSION.** Seller shall deliver possession to Buyer on May 2, 1994 unless extended by written agreement of parties.

10. **AGENCY DISCLOSURE.** At the signing of this Agreement the listing agent N/A represents () Seller () Buyer. Buyer and Seller confirm that prior to signing this Agreement and the selling agent N/A represents () Seller () Buyer. Buyer and Seller confirm that prior to signing this Agreement disclosure of the agency relationship(s) was provided to him/her. () () Buyer's initials () () Seller's initials.

11. **GENERAL PROVISIONS.** UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.

12. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Seller shall have until 5:30 (AM/PM) Feb 17, 1994, to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

<u>X William K McPherson</u> (Buyer's Signature)	<u>Feb 17, 1994</u> (Date)	<u>SR Box 234</u> (Address)	<u>743-5170</u> (Phone)	<u>368-34-105</u> (SSN/TAX ID)
<u>X William K McPherson</u> (Buyer's Signature)	<u>Feb 17, 1994</u> (Date)	<u>SR Box 234</u> (Address)	<u>743-5170</u> (Phone)	<u>368-34-105</u> (SSN/TAX ID)

CHECK ONE

- ☒ **ACCEPTANCE OF OFFER TO PURCHASE:** Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above
- ☐ **REJECTION.** Seller hereby REJECTS the foregoing offer. _____ (Seller's initials)
- ☐ **COUNTER OFFER.** Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until _____ (AM/PM) _____, 19____ to accept the terms specified below.

<u>Carol L. Smith</u> (Seller's Signature)	<u>2/15/94</u> (Date)	<u>8:10 P.M.</u> (Time)	<u>P.O. Box 985</u> (Address)	<u>743-5170</u> (Phone)	<u>368-34-105</u> (SSN/TAX ID)
<u>Carol L. Smith</u> (Seller's Signature)	<u>2/15/94</u> (Date)	<u>8:10 P.M.</u> (Time)	<u>P.O. Box 985</u> (Address)	<u>743-5170</u> (Phone)	<u>368-34-105</u> (SSN/TAX ID)

CHECK ONE:

- ☐ **ACCEPTANCE OF COUNTER OFFER.** Buyer hereby ACCEPTS the COUNTER OFFER
- ☐ **REJECTION.** Buyer hereby REJECTS the COUNTER OFFER. _____ (Buyer's Initials)
- ☐ **COUNTER OFFER.** Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum.

_____ (Buyer's Signature)	_____ (Date)	_____ (Time)	_____ (Buyer's Signature)	_____ (Date)	_____ (Time)
------------------------------	-----------------	-----------------	------------------------------	-----------------	-----------------

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed).

A. <input checked="" type="checkbox"/> I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:	
SIGNATURE OF SELLER <u>Carol L. Smith</u> Date <u>2/15/94</u>	SIGNATURE OF BUYER <u>William K. McPherson</u> Date <u>2/15/94</u>

B. ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____, 19____ by Certified Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by _____

K AUTHORITY OF SIGNATORS If Buyer or Seller is a corporation, partnership, trust estate, or other entity, the person executing this Agreement on its behalf warrants s or her authority to do so and to bind Buyer or Seller

L COMPLETE AGREEMENT — NO ORAL AGREEMENTS. This instrument constitutes the entire agreement between the parties and supersedes and cancels any id all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agree ent This Agreement cannot be changed except by mutual written agreement of the parties

M COUNTER OFFERS. Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement t expressly modified or excluded therein

N DEFAULT/INTERPLEADER AND ATTORNEY'S FEES In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages to institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to yyer. 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, cluding 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 ap- icable law, whether such remedy is pursued by filing suit or otherwise. In the event the principal broker holding the earnest money deposit is required to file an in- rpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the rnest money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall r interpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's es incurred by the principal broker in bringing such action

O ABROGATION. Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement

P RISK OF LOSS. All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between e date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent 0%) of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property or to closing or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed

Q TIME IS OF ESSENCE—UNAVOIDABLE DELAY In the event that this sale cannot be closed by the date provided herein due to interruption of transport, s e, flood, extreme weather, governmental regulations delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing ate shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein. Thereafter, ne is of the essence. This provision relates only to the extension of closing dates. "Closing" shall mean the date on which all necessary instruments are signed and livered by all parties to the transaction

R CLOSING COSTS. Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing le insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer closing

S REAL PROPERTY CONVEYANCING If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those ex- pted herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, ntaining Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real state contract therein

T NOTICE Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence the event with respect to which notice is required. If any such timely required notice is not given, the contingency with respect to which the notice was to be given automatically terminated and this Agreement is in full force and effect. If a person other than the Buyer or the Seller is designated to receive notice on behalf of the uyer or the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice

U BROKERAGE For purposes of this Agreement, any references to the term Brokerage shall mean the respective listing or selling real estate office

DAYS For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays

PAGE FOUR OF A FOUR PAGE FORM

A. BRYCE DIXON, ESQ. (#889)
NATHAN K. FISHER, ESQ. (7522)
DIXON, TRUMAN & FISHER, a P.C.
192 East 200 North Suite 203
St. George, Utah 84770
Telephone: (435) 652-8000
Facsimile: (435) 652-9000
Attorneys for Defendant

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

WILLIAM MOORE and MARY MOORE,)	
)	
Plaintiff,	)	DEFENDANTS' SECOND SET
	)	OF REQUESTS FOR
	)	ADMISSIONS TO 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,)	
	)	Case No. 000700142 MI
Defendants.	)	Judge Eyre
)	

**DEFENDANTS' FIRST SET OF REQUESTS FOR
ADMISSIONS TO PLAINTIFFS**

Defendants, Dan and Carol Smith, by and through their attorney, A. Bryce Dixon, Esq., of DIXON, TRUMAN & FISHER, a P.C., hereby request that Plaintiffs and their attorney answer, pursuant to Utah Rules of Civil Procedure 36, in writing and under oath, within 30 days of receipt hereof, the following Requests for Admission:

REQUESTS FOR ADMISSION

REQUEST NO. 1: Admit that Jason Bullock and Mark O'Barr are home inspectors.

REQUEST NO. 2: Admit that Plaintiffs had the right to have a home inspection

performed before the sale of the home.

REQUEST NO. 3: Admit that Plaintiffs had the time and opportunity to have a home inspection performed before the sale of the home.

REQUEST NO. 4: Admit that Defendants did nothing to prevent Plaintiffs from exercising their right to ask for and obtain a home inspection before the closing of the sale of the home.

As to all Items 1 thru 42:

DEFECT ITEM #1

REQUEST NO. 5: Admit that the alleged construction defects described in items 1 thru 42 in your expert witness report were discovered without destructive testing.

REQUEST NO. 6: Admit that said defects were discovered through inspection by person(s) knowledgeable in the trade of home building or home inspection.

REQUEST NO. 7: Admit that said defects could have been discovered before the sale of the home by a home inspector.

REQUEST NO. 8: Admit that a home inspection would have revealed said defects.

REQUEST NO. 9: 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 home were not a latent defects as the phrase “latent defect” is used in the court’s order regarding the Smiths’ motion for summary judgment.

REQUEST NO. 10: Admit that said defects were not a material defect as the phrase “material defect(s)” is used in the court’s order regarding the Smiths’ motion for summary judgment.

Gregory B. Hadley (3652)
HADLEY & ASSOCIATES
Counsel for Plaintiff
2696 North University Avenue, #260
Provo, Utah 84604
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.	PLAINTIFF'S AMENDED ANSWERS TO DEFENDANTS' SECOND SET OF REQUEST FOR ADMISSIONS Civil No. 00700142 MI Judge Donald J. Eyre
--	---

COMES NOW the Plaintiffs and do hereby amend their Answers to Defendants'

Second Set of Request of Admissions to include the following:

ANSWER TO NO. 1

Admit

ANSWER TO NO. 2

Admit

ANSWER TO NO. 3

Admit

ANSWER TO NO. 4

Admit

ANSWER TO NO. 5

Admit

ANSWER TO NO. 6

Admit

ANSWER TO NO. 7

Admit

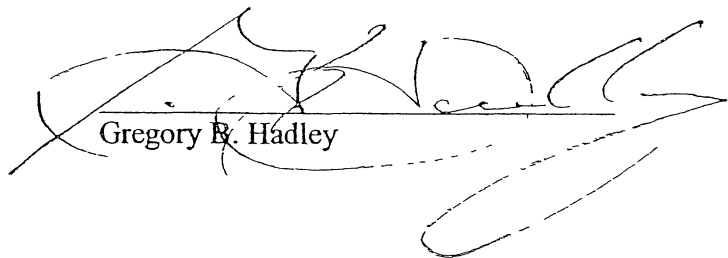
ANSWER TO NO. 8

Deny

ANSWER TO NO. 9

Admit as to defects 2 – 8, 10, 13 – 25, 28, 29, 30 – 37, 40, and 41.

DATED this 14th day of February 2003


Gregory B. Hadley

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Page 19

1 MR. HADLEY: Counsel, not to break your
2 stride, we went through -- she's still working through
3 the papers, but there's some documents in there from
4 Tamko.

5 MR. DIXON: Are there?

6 MR. HADLEY: Yes.

7 MR. DIXON: Let's take a look at it.

8 Q. Can you find it for me?

9 A. Yes.

10 Q. Okay.

11 A. Well, I guess you don't have them. They
12 were all together there. But I have --

13 MR. DIXON: Is this your stuff?

14 MR. HADLEY: Oh, there is more. There you
15 go.

16 THE WITNESS: I started out by putting rain
17 gutters -- finishing the rain gutter on my home, and
18 Jim Sampson discovered it, and we got ahold of them and
19 Tamko. That started it.

20 MR. DIXON:

21 Q. All right. There's a complaint form that
22 says that you are filling out to Tamko, correct? How
23 did you find out that Tamko was the manufacturer of the
24 shingles?

25 A. I asked Allen Roper at the lumberyard here.

1 So your allegation at this time is that the
2 shingles were faulty, correct?

3 A. We thought like the shingles were faulty.

4 Q. Why did you think that the shingles were
5 faulty?

6 A. Because they were cracking, raising and
7 curling.

8 Q. Where did you see raising and curling?

9 A. This gentleman that we hired, Jim Sampson,
10 to install the rain gutter on the north side above the
11 garage, came down and stopped on top of the garage. We
12 realized it didn't come down, but it didn't connect
13 into the rain gutter. We wanted it to go in and hook
14 into the rain gutter so there would be no problems. He
15 came and installed that, saw the roof, said something
16 about it.

17 I said, What's the problem?

18 He says, They're very brittle.

19 I said, Who would I talk to?

20 He sent me to Allen Roper.

21 Q. Okay.

22 A. Allen Roper got me started on this end, and
23 then that gentleman came down and did an inspection and
24 wrote -- came back. And he -- or he and Jack Peterson
25 came back then.

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Page 20

1 Q. And how did he --

2 A. And he --

3 Q. How did Allen Roper know that they were
4 Tamko shingles?

5 A. There's a paper with -- in there that has a
6 receipt from them.

7 Q. Okay.

8 A. And Allen came over and looked at my roof
9 and told me to contact these people. In fact, he
10 helped me do it.

11 Q. All right. So in your complaint you state
12 that the shingles were purchased from Roper Lumber and
13 the date the home was purchased, February 15th, 1994,
14 and this is Mr. Roper helping you fill out this
15 complaint form; is that what you're saying?

16 A. Yes.

17 Q. Okay.

18 MR. DIXON: Let's mark the complaint form as
19 Exhibit 1 up here.

20 (Whereupon, Exhibit 1 was marked
21 for identification.)

22 MR. DIXON:

23 Q. And you state that the labor was correct,
24 the shingles faulty, you should replace all shingles
25 and labor to replace.

1 Q. So Mr. Sampson actually replaced three
2 singles, correct?

3 A. Tamko asked him to take them off and replace
4 them so that they could be mailed in for testing.

5 Q. Okay.

6 A. And we did that.

7 Q. Now, is that the first that you had ever
8 heard of any problems with the shingles on the roof,
9 was when Mr. Sampson brought that to your attention?

10 A. Yes. I don't go on the roof.

11 Q. You didn't have any leaking through the
12 roof, right?

13 A. No, I had not.

14 Q. Okay.

15 A. None that I was aware of, anyway.

16 Q. And this was on the north side of the house
17 just above the garage, correct?

18 A. Correct.

19 Q. Did Mr. Sampson say there were any other
20 shingles that looked bad?

21 A. Yes, he did.

22 Q. What other shingles did he say looked bad?

23 A. He said my roof looked bad. The shingles
24 were getting brittle. And it was not lack of their
25 materials; it was lack of ventilation.

5 (Pages 17 to 20)

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1 A. Put the stuff around the --
2 Q. Around the turtle vents?
3 A. No, around the roof. That comes over the
4 garage. Like this is the garage roof, it's the piece
5 that goes on the edge around the garage.
6 Q. All right.
7 A. I don't know what it's called.
8 Q. Did you hire Jack Peterson to do that?
9 A. No, I did not.
10 Q. Why did you call Jack Peterson about that?
11 A. Tamko asked for me to contact the city
12 inspector to see what was required, what we needed for
13 the home.
14 Q. Okay.
15 A. He gave us an idea and so did Jack.
16 Q. All right. But I don't quite understand why
17 Jack Peterson would be willing to work on the house.
18 Did you hire him to do work on the house?
19 A. No, he told Tom the roofer that he would put
20 that on.
21 Q. Okay.
22 A. Because Tom the roofer does not do that;
23 Jack can.
24 Q. Did he expect to be paid for that?
25 A. He would have been paid if he would have

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1 sent me a bill. He would have.
2 Q. All right. Let's go to the toilet flooding
3 over several times. What damage did that do?
4 A. Well, it floods over. It gets under the
5 moulding. At one time it was so bad it leaked down
6 into the basement. It got on the carpet in the
7 bedroom.
8 Q. Okay. Do you know why the toilets flooded?
9 A. I didn't know for years why the toilet
10 flooded. I just felt like I didn't know how to flush
11 the toilet properly. I don't know why it didn't flush.
12 Q. And did you find out the reason eventually
13 why the toilets were flooding?
14 A. I believe somebody told me venting. But I
15 wouldn't -- I'm not --
16 Q. Okay. All right. What other damage have
17 you suffered?
18 A. We had a very bad leak in the front windows.
19 Very, very cold.
20 Q. Excuse me, before we go on to the toilets,
21 did you hire anyone to repair the toilets?
22 A. I made attempts. I think we got them here.
23 Q. It appears that the check for this repair of
24 the toilet problem is dated July 29th of 2002? Is that
25 right?

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1 A. Yeah. I tried like the stuff you put down
2 drains to clean things. Dan had told me about the
3 clean-out valve. I had plunged it. I had tried
4 everything I knew how to try. It's not a consistent
5 thing, it just happens every once in a while. You
6 think you have it cleared up and then it happens again.
7 Q. Well, this is in 2002. This is, you know,
8 how many years after you bought the house? Eight years
9 after you bought the house.
10 A. It might plug up once or twice and not for
11 several months. It might plug up 20 times in a month.
12 Q. This is the first time your toilet plugged
13 up is 2002?
14 A. Oh, no.
15 Q. Eight years after you bought the house and
16 you want to charge --
17 A. I told you I tried --
18 MR. HADLEY: Let him finish his question.
19 THE WITNESS: I'm sorry.
20 MR. DIXON:
21 Q. When did it first plug up, then?
22 A. That I do not remember.
23 Q. Well, just approximately how soon after you
24 bought the house did you have a toilet problem?
25 A. Six months. Approximately.

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1 Q. And periodically ever since then you've had
2 these toilet problems?
3 A. Just here and there. You would think it was
4 fixed. It wasn't
5 Q. All right. You say you got bad leaks in the
6 front window, right?
7 A. We had a lot of air coming, and there was a
8 gap in front of our window.
9 Q. Okay. I don't understand gap. Could you
10 describe it for me.
11 A. Evidently the caulking that had been there
12 had gone in the wall. I don't know where it went. But
13 we kept filling it with caulking trying to seal it off.
14 It was very cold.
15 Q. Okay. So you're talking about the front
16 room window, the biggest window or the smaller windows?
17 A. The big one.
18 Q. The big window in the front room looking
19 north, correct?
20 A. (Nods head).
21 Q. Yes?
22 A. Yes. Okay. I'm thinking when I do that.
23 Q. That's fine.
24 And you say that on the inside of the window
25 where there was some caulking, the caulking wasn't

7 (Pages 25 to 28)

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1 I still don't go touch my living room window every day.
2 Q. Well, ma'am, let me tell you when we get any
3 leaks in our house, my wife is all over the place
4 feeling for leaks. She wants to see if there's water
5 here, water there. She wants to know where that water
6 is coming from. And I can't imagine you as a
7 conscientious homeowner, who keeps a very nice home,
8 sees water damage, or evidence of some kind of water
9 damage, and you not feeling all around to see how wet
10 it might be.

11 You just didn't feel all around?

12 A. But it was already dry when I discovered it.
13 So there was no way of knowing.

14 Q. Okay. So you have never seen -- what I'm
15 trying to find out, have you ever seen any damage on
16 the vertical section of sheet rock on either side of
17 any window in your house? I know that you're saying
18 that there's some water damage at the bottom. But have
19 you ever seen any on the vertical sections, the part --
20 the sides of the windows, interior?

21 A. I'm not sure.

22 Q. Okay. When was the first time you saw any
23 flaking of paint caused by water damage, first winter,
24 second winter, third winter? First summer? First
25 rain?

1 Q. So the towels kept the water away?

2 A. Kept the cold air.

3 Q. So after that first winter when you noticed
4 some water damage, did you ever notice any water damage
5 after that?

6 A. I can't remember

7 Q. Okay. So if you can't remember, it hasn't
8 been a very big problem, has it, ma'am?

9 A. I haven't spent a lot of time going around
10 my windows.

11 Q. It's not been something that you've been
12 very concerned about, has it?

13 A. I had other things I've been concerned more
14 about.

15 Q. Has it been something that you've been
16 concerned about or not?

17 A. Slightly.

18 Q. All right. What other damage have you
19 noticed to your house? Let's talk about the stuff that
20 you are concerned about, then. Serious damage, then.
21 Is there any?

22 A. Well, the biggest damage would be the
23 foundation.

24 Q. Okay. How do you think your home has been
25 damaged with respect to the foundation?

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1 A. Probably the -- end of the first winter.

2 Q. Okay. Where did you see the water damage,
3 on each of the windows or just in one window? Or
4 windows on one side of the house? Where?

5 A. The guest bedroom was the first one I
6 noticed.

7 Q. Okay.

8 A. On the --

9 Q. North side of the house?

10 A. North side of the house, yes.

11 Q. What about the living room, did you notice
12 any water damage, paint peeling, in that first winter
13 there?

14 A. It's got a hard thing on it.

15 Q. What's that?

16 A. It has a hard base on it.

17 Q. So that wouldn't have been damaged; is that
18 right?

19 A. No.

20 Q. Okay.

21 A. It formed mold up in the window.

22 Q. All right. Now, as each winter passed, did
23 you see more and more evidence of water damage at the
24 base of the windows in your home?

25 A. Not as much. The towels on there.

1 A. When it was explained the depth of the frost
2 line, they said that it could damage the base of my
3 home. It wasn't below the frost line.

4 Q. Ma'am, has your home been damaged?

5 A. I'm saying I don't know if it's damaged
6 underneath

7 Q. Okay. Is your house sagging at all?

8 A. Something does. I don't know what's causing
9 it.

10 Q. Is it out of -- have you had one of these
11 experts in any of these 42 items say that the house is
12 going out of kilter, going out of whack, starting to
13 tip, and are there cracks in the interior of the house
14 caused by the foundation settling, or something like
15 that? Is that happening?

16 A. I wouldn't know that if I saw it. Unless I
17 felt the house shake.

18 Q. Well, ma'am, I'm asking for what you have
19 observed by way of damage. You're telling me that some
20 of these experts have told you there's some damage on
21 the foundation, or there's -- there may be some damage,
22 but you haven't observed any damage, have you?

23 A. I have observed cracks in my home.

24 Q. Where?

25 A. I have one that goes through from outside to

11 (Pages 41 to 44)

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1 the inside of the back of my house. I have one that
2 goes from the outside inside from the garage side of my
3 house.
4 Q. And --
5 A. We have tried to caulk them.
6 Q. Do you attribute these to the fact that the
7 footings of the house are not deep enough?
8 A. No idea.
9 Q. When you said the foundation, I think you
10 said the footings not being buried low enough below the
11 frost line, right?
12 A. Yes.
13 Q. Now, I want to know what you have seen, that
14 you can observe, that tells me about that damage, about
15 how you personally feel about this, because you've been
16 damaged.
17 A. I can tell you how I feel about it. I can't
18 tell you about any damages --
19 Q. Okay. So you have --
20 A. -- because I don't know one damage from the
21 other.
22 Q. So you haven't observed any damage to the
23 foundation, the footings, personally, correct?
24 A. I don't know what you attribute to --
25 Q. Well, do you even know what the footings

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1 Q. All right.
2 A. I saw.
3 Q. When you first moved in?
4 A. I saw, yes.
5 Q. Now, did you see that before you moved in,
6 after you moved in?
7 A. No.
8 Q. When?
9 A. Probably that spring.
10 Q. When you first started to landscape, right?
11 A. Raking the weeds and stuff out.
12 Q. Okay. And did you ever put a shovel down to
13 it and come to kind of a hard part and felt the cement
14 of the footings?
15 A. We didn't work up around the house. We were
16 trying to get sand burs, and that's all done by hand.
17 And we just sit and pull sand burs and to load the
18 pickup with sand burs.
19 Q. How much of the footings was exposed, could
20 you say? I mean, was it like a circle of --
21 A. The cement?
22 Q. Yeah, the cement --
23 A. Along the edge of the house?
24 Q. Yes.
25 A. The back side of the house, the door -- from

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1 are?
2 A. Not particularly.
3 Q. Do you know what the foundation is?
4 A. The house is supposed to be setting on it.
5 Q. Okay. Do you know what the difference
6 between footings and foundation is?
7 A. No, I do not.
8 Q. Okay. Well, let me see if I can -- mind
9 you, I think Mr. Steenblik yesterday testified that you
10 told him that you could see the footings in the house
11 when you first moved in. Did he tell the truth in his
12 testimony?
13 A. Yes, he did. But you have to understand, I
14 didn't know that there were footings until it was
15 pointed out to me that they were footings.
16 Q. All right. So you saw what you --
17 A. I saw the cement there. And that to me was
18 cement. I call it cement.
19 Q. Okay.
20 A. They call it footing, or whatever, and
21 that's what I was -- that's why it was called footing
22 to me.
23 Q. The rough cement at the very bottom of the
24 house you could see?
25 A. (Nods head).

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1 the back door to the west, you could see chunks of it
2 all along there.
3 Q. Okay. Now, did your husband see that, too?
4 A. No.
5 Q. Just you?
6 A. Well, I was doing pulling weeds in the yard.
7 He was out helping move stuff out from the farm to the
8 house. Moving weeds out. Eventually I'm sure he saw
9 it. But there was poured cement in several places in
10 our yard.
11 Q. Okay. Well, you knew that up there where
12 the footings were that that's cement that you couldn't
13 dig down to, right?
14 A. We never tried to dig up around the house.
15 Q. You knew you needed to put some dirt over
16 that in order to plant in that area, right?
17 A. No. Up around our home was not a priority.
18 We had set the flower bed out in the front. That was
19 going to be our flower bed. We put our trumpet vines
20 in. We just wanted grass.
21 Q. But you had to put some dirt in to grow
22 grass? You couldn't grow it on top of concrete, right?
23 A. We don't like things up against the house,
24 it draws bugs in.
25 Q. Okay. Did you ever try to cover up those

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1 footings that were exposed when you saw them? That
2 cement that was exposed, did you try to cover it up
3 with the dirt on top of it?
4 A. No, because I thought it was just cement.
5 When I did the other I did.
6 Q. Well, there's something on top of it right
7 now, right? Isn't there kind of a dirt --
8 A. Last -- last summer I put -- when it rained,
9 or anything, the water ponded under that deck.
10 Q. Under the deck?
11 A. And I carried sand over there in five gallon
12 buckets and put it so that I could put some wood on it
13 and set on it and be outside and enjoy the outside
14 world.
15 Q. And so, if I'm understanding correctly, this
16 part where the footings --
17 A. Now that you say they were footings, there
18 was cement showing, yes.
19 Q. In that area right under the deck, right?
20 A. Yes.
21 Q. And you covered it last year?
22 A. Uh-huh.
23 Q. Is that yes?
24 A. Yes.
25 Q. Okay. Until that time those footings had

1 Q. Is that yes?
2 A. Yes.
3 Q. And did you try to get up close to the house
4 or not?
5 A. No.
6 Q. How far away from the house did you keep the
7 grass? Three feet? Three and a half feet?
8 A. About this far out, because --
9 Q. Well, I'll represent that we're talking --
10 A. Lawn mower type width.
11 Q. We're talking about a width of about three
12 and a half feet.
13 Okay. How much did all that landscaping
14 cost you?
15 A. I don't know.
16 Q. Well, you planted some flowers and you
17 planted some grass by seed. Did it cost you \$10,000 to
18 do that landscaping?
19 A. My son brought a trailer load of lime after
20 we got the grass growing, put it on there. We
21 hauled --
22 Q. You put lime on this alkaline soil we have
23 here?
24 A. It's a --
25 Q. I bet you it wasn't lime.

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1 been exposed to the elements for the eight years or so,
2 right?
3 A. The cement was.
4 Q. Now, in your affidavits I think you have
5 said that you did landscaping of the house, correct?
6 A. We planted grass. And I planted flowers in
7 that -- by the railroad ties.
8 Q. In the front?
9 A. Uh-huh.
10 Q. Is that yes?
11 A. Yes.
12 Q. And in the back the landscaping you did was
13 to plant grass, correct?
14 A. Yes.
15 Q. Did you ever try to plant grass right up
16 next to the house?
17 A. No.
18 Q. How did you plant the grass? Did you put
19 sod down, or did you just throw seed out?
20 A. We would take areas and pull weeds and put
21 down grass, and pull weeds and put down grass.
22 Q. With seeds?
23 A. With seeds.
24 Q. Put a little manure on top of it?
25 A. Uh-huh.

1 A. It was white and it was -- I don't know what
2 it was. It's just to make things green. And we
3 fertilized it. Bill brought up manure and stuff to put
4 in the yard and gardened.
5 Q. Well, ma'am, you see that Project Analysts
6 want to spend \$10,000 to re-landscape your yard. You
7 didn't spend that much in the first place, did you?
8 A. I never spent that much.
9 MR. HADLEY: I object to the question as
10 argumentative.
11 MR. DIXON:
12 Q. Do you think it's fair for you to charge the
13 Smith's \$10,000 for brand new landscaping when you
14 didn't put in maybe 2 or \$300 into your landscaping in
15 the first place?
16 MR. HADLEY: Object, argumentative.
17 THE WITNESS: Yeah, I pulled an awful lot of
18 weeds out of that place and I hauled an awful lot of
19 weeds out of that place, and I got the garden dug up
20 and dug a lot of old cement and junk out of that and
21 hauled it out.
22 MR. DIXON:
23 Q. \$10,000 worth?
24 A. I don't know, I'm pretty valuable, too.
25 Q. Okay. Now, did you ever have any

13 (Pages 49 to 52)

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1 Q. Do you remember having thought we better get
2 a certificate of occupancy before we buy this house to
3 make sure that the house is okay?

4 A. No, because we had been told there was one
5 given.

6 Q. Who told you that?

7 A. I don't remember which it was, Dan or Carol,
8 that Jack had given them the safety inspection for the
9 home.

10 Q. And did they tell you that before you signed
11 this earnest money agreement?

12 A. Well, I would say during the time that we
13 were doing it.

14 Q. Okay. Did you know that you were buying the
15 house as is? Have you ever heard that phrase before,
16 to buy a house as is?

17 A. When it's an older home, yes, I do, but not
18 a brand new home.

19 Q. Did you know that there was an as is
20 provision in this contract? Do you remember reading it
21 before you signed it?

22 A. I don't remember discussing it, no.

23 Q. Okay.

24 A. But again, it was a brand new home.

25 Q. Did you and your husband ever discuss

1 A. We know people. I don't know, friends.

2 Q. But you had acquaintances that you could
3 have asked, right?

4 A. Yes, we do.

5 Q. And you could have shown them this earnest
6 money sales agreement before you signed it, correct?

7 A. We trusted Dan and Carol.

8 Q. You could have shown this to anybody who was
9 expert in real estate matters to have them review it,
10 correct?

11 A. I could have.

12 Q. You could have shown it to a lawyer,
13 correct?

14 A. I could have.

15 Q. And you chose not to do any of those things,
16 right?

17 A. I didn't feel like it was necessary.

18 Q. And why exactly did you feel it was not
19 necessary?

20 A. I trusted that he was a contractor, knowing
21 what he was doing; that Jack Peterson had inspected the
22 work going on. It was a brand new house.

23 Q. Did Carol Smith or Dan Smith ever tell you I
24 guarantee you that this house is free from defects?
25 Did they ever use those words?

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1 whether you should get some kind of warranties from Dan
2 and Carol Smith on anything?

3 A. We thought everything was warrantied.

4 Q. Did you ever discuss with your husband the
5 need to include a specific warranty provision in the
6 agreement?

7 A. She read it, explained it, and we thought we
8 understood what she explained to us.

9 Q. Okay. Now, you did not have a Realtor help
10 you with the purchase of this house, did you?

11 A. No. He had not listed it yet.

12 Q. Okay. Did you consult with anybody to
13 advise you on the purchase of this house?

14 A. They said they knew how to do the paperwork.

15 Q. Okay. So that means no, you did not get any
16 advice from anybody, did you?

17 A. No.

18 Q. You could have gotten advice from somebody
19 if you thought it necessary, right?

20 A. Had we thought it was necessary, yes.

21 Q. You could have consulted some kind of real
22 estate expert, a real estate agent, correct?

23 A. We could have.

24 Q. Did you have any friends that were expert in
25 real estate matters?

1 A. Repeat it.

2 Q. Did they ever say I guarantee you this house
3 is free from every defect? Did they say those words?

4 A. No, they did not.

5 Q. Did they say anything of the kind?

6 A. They never discussed anything to that sort.

7 MR. HADLEY. I'm sorry, I couldn't hear that
8 answer.

9 MR. DIXON: Did you get that?

10 THE WITNESS: I don't remember discussing
11 anything of that sort of defects. Again, all we really
12 looked at was a brand new home.

13 MR. DIXON:

14 Q. Did you perform any kind of inspection of
15 the home before purchasing it?

16 A. Dan walked us through the house and showed
17 us the different -- and Carol, the closets, the
18 pantries. What impressed me was the room big enough to
19 put our bed in, because that's where we had run into
20 problems before. He had told us he had built homes,
21 and it was a beautiful home. That was it.

22 Q. Okay. Did you ever consider having someone
23 look the house over before buying it to make sure that
24 it was up to code?

25 A. It was a brand new house.

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1 Q. You shook your head, you said no, you never
2 considered that?
3 A. It was a brand new house.
4 Q. So you did not consider that?
5 A. It was a brand new house.
6 Q. I need you to say whether you considered it
7 or not.
8 A. No.
9 Q. Okay. I want you to tell me about any other
10 conversations that you remember with either Dan or
11 Carol Smith before closing this deal. I'm trying to
12 exhaust your memory, anything you can possibly
13 remember.
14 A. Not particularly with Dan, but with Carol.
15 We went up and planted some flowers in the -- inside
16 the rail, the tire rails. There was never anything
17 particularly important. It was never to do with papers
18 or anything.
19 Q. Have you ever asked Carol Smith for a copy
20 of the certificate of occupancy?
21 A. I don't recall ever asking her. I asked her
22 about the roof stuff. But that's all I recall asking
23 her that.
24 Q. Okay. So did you and your husband both read
25 the earnest money agreement before signing it,

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1 Exhibit 2?
2 A. Kind of like this. And we were over there.
3 And she would go through and explain it as it was.
4 Q. Okay. So you all read it together; is that
5 right?
6 A. Kind of that way.
7 Q. When you and your husband bought the house,
8 did he have any trouble getting up and down stairs?
9 A. No.
10 Q. Did he eventually start to have trouble
11 getting up and down stairs?
12 A. Probably down into around late 2000.
13 Q. What happened to him that caused him to have
14 trouble getting up and down stairs?
15 A. He still went up and down the stairs. We
16 just were more cautious with him. He was walking up to
17 2001 up and down those stairs.
18 Q. Okay. Did he spend time in the basement
19 right up until the time that he -- just before he died?
20 A. We live upstairs.
21 Q. You didn't get down in the basement very
22 much?
23 A. We had no need for the basement.
24 Q. All right. I see that there's a bedroom
25 down in the basement, correct?

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1 A. Right. I put a bed up there, and that's
2 just in case somebody comes.
3 Q. Okay.
4 A. I have extra beds, so I make extra -- I made
5 an extra bedroom down there. My brother comes and
6 visits once in a while.
7 Q. Have you done any work downstairs, hired any
8 contractors to do anything?
9 A. No.
10 Q. Have you hired anybody to do any work on the
11 windows downstairs?
12 A. No.
13 Q. Did anybody ever cut anything away from the
14 windows downstairs?
15 A. No. The only thing's that done to our
16 windows, I put the plastic over the one and put the
17 curtains. And she put the curtains in.
18 Q. You didn't have to hire anybody to landscape
19 the yard for you? What landscaping there is you did
20 yourself, correct?
21 A. That's correct.
22 Q. Or you and your husband together, correct?
23 A. That's true.
24 Q. Did you ever have any neighbors come and
25 help you?

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1 A. My friends used to come and sit in the weeds
2 with me and help pull weeds, if that's called
3 landscaping. We got a lot of visiting in.
4 Q. And that's the kind of maintenance you would
5 do, you would pull weeds, right?
6 A. It's my form of entertainment.
7 Q. Did you mow the lawn, too, or did your
8 husband mow the lawn?
9 A. I loved to mow the lawn.
10 Q. Okay.
11 A. He liked the garden. I liked the yard.
12 Q. How did you first come to find out that
13 there was a problem with the foundation -- or the
14 footings?
15 A. When they were digging the fence posts to
16 put the gates in. They called me out and asked me if I
17 was aware of this, and I said what. And they explained
18 it.
19 Q. What did they explain?
20 A. That it should be deeper. And they told me
21 to go and call Annette at the city building and see
22 what the depth was, which I did. And I came back and I
23 told them.
24 And they says, Well, they're not deep
25 enough. Your footing is in danger -- I mean, your

19 (Pages 73 to 76)

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1 done some damage to your home? That you're aware of.
2 I mean, as a homeowner living in that house day in, day
3 out, for eight years now --

4 A. I was not aware of any problem in my home,
5 even with small things and the roof, until Jason's
6 inspection. Little things happen you do and you deal.
7 All new homes have problems.

8 Q. So if Jason had never come out you would be
9 living in that house very happily right now?

10 A. Oh, no. If they had not dug my fence and
11 found the situation as it was, I would have had
12 different problems in my home, not understanding why I
13 had the problems. So I would have dealt with them the
14 best I could.

15 Q. What problems do you think you would have
16 had?

17 A. My toilet is still a problem to this day.

18 Q. Other than your toilet, what else?

19 A. I can't think of all the things that I have.

20 Q. Well, what about the smoke detectors? Did
21 you ever really want a smoke detector in your house?
22 Didn't you tell Dan Smith one time that you wanted him
23 to take out the smoke detectors?

24 A. No, I did not.

25 Q. That you didn't like how they went off? You

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1 was working.

2 Q. Okay. So a year after you moved into the
3 home you found out that the smoke detector in your home
4 wasn't working or was not wired properly, right?

5 A. Yeah, I guess.

6 Q. How did you find that out?

7 A. Jack Peterson, I believe, checked it.

8 Q. How did Jack Peterson come to check that?

9 A. He and Mike came to take my son to work with
10 the volunteer firemen.

11 Q. And Jack Peterson happened to come into the
12 home at that point in time?

13 A. They came to talk with my son.

14 Q. Jack Peterson did?

15 A. Well, he was part of the fire department,
16 yes.

17 Q. And so he came into your home --

18 A. Him, Mike. And they both work for the fire
19 department.

20 Q. Did they do some kind of fire inspection on
21 the home?

22 A. They just asked me about my fire alarm, and
23 I said I didn't know what kind it was. They checked it
24 and said it wasn't wired. They brought me a another
25 fire alarm, another thing. I stuck it on the wall, put

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1 didn't like the sound they make?

2 A. I wouldn't place my life on a smoke
3 detector. But, no, I would never -- I do know that you
4 have to have one in your home.

5 Q. All right. So one is enough.

6 A. And he had one in.

7 Q. Did it ever go off?

8 A. It never worked.

9 Q. It never worked? You never heard the smoke
10 detector go off?

11 A. Not that I know of. I have heard the one on
12 the wall go off.

13 Q. When was that placed?--

14 A. When was that one put on the wall?

15 Q. Yes.

16 A. The fire department gave it to me, and I
17 went and put it on the wall.

18 Q. When did you do that?

19 A. Back when I found out that the other one
20 wasn't wired.

21 Q. When did you find that out?

22 A. About a year. I'm not sure of the date.

23 Q. A year after what?

24 A. I'm not sure of the date. About a year
25 after I moved into the home. I thought the other one

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1 a battery in it.

2 Q. And that one's worked?

3 A. Yes, it was.

4 Q. Have you ever disconnected it for any
5 reason?

6 A. The top one?

7 Q. No, the one on the side.

8 A. You mean other than put a battery in it?

9 No.

10 Q. Okay. When Jack Peterson came and checked
11 that smoke detector, did he tell you that you ought to
12 have a smoke detector in every bedroom in your house?

13 A. No, he did not.

14 Q. Did that worry you about the smoke detector
15 not being in the house, the one that had come with the
16 house, that it wasn't functioning properly?

17 A. I thought it was a little cheesy.

18 Q. You thought that?

19 A. (Nods head).

20 Q. Yes?

21 A. I thought it was a little cheesy.

22 Q. Did you talk to Dan Smith about that?

23 A. No.

24 Q. Okay. So are there any -- we got the
25 toilets, we got the water damage, we got the roof

<p style="text-align: right;">Page 101</p> <p>1 Fillmore to you and to us; is that what you think?</p> <p>2 MR. HADLEY: No. Why don't you tell them</p> <p>3 where you would have faxed this to.</p> <p>4 THE WITNESS: I would assume I would have</p> <p>5 faxed this to you.</p> <p>6 MR. HADLEY: From where?</p> <p>7 THE WITNESS: From here.</p> <p>8 MR. HADLEY: Well, from here, where? This</p> <p>9 building?</p> <p>10 THE WITNESS: No, over there.</p> <p>11 MR. HADLEY: You got to be more specific.</p> <p>12 Where is over there? Tell us exactly.</p> <p>13 THE WITNESS: Where we're going to meet.</p> <p>14 The city building.</p> <p>15 MR. DIXON:</p> <p>16 Q. Okay. So you would believe that you would</p> <p>17 have used the city fax machine to fax this to your</p> <p>18 attorney; is that right?</p> <p>19 A. They may have faxed this out. Their place</p> <p>20 would have been from Josh.</p> <p>21 Q. Do you recognize this handwriting down at</p> <p>22 the bottom, it says, "Check 3904 Hadley Associates, pay</p> <p>23 \$270, review inspection on house, August 10th, 2000"?</p> <p>24 A. Yes.</p> <p>25 Q. Do you understand what that means?</p>	<p style="text-align: right;">Page 103</p> <p>1 Q. Each and every letter, each and every word,</p> <p>2 each and every sentence?</p> <p>3 A. Yes.</p> <p>4 Q. The lower left-hand corner?</p> <p>5 A. Yes.</p> <p>6 Q. Check number, Hadley & Associates, all of</p> <p>7 that's your handwriting?</p> <p>8 A. Yes.</p> <p>9 Q. And you faxed this to my office?</p> <p>10 A. Yes.</p> <p>11 MR. HADLEY: Okay.</p> <p>12 THE WITNESS: And my misspellings.</p> <p>13 MR. DIXON: Okay. I guess we established</p> <p>14 that. But you're right. Thank you for doing that.</p> <p>15</p> <p>16 EXAMINATION (Resumed)</p> <p>17 BY MR. DIXON:</p> <p>18 Q. Okay. And this is a time line. Is</p> <p>19 everything in this correct, to the best of your</p> <p>20 knowledge?</p> <p>21 A. May I finish reading it?</p> <p>22 Q. Oh, please. I'm sorry. Go ahead.</p> <p>23 A. Yeah. So what was the question?</p> <p>24 MR. HADLEY: He's asked you if that's a</p> <p>25 chronology.</p>
<p style="text-align: right;">Page 102</p> <p>1 A. I believe that was for them to review the</p> <p>2 inspection on my house.</p> <p>3 Q. So you're asking Fillmore City --</p> <p>4 A. I'm asking --</p> <p>5 Q. Oh, you're asking Greg Hadley to review the</p> <p>6 inspection?</p> <p>7 A. Well, it was Jim Haslam.</p> <p>8 MR. DIXON: All right. For some reason I</p> <p>9 assumed that you would be giving me a document between</p> <p>10 your client, and I always thought --</p> <p>11 MR. HADLEY: Right. And that's what I</p> <p>12 looked at. In fact, Jim would have sent it to you, my</p> <p>13 former associate.</p> <p>14 MR. DIXON: Well, we've got it now. It's</p> <p>15 not anything that's -- it's just a chronology -- this</p> <p>16 is a chronology of the events, right? A chronology, a</p> <p>17 time line of the events?</p> <p>18 MR. HADLEY: Would you let me voir dire in a</p> <p>19 second? I think I'll help you.</p> <p>20 MR. DIXON: All right</p> <p>21</p> <p>22 VOIR DIRE EXAMINATION</p> <p>23 BY MR. HADLEY:</p> <p>24 Q. Is that your handwriting?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 104</p> <p>1 MR. DIXON:</p> <p>2 Q. All right. Is this accurate?</p> <p>3 A. Yes.</p> <p>4 Q. And so November 7th, 1997, the roof lifting,</p> <p>5 those are the shingles on the roof over the garage that</p> <p>6 you spoke of before, correct?</p> <p>7 A. That is correct.</p> <p>8 Q. And Jim was here to check rain drain, that's</p> <p>9 the Jim Sampson that you referred to earlier, correct?</p> <p>10 A. Yes.</p> <p>11 Q. Now, December 14th, 1997 says, Furnace quit.</p> <p>12 Judy said check circuit breaker was on, said try it.</p> <p>13 And then what's the next word?</p> <p>14 A. Heat.</p> <p>15 Q. Heat. Tell me about that.</p> <p>16 A. The furnace wasn't working. She told me to</p> <p>17 go down and throw the -- do something in the switch.</p> <p>18 And I did. And the heater started coming on. I had</p> <p>19 heat.</p> <p>20 Q. Okay. Who's Judy?</p> <p>21 A. My friend.</p> <p>22 Q. Okay. A neighbor?</p> <p>23 A. She lives a couple blocks down the street.</p> <p>24 Q. Okay.</p> <p>25 (Discussion off the record.)</p>

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1 MR. DIXON: All right.
2 Q. It says, "Shane calked windows because it
3 was down in wall, cold air."
4 A. I explained that to you earlier.
5 Q. Okay.
6 A. That was the window I was telling you about,
7 the caulking kept falling in the wall.
8 Q. And that's in his bedroom?
9 A. No, that's in the living room.
10 Q. In the living room, okay.
11 All right. Then you've got a conversation
12 with Jack Peterson here in September of 1998, and it
13 says, Dan Smith -- and that Jack said that Dan Smith
14 contractor should be responsible.
15 Responsible for what? Did he tell you he
16 should be responsible for something in specific?
17 A. I would say we were discussing the roof.
18 Q. Responsible to replace the roof for you?
19 A. Tom's Roofing came and said -- discussed the
20 roof on August and asked Jack if there was a -- I'm
21 trying to find where you were reading from.
22 Q. Jack --
23 MR. HADLEY: Right there. That entry.
24 THE WITNESS: Oh. When it says he said, I
25 was referring to Jack.

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1 MR. DIXON:
2 Q. Yeah. That Dan Smith should be
3 responsible --
4 A. Jack Smith contractor should be responsible.
5 Q. For the roof; is that right?
6 A. Uh-huh.
7 Q. Is that yes?
8 A. Yes.
9 Q. Okay. And so Jack came back and then
10 measured the house for ventilation, correct?
11 A. Yes.
12 Q. And what did he tell you about that?
13 A. We put the turtle vents in.
14 Q. Okay. And did he say that that would
15 satisfy the ventilation requirement of the code? Did
16 he say anything like that?
17 A. I really don't remember.
18 Q. What about November 13th, 1998, it says,
19 "Jack about appraisal." Look at November 1998 it says,
20 "Jack about appraisal." What does that mean?
21 A. I don't know.
22 Q. Okay. Any other conversations you remember
23 with Jack Peterson than what we've talked about here
24 today?
25 A. Regarding the home, Jack Peterson and I?

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1 Q. Right. Any other thing you remember?
2 A. The home, the roof, the inspection, the
3 toilet Jack and I talked pretty much until the --
4 until the city told him he couldn't talk to me anymore.
5 Q. I'm going to show you Exhibit 8 to the
6 Steenblik deposition, which is a photograph; a
7 photograph of a window. Where is that window?
8 A. That window would be either in the spare
9 bedroom or in my son's bedroom.
10 Q. Okay.
11 A. It doesn't say on the back.
12 Q. It says water -- that's evidence of water
13 damage. Is that your handwriting on the back of that
14 exhibit?
15 A. Yes.
16 Q. All right.
17 A. And the reason I'm saying is this is the
18 wide seal in front of the window.
19 Q. Okay. That's where the water damage is,
20 correct?
21 A. And I don't know which bedroom it is without
22 being at home.
23 Q. Okay.
24 A. I mean, I don't remember.
25 Q. Now, when did you first notice the water

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1 damage in that area that's shown on Exhibit 8? Did it
2 happen just that year the first time?
3 A. It was kind of like a blister of just a
4 little and then a little and then a little. And it
5 just wasn't something that was noticeable when I was --
6 unless I was there cleaning. And then it just seemed
7 like it was getting kind of big and bad. But I didn't
8 know what to do with it.
9 Q. Okay. So you noticed it --
10 A. Before, but I didn't know how to fix it.
11 Q. When you first noticed, it would have
12 been --
13 A. It was smaller.
14 Q. It was smaller? Would that have been the
15 first year or two after you moved in the house?
16 A. I would say the first year it started.
17 Q. What about Exhibit 7 to the Steenblik
18 deposition, it's called the cracking around the
19 foundation, I think. When did you first notice that?
20 A. This part was probably the first spring we
21 were there, but it was tiny. And each year it just got
22 bigger and started exposing the wood. I didn't -- I
23 didn't know it was exposing the wood until they came
24 and I -- I could just see like a little plaster off.
25 And I asked them if it was important, and they checked

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1 safety inspection on it
2 Q Did you ask him to inspect anything else
3 specifically other than the footings and foundation?
4 A Probably things that I had had problems
5 with
6 Q So did you ask him to check on the roof?
7 A No, I knew the condition of the roof
8 Q Okay You knew already about the roof
9 Did you ask him to check on the windows?
10 A I don't believe so
11 Q Did you ask him to check on the electrical
12 system?
13 A I really don't know
14 Q Okay The only thing you really remember
15 asking him to check specifically was the footings and
16 foundation problem?
17 A He just walked through the home and was
18 making a list of things, then turned and said we needed
19 to get an inspector in before we do anything
20 Q Ma'am, that wasn't the answer to my
21 question My question was, was there anything other
22 than the footing and the foundation problem that you
23 specifically asked Mr Zeigler to look at?
24 MR HADLEY I'm going to just object I
25 believe it's been asked and answered about five minutes

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1 ago But answer the question
2 MR DIXON
3 Q I thought you answered no, that that was the
4 only thing Is that what you think, too?
5 MR HADLEY No, I thought she said and
6 anything else that needed --
7 MR DIXON
8 Q That's what I'm asking about specifics now
9 I'm not talking about the anything else category, I'm
10 just saying specifics
11 A Specifics, anything that I had had problems
12 with prior to And then the plumbing would have been
13 questions on -- Tonya had a question on the board
14 across the top -- I don't know what it's called --
15 downstairs We just -- he walked through and made a
16 list of things and told me he couldn't help me until I
17 had an inspection done
18 Q Okay Well, he actually gave you a bid,
19 though, \$31,000 I don't understand, if he gives you a
20 bid for \$31,000, isn't he saying I'll be glad to do
21 this work for \$31,000 and you could have said yes, sir,
22 go to work? It's what I don't understand, why would he
23 give you a bid for \$31,000 if he said he can't help
24 you?
25 A He told me to get a safety inspection done

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1 That's what he felt like would repair the things that
2 needed to be done
3 Q Well, didn't you understand what he gave you
4 a bid for \$31,000, ma'am, that he was proposing to
5 repair these particular problems for the figure of
6 \$31,000?
7 A I do
8 Q You did?
9 A I wanted to fix the problem
10 Q Okay But never did, not any of them?
11 A No
12 Q Okay All right
13 MR DIXON Let's have this one marked
14 This one marked This one marked This one marked
15 This one marked We have that one
16 MR HADLEY Can we go off the record just a
17 second?
18 MR DIXON Yes
19 (Discussion off the record)
20 (Whereupon, a recess was taken
21 at 10 08 a m to 10 12 a m)
22 (Whereupon, Exhibits 8 through 19
23 were marked for identification)
24 MR DIXON
25 Q Exhibit 8, ma'am, is this the bill that

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1 Tom's Roofing gave you for re roofing the garage?
2 A Yes
3 Q And that's the check that you wrote to Tom's
4 Roofing for that?
5 A Yes
6 Q It says cold roofing the garage Do you
7 understand that they took the old shingles off and put
8 new shingles on, or did they roof right over the old
9 shingles?
10 A Took the old ones off
11 Q Why did you have that roof redone? This
12 appears to be the one repair that you had ever done in
13 the house, doesn't it, of any substantial nature?
14 Right?
15 A Because Jack Peterson told us what needed to
16 be done with Tamko Roofing
17 Q Okay Exhibit 9 what's that?
18 A The water softener I put in
19 Q What does that have to do with the Smiths?
20 A It's just trying to take care of the home --
21 MR HADLEY If I --
22 THE WITNESS -- was the reason it was
23 installed
24 MR HADLEY Let me interject Part of what
25 you folks had requested was that any improvements she

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1 may have done to the home.
2 MR. DIXON: That's what I'm asking.
3 MR. HADLEY: So this was an improvement, not
4 really to repair anything.
5 MR. DIXON:
6 Q. All right. So you're not implicating the
7 Smiths in any way with the need for a water softener,
8 are you? You're not blaming them in any way in
9 connection with Exhibit 9, are you?
10 A. Blaming?
11 Q. Let me ask it this way: Do you think that
12 it was some error or mistake or negligence or defect in
13 the building that caused you to need a water softener?
14 A. No.
15 Q. You wanted a water softener for your own
16 purposes, correct?
17 A. To maintain pipes and hot water tank, and
18 stuff like that, yes.
19 Q. Now, do you know if when the people came out
20 to install the water softener did they complain about
21 any defects or anything?
22 A. No.
23 Q. Did they say that there is some problem with
24 the grounding of the water pipes, or anything like
25 that?

1 A. No
2 Q. When I ask for a defect, I'm talking about
3 did they observe some kind of construction defect.
4 Such as the guys who did the fence, when they told you
5 about the frost line and foundation problem, did the
6 people who installed the central air conditioner, did
7 they call to your attention any such problems?
8 A. No.
9 Q. Well, I guess just to make sure, do you
10 believe that the Smiths should reimburse you for this
11 central air conditioning system that you installed?
12 A. If they get the home, you bet.
13 Q. Well, let me ask it this way, then. Do you
14 believe that there is some defect in the construction
15 of the house that made it necessary for you to install
16 central air conditioning? I assume the answer is no.
17 I'm just trying to tie these things up. I just want to
18 make sure that you're not claiming that this air
19 conditioner is somehow related to any defects in the
20 house.
21 You're not claiming that, are you? Are you
22 claiming that? No. Is the answer no?
23 A. I don't know what you're looking for.
24 MR. HADLEY: Let me make a comment. Don't
25 worry what he's looking for. Just answer the question.

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1 A. They did not.
2 Q. Okay. And it was Roper Lumber Company from
3 whom you purchased the water softener and had it
4 installed, correct?
5 A. Yes.
6 Q. Okay. Exhibit 10. What is Exhibit 10?
7 A. Refrigeration unit.
8 Q. So that's an in-window air conditioner?
9 A. No, it isn't.
10 Q. What is a refrigeration unit, like a
11 refrigerator?
12 A. No. It's like a -- it's an outside
13 refrigeration unit. I don't know what you call it.
14 Q. Okay. So you're upgrading the air
15 conditioning system in the house?
16 A. I put air conditioning in. There was none.
17 That is our air conditioning for the home. Central
18 air.
19 Q. So this Exhibit 10 reflects that you're
20 having central air conditioning installed into the
21 home, correct?
22 A. Yes.
23 Q. When the people came in to install the air
24 conditioning, did they report to you any defect of any
25 kind?

1 THE WITNESS: Is he saying has the house
2 caused the problem?
3 MR. HADLEY: No, he's saying did you install
4 the air conditioning because the house was causing you
5 problems?
6 THE WITNESS: No.
7 MR. HADLEY: Okay.
8 MR. DIXON:
9 Q. All right. Now, Exhibit 11, could you tell
10 me what Exhibit 11 is, please?
11 A. Security door on the front. And dead bolt
12 on the back. And TV antenna.
13 Q. All right. If I understand you correctly,
14 you're saying that you had a new door put on the front
15 of your house?
16 A. (Shakes head).
17 Q. What happened?
18 A. I put a security door on the outside of the
19 regular door.
20 Q. Okay. And then the second one was a dead
21 bolt on the back door?
22 A. Yes, sir.
23 Q. Had you been broken into that you were
24 afraid of this?
25 A. No, sir.

<p style="text-align: right;">Page 149</p> <p>1 Q. Just precautions?</p> <p>2 A. Yes From country to town.</p> <p>3 Q And the antenna was put up on November 29th,</p> <p>4 1994, correct?</p> <p>5 A. That's correct.</p> <p>6 Q. And that's when you found out that the attic</p> <p>7 access was too small?</p> <p>8 A. Yes, sir.</p> <p>9 Q. Okay. Exhibit 12, tell me what that is,</p> <p>10 please.</p> <p>11 A. The installation of the water line from the</p> <p>12 irrigation to the house put into faucets so we could</p> <p>13 water, outside watering with irrigation water.</p> <p>14 Q. Pardon me for not understanding entirely,</p> <p>15 but -- and let me ask some specific questions about</p> <p>16 that.</p> <p>17 Did you have a water line taken from the</p> <p>18 water meter or the main water line entering into your</p> <p>19 house to someplace around the yard and have faucets put</p> <p>20 in there?</p> <p>21 A. You're asking if that's what that is?</p> <p>22 Q. Yes.</p> <p>23 A. No.</p> <p>24 Q. Does this have to do with the installation</p> <p>25 of a water line of some sort?</p>	<p style="text-align: right;">Page 151</p> <p>1 A. Yes.</p> <p>2 Q. Where did you hook into the irrigation</p> <p>3 water?</p> <p>4 A. The main line on the irrigation.</p> <p>5 Q. Where is that in relationship to your house?</p> <p>6 A. In the back pasture behind our home.</p> <p>7 Q. So you brought where those fruit trees are</p> <p>8 there back there?</p> <p>9 A. They're back.</p> <p>10 Q. At the very back?</p> <p>11 A. Yes.</p> <p>12 Q. So there's an irrigation ditch or line back</p> <p>13 there?</p> <p>14 A. Line.</p> <p>15 Q. It's a covered line?</p> <p>16 A. Yes</p> <p>17 Q. All right. Does it run continuously, or do</p> <p>18 get your turn from time to time?</p> <p>19 A. You get a turn.</p> <p>20 Q. All right So when you get that turn, the</p> <p>21 water will run up and you can turn it on -- do you have</p> <p>22 a pump? Do you have to pump it up?</p> <p>23 A. No.</p> <p>24 Q. And that's to water the backyard?</p> <p>25 A. The garden, the back and front yard. The</p>
<p style="text-align: right;">Page 150</p> <p>1 A. Yes, it does.</p> <p>2 Q. Tell me where the water line ended up.</p> <p>3 A. In the back. Southeast corner of the</p> <p>4 backyard and the west. Southwest side of the back of</p> <p>5 the house. For outside watering.</p> <p>6 Q. Was that for an underground sprinkler</p> <p>7 system?</p> <p>8 A. No.</p> <p>9 Q. Was it for a faucet, a water faucet, two</p> <p>10 water faucets? Is that yes?</p> <p>11 A. Yes. Two.</p> <p>12 Q. So this would be a PVC pipe that came out of</p> <p>13 the ground and had a water faucet on the end of it,</p> <p>14 something like that?</p> <p>15 A. It's a metal piping that comes up out of the</p> <p>16 ground.</p> <p>17 Q. Okay. It's metal piping that comes up out</p> <p>18 of the ground? Is that yes?</p> <p>19 A. Yes.</p> <p>20 Q. And you had those water lines brought to the</p> <p>21 back of your house for purposes of attaching hoses</p> <p>22 thereto in order to water the lawn back there?</p> <p>23 A. With the irrigation water.</p> <p>24 Q. Okay. I take it so that you have water</p> <p>25 shares in addition to city water; is that right?</p>	<p style="text-align: right;">Page 152</p> <p>1 pasture.</p> <p>2 Q. Okay. How close to the house do these water</p> <p>3 lines get?</p> <p>4 A. (Indicating).</p> <p>5 Q. About three feet, two and a half feet?</p> <p>6 A. Two and a half feet from the southwest</p> <p>7 corner of the house.</p> <p>8 Q. Okay. And what about the southeast corner,</p> <p>9 did it go up that close to the house, too?</p> <p>10 A. No, it's in the back of the backyard.</p> <p>11 Q. Okay. Now, if I recall correctly, the</p> <p>12 southwest corner was where you first saw the footings</p> <p>13 exposed, right?</p> <p>14 A. No. It was on the east side.</p> <p>15 Q. The southeast side is where you saw the</p> <p>16 footings exposed?</p> <p>17 A. What's the footing?</p> <p>18 Q. The footings are the concrete in the ground.</p> <p>19 Do you remember we talked about that last time, you</p> <p>20 told me you had seen that when you were --</p> <p>21 A. That was on the south.</p> <p>22 Q. The south?</p> <p>23 A. Not the southwest side.</p> <p>24 Q. Just directly south in the middle of the</p> <p>25 house, so to speak?</p>

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1 the home?
2 A. I don't understand the question. I'm sorry.
3 Q. Well, you had some conversations with the
4 Smiths before you purchased the home, correct, before
5 the closing?
6 A. We called the Smiths. We were told the home
7 was for sale. We called the Smiths and they said yes,
8 it was.
9 Q. Okay. And then after that you had some
10 discussions about the home, correct?
11 A. What kind of discussion?
12 Q. That's what I'm asking you.
13 A. We went and saw the home.
14 Q. All right. Now, when you saw the home in
15 the Smiths presence, did they tell you anything that
16 you relied upon in purchasing the home? Do you know
17 what it is to rely upon something? To believe and act
18 on?
19 A. That they had built the home?
20 Q. Is that one of the things that induced you
21 to buy the home from them?
22 A. No. We -- the home was a new home. They
23 had told us when they started it, when they moved into
24 it.
25 Q. Okay. What did they tell you when they

1 A. No, I was not.
2 Q. Were you able to get anything from her at
3 that time?
4 A. No.
5 Q. Now, the first time you noticed that the
6 roof was lifting was on November 7th of 1997, correct?
7 Was that about the time you talked to Carol?
8 A. When Jim Sampson came is when I noticed it.
9 Q. Okay. It says August 25th, 1999, Scott from
10 Salt Lake came --
11 A. From Tamko.
12 Q. Said it was ventilation, get a safety
13 inspection. No copy from city. Jack said it wasn't
14 required to keep them. Jack said not enough
15 ventilation. He's our safety inspector.
16 Is this the time you're talking about?
17 A. Yes. And I would say about that time is
18 when I called Carol.
19 Q. Okay. Could it have been a few days before
20 or after?
21 A. After the man from Salt Lake came, probably.
22 Q. Okay. And you say his name was Jim Sampson?
23 A. No.
24 Q. Scott?
25 A. Scott. He was the Tamko man.

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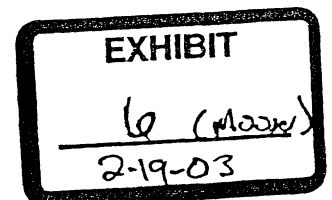
1 started it and when they moved into it?
2 A. I believe it was in September that they
3 started it, and they moved in in November. And it was
4 February.
5 Q. Okay. So the home had been lived in for
6 only about three months, right?
7 A. Yes, sir.
8 Q. Okay. And that's true, you have never --
9 isn't it? It is true that the Smiths lived in the home
10 for about three months; is that right?
11 A. As far as I know it is, yes.
12 Q. You don't think that's false, do you?
13 A. No reason to believe it was false.
14 Q. Okay. Now, in any other conversations with
15 you, did they tell you anything about the house to make
16 you buy the house, to lead you to buy the house?
17 A. No.
18 Q. Okay. Let me just clarify. Did you ever
19 ask Carol Smith for a copy of the final inspection of
20 her home?
21 A. I think I did when we discussed the roof.
22 Q. At the time of the roof?
23 A. If they had a copy of the final inspection
24 on the home.
25 Q. Were you able to get one from her?

1 Q. Okay.
2 A. Inspector.
3 Q. Is it possible that you called her at the
4 time when you were concerned about the shingles, and
5 you wanted to find out who the manufacturer of the
6 shingles was?
7 A. No.
8 Q. Okay. Do you believe that the house is
9 unfit for occupancy now?
10 A. Unfit for occupancy. It's got an awful lot
11 of problems with it.
12 Q. That wasn't my question. It's a yes-or-no
13 question.
14 A. Is it unfit for occupancy? Yes.
15 Q. Okay. Has anyone ever told you to move out?
16 A. No.
17 Q. Has Jack Peterson ever suggested that you
18 move out?
19 A. No.
20 Q. Has Mr. Radford told you you should move out
21 immediately?
22 A. No.
23 Q. Mr. Steenblik?
24 A. No.
25 Q. Mr. Bullock?

- Nov. 7, 1997 Roof lifting. Jim was here to check rain drains
- Dec. 14, 1997 Furnace quit. Judy said check circuit breaker, was on, said try it, test.
- Feb 15, 1998 Thore talked windows because I was down in wall, cold air.
- Aug. 25, 1998 Scott from East Lake came about roof, said it was ventilation get a safety inspection copy. No copy from city. Jack said it wasn't required to keep them. Jack said not enough ventilation, he is our safety inspector.
- Aug. 27, 1998 Tom's Roofing came said "who did this roof - sure didn't know what he was doing"
- Oct 3, 1998 Ask Jack for another walk through inspection he said Dan Smith, contractor should be responsible, with inspection because the roof is fire alarm.
- Sept 22, 1998 Jack came measured house for ventilation
- Nov 13, 1998 Jack about approval.
- March 2, 2000 San County came ~~called~~ called out side of windows, hadn't been done, also inside
- April 6, 2000 Mr Barkdell digging for lines, foundation wasn't deep enough.
- July 29, 2000 Plus C. Rooter, said plumbing is not right.

These were the things I was aware of and the dates, the rest we found out on Aug. 8, 2000, when we finally got the inspection Also my husband fell down the stairs 3 times, once broke his leg, I fell once hurt my right hand.

CP # 3904
Haley Associates
PJ 270-00
Review inspection
31 House
Aug. 10, 2000



Gregory B. Hadley (3652)
James K. Haslam (6887)
HADLEY & ASSOCIATES
Attorneys for Plaintiffs
2696 North University Avenue Suite 200
Provo Utah 84604
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,

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.

19. Mr. Bullock indicated to me that there were several problems with the home's construction that were not in compliance with the building code. The next day, Mr. Bullock provided us with a list of these items that were not constructed in compliance with the building code. A true and correct copy of this list is attached hereto as Exhibit "A".

20. It was at this time, that my husband and I first learned of the severity of the problems in our home's construction.

21. We visited with Mr. Haslam of Hadley & Associates and filed the complaint in this case on August 24, 2000.

22. Thereafter, my husband and I retained a plumber and electrician to inspect the home. Again, severe defects in both the plumbing and electrical systems were discovered and reported to us.

23. Mark O'Barr, the electrician who inspected our home, subsequently provided me with a letter, addressed to our attorney, addressing some of the defects he uncovered. A true and correct copy of Mr. O'Barr's letter is attached hereto as Exhibit "B".

24. I attempted to discuss these problems with Jack Peterson, the Fillmore City Building Inspector. Mr. Peterson was not particularly helpful, although he provided me a letter in October of 2000, a true and correct copy of which is attached hereto as Exhibit "C".

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.

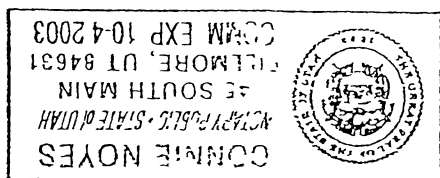
26. I do not believe that my husband and I could have discovered these structural defects prior to August of 2000.

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.

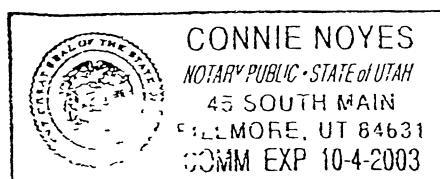
DATED this 12 day of March, 2001.

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

EXHIBIT "A"

MARY MOORE

155W. 300So.

Inspection Request 8/7/2000

Sunrise Engineering, Inc.

Inspector: Jason M. Bullock

ICBO Lic. #89388

Items found not to be in code compliance at a final inspection.

1. Fascia has not been completed below roof, exposed decking
2. Ledger to rear deck has not been fastened properly with bolts.
3. Joists that bear over header for deck have not been anchored.
4. Foundation on SE corner is cracked and braking apart.
5. All handrails must return to wall at top and bottom.
6. No soffit venting, lack of attic ventilation has caused roof shingles to deteriorate.
7. Open outlet box under kitchen cabinets with exposed electrical wiring.
8. Attic access opening does not meet required code minimum opening of 22"x30".
9. No counter-flashing around windows or doors, looks to have a lot of water leakage damage.
10. Bathroom fixtures not caulked.
11. No truss bracing or angle braces.
12. No smoke detectors in bedrooms and the only smoke detector in house is a battery detector, code requires all smoke detectors to be hard wired with battery back up.
13. Stair risers exceed 8" max with 3/8 variance for entire run of stairs.
14. No 5/8 type x Sheetrock under stair lids.
15. No Pressure reducing valve has been installed.
16. Copper lines in house are not grounded.
17. 2x6 headers in basement exceed limits and are over spanned.
18. Missing nuts and washers on anchor bolts for sill plate in basement.
19. 4' cantilever at front of house requires doubled up end joists with a 2-1 span back into house.
20. No combustion air, vent clearance problems.
21. Dishwasher appears to not be plumbed.
22. Water heater is not seismically strapped to foundation.
23. Kitchen circuits are required to be on 2- 20 amp gfci circuits with 12/2 awg.
24. Bathrooms required to be on a separate 20-amp circuit for gfci's.
25. Electrical panel has not been labeled.
26. House has over spanned headers and joists throughout the house.
27. Footings appear to be at grade level in some places and do not meet min 30" frost line depth.
28. Grading from house does not meet 2% slope for the first 10ft. away from house.
29. Outlets in garage are not on gfci
30. No gfci in basement.

Jason M. Bullock

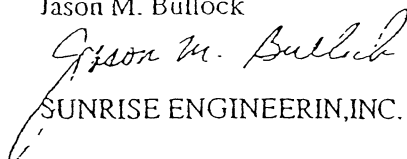

SUNRISE ENGINEERING, INC.

EXHIBIT "B"

October 12, 2000

To:
Hadley & Associates
Attn: Jim Haslam

Dear Mr. Haslam

On Oct. 9, 2000 I visited the home of a client of yours Mrs. Mary Moore. My visit was in response to a phone call that I had received from Mrs. Moore the week before. During our phone conversation she had informed me of an inspection of her home that had taken place back in the first part of August by a work associate of mine Mr. Jason Bullock (Mr. Bullock is an ICBO certified 4/Way Building Inspector). Mrs. Moore said that Mr. Bullock had made a recommendation to her to give me a call to see if I would come over and be able to answer some questions that she may have on the electrical portion of his inspection, and also look over the electrical installation in her home that I might add some insight to Mr. Bullocks inspection.

My findings were as follows:

Kitchen area;

1. There is an outlet inside a lower cabinet on the east wall that has no cover plate on it. Wiring is exposed and susceptible to damage or someone to personal injury. Violation of National Electrical Code (NEC) Article 370-28 (C)

2. The Peninsular cabinet that extends past the 24 inches allowed by the NEC does not have an outlet located in it.
Violation of NEC Article 210-52 (C) (3)

3. The Garbage disposal has no disconnecting means inside the cabinet with in sight of the disposal where service personnel can unplug the appliance while working there on. I recommend an outlet and an approved appliance cord in accordance with Article 422-16 (B) (1) (a-d) be installed in place of the metal flex that has been installed. The metal flex is in violation of the NEC and is not suitable for wet locations.
Violation of NEC Article 350-5

4. In the master bedroom and dining room, the outlet spacing and locations do not comply with the NEC
Violation of NEC Article 210-52 (A) (1), (2) (a-c).

5 The natural gas pipe is not bonded to the grounding system.
Violation of NEC Article 250-104 (B)

6. There is no ground buss in the main lighting panel in the basement. The ground wires from the electrode as well as all the lighting circuit ground wires are tied together under the same split-bolt connector. The NEC states that the arrangement of grounding connections shall be such that the disconnection or removal of a ground wire will not break the integrity of the ground system. Also the NEC states that wires of dissimilar metals because of their different characteristics (such as copper and aluminum, also none of the aluminum wire connections have Nolex, Penitrox or any other kind of anti-oxidant compound applied to their connections) shall not be placed under the same connector. Therefore my recommendation would be to install a grounding kit in this panel and terminate each wire in the proper manner underneath its own screw on the ground-buss provided in this kit.

Violation of NEC Article 110-14.

7. There is only one smoke detector in this house, which the Uniform Building Code book clearly shows that this is an inadequate amount. The 1991, 1994 and 1997 editions of the Uniform Building Code book (UBC) Volume 1; Section 1210-4 of the 91 and Volume 1; Section 310.9.1.4 of the 94 and 97 state that there shall be a smoke detector located in each of the bedrooms, in the corridors leading to the sleeping areas and any room opening to the hallways that lead to the sleeping areas whose ceiling exceeds that of the hallway by 24". One shall also be mounted at the top of a stairway when the house has a basement, and if the basement has a sleeping area the same rule will apply as the upstairs. The smoke detectors shall also be interconnected with each other so if one detector goes off all of the others will as well.

8. The garage outlets are considered a wet location area therefore they should be put on a GFCI circuit

Violation of NEC Article 210-8 (A) (2)

9. The wire connections outside at the main breaker have had some of the strands cut off so that the wire can fit into the lugs provided with the main breaker, by doing so the installing electrician has taken away from the integrity of the electrical conductor installed. Cutting the end off and re-stripping the wires end and putting the necessary anti-oxidant compound on the bare aluminum wire and re-terminating the wire can fix this.

I was also asked to give an estimated cost as to how much it would cost the homeowner to have these items done. I feel that the homeowner could have these services done for an estimated cost of \$ 1250.00 - \$ 1,565.00.

If you have any questions please feel free to call me at (435) 743-6151.

Sincerely Yours

Mark O'Barr



EXHIBIT "C"

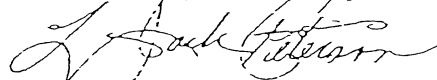
L. Jack Peterson
95 East 500 South
P O Box 84
Fillmore, Utah 84631

To whom it may concern:

I was contacted by Dan Smith and went over the property and the layout of the home on the 11th of August 1993, and inspected the footings on Friday 13th. 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 16th and the rough plumbing on the 18th. The rough electrical and plumbing, along with the framing inspection, was done on the 8th and 9th of September 1993. I checked the building progress on both the 28th and the 29th 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 8th 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

A handwritten signature in cursive script, appearing to read "L. Jack Peterson".

L. Jack Peterson, Fillmore City Building Inspector

Page 29

1 A. Man
2 Q Can you estimate on a weekly basis how many
3 you would do?
4 A. I don't do as much as I used to. I'm
5 strictly more -- I get out maybe twice a week now on
6 full eight-hour days. I mean, take, for example,
7 yesterday, I did probably 15 different homes up in
8 Herriman. But realistically you could probably say
9 close to -- probably a thousand.
10 Q. Okay. So in an interior inspection process
11 for a UBC code inspection for an average size
12 residence, single family residence, about how much time
13 would the inspector spend on the premises inspecting
14 that home?
15 A. It depends on the inspection.
16 Q. No, I'm talking about all the inspections
17 combined.
18 A. It depends on the inspector. Oh, to be safe
19 on an entire home with all the small inspections
20 involved, your big inspections are going to be your
21 four-way inspection and your final inspection. Usually
22 a couple hours. You're probably looking between 10 to
23 12 hours.
24 Q. Okay. Have you ever been involved in
25 inspections of homes for people who are considering

Page 30

1 buying a home and they want -- and they want to find
2 out if the home --
3 A. Yes.
4 Q. -- is a -- is a sound home?
5 A. I am
6 Q. All right. In your employment with Sunrise
7 Engineering have you done that?
8 A. Yes.
9 Q. That is one of the services that Sunrise
10 Engineering offers the public?
11 A. Yeah.
12 Q. How many of those have you done,
13 approximately?
14 A. Residentially, we don't do a whole lot. We
15 do more on the commercial end. Residentially, oh, 20.
16 Q. Okay. Now, when you came to Mary Moore's
17 home, what kind of inspection did you originally do for
18 her?
19 A. Originally when Mary contacted me, she had
20 talked to Ken Zeigler that was a contractor, and I came
21 out more or less -- just came back -- more or less I
22 will walk through the home as a final. I'm not going
23 to spend five, six hours, you know, nitpicking. I
24 basically went through and walked through and basically
25 what I would check on a final; go through things that I

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1 would catch on a final.
2 And then there was some other things that
3 just caught my eye that I brought up in my list.
4 Q. Now, how would that type of inspection
5 differ from the inspection you have done for people who
6 are considering buying a home?
7 A. If somebody is gonna buy a home and we go
8 out and we do a full fledged inspection, there's, I
9 feel, probably more involvement when they're going out
10 to buy a home. You know, I was just contacted, came
11 over, and walked through the house for her.
12 There's quite a lot more detail if
13 somebody's gonna pay the fee for us to walk through a
14 house that's gonna be bought.
15 Q. Okay. Do you remember the -- or have the
16 documents with you to show how much you charged Mary
17 Moore for your initial inspection?
18 A. Boy. The initial inspection I -- I can't
19 even remember, to be honest. I believe it was around
20 \$60.
21 Q. Okay. And that's a pretty good estimate
22 because you know what you did on the original
23 inspection?
24 A. Give or take probably \$10, I bet.
25 Q. Okay.

Page 32

1 A. I mean, it was more or less, I guess, a
2 courtesy.
3 Q. Does that figure include the drafting up of
4 the report that you did, the 30 items?
5 A. In that \$60 there?
6 Q. Yes.
7 A. Yeah.
8 Q. Okay. Now, what would you do in a
9 pre-purchase home inspection that you did not do in
10 that inspection?
11 A. I would involve more guys. I would probably
12 have two additional guys. I usually try to bring in
13 guys that are considered, I guess, expert, expertise,
14 in that field. I have guys on my staff that have
15 either been plumbers, mechanical contractors, that I
16 have hired that have got licensed through ICBO. So
17 I -- I respect their knowledge of, yeah, I hold all
18 these licenses but I respect their knowledge to come
19 in. And we would come through and just do a
20 thorough -- we go through everything. We go through
21 furnaces. We take everything apart. Which on Mary's
22 house I did not do. You know, obviously you can't come
23 in and start checking walls and cutting sheet rock.
24 Q. You have done no destructive testing?
25 A. No. No.

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1 Q. Let me finish my question, since I know you
2 knew what I was going to say, but I need to make sure
3 that it's all the way finished.
4 A. Sure.
5 Q. Have you done any destructive testing on the
6 Mary Moore home?
7 A. No.
8 Q. Have you done the type of inspection on Mary
9 Moore's home that you would have done -- and I say
10 "you," meaning Sunrise Engineering and you supervising,
11 would have done had you been hired pre purchase to
12 inspect the home?
13 A. That I would have done?
14 Q. Yes. Have you accomplished as of yet that
15 thorough an inspection of the Moore residence?
16 A. I would say no. I've obviously -- I've gone
17 back at later dates and inspected some additional
18 things that were not part of that list, the original
19 30. But if I was, you know, to bring down -- the only
20 other guy I got involved on this was Mark O'Barr.
21 Q. Was the original list of 30 alleged defects,
22 was that list drawn up after your first inspection?
23 A. Right after my first inspection? It was
24 actually drawn up at the time I was walking through the
25 home.

1 you know, we have a list that we would go through. A
2 checklist, call it, that we go through and check
3 specific items on everything. Whether it's the Mary
4 Moore house or Joe Blow's house, we have a list that we
5 would go through.
6 Q. And you have never gone through that entire
7 list on the Mary Moore home, have you?
8 A. No.
9 Q. Okay. Is there any reason why you haven't
10 done that?
11 A. At the time of the inspection that Mary --
12 at the time Mary called me, when I came over I just
13 told her that I would be go through -- she asked me to
14 come through and basically do this as if this was a
15 final inspection on a house that had just been built
16 and go through a final inspection of what I would do on
17 any new residential home where I would walk through on
18 a final inspection. And we usually take an hour and a
19 half to two hours there.
20 Q. Okay. Did she tell you about anything in
21 particular that she was concerned about?
22 A. She pointed out some things, open electrical
23 box. But to be honest with you, I cannot remember. If
24 I recall, I walked through the house and do what I'm
25 supposed to do. I'm here. And there may -- I know

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1 Q. Okay. How long did you spend in that
2 inspection?
3 A. Probably a little over an hour on that
4 inspection.
5 Q. Okay. And how many hours would be spent on
6 a pre-purchase inspection?
7 A. It depends on the home, really.
8 Q. In a home such as Mary Moore's.
9 A. Really to go through it thoroughly, you're
10 probably looking six hours. Six to eight hours.
11 Q. I guess there are degrees of thoroughness
12 that a person could ask in a pre-purchase inspection,
13 correct?
14 A. Sure.
15 Q. She could have hired you for the \$60 and
16 felt that that might be okay, correct, depending on
17 what the person wanted?
18 A. Depending on what the person wanted, what
19 was necessary.
20 Q. And they may have concern about certain
21 areas and ask you to concentrate on certain things,
22 right? That might affect how much work you do, right?
23 Not any one inspection will ever be exactly the same in
24 a pre-purchase situation, I suppose?
25 A. No. I mean, we go through -- I have a --

1 maybe the electrical box was pointed out. But it's
2 something that I would have eventually looked at.
3 Q. Did she tell you why she was asking for a
4 home inspection?
5 A. Not that I recall.
6 Q. Did she tell you anything about any footings
7 issues?
8 A. As far as coming out, she pointed -- when we
9 got outside, you could see where the footings were.
10 And she just brought up that as a concern of hers,
11 safety issue.
12 Q. Okay. Did she elaborate on that? Did she
13 explain what she was concerned about? What did she say
14 to you about the footings?
15 A. I don't think she would know as a homeowner
16 of what the concerns to be there. I mean, this is -- I
17 feel she's just a homeowner that is looking -- you
18 know, you've got an exposed footing there, and by code,
19 you know, it's required to be 30 inches in depth for
20 frost line. I really don't think she would know that
21 that's an issue.
22 Q. That wasn't my question, sir. My question
23 was simply what did she say about that?
24 A. More or less that she pointed out the fact
25 is this something that maybe I should be concerned

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1 Q. That would be great. I appreciate it.

2 Thank you

3 Okay. Based upon the second inspection
4 where Rex Radford was present, did you make any changes
5 to the original report based upon the things that were
6 observed there?

7 A. Yes. And those are the changes that I have
8 given to you today. As a result of our inspection
9 we -- we observed closely the construction of the
10 windows. I had made a statement in the original report
11 that the window was installed on the outside of the
12 siding. On closer inspection we determined that that
13 was not the case. The windows still leak. It's
14 apparent that the window installation does not keep out
15 the weather. So I did not change my opinion as to the
16 cost of repairing the window defect, but merely changed
17 what I had observed on closer inspection.

18 The --

19 Q. Go ahead, please.

20 May I ask this about the window? And it
21 just may be slipping my memory right now. If I recall
22 correctly, it was Jason Bullock who originally
23 determined that the windows were defective in their
24 installation. Isn't that correct?

25 A. Yes.

1 defect is.

2 MR. DIXON: I'll be asking that. We'll be
3 talking about that. That's a good point. We do need
4 to get to a definition.

5 Q. But right now I'm just trying to get to the
6 scope of your reports, and I'm going to go into these
7 in a little more detail later on. I don't want to get
8 too far into it.

9 I think you've answered the question, you
10 didn't just assume that everything that Jason Bullock
11 said was correct, you tried to make an independent
12 analysis of what Jason Bullock said of what alleged
13 defects that Jason Bullock had found, and you went and
14 checked each one of them out and tried to make an
15 independent review to see if they were indeed defects,
16 correct?

17 A. That is correct.

18 Q. And, if I understand you correctly, the way
19 you have defined defects in your report is a deviation
20 from the building code, correct?

21 A. Well, I think we defined it in the report.
22 But I'm not sure if that's where we defined it or not.

23 Q. I'm not sure if you used the word
24 "deviation." Let's look for that. I think that was
25 the essence; is that right?

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1 Q. Were you sort of relying on Jason Bullock's
2 original inspection of the windows and sort of adopting
3 his inspection, and is that the reason for the error?

4 A. No. The reason that I went down to the home
5 to inspect the home was -- was to independently observe
6 the conditions of the home as it was built, the
7 construction, and then to do an independent check
8 against the building code that I would agree that those
9 were, in fact, construction defects.

10 So I could have -- I didn't want to just
11 agree with the list of construction defects without
12 being able to independently verify that they were, in
13 fact, construction defects, after having observed the
14 actual conditions and construction of the home.

15 Q. Okay.

16 MR. HADLEY: Can I make a comment?

17 MR. DIXON: No.

18 MR. HADLEY: Okay. I was actually going to
19 ask you a question.

20 MR. DIXON: Thank you for asking. I'll let
21 you ask the questions at the end.

22 MR. HADLEY: All right. (Laughter.)

23 MR. DIXON: You would probably help me more
24 than anything. I just want to make sure --

25 MR. HADLEY: I just wanted to clarify what a

1 A. It says -- in our report, page 3, I believe
2 first paragraph, site visit, "During our inspection we
3 observed the existing conditions at the home relative
4 to each item listed by Sunrise as, 'found not to be in
5 code compliance', throughout the remainder of this
6 report the listed items found not to be in code
7 compliance will be referred as 'defects'."

8 Q. So the deviation from the code I said, and
9 the reasons you found were not in code compliance, but
10 that means the same thing, doesn't it?

11 A. Yes.

12 Q. All right. Now, is that definition of a
13 construction defect a generally accepted definition in
14 the field?

15 A. Something could be a defect without --
16 without being necessarily a code compliance problem.

17 Q. Because there might be just standards
18 observed by the construction industry that are not
19 embodied in the code, and if a person didn't meet that
20 standard, that could be considered a defect; is that a
21 fair statement?

22 A. That is correct.

23 Q. Okay. But likewise, though, that's because
24 there might be substantial, I guess, safety issues or
25 structural integrity issues that might be considered to

<p style="text-align: right;">Page 77</p> <p>1 destructive testing, removing any sheet rock, or 2 whatnot, to observe it was a question in my mind and it 3 still is. 4 Q. Because you have never done any destructive 5 testing to answer that question, correct? 6 A. That's correct. 7 Q. Ceiling access 19 inches by 16 inches. 8 A. That's a recording of -- of the measurement 9 that I took of the ceiling access while I was there. 10 Q. Okay. And bathroom, no vent, is that what 11 that says? 12 A. Yes. 13 Q. No vent at all? 14 A. That's -- that may be a -- a recording of 15 what was reported as -- as a condition. 16 Q. Is that what you had found? 17 A. Is that what I found? 18 Q. Yes. 19 A. I believe that there is a vent in -- in that 20 bathroom. I don't know whether -- I don't believe that 21 that vent is necessarily the only -- or the proper 22 vent. 23 Q. Okay. Support for pipe, what does that 24 mean? 25 A. As I was reviewing the construction in the</p>	<p style="text-align: right;">Page 79</p> <p>1 Q. Engineered trusses at 2 foot off center? 2 A. 2 foot on center. I measured the spacing of 3 the trusses to assure that they were, in fact, 2 foot 4 on center. And I observed such to be the case. 5 Q. And you found that there was 8 inches of 6 cellulose insulation in the attic? 7 A. Yes, uh-huh. I did. 8 Q. And that was adequate? 9 A. Pardon me? 10 Q. Was that adequate? 11 A. I didn't make a determination about whether 12 that was adequate. 13 Q. Okay. The next page, which would be 3-B, it 14 appears that you start going through the list of 30 15 items at this point, right? 16 A. Yes, uh-huh. 17 Q. Maybe I can just -- now we've gone from 30 18 to 42. Are the 12 additional items 12 additional 19 defects or just a different breakdown of the original 20 30? 21 A. Some of the additional items are related to 22 stuff that was pointed out by Mark O'Barr in his 23 supplementary electrical inspection. 24 Q. Let me just ask it this way, did you find 25 any defects that either Mark O'Barr or Jason Bullock</p>
<p style="text-align: right;">Page 78</p> <p>1 home, I had a concern about whether the pipe had enough 2 pipe supports. 3 Q. Those are the little ties to keep the pipe 4 from rattling around? 5 A. And from sagging. 6 Q. Sagging? 7 A. Yeah. 8 Q. Did you include that in your report? 9 A. No, I didn't. I didn't -- I didn't address 10 that as a code violation. It was merely a comment to 11 me about it appeared not to have enough support. 12 Q. So you didn't make any definite conclusions 13 one way or the other on that one? 14 A. No. 15 Q. The next one is -- I don't know if I can 16 read that. Slope five? 17 A. Slope. 18 Q. I was going to say slope, and I didn't see 19 the E in there. I didn't want to -- 20 What does that mean? 21 A. Just a question about slope of the sanitary 22 sewer lines. 23 Q. Okay. Did you make any -- you didn't render 24 any opinions on that? 25 A. No.</p>	<p style="text-align: right;">Page 80</p> <p>1 originally identified? 2 A. Yes, I did. 3 Q. Tell me which ones those were. 4 A. 40 -- 38, 39 and 40. 5 Q. Okay. All right. Tell me how you found 6 that there was insulation in the eave space. 7 A. By observation. I could see that the 8 insulation was covering the -- all the way to the 9 underside of the sheeting -- sheathing. And I also was 10 able to observe that the venting in the attic was 11 inadequate, did not meet code. In order to meet code 12 my repair analysis recommended putting additional 13 venting in the eaves. And without removing that 14 insulation from the underside of the joist, it would be 15 ineffectual to put eave ventilation in if the air can't 16 get there. 17 Q. Right. And that's why you recommend these 18 baffles to keep the eave space from -- 19 A. Right. So that the roof temperature stays 20 cold in the winter so you don't get ice dams forming. 21 Q. But how do you keep the eave space clear of 22 the insulation? Is that -- 23 A. You put the insulation baffles in. 24 Q. The insulation baffles, is that what that's 25 for?</p>

ADDENDUM 3

2005 MAR 10 PM 4:52

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

WILLIAM MOORE and MARY MOORE,)	
)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT
vs.	)	OR ORAL MOTION UNDER
	)	RULE 50 FOR A DIRECTED
DAN SMITH, individually and as Trustee of the	)	VERDICT
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: HAYRE
)	

MEMORANDUM IN SUPPORT OF ORAL MOTION UNDER RULE 50 FOR A
 DIRECTED VERDICT

Plaintiffs allege two theories of recovery: fraudulent nondisclosure and breach of contract. The two remaining alleged defects are both subject to the fraudulent nondisclosure claim. Only the final grading issue is subject to the breach of contract claim. Both theories of recovery should be dismissed and a directed verdict granted because the Statute of Limitations dictates this result and because Plaintiffs have not adduced the evidence necessary to sustain those claims.

I. STATUTE OF LIMITATIONS

Finish Grading Claim

The court has already ruled that UCA 78-12-21.5 is the statute of limitations applicable to this case. See order dated October 1, 2003 annexed hereto. Subsection 21.5 (3) provides that all claims in contract have a six year limitations period running from the earliest of either the date of the Certificate of Occupancy or the date of possession of the improvement. In this case it is admitted that the Certificate of Occupancy was granted on January 28, 1994 and that possession took place in November of 1993. The Moores occupancy was May of 1994. The complaint was filed in August of 2000, over six years from either date. Therefore the statute of limitations bars the contract claim.

The plaintiffs argue that the statute of limitations does not begin to run until discovery of the alleged building code violation. That argument fails as a matter of law and as a matter of fact. Legally it fails because subsection 3 clearly implies that the discovery rule does not apply to contract or warranty claims. 21.5 (3) (a) provides for a six year period of limitations for actions in contract, then 21.5(3) (b) provides: "All other actions . . . shall be commenced 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 by reasonable diligence." The juxtaposition of these two paragraphs clearly implies that only the non-contract claims are subject to the discovery rule. Contract claims exist for six years and no more. This is to allow builders some certainty and peace of mind that they

will not be afflicted with stale contract claims. If Plaintiffs' argument prevailed that would allow the Moores to sue six years after they discovered the contract claim. That is clearly excessive. In fact, the legislative preamble language immediately preceding these two provisions explains the legislative purpose of drawing definite limitations periods: "The legislature finds that (a) exposing a [builder] to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardship to the [builder] and the citizens of the state . . . (d) the possibility of injury and damage becomes highly remote and unexpected seven years following completion [of the building] . . .; and (e) . . . it is in the best interest of the citizens of the state to impose the periods of limitation and repose provided in this chapter . . ." Clearly the intent of this six year statute of limitations is that it be construed in favor of the builder. Thus, the discovery rule should not apply to the six year limitations period for contract claims.

Moreover, the contract makes it clear that the breach occurs if at all at the time of the closing. It was at that time that any alleged building code violations remained unremedied. Therefore the statute must run from the date of closing. The closing was in May of 1994. Therefore, the breach of contract claim is barred.

If there was a breach it was that there was a building code violation at closing. Even if the discovery rule applied, reasonable diligence would have required Plaintiffs to inquire of the building official whether there were any building violations. Had they done this they would have

discovered either that there were none or they would have discovered some violation from which time the statute of limitations would have begun to run. Clearly, for Mrs. Moore to wait over six years to make such an inquiry is not reasonable diligence.

Therefore the statute of limitations bars her contract claim.

Alleged Defective Windows Claim

UCA 78-12-21.5 (3)(b) bars the fraudulent nondisclosure claims as well. This two year statute of limitations begins to run upon discovery of the alleged defect or on the "date upon which a cause of action should have been discovered through reasonable diligence."

Mrs. Moore admitted that she saw the water intrusion and damage to the paint at the window sill in the first winter after she moved in. That is when she had notice of the claim. She admits and Jack Peterson confirms that she called him to check out the water intrusion. Although he said the windows were not defective she still had notice as early as 1994 and no later than 1995 or 1996 of water intrusion.

II. FRAUDULENT NONDISCLOSURE CLAIMS

To prevail plaintiffs must prove that Dan and Carol Smith know of the existence of these two building code violations. The sole evidence of this is that Dan Smith must have known there were building code violations since he was required, as a builder of a home, to know the contents of the building code. Carol Smith did not build the home. There is no evidence that she has any such requirement so she should be dismissed at the threshold.

Fraud requires clear and convincing evidence. No such evidence exists that shows that Dan Smith knew there were material defects and that he refused to disclose them. Regarding the final grading issue, his un-rebutted evidence is that he explained to Mr. Moore that the final grading had not yet been accomplished. Jack Peterson, the Building official, has testified that he granted Dan Smith permission to do the final grading when the weather cleared in the spring. The condition of the grading when the Moores bought the property is not a hidden thing. The status of the dirt was obvious. There is no evidence therefore that Mr. Smith held back that information.

Regarding the windows, there is no evidence that Dan Smith knew there was a building code violation. There is no evidence that Dan Smith was cited or red tagged for any building code violation. No witness for the Plaintiffs has been able to say with any certainty what the defect is. Therefore, Dan Smith cannot be found to have withheld information concerning a defect of which Plaintiffs have no knowledge.

III. BREACH OF CONTRACT

The contractual provision that applies is found in paragraph C: . This paragraph clearly applies to either one of two types of cases. Either the building official has cited the home builder for a violation or the home builder has concealed the violation from the building official. There is no such evidence. The evidence is that the home builder could not accomplish the final grading because it was too muddy. He intended to do the final grading in the spring. The

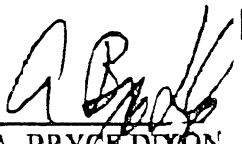
contractual provision requires there to be a violation. There was no violation because Dan Smith obtained permission from the building official to do the grading in the spring.

IV. CONCLUSION

Plaintiffs have not produced evidence sufficient for this case to go to the jury. Therefore under URCP 50 a directed verdict should be granted

DATED this 7th day of March, 2005

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ADDENDUM 4

2005 MAR 23 PM 12:23

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**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
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.

)
)
) **MOTION AND MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF MOTION UNDER**
) **RULE 50 FOR A JUDGMENT**
) **NOTWITHSTANDING THE**
) **VERDICT OR IN THE**
) **ALTERNATIVE FOR REMITTITUR**
)
)
) Case No. 000700142 MI
) Judge Donald J. Eyre

**MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION UNDER RULE 50 FOR A JUDGMENT NOTWITHSTANDING THE
VERDICT OR IN THE ALTERNATIVE FOR REMITTITUR**

Plaintiffs prevailed on its two theories of recovery, fraudulent nondisclosure and breach of contract, with respect to one of 42 alleged defects. Defendants moved for a directed verdict at the conclusion of plaintiffs' case. The court allowed the case to go to the jury without ruling on the motion. Now the Defendants request a judgment notwithstanding the verdict under URCP

1332

50.

Both theories of recovery are defective because the Statute of Limitations bars them. The contract claim as a matter of law fails. Moreover, there was insufficient evidence to support the claim on final grading.

I. STATUTE OF LIMITATIONS

Finish Grading Claim

The court has already ruled that UCA 78-12-21.5 is the statute of limitations applicable to this case. See order dated October 1, 2003. Subsection 21.5 (3) provides that all claims in contract have a six year limitations period running from the earliest of either the date of the Certificate of Occupancy or the date of possession of the improvement. In this case it is admitted that the Certificate of Occupancy was granted on January 28, 1994 and that possession took place in November of 1993. The Moores occupancy was May 2, 1994. The complaint was filed in August of 2000, over six years from either date. Therefore the statute of limitations bars the contract claim.

The plaintiffs argue that the statute of limitations does not begin to run until discovery of the alleged building code violation. That argument fails as a matter of law and as a matter of fact. Legally it fails because subsection 3 clearly implies that the discovery rule does not apply to contract or warranty claims. 21.5 (3) (a) provides for a six year period of limitations for actions in contract, then 21.5(3) (b) provides: "All other actions . . . shall be commenced 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 by reasonable diligence.” The juxtaposition of these two paragraphs clearly implies that only the non-contract claims are subject to the discovery rule. Contract claims exist for six years and no more. This is to allow builders some certainty and peace of mind that they will not be afflicted with stale contract claims. If Plaintiffs’ argument prevailed that would allow the Moores to sue six years after they discovered the contract claim. That is clearly excessive. In fact, the legislative preamble language immediately preceding these two provisions explains the legislative purpose of drawing definite limitations periods: “The legislature finds that (a) exposing a [builder] to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardship to the [builder] and the citizens of the state(d) the possibility of injury and damage becomes highly remote and unexpected seven years following completion [of the building]. . . ;and (e) . . . it is in the best interest of the citizens of the state to impose the periods of limitation and repose provided in this chapter” Clearly the intent of this six year statute of limitations is that it be construed in favor of the builder. Thus, the discovery rule should not apply to the six year limitations period for contract claims.

Section 4 of 78-12-21.5 supports this statutory construction. It provides for a period of repose after which no claim can be brought regardless of discovery. In doing so, it refers to section 3(b) but not to section 3(a). It provides that “Notwithstanding Subsection (3)(b), an

action may not be commenced against a provider more than nine years after completion of the improvement” It is significant that this statute of repose is given “notwithstanding” subsection (3)(b) but not subsection (3)(a). If (3)(a) could be construed to enlarge the period of limitations beyond 9 years then it would have been referred to. The language of Subsection 4 would have read: “ Notwithstanding Section 3. . .” It would not have limited its reference to subsection (3)(b). Since the legislature did not intend Subsection (3)(a) to be subject to the discovery rule there was no need to refer to it in the statute of repose.

Moreover, the contract makes it clear that the breach occurs if at all at the time of the closing. It was at that time that any alleged building code violations remained unremedied. Therefore the statute must run from the date of closing. The closing was in May of 1994. Therefore, the breach of contract claim is barred.

If there was a breach it was that there was a building code violation at closing. Even if the discovery rule applied, reasonable diligence would have required Plaintiffs to inquire of the building official whether there were any building violations. Had they done this they would have discovered either that there were none or they would have discovered some violation from which time the statute of limitations would have begun to run. Clearly, for Mrs. Moore to wait over six years to make such an inquiry is not reasonable diligence.

The Plaintiffs argue that this court has considered and rejected this claim previously. It has not considered this issue in isolation. The statute of limitation issues were always considered

in conjunction with the fraudulent nondisclosure issues. This is the first time the court has been able to focus solely on whether the discovery rule applies to contracts without the distraction of 41 other defects and fraudulent non-disclosure claims. The Plaintiffs in effect have confused the one simple issue that should have been the subject of this lawsuit. By throwing so much irrelevance at the court, Plaintiffs have succeeded in obscuring the true nature of their claim for breach of contract. Finally, with all the irrelevance blasted away, the court can see clearly to grant judgment based on the clear meaning of the statute of limitations.

II. FRAUDULENT NONDISCLOSURE CLAIMS

To prevail plaintiffs must prove that Dan and Carol Smith knew of the existence of the alleged violation of the building code. The sole evidence of this is that Dan Smith must have known there were building code violations since he was required, as a builder of a home, to know the contents of the building code.

Fraud requires clear and convincing evidence. No such evidence exists that shows that Dan Smith knew there were material defects and that he refused to disclose them. Regarding the final grading issue, his un-rebutted evidence was that he explained to Mr. Moore that the final grading had not yet been accomplished. Jack Peterson, the Building official, has testified that he granted Dan Smith permission to do the final grading when the weather cleared in the spring. Thus, there is no fraud.

The condition of the grading when the Moores bought the property is not a hidden thing.

Even if Dan Smith had not informed Mr. Moore and even if the Moores did not remove dirt, the Moores knew when they bought the house that there was no landscaping. The height of the dirt against the foundation was clearly visible for all to see. They could see, for example, that the electric meter sat so high that someone needed to stand on a box to read it. There is nothing hidden or latent about this issue. There is no evidence therefore that Mr. Smith held back that information.

III. BREACH OF CONTRACT

The contractual provision that applies is found in paragraph C: . This paragraph clearly applies to either one of two types of cases. Either the building official has cited the home builder for a violation or the home builder has concealed the violation from the building official. There is no such evidence. The evidence is that the home builder could not accomplish the final grading because it was too muddy. He intended to do the final grading in the spring. The contractual provision requires there to be a violation. There was no violation because Dan Smith obtained permission from the building official to do the grading in the spring.

Under URCP 50 a judgment notwithstanding the verdict should be granted.

REDUCTION OF DAMAGES

Utah law on reduction of excessive damage awards by juries is as follows: "Juries are permitted wide discretion in awarding damages, and courts must accord considerable deference to the jury's determination. *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1083

(Utah 1985), *Brown v. Richards*, 840 P.2d 143, 153 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1993). Thus, a jury's award of damages should not be disturbed "unless (1) the jury disregarded competent evidence, (2) the award is so excessive beyond rational justification as to indicate the effect of improper factors in the determination, and (3) the award was rendered under a misunderstanding." *Holbrook v. Master Protection Corporation dba Firemaster*, 883 P.2d 295, 300, quoting *Brown*, 840 P.2d at 153.

Disregard of competent evidence. The evidence was undisputed that there is no damage to the structure of the house from the alleged violation of the building code. The only testimony on damage was that of Steenblik who claimed that it would cost \$30,680 to repair the defect. First, this is excessive because it would give the Moores numerous landscaping and home features that they did not pay for. For example, Steenblik's plan included large retaining walls both in front and back, \$13,000 worth of sod in front and back, and rain gutters . The Moores bought the house "as is" without any such features. The jury must have disregarded the evidence that the home had no landscaping to begin with and that the house was bought "as is."

The award is excessive beyond rational justification. The total cost of the house was \$83,000. \$30,860 is 37 % of the total cost of the house. That is clearly excessive. Mary Moore received one bid to put dirt up to the 30 inch frost line that covered everything for \$7,000. See the second page of the exhibit where the price of \$7,000 is quoted to take care of item "#27 & 28 Footing and Grading." Item 27 is the same item and item number that the final grading issue has

been identified by throughout this litigation. Defendants are willing to pay twice \$7,000 or \$14,000, to satisfy this judgment. That is twice as much as can be sustained by any reasonable interpretation of the evidence. The court should reduce the damages and allow this case to be disposed of properly.

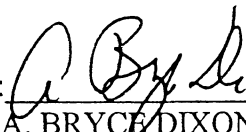
The award was rendered under a misunderstanding. The jury must have misunderstood the nature of damages because damages cannot be used to place the Plaintiffs in a position better than what they would have been had there been no breach. As shown above, this damage award does that very thing.

CONCLUSION

The statute of limitations in a contract claim cannot be tolled by the discovery rule. There is no clear and convincing evidence to support fraud. The Defendants are willing to accept a reduction of damages to \$14,000. That is twice the true worth of the claim.

DATED this 22 day of March, 2005.

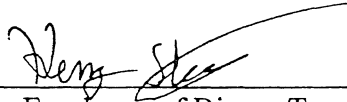
DIXON, TRUMAN & FISHER, P.C.

By: 
A. BRYCE DIXON
Attorney for Defendants
192 East 200 North, Suite 203
St. George, UT 84770

CERTIFICATE OF MAILING AND FAX

I hereby certify that I am an employee of DIXON, TRUMAN & FISHER and that on March 22, 2005, I placed a true and correct copy of the foregoing in the United States mails at St. George, Utah, with 1st class postage prepaid and addressed as follows and also faxed this document to:

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



An Employee of Dixon, Truman & Fisher, a P.C.

ADDENDUM 5

PATRICK J. ASCIONE (USB #6469)
JUSTIN D. HEIDEMAN (USB #8897)
LORELEI NAEGLE (USB #9577)
ASCIONE, HEIDEMAN & MCKAY L.L.C.
2696 North University Avenue, Suite 180
P.O. Box 600
Provo, UT 84604
Telephone: (801) 812-1000
Fax: (801) 374-1724
Attorneys for Defendants

**IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR 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.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR RELIEF FROM
JUDGMENT IN ACCORDANCE WITH
U.R.Civ.P. RULE 60(b)**

Hearing Requested

Case No.: 000700142 MI

Judge Donald J. Eyre

COMES NOW Patrick J. Ascione, of the law firm Ascione, Heideman & McKay, L.L.C.,
substitute counsel for Defendants and does hereby file its Memorandum of Points and Authorities in
Support of Defendants' Motion for Relief from Judgment in Accordance with U.R.C.P 60(b).

STATEMENT OF FACTS

For the sake of clarity and convenience Defendants set forth the following procedural history
regarding this Court's rulings on the various summary judgment motions that have been filed in this
case:

1. Defendants filed their first Motion for Summary Judgment on February 26, 2001 in which they argued that: (1) Plaintiffs' breach of contract claim was barred by the statute of limitations; (2) Plaintiffs' claim of rescission was barred by the statute of limitations; (3) Plaintiffs' claim for violation of the consumer sales practices act was barred by the statute of limitations; (4) Plaintiffs failed to plead fraud and misrepresentation with sufficient particularity; (5) punitive damages should be dismissed because all underlying claims are subject to summary judgment.

2. August 16, 2001, this Court entered a ruling on Defendants' first Motion for Summary Judgment and held that:

- a. Plaintiffs' claim for negligent misrepresentation in this case was precluded as a matter of law by the merger doctrine as set forth in the case of Robinson v. Tripco Inv., Inc., 21 P.3d 219 (Utah App. 2000).
- b. That the claims of fraudulent nondisclosure and fraudulent misrepresentation had been pled with sufficient particularity to satisfy Rule 9 of the Utah Rules of Civil Procedure.
- c. That there were genuine issues of material fact with respect to claims of fraudulent nondisclosure and fraudulent misrepresentation that precluded summary judgment.
- d. Defendants may have had a legal duty to disclose to Plaintiffs any latent and material defects in the home or building code violations, of which they were aware.
- e. The discovery rule should be applied to toll the statute of limitations in situations where its application was not otherwise expressly prohibited by law.
- f. The discovery rule does apply to those defects that would be considered latent and that there were issues of fact with respect to when the defects should have reasonably been discovered.

- g. Plaintiffs elected rescission rather than monetary damages for breach of contract.
3. Defendants filed their next motion for summary judgment on May 6, 2003 arguing that: (1) Plaintiffs' claims were barred inasmuch as the Plaintiffs failed to have the home inspected and inasmuch as the applicable statute of limitation ran before suit was filed; (2) Plaintiffs admitted that the majority of their claims were patent defects and should therefore be dismissed.
 4. On August 21, 2003, this Court held that: (1) the Defendants were only legally obligated to disclose defects that were not discoverable by reasonable care; (2) that summary judgment was appropriate for all admittedly patent items and that summary judgment was not appropriate for defects 9, 11, 12, 26, 27, 38 and 39; (3) that there were disputed material facts regarding Plaintiffs' claim for fraudulent misrepresentation; (4) that there were disputed material facts regarding Defendants' statute of limitations defense. Accordingly, this Court granted summary judgment only as to the dismissal of Plaintiffs' claim of fraudulent nondisclosure as to all defects except 9, 11, 12, 26, 27, 38 and 39.
 5. Finally in November 2003, Defendants filed four (4) additional motions for summary judgment as to Plaintiffs' claims for breach of contract; consumer sales practice act; mutual mistake of fact; and fraudulent misrepresentations.
 6. On April 26, 2004, this Court granted Defendants' Motion for Summary Judgment as to Plaintiffs' claims under the Consumer Sales Practice Act and Fraudulent Misrepresentation, but denied the motion as to Plaintiffs' breach of contract claim. Furthermore, during the hearing on the motions, Plaintiffs' counsel stipulated to the dismissal of the claim for mutual mistake.
 7. In addition, on April 26, 2004, this Court also denied Plaintiffs' Motion to reconsider its prior ruling on Plaintiffs' Fraudulent Nondisclosure and Negligent Misrepresentation causes of action.

ARGUMENT

This Court should grant Defendants' Motion for relief from judgment based upon mistake of law and in the furtherance of justice. Mistake of law by the trial court may support a motion for relief from judgment. Udy v. Udy, 893 P.2d 1097 (Utah App. 1995). Furthermore, this Court may grant relief under the catchall provision of Rule 60(b)(6) governing relief from judgment for any reason other than those specifically enumerated by rule if relief is justified and motion is made with reasonable time. Kunzler v. O'Dell, 855 P.2d 270 (Utah App. 1993).

The mistake upon which Defendants seek relief from judgment is determinative and precedential case law on the merger doctrine as applied to the prior decisions of this Court that effectively invalidates both Plaintiffs' claim for breach of contract and claim for fraudulent nondisclosure. Defendants specifically affirmative that they do not seek to re-litigate issues that have already been raised and argued, but instead seek to draw the Court's attention to conclusive precedent on the issue of the co-effect of the merger doctrine on Plaintiffs' claims and this Court's decision regarding the dismissal of Plaintiffs' claims of fraudulent misrepresentation.

I. UNDER THE DOCTRINE OF MERGER THE PARTIES' EARNEST MONEY SALES AGREEMENT IS SUBSUMED AND EXTINGUISHED.

As Judge Howard noted in his summary judgment decision in this case on August 16, 2001, the common law merger doctrine applies to this case. In particular, this Court stated that:

Pursuant to the common-law merger doctrine, execution and delivery of a deed by a seller usually renders any prior contractual terms extinguished and unenforceable. Although certain specific exceptions allow a party to avoid application of the merger doctrine, a claim for negligent misrepresentation relating to alleged construction defects in a building does not fall within any such exception. Accordingly, Plaintiff's claim for negligent misrepresentation in this case is precluded as a matter of law by the merger doctrine as set forth in the case of Robinson v. Tripco Inv. Inc., 2000 UT App 200, 21 P.3d 219.

[Order on Motion for Summary Judgment dated August 16, 2001]. Robinson v. Tripco, as well as numerous other cases establishes that the merger doctrine applies in Utah. Although the merger doctrine has been described as “‘an admittedly harsh rule of law’ it applies in Utah because it ‘preserves the integrity of the final document of conveyance and encourages the diligence of the parties.’” Robinson v. Tripco, 21 P.3d at 223 (citing Maynard v. Wharton, 912 P.2d 446, 451 (Utah App. 1996)).

The doctrine of merger ...is applicable when the acts to be performed by the seller in a contract relate only to the delivery of title to the buyer. Execution and delivery of a deed by the seller then usually constitute full performance on his part, and acceptance of the deed by the buyer manifests his acceptance of that performance even though the estate conveyed may differ from that promised in the antecedent agreement. Therefore, in such a case, the deed is the final agreement and all prior terms, whether written or verbal, are extinguished and unenforceable.

Furthermore, “the merger doctrine extinguishes the Earnest Money Sales Agreement and makes preeminent the warranty deed.” Shafir v. Harrigan, 879 P.2d 1384, 1392 (Utah App. 1994).

The facts of Shafir are very similar to the facts of this case in that both cases involved the interpretation of Section “C” of a standard Earnest Money Sales Agreement. In particular, the Earnest Money Sales Agreement in Shafir contained a general provision entitled “Seller Warranties” wherein the Seller warranted that “Seller had received no claim or notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing.” Id. Likewise, in this case section (C) of the parties’ Earnest Money Sales Agreement provides that “Seller had received no claim or notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing.”

In Shafir, the Court specifically found that the warranty deed did not include a warranty of notice of building code violations, and therefore, the merger doctrine precluded the argument that the sellers

had breached a warranty contained in the Earnest Money Sales Agreement Id. Thus, under the merger doctrine, Plaintiffs' argument that Defendants breached section C of the Earnest Money Sales Agreement would be precluded as a matter of law.

II. PLAINTIFFS HAVE FAILED AS A MATTER OF LAW TO MEET THE FRAUD EXCEPTION TO THE MERGER DOCTRINE.

As recognized by this Court in its summary judgment decision, there are several discrete exceptions to the merger doctrine including "fraud in the transaction". See Maynard, 912 P.2d at 450. However, the fraud exception only "applies when the party seeking to avoid merger can prove by clear and convincing evidence that the other party committed fraud in the real estate transaction" Id. In order to prevail under the fraud exception, "all the elements of fraud must be established." Secor v. Knight, 716 P.2d 790, 794 (Utah 1986). The elements of fraud in Utah 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 or she had insufficient knowledge on 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; (8) and was thereby induced to act; (9) to his [or her] injury and damage.

Maynard, 912 P.2d at 450 (emphasis added)(quoting Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980)). Thus, in order for Plaintiffs to prove that the fraud exception to the merger doctrine should apply, they must necessarily provide clear and convincing evidence that any omissions by Defendants were (1) material; (2) withheld knowingly or recklessly for the purpose of inducing the Plaintiffs to act (3) that Defendants had a duty to disclose the material fact; and (4) that Plaintiffs acted reasonably and did in fact rely upon the concealment of the fact.

On April 26, 2004, this Court determined as a matter of law that Plaintiffs had failed to establish a core element of fraud: willful or reckless intent to mislead the Plaintiffs. Upon motion by Defendants

for summary judgment on Plaintiffs' claim for fraudulent misrepresentation, this Court identified three alleged misrepresentations by the Defendants:

(1) the earnest money sales agreement constituted a representation "that they [the Smiths] had no knowledge or notice of any building or zoning violations concerning the property that would not be remedied before closing;" (2) the Smiths made an implied fraudulent misrepresentation that there were no building code violations by providing the Plaintiffs a copy of the Certificate of Occupancy; (3) the Smiths impliedly misrepresented that the home was compliant with the building code by Dan Smith having said (a) that he was a contractor; (b) by the Smiths living in the home, and (c) by the Smiths *remaining silent* regarding any possible building code violations.

[Memorandum Decision dated April 26, 2004, pg. 4 (emphasis added)]. Thus, this Court identified not only the alleged misstatements or misrepresentations made by the Defendants but also the alleged omissions of the Defendants. This Court then went on to specifically find that:

Defendants alleged misrepresentations by Plaintiffs *do not* meet the requirement that these representations were made recklessly for the purpose of inducing the other party to act upon it. *There is not legally sufficient evidence before the Court [that] the Defendants acted willfully or recklessly to mislead the Plaintiffs. Id.*

Thus, this Court has already determined as a matter of law that Defendants did not have the requisite scienter for fraud.

Because this Court has expressly determined that Plaintiffs could not establish willful or reckless intent to defraud, the fraud exception to the merger doctrine fails and the merger doctrine necessarily acts to merge and subsume the Earnest Money Sales Agreement. Thus, Plaintiffs' breach of contract claim fails as a matter of law.

III. PLAINTIFFS' CLAIMS OF FRAUDULENT NONDISCLOSURE ALSO FAIL AS A MATTER OF LAW.

If there was insufficient evidence to support a finding that Defendants acted willfully or recklessly to mislead the Plaintiffs, it *necessarily* follows that there is insufficient evidence to support a

finding that Defendants acted willfully or recklessly in failing to disclose information. The misrepresentations identified in Plaintiffs' fraudulent misrepresentation claim, which were expressly dismissed by this Court for lack of legally sufficient evidence, are the same representations/omissions upon which Plaintiffs' fraudulent nondisclosure claim was based; namely, that the Defendants are liable for remaining silent about building code violations.

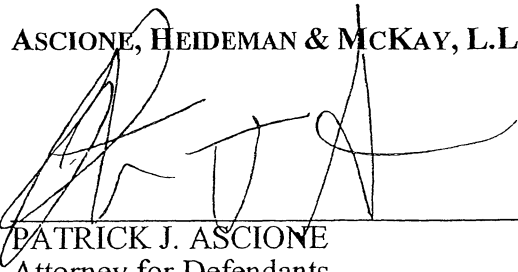
The elements of fraudulent nondisclosure claim include proof that: (1) the nondisclosed information is material; (2) that the nondisclosed information is known to the party failing to disclose, and (3) that there is a legal duty to communicate. Mitchell v. Christensen, 31 P.3d 572, 574 (Utah 2001). However, it is clear that fraudulent nondisclosure is a claim of fraud by "suppression of the truth", Elder v. Clawson, 384 P.2d 802, 804 (Utah 1963), and requires all of the same elements of fraud including willful or reckless intent to induce the Plaintiffs to act. In light of the fact that this Court determined that there is not sufficient evidence to support a finding that Defendants acted with willful or reckless intent, Plaintiffs' fraudulent nondisclosure claims also fail as a matter of law.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant Defendants Motion under Rule 60(b) for Relief from Judgment.

DATED AND SIGNED this 19th day of April, 2005

ASCIONE, HEIDEMAN & MCKAY, L.L.C.


PATRICK J. ASCIONE
Attorney for Defendants

ADDENDUM 6

RESIDENTIAL

Ex 7

Certificate of Occupancy and Zoning Compliance

CITY OF FILLMORE

Name of Owner: Dan Smith Building Permit No.: 1143Address of Owner: 155 W 300 S Telephone No.: 743-5170Property described as: _____ Zone: _____
Legal descriptionOtherwise known as: _____
Street address

Architect/Engineer: _____ Occupancy Group: _____

Contractor: Dan Smith Altered _____ New ☒1 No. of buildings on lot 1 Building No. _____ No. of Units _____

TYPE OF OCCUPANCY

☒ FAMILY OCCUPANCY

- _____ Number of families approved to reside per building
 _____ Number of boarders or roomers with automobiles approved to reside on premises with a family
 _____ Number of legal-sized off-street parking spaces

_____ BACHING SINGLES OCCUPANCY

- _____ Number of baching singles approved to reside per unit
 _____ Number of legal-sized off-street parking spaces. The number of occupants owning or operating vehicles cannot exceed this number.

I declare under penalty of perjury that I am the owner or authorized agent of the property subject of this request, that the foregoing statements and answers are true and correct, and that the stated conditions will be maintained on the premises.

Signature

Date

Any change in intensity of use on the building or premises, or an increase of more than five percent (5%) in the number of occupants in an apartment or multiple residential building will require the issuance of a new certificate.

Dale A. Smith
 Zoning Administrator

Date

January 28, 1994

D. Peterson
 Chief Building Inspector

Date

Jan 26 1994

Remarks: _____

Section 4-4 Zoning Ordinance No. 77-3 Certificate of Occupancy and Zoning Compliance. It shall be unlawful to use or occupy or to permit the use or occupancy of any building or premises until a certificate of occupancy and zoning compliance shall have been issued for the premises and/or building by Fillmore City.

Failure to comply with any section of this ordinance is a misdemeanor and is punishable by a fine of not more than \$1000 or imprisonment for not more than six (6) months or both as is set forth in Chapter 1 Sec. 11-100.

ADDENDUM 7

EARNEST MONEY RECEIPT

Legend Yes(X) No(O)

DATE February 15, 1994

he undersigned Buyer William K Moore & Mary J. Moore hereby deposits with Brokerage
 EARNEST MONEY, the amount of Four Thousand no/100 Dollars (\$ 4000.00)
 he form of check
 ch shall be deposited in accordance with applicable State Law

none Brokerage Phone Number Received by Mar J. Smith

OFFER TO PURCHASE

PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 155 W 300S.
 in the City of Fillmore County of Millard, Utah
 subject to any restrictive covenants zoning regulations utility or other easements or rights of way government patents or state deeds of record approved by Buyer in
 accordance with Section G Said property is owned by Dan & Carol L. Smith as sellers and is more particularly described

CHECK APPLICABLE BOXES

☒ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other _____
☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other _____

(a) Included items Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property
 The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title _____

(i) Excluded items The following items are specifically excluded from this sale living room lamp & shower curtain
main bath

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS Seller represents that the property includes the following improvements in the purchase price
☒ public sewer ☒ connected ☐ well ☐ connected ☐ other _____ ☒ electricity ☒ connected
☒ septic tank ☐ connected ☒ irrigation water / secondary system ☐ ingress & egress by private easement
☒ other sanitary system _____ # of shares to be determined ☒ dedicated road ☒ paved
☒ public water ☒ connected ☐ TV antenna ☐ master antenna ☐ prewired ☐ curb and gutter
☒ private water ☐ connected ☒ natural gas ☒ connected ☐ other rights _____

(d) Survey A certified survey ☐ shall be furnished at the expense of _____ prior to closing ☒ shall not be furnished

(e) Buyer Inspection 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 _____

2 PURCHASE PRICE AND FINANCING The total purchase price for the property is Eighty Three Thousand
no/100 Dollars (\$ 83,000.00) which shall be paid as follows

000.00 which represents the aforementioned EARNEST MONEY DEPOSIT
4,000.00 representing the approximate balance of CASH DOWN PAYMENT at closing
0 representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer,
 which obligation bears interest at 0 % per annum with monthly payments of \$ 0
 which include ☐ principal, ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees, ☐ other _____
0 representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be
 assumed by Buyer, which obligation bears interest at _____ % per annum with monthly payments of \$ _____
 which include ☐ principal, ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees, ☐ other _____
0 representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows _____

Other _____

83,000.00 TOTAL PURCHASE PRICE

EXHIBIT

2 (Moore)2-19-93

If Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best efforts
 assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing Buyer agrees
 make application within N/A days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at
 interest rate not to exceed N/A % If Buyer does not qualify for the assumption and/or financing within N/A days after Seller's acceptance
 this Agreement, this Agreement shall be voidable at the option of the Seller upon written notice Seller agrees to pay up to N/A mortgage loan discount
 points, not to exceed \$ N/A In addition, seller agrees to pay \$ N/A to be used for Buyer's other loan costs

EARNEST MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.

GENERAL PROVISIONS (Sections)

INCLUDED ITEMS. Unless excluded herein, this sale shall *include* all fixtures and any of the following items if presently attached to the property, plumbing, heating, conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter), fencing, trees and shrubs.

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 to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, inspection shall be allowed by Seller but arranged for and paid by Buyer.

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 been 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 and in satisfactory working condition at closing.

CONDITION OF WELL. Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

CONDITION OF SEPTIC TANK. Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

ACCELERATION CLAUSE. Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, the earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

i. TITLE INSPECTION. Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. Hereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

l. TITLE INSURANCE. If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and all encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

. EXISTING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing a copy of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

l. CHANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

3 CONDITION AND CONVEYANCE OF TITLE

late contract Transfer of Seller's ownership interest shall be made as set forth in Section S Seller agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein, evidenced by ☒ a current policy of title insurance in the amount of purchase price ☐ an abstract of title brought current, and an attorney's opinion (See Section H)

4 INSPECTION OF TITLE. In accordance with Section G Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants including condominium restrictions (CC & R's) Buyer ☐ has ☒ has not reviewed any condominium CC & R's prior to signing this Agreement.

5 VESTING OF TITLE. Title shall vest in Buyer as follows as directed at closing

6 SELLERS WARRANTIES In addition to warranties contained in Section C, the following items are also warranted None

exceptions to the above and Section C shall be limited to the following None

7. SPECIAL CONSIDERATIONS AND CONTINGENCIES This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing

closing fees to be paid half by buyer & half by seller

8 CLOSING OF SALE This Agreement shall be closed on or before May 2, 1994 at a reasonable location to be designated by Seller, subject to Section Q Upon demand Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with this Agreement Prorations set forth in Section R shall be made as of ☐ date of possession ☒ date of closing ☐ other _____

9 POSSESSION. Seller shall deliver possession to Buyer on May 2, 1994 unless extended by written agreement of parties

10 AGENCY DISCLOSURE At the signing of this Agreement the listing agent N/A represents () Seller () Buyer and the selling agent N/A represents () Seller () Buyer Buyer and Seller confirm that prior to signing this Agreement a disclosure of the agency relationship(s) was provided to him/her () () Buyer's initials () () Seller's initials

11 GENERAL PROVISIONS UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE

12 AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE Buyer offers to purchase the property on the above terms and conditions Seller shall have until 5:30 (AM/PM) Feb. 17, 19 94 to accept this offer Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer

Buyer's Signature [Signature] (Date) Feb. 17 (Address) SR Box 234 (Phone) 743-5170 (SSN/TAX ID) 368-34-517
Buyer's Signature _____ (Date) _____ (Address) _____ (Phone) _____ (SSN/TAX ID) _____

CHECK ONE
☒ ACCEPTANCE OF OFFER TO PURCHASE Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above
☐ REJECTION Seller hereby REJECTS the foregoing offer _____ (Seller's initials)
☐ COUNTER OFFER Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance Buyer shall have until _____ (AM/PM) _____, 19 _____ to accept the terms specified below

Seller's Signature Carol L Smith (Date) 2/15/94 (Time) 8:10 P.M. (Address) P.O. Box 985 (Phone) 743-5170 (SSN/TAX ID) 368-34-517
Seller's Signature Carol L Smith (Date) 2/15/94 (Time) 8:10 P.M. (Address) P.O. Box 985 (Phone) 743-5170 (SSN/TAX ID) 368-34-517

CHECK ONE
☐ ACCEPTANCE OF COUNTER OFFER Buyer hereby ACCEPTS the COUNTER OFFER
☐ REJECTION Buyer hereby REJECTS the COUNTER OFFER _____ (Buyer's Initials)
☐ COUNTER OFFER Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum

(Buyer's Signature) _____ (Date) _____ (Time) _____ (Buyer's Signature) _____ (Date) _____ (Time) _____

DOCUMENT RECEIPT
State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures (One of the following alternatives must therefore be completed)
A ☒ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures
SIGNATURE OF SELLER [Signature] Date 2/15/94
SIGNATURE OF BUYER [Signature] Date _____

B ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____, 19 _____ by Certified Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer Sent by _____

AUTHORITY OF SIGNATORS. If Buyer or Seller is a corporation, partnership, trust estate, or other entity, the person executing this Agreement on its behalf warrants or her authority to do so and to bind Buyer or Seller

COMPLETE AGREEMENT — NO ORAL AGREEMENTS. This instrument constitutes the entire agreement between the parties and supersedes and cancels any all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

COUNTER OFFERS. Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement expressly modified or excluded therein.

DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. 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. In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action.

ABROGATION. Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.

RISK OF LOSS. All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed.

TIME IS OF ESSENCE—UNAVOIDABLE DELAY. In the event that this sale cannot be closed by the date provided herein due to interruption of transport or flood, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein. Thereafter, time is of the essence. This provision relates only to the extension of closing dates. "Closing" shall mean the date on which all necessary instruments are signed and recorded by all parties to the transaction.

CLOSING COSTS. Seller and Buyer shall each pay one-half (½) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

REAL PROPERTY CONVEYANCING. If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those excluded herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, assigning Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein.

NOTICE. Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence of the event with respect to which notice is required. If any such timely required notice is not given, the contingency with respect to which the notice was to be given shall be automatically terminated and this Agreement is in full force and effect. If a person other than the Buyer or the Seller is designated to receive notice on behalf of the Buyer or the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice.

BROKERAGE. For purposes of this Agreement, any references to the term "Brokerage" shall mean the respective listing or selling real estate office.

DAYS. For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays.

END OF FOUR OF A FOUR PAGE FORM

ADDENDUM 8

FILED
Fourth Judicial District Court of
Millard County, State of Utah
CARMA B. SMITH, Clerk
8/16/01 Deputy

Gregory B. Hadley (3652)
James K. Haslam (6887)
HADLEY & ASSOCIATES
Attorneys for Plaintiffs
2696 North University Avenue Suite 200
Provo Utah 84604
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,

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.

ORDER

Civil No. 000700142 MI

Judge Fred Howard

Defendants' Motion for Summary Judgment came before this Court for decision pursuant to a Notice to Submit for Decision filed by the Defendants, and a hearing was held before the Court on May 31, 2001, concerning this motion and Plaintiffs' Alternative Motion for Leave to Amend Complaint. Appearing at the hearing were James K. Haslam, of Hadley & Associates, on behalf of Plaintiffs, and A. Bryce Dixon, of Dixon & Truman, on behalf of Defendants. The Court, having reviewed the motions and all memoranda, objections, and other materials filed in support and in opposition

10/18

thereto, and having heard oral arguments from the parties on the motions, and for good cause shown, hereby makes the following findings, conclusions, and rulings:

Pursuant to the common-law merger doctrine, execution and delivery of a deed by a seller usually renders any prior contractual terms extinguished and unenforceable. Although certain specific exceptions allow a party to avoid application of the merger doctrine, a claim for negligent misrepresentation relating to alleged construction defects in a building does not fall within any such exception. Accordingly, Plaintiffs' claim for negligent misrepresentation in this case is precluded as a matter of law by the merger doctrine as set forth in the case of Robinson v. Tripco Inv., Inc., 2000 UT App 200, 21 P.3d 219.

With respect to Plaintiffs' claims for fraudulent nondisclosure and fraudulent misrepresentation, the Court concludes that those causes of action, though not pleaded with great detail, have been pleaded in the Complaint with sufficient particularity by Plaintiffs satisfy the requirements of Rule 9 of the Utah Rules of Civil Procedure. In any event, the Court would grant Plaintiffs' motion to amend the Complaint to plead these causes of action with greater detail if Plaintiffs desired to do so. Moreover, the Court concludes that there are genuine issues of material fact with respect to these claims that precludes the granting of summary judgment. Finally, the Court further concludes that Defendants, as the sellers of the home in question, may have had a legal duty to

disclose to Plaintiffs any latent and material defects in the home, or building code violations, of which they were aware.

With respect to the remaining claims, the Court believes that the discovery rule should be applied to toll the statute of limitations, even as to contract-based claims, in situations where its application is not otherwise expressly prohibited by law.

Accordingly, the Court concludes, as a matter of law, that the discovery rule does apply in this case with respect to those defects that would be considered latent, and that there remain issues of fact with respect to when those defects should have reasonably been discovered. Therefore, summary judgment is not appropriate with respect to Plaintiffs' claims for breach of contract, rescission, and violations of the Consumer Sales Practices Act.

The Court will consider, at the close of all discovery, a motion for summary judgment by Defendants, based on their limitations defense.

Finally, over Plaintiffs' objection, the Court required Plaintiffs to make an election of remedies at the hearing between their contract-based claims asserting both a right to contractual damages and a right to rescission of the transaction. Plaintiffs elected to pursue the remedy of rescission.

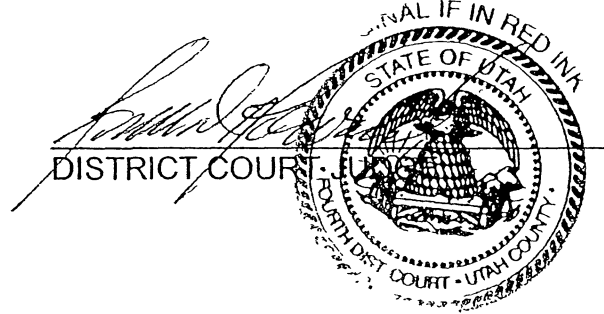
On the basis of the foregoing, the Court HEREBY ORDERS AS FOLLOWS:

1. Defendants' motion for summary judgment is granted as to Plaintiffs' claim of negligent misrepresentation, and that claim is hereby dismissed;

2. Defendants' motion for summary judgment is denied as to all other claims;
3. Plaintiffs may not seek monetary damages for breach of contract, but may pursue the remedy of rescission; and
4. No further motions for summary judgment will be considered by the Court until after the close of discovery.

DATED this 16th day of August, 2001.

BY THE COURT:



ADDENDUM 9

A. BRYCE DIXON, ESQ (#889)
AARON M. WAITE, ESQ (#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

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

WILLIAM MOORE and MARY MOORE,)	
	Plaintiffs,)
	)	ORDER ON DEFENDANTS' MOTION
	)	FOR SUMMARY JUDGMENT
vs.)	
	)	Civil No.: 000700142 MI
DAN SMITH, individually and as Trustee of	)	Judge: EYRE
the Dan Irvin Smith Inter Vivos Trust, and)	
CAROL SMITH, individually and as Trustee)	
of the Carol L. Smith Inter Vivos Trust,)	
	Defendants.)

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment came before the court on July 21, 2003.

Plaintiffs were represented by Gregory Hadley and defendants by Bryce Dixon. The court heard the arguments of counsel, read the briefs, took the matter under advisement and issued a "Memorandum Decision" dated August 21, 2003. Based on that decision the following is ordered adjudged and decreed:

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.

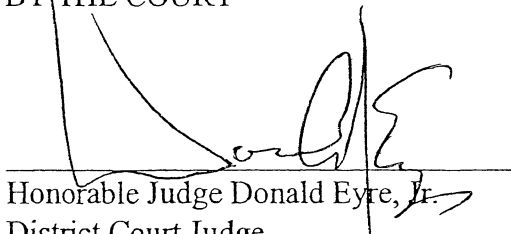
(Court's decision at page 5.) In addition, the court determines that defect items 12 and 38

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 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 a 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 defects is denied.
4. Defendants did not address the claim of fraudulent misrepresentation in their motion for summary judgment. The defendants did however mention that *Maack v. Resource Design & Construction, Inc.* 875 P.2d 570 (Utah App. 1994) disposed of a fraudulent misrepresentation claim. However, *Maack* decided that issue on whether there was a presently existing material fact. There was none in *Maack* but there are such issues in the instant case. Therefore, plaintiffs' fraudulent misrepresentation claims survive summary judgment.

DATED this 29th day of August, 2003.

BY THE COURT



Honorable Judge Donald Eyre, Jr.
District Court Judge

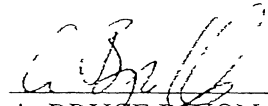
NOTICE TO DEFENDANTS' ATTORNEYS

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

You will please take notice that the undersigned, Attorney for Plaintiffs, will submit the above and foregoing ORDER ON September 11, 2003, HEARING to the Honorable Donald Eyre, Jr., for his signature, upon the expiration of five (5) days from the date of this Notice.

DATED this 29th day of August, 2003.

DIXON, TRUMAN & FISHER, P.C.

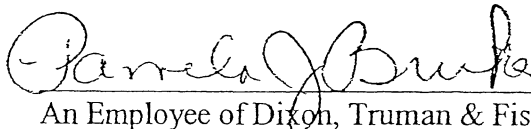


A. BRYCE DIXON, ESQ.
AARON M. WAITE, ESQ.
Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I do hereby certify that on the 29th day of August, 2003, 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 & Fisher, P.C.

ADDENDUM 10

2005 MAR 10 AM 10:19

FILED BY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR 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.

SPECIAL VERDICT

Civil #00700142 MI
Judge Donald J. Eyre

MEMBERS OF THE JURY:

Please answer the following questions considering all the evidence:

1. a) Do you find by a preponderance of the evidence that Dan and Carol
Smith breached their contract with William and Mary Moore?

Yes 8 No 0

b) If yes, what, if any, compensatory damages did the Plaintiff suffer as a
result thereof? \$ 30,680.00

c) If you answered "yes" to 1a above, do you find that the statute of
limitations barred or prohibited the Plaintiff's breach of contract claim?

Yes 0 No 8

2. a) Do you find by clear and convincing evidence that the Defendant, Dan
Smith, fraudulently failed to disclose the material defect involving the footings to the

Plaintiffs at or about the time of the sale of the house?

Yes 8 No 0

b) If yes, what, if any, compensatory damages did the Plaintiff suffer as a result thereof: \$ 30,680.00

c) If you answered "yes" to 2a above, do you find that the statute of limitations barred or prohibited the Plaintiff's fraudulent non-disclosure claim to the footings?

Yes 0 No 8

3. a) Do you find by clear and convincing evidence that the Defendant, Dan Smith, fraudulently failed to disclose the material defect involving the windows to the Plaintiffs at or about the time of the sale of the house?


Yes 0 No 8

b) If yes, what, if any, compensatory damages did the Plaintiff suffer as a result thereof: \$ 0

c) If you answered "yes" to 3a above, do you find that the statute of limitations barred or prohibited the Plaintiff's fraudulent non-disclosure claim as to the windows?

Yes _____ No _____

DATED this 9th day of March, 2005.

JEFF PINNE 
JURY FOREPERSON

FOURTH DISTRICT COURT-MILWAUKEE

2005 MAR 10 AM 10:21

SUPPLEMENTAL VERDICT FORM

FILED BY

4a Since you found the defendant liable for fraudulent nondisclosure, should punitive damages be assessed against the defendant, Dan Smith?

 Yes

 ☒ No

b. If yes, in what amount?

\$

Dated this 9 day of March, 2005.

 JEFF PAYNE
Foreperson

ADDENDUM 11

2005 MAR 10 AM 10:19

FILED BY

Gregory B. Hadley (3652)
 Counsel for Plaintiff
 2696 North University Avenue, #260
 Provo, Utah 84604
 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,

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

Defendants.

JUDGMENT

Civil No. 000700142 MI

Judge Donald J. Eyre

THIS ACTION came on for Trial before the Court and a Jury, Honorable Donald J. Eyre
 District Judge, presiding, and the issues having been duly tried and the Jury having duly rendered
 its verdict, it is ORDERED and ADJUDGED:

1. That Plaintiff recover from Defendants, jointly and severly, \$ 30,680.00
 with interest at the statutory rate.

DATED this 10th day of March 2005.



FORM 22, Utah Rules of Civil Procedure

1326

ADDENDUM 12

2005 JUL -6 PM 12:50

FILED BY

NG

Gregory B. Hadley (3652)
Counsel for Plaintiff
2696 North University Avenue, #260
Provo, Utah 84604
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.

**ORDER DENYING DEFENDANT'S
MOTION UNDER RULE 50 FOR A
JUDGMENT NOTWITHSTANDING
THE VERDICT OR IN THE
ALTERNATIVE FOR
REMITTITUR**

Civil No. 00700142 MI

Judge Donald J. Eyre

THIS MATTER came before the Court pursuant to Defendant's Motion Under Rule 50 for a Judgment Notwithstanding the Verdict or in the Alternative for Remittitur. The Court having reviewed the various memorandum on file and having heard oral argument on the Motion on June 6, 2005 stated it's ruling from the bench. There now being no just reason for delay and for good cause appearing the Court does hereby ORDER, ADJUDGE and DECREE as follows:

1. Defendant's Motion Under Rule 50 for a Judgment Notwithstanding the Verdict or in the Alternative for Remittitur is denied.

2373

DATED this 6th day of July 2005.

By the Court:



Ronald J. Eyre

CERTIFICATE OF SERVICE

I hereby certify that I hand-carried, a true and correct copy of the foregoing on this 24th day of June 2005 to the following:

ASCIONE, HEIDEMAN & McKAY, LLC
2696 N University Avenue, Suite 180
PO Box 600
Provo, UT 84604

Rebekah C. Scott



**CERTIFICATE
FOURTH DISTRICT COURT,
STATE OF UTAH
COUNTY OF MILLARD**

Norma Brunson, Clerk of the above named Court, certify that the foregoing is a full, true and correct copy of the original as filed and now of record in this office. Consisting of 2 pages. Dated this 12th day of May, 2006.
Signed Norma Brunson Clerk
by Chene Scott Deputy Clerk

2374

ADDENDUM 13

2005 JUL 19 AM 11:39

FILED BY JS

Gregory B. Hadley (3652)
 Counsel for Plaintiff
 2696 North University Avenue, #260
 Provo, Utah 84604
 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, 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.

**ORDER DENYING DEFENDANTS'
 RULE 60(b) MOTION TO SET
 ASIDE JUDGMENT**

Civil No. 000700142 MI

Judge Donald J. Eyre

THIS MATTER came before the Court pursuant to Defendants' Rule 60(b) Motion to Set Aside Judgment. The Court having reviewed the various memoranda on file and having heard oral argument on said Motion on June 6, 2005, entered it's written Ruling denying the Motion on July 6, 2005 with the Court directing Plaintiff's Counsel to prepare an Order consistent with said Ruling. There now being no just reason for delay and for good cause appearing the Court does hereby ORDER, ADJUDGE and DECREEE as follows:

3304

1. Defendants' Rule 60(b) Motion to Set Aside Judgment is denied

DATED this 18th day of July 2005

BY THE COURT



[Signature]
JUDGE DONALD J EYRE

APPROVED AS TO FORM:

[Signature]
Counsel for Defendants

CERTIFICATE
FOURTH DISTRICT COURT,
STATE OF UTAH
COUNTY OF MILLARD



Norma Brunson, Clerk of the above named Court, certify that the foregoing is a full, true and correct copy of the original as filed and now of record in this office. Consisting of 2 pages. Dated this 12th day of May, 2006. Signed Norma Brunson Clerk by Shene Scott Deputy Clerk

2355

ADDENDUM 14

2005 AUG 25 AM 9:05

FILED BY

Gregory B. Hadley (3652)
 Counsel for Plaintiff
 2696 North University Avenue, #260
 Provo, Utah 84604
 Telephone: (801) 377-4403
 Facsimile: (801) 377-4411

COPY

IN THE FOURTH JUDICIAL DISTRICT COURT OF 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,**

Defendants.

**ORDER ON PLAINTIFF'S MOTION
 FOR AN ORDER AWARDING
 ATTORNEY FEES, EXPENSES
 AND COSTS**

Civil No. 000700142 MI

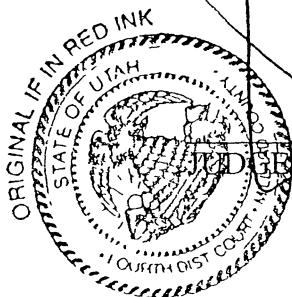
Judge Donald J. Eyre

THIS MATTER came before the Court pursuant to Plaintiff's Motion for an Order Awarding Attorney Fees, Expenses, and Costs. The Court having reviewed the various memoranda on file and having heard oral argument on said Motion on June 6, 2005, entered it's written Memorandum Decision on August 1, 2005. There now being no just reason for delay and for good cause appearing the Court does hereby ORDER, ADJUDGE and DECREE as follows:

1. Attorneys fees are awarded to Plaintiff in the amount of \$40,000.00.
2. Costs are awarded to Plaintiff in the amount of \$10,000.00.
3. The Judgment previously entered in the amount of \$30,680.00 is augmented in the amount of \$50,000.00 for a total Judgment in the amount of \$80,680.

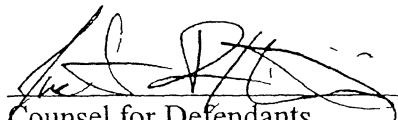
DATED this 25th day of August 2005.

BY THE COURT:




JUDGE DONALD J. EYRE

APPROVED AS TO FORM:


Counsel for Defendants

ADDENDUM 15

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART II. Actions, Venue, Limitation of Actions
CHAPTER 12. LIMITATION OF ACTIONS
ARTICLE 2. OTHER THAN REAL PROPERTY
Copyright © 1953, 1960-1963, 1966, 1968-1971, 1973, 1974, 1976-1978, 1981,
1982, 1984 by The Allen Smith Company; Copyright © 1986-1994 by The Michie
Company. All rights reserved.

78-12-25.5 Actions related to improvements in real property.

(1) As used in this section:

- (a) "action" means any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty that causes injury to persons or property, whether based in tort, contract, warranty, strict liability, indemnity, contribution, or other source of law;
- (b) "completion of improvement" means the date of substantial completion of an improvement to real property as established by a Certificate of Substantial Completion, a Certificate of Occupancy issued by a governing agency, or the date of first use or possession of the improvement, whichever is earliest;
- (c) "improvement" means any building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property;
- (d) "person" means an individual, corporation, partnership, joint venture, association, proprietorship, or any other legal or governmental entity; and
- (e) "provider" means any person contributing to, providing, or performing studies, plans, specifications, drawings, designs, value engineering, cost or quantity estimates, topographic surveys, staking, construction, and the review, observation, administration, management, supervision, inspections, and tests of construction for or in relation to an improvement.

(2) The Legislature finds that:

- (a) exposing a provider to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardships to the provider and the citizens of the state;
- (b) these costs and hardships include liability insurance costs, records storage costs, undue and unlimited liability risks during the life of both a provider and an improvement, and difficulties in defending against claims many years after completion of an improvement;
- (c) these costs and hardships constitute clear social and economic evils;
- (d) the possibility of injury and damage becomes highly remote and unexpected as to claims for breach of contract or warranty six years following completion of the improvement or the abandonment of construction and, as to all other claims, ten years following completion or abandonment;
- (e) it is in the best interests of the citizens of the state to impose the periods of repose provided in this chapter; and
- (f) it is in the best interests of the citizens of this state to impose a period of limitation requiring that an action against a provider be brought within a two-year period following discovery of the act, error, omission, or breach of duty that forms the basis of the action.

(3) An action against a provider shall be commenced within two years from the date of discovery of the act, error, omission, or breach of duty or the date upon which the act, error, omission, or breach of duty should have been discovered through reasonable diligence. If the act, error, omission, or breach of duty is discovered or discoverable before completion of the improvement or abandonment of construction, the two year period begins to run upon completion or abandonment.

(4) Subject to Subsection (3), no action for breach of contract or warranty may be commenced against a provider more than six years after completion of the improvement or abandonment of construction. In the event the act, error, omission, or breach of duty is discovered in the sixth year of the six year period, the injured person has two additional years from the date of discovery to commence an action.

(5) Subject to Subsections (3) and (4), no action may be commenced against a provider more than 12 years after completion of the improvement or abandonment of construction. In the event the act,

error, omission, or breach of duty is discovered in the twelfth year of the 12-year period, the injured person shall have two additional years from the date of discovery to commence an action.

(6) Subsections (4) and (5) do not apply to an action against a provider:

(a) who has fraudulently concealed the act, error, omission, or breach of duty;

(b) for a willful or intentional act, error, omission, or breach of duty; or

(c) for breach of a written express warranty where the warranty period extends beyond six years as provided in Subsection (4).

(7) If a person otherwise entitled to bring an action did not commence the action within the periods prescribed by Subsections (4) and (5) solely because that person was a minor or mentally incompetent and without a legal guardian, that person shall have two years from the date the disability is removed to commence the action.

(8) The time limitation imposed by this section shall not apply to any action against any person in actual possession or control of the improvement as owner, tenant, or otherwise, at the time any defective or unsafe condition of the improvement proximately causes the injury for which the action is brought.

(9) This section does not extend the period of limitation or repose otherwise prescribed by law or a valid and enforceable contract.

(10) This section applies to all claims and causes of action that accrue after April 29, 1991, notwithstanding that the act, error, omission, or breach of duty occurred, or the improvement was completed or abandoned before April 29, 1991.

History: C. 1953, **78-12-25.5**, enacted by L. 1991, ch. 290, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. -- Laws 1991, ch. 290, § 1 repeals former § **78-12- 25.5**, as last amended by Laws 1988, ch. 61, § 1, relating to the seven-year limitation on actions for injuries due to defective improvements to real property, effective April 29, 1991, and enacts the present section.

Cross-References. -- Product Liability Act, statute of limitations, § 78-15- 3.

Wrongful death, §§ 78-11-6, 78-11-7.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Discovery doctrine.

Statute of repose.

Cited.

Constitutionality.

Seven-year limitation was applicable to the owner or tenant in possession at time of construction, or to their successors; those in possession and control of realty had a continuing duty to make repairs, and should discover any fault in construction within seven years; claim that the statute is unconstitutional is without merit. *Good v. Christensen*, 527 P.2d 223 (Utah 1974).

The former section violated the open courts provision of the Utah constitution (Utah Const. art. I, § 11) because it did not provide an injured person with an effective and reasonable alternative remedy for vindication of his or her constitutional interest, and abrogation of the remedy is arbitrary and unreasonable. *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son*, 782 P.2d 188 (Utah 1989).

The former section denied a remedy for injury to one's person or property when the injury was caused by a latent defect and was therefore unconstitutional under the open courts provision of the Utah constitution (Utah Const. art. I, § 11). *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989).

Discovery doctrine.

The discovery doctrine was inapposite in an action for injuries sustained when plaintiffs struck a pole

on a city-constructed sled-run, where the defect, if it was such, was patent, and there was no injury inflicted that was unknown at the time of its infliction. *Jackson v. Layton City*, 743 P.2d 1196 (Utah 1987).

Statute of repose.

The former section was a statute of repose, and not a statute of limitations, because it barred all actions against planners, designers, and builders of improvements to real property for injuries occurring after seven years from the date of construction, as well as actions based on injuries occurring within the seven-year period if no action is filed within that period. *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989).

Cited in *Katsos v. Salt Lake City Corp.*, 634 F. Supp. 100 (D. Utah 1986); *Lichtefeld v. Cutshaw*, 784 P.2d 143 (Utah 1989); *Stilling v. Skankey*, 784 P.2d 144 (Utah 1989).

COLLATERAL REFERENCES

Am.Jur.2d. -- 13 Am. Jur. 2d Building and Construction Contracts § 114.

A.L.R. -- What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor, 1 A.L.R.3d 914.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants, 11 A.L.R.5th 438.

Key Numbers. -- Limitation of Actions ✎55(3).

U.C.A. 1953 § **78-12-25.5**

UT ST § **78-12-25.5**

END OF DOCUMENT

ADDENDUM 16

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART II. Actions, Venue, Limitation of Actions
CHAPTER 12. LIMITATION OF ACTIONS
ARTICLE 2. OTHER THAN REAL PROPERTY
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78-12-25.5 Actions related to improvements in real property.

(1) As used in this section:

- (a) "Action" means any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty that causes injury to persons or property, whether based in tort, contract, warranty, strict liability, indemnity, contribution, or other source of law.
- (b) "Completion of improvement" means the date of substantial completion of an improvement to real property as established by the earliest of:
 - (i) a Certificate of Substantial Completion;
 - (ii) a Certificate of Occupancy issued by a governing agency;
 - (iii) the date of first use or possession of the improvement; or
 - (iv) the date the map of the survey is filed under Section 17-23-17 with respect to real property.
- (c) "Improvement" means any building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property.
- (d) "Person" means an individual, corporation, partnership, joint venture, association, proprietorship, or any other legal or governmental entity.
- (e) "Provider" means any person contributing to, providing, or performing studies, plans, specifications, drawings, designs, value engineering, cost or quantity estimates, surveys, staking, construction, and the review, observation, administration, management, supervision, inspections, and tests of construction for or in relation to an improvement.

(2) The Legislature finds that:

- (a) exposing a provider to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardships to the provider and the citizens of the state;
- (b) these costs and hardships include liability insurance costs, records storage costs, undue and unlimited liability risks during the life of both a provider and an improvement, and difficulties in defending against claims many years after completion of an improvement;
- (c) these costs and hardships constitute clear social and economic evils;
- (d) the possibility of injury and damage becomes highly remote and unexpected as to claims for breach of contract or warranty six years following completion of the improvement or the abandonment of construction and, as to all other claims, ten years following completion or abandonment;
- (e) it is in the best interests of the citizens of the state to impose the periods of repose provided in this chapter; and
- (f) it is in the best interests of the citizens of this state to impose a period of limitation requiring that an action against a provider be brought within a five-year period following discovery of the act, error, omission, or breach of duty that forms the basis of the action.

- (3) (a) An action against a provider shall be commenced within five years from the date of discovery of the act, error, omission, or breach of duty or the date upon which the act, error, omission, or breach of duty should have been discovered through reasonable diligence.
- (b) If the act, error, omission, or breach of duty is discovered or discoverable before completion of the improvement or abandonment of construction, the five-year period begins to run upon completion or abandonment.

- (4) Subject to Subsection (3), no action for breach of contract or warranty may be commenced against a provider more than six years after completion of the improvement or abandonment of construction. In the event the act, error, omission, or breach of duty is discovered in the first through the sixth year of the six-year period, the injured person has five additional years from the date of discovery to commence an action.

(5) Subject to Subsections (3) and (4), no action may be commenced against a provider more than 12 years after completion of the improvement or abandonment of construction. In the event the act, error, omission, or breach of duty is discovered in the seventh through the twelfth year of the 12-year period, the injured person shall have five additional years from the date of discovery to commence an action.

(6) Subsections (4) and (5) do not apply to an action against a provider:

(a) who has fraudulently concealed the act, error, omission, or breach of duty;

(b) for a willful or intentional act, error, omission, or breach of duty; or

(c) for breach of a written express warranty where the warranty period extends beyond six years as provided in Subsection (4).

(7) If a person otherwise entitled to bring an action did not commence the action within the periods prescribed by Subsections (4) and (5) solely because that person was a minor or mentally incompetent and without a legal guardian, that person shall have two years from the date the disability is removed to commence the action.

(8) The time limitation imposed by this section shall not apply to any action against any person in actual possession or control of the improvement as owner, tenant, or otherwise, at the time any defective or unsafe condition of the improvement proximately causes the injury for which the action is brought.

(9) This section does not extend the period of limitation or repose otherwise prescribed by law or a valid and enforceable contract.

(10) This section applies to all claims and causes of action that accrue after April 29, 1991, notwithstanding that the act, error, omission, or breach of duty occurred, or the improvement was completed or abandoned before April 29, 1991.

History: C. 1953, **78-12-25.5**, enacted by L. 1991, ch. 290, § 1; 1997, ch. 149, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. -- Laws 1991, ch. 290, § 1 repeals former § **78-12- 25.5**, as last amended by Laws 1988, ch. 61, § 1, relating to the seven-year limitation on actions for injuries due to defective improvements to real property, effective April 29, 1991, and enacts the present section.

Amendment Notes. -- The 1997 amendment, effective May 5, 1997, subdivided Subsection (1)(b) and added Subsection (1)(b)(iv); deleted "topographic" before "surveys" in Subsection (1)(e); substituted "five-year period" for "two-year period" in Subsections (2)(f) and (3)(b), "five years" for "two years" in Subsection (3)(a), and "five additional years" for "two additional years" in Subsections (4) and (5); substituted "first through the sixth year" for "sixth year" in Subsection (4) and "seventh through the twelfth year" for "twelfth year" in Subsection (5); and made stylistic changes.

Cross-References. -- Product Liability Act, statute of limitations, § 78- 15-3.
Wrongful death, §§ 78-11-6, 78-11-7.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Discovery doctrine.
Statute of repose.
Cited.

Constitutionality.
Seven-year limitation was applicable to the owner or tenant in possession at time of construction, or to their successors; those in possession and control of realty had a continuing duty to make repairs, and should discover any fault in construction within seven years; claim that the statute is unconstitutional is without merit. *Good v. Christensen*, 527 P.2d 223 (Utah 1974).
The former section violated the open courts provision of the Utah constitution (Utah Const. art. I, § 11) because it did not provide an injured person with an effective and reasonable alternative remedy

for vindication of his or her constitutional interest, and abrogation of the remedy is arbitrary and unreasonable. *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son*, 782 P.2d 188 (Utah 1989).

The former section denied a remedy for injury to one's person or property when the injury was caused by a latent defect and was therefore unconstitutional under the open courts provision of the Utah constitution (Utah Const. art. I, § 11). *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989).

Discovery doctrine.

The discovery doctrine was inapposite in an action for injuries sustained when plaintiffs struck a pole on a city-constructed sled-run, where the defect, if it was such, was patent, and there was no injury inflicted that was unknown at the time of its infliction. *Jackson v. Layton City*, 743 P.2d 1196 (Utah 1987).

Statute of repose.

The former section was a statute of repose, and not a statute of limitations, because it barred all actions against planners, designers, and builders of improvements to real property for injuries occurring after seven years from the date of construction, as well as actions based on injuries occurring within the seven-year period if no action is filed within that period. *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989).

Cited in *Katsos v. Salt Lake City Corp.*, 634 F. Supp. 100 (D. Utah 1986); *Lichtefeld v. Cutshaw*, 784 P.2d 143 (Utah 1989); *Stilling v. Skankey*, 784 P.2d 144 (Utah 1989).

COLLATERAL REFERENCES

Am.Jur.2d. -- 13 Am. Jur. 2d Building and Construction Contracts § 114.

A.L.R. -- What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor, 1 A.L.R.3d 914.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants, 11 A.L.R.5th 438.

U.C.A. 1953 § **78-12-25.5**

UT ST § **78-12-25.5**

END OF DOCUMENT

ADDENDUM 17

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART II. Actions, Venue, Limitation of Actions
CHAPTER 12. LIMITATION OF ACTIONS
ARTICLE 1. REAL PROPERTY

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78-12-21.5 Actions related to improvements in real property.

(1) As used in this section:

(a) "Abandonment" means that there has been no design or construction activity on the improvement for a continuous period of one year.

(b) "Action" means any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty arising out of or related to the design, construction, or installation of an improvement, whether based in tort, contract, warranty, strict liability, indemnity, contribution, or other source of law.

(c) "Completion of improvement" means the date of substantial completion of an improvement to real property as established by the earliest of:

(i) a Certificate of Substantial Completion;

(ii) a Certificate of Occupancy issued by a governing agency; or

(iii) the date of first use or possession of the improvement.

(d) "Improvement" means any building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property.

(e) "Person" means an individual, corporation, limited liability company, partnership, joint venture, association, proprietorship, or any other legal or governmental entity.

(f) "Provider" means any person contributing to, providing, or performing studies, plans, specifications, drawings, designs, value engineering, cost or quantity estimates, surveys, staking, construction, and the review, observation, administration, management, supervision, inspections, and tests of construction for or in relation to an improvement.

(2) The Legislature finds that:

(a) exposing a provider to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardships to the provider and the citizens of the state;

(b) these costs and hardships include liability insurance costs, records storage costs, undue and unlimited liability risks during the life of both a provider and an improvement, and difficulties in defending against claims many years after completion of an improvement;

(c) these costs and hardships constitute clear social and economic evils;

(d) the possibility of injury and damage becomes highly remote and unexpected ten years following completion or abandonment;

(e) except as provided in Subsection (7), it is in the best interests of the citizens of the state to impose the periods of limitation and repose provided in this chapter upon all causes of action by or against a provider arising out of or related to the design, construction, or installation of an improvement.

(3) (a) 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. Where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period.

(b) 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. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

(4) Notwithstanding Subsection (3)(b), an action may not be commenced against a provider more than 12 years after completion of the improvement or abandonment of construction. In the event the

cause of action is discovered or discoverable in the eleventh or twelfth year of the 12-year period, the injured person shall have two additional years from that date to commence an action.

(5) Subsection (4) does not apply to an action against a provider:

(a) who has fraudulently concealed his act, error, omission, or breach of duty, or the injury, damage, or other loss caused by his act, error, omission, or breach of duty; or

(b) for a willful or intentional act, error, omission, or breach of duty.

(6) If a person otherwise entitled to bring an action did not commence the action within the periods prescribed by Subsections (3) and (4) solely because that person was a minor or mentally incompetent and without a legal guardian, that person shall have two years from the date the disability is removed to commence the action.

(7) This section shall not apply to an action for the death of or bodily injury to an individual while engaged in the design, installation, or construction of an improvement.

(8) The time limitation imposed by this section shall not apply to any action against any person in actual possession or control of the improvement as owner, tenant, or otherwise, at the time any defective or unsafe condition of the improvement proximately causes the injury for which the action is brought.

(9) This section does not extend the period of limitation or repose otherwise prescribed by law or a valid and enforceable contract.

(10) This section does not create or modify any claim or cause of action.

(11) This section applies to all causes of action that accrue after May 3, 1998, notwithstanding that the improvement was completed or abandoned before May 3, 1999.

History: C. 1953, 78-12-25.5, enacted by L. 1991, ch. 290, § 1; 1997, ch. 149, § 1; renumbered by L. 1999, ch. 123, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. --Laws 1991, ch. 290, § 1 repeals former § 78-12- 25.5, as last amended by Laws 1988, ch. 61, § 1, relating to the seven-year limitation on actions for injuries due to defective improvements to real property, effective April 29, 1991, and enacts the present section.

Amendment Notes. --The 1997 amendment, effective May 5, 1997, subdivided Subsection (1)(b) and added Subsection (1)(b)(iv); deleted "topographic" before "surveys" in Subsection (1)(e); substituted "five-year period" for "two-year period" in Subsections (2)(f) and (3)(b), "five years" for "two years" in Subsection (3)(a), and "five additional years" for "two additional years" in Subsections (4) and (5); substituted "first through the sixth year" for "sixth year" in Subsection (4) and "seventh through the twelfth year" for "twelfth year" in Subsection (5); and made stylistic changes.

The 1999 amendment, effective May 3, 1999, renumbered this section, which formerly appeared as 78-12-25.5, and rewrote the section.

Cross-References. --Product Liability Act, statute of limitations, § 78- 15-3.
Wrongful death, §§ 78-11-6, 78-11-7.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Applicability.

Discovery doctrine.

Express warranty.

Running of statute.

Statute of repose.

Cited.

Constitutionality.

Former seven-year limitation was applicable to the owner or tenant in possession at time of construction, or to his successors; those in possession and control of realty had a continuing duty to

make repairs, and should discover any fault in construction within seven years; claim that the statute was unconstitutional was without merit. *Good v. Christensen*, 527 P.2d 223 (Utah 1974).

The former section violated the open courts provision of the Utah constitution (Utah Const. art. I, § 11) because it did not provide an injured person with an effective and reasonable alternative remedy for vindication of his or her constitutional interest, and abrogation of the remedy is arbitrary and unreasonable. *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son*, 782 P.2d 188 (Utah 1989).

The former section denied a remedy for injury to one's person or property when the injury was caused by a latent defect and was therefore unconstitutional under the open courts provision of the Utah constitution (Utah Const. art. I, § 11). *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989).

Given the legislative intent in enacting this section, and the remote chance of injury or damage after a period of years, the statute is not an arbitrary or unreasonable means of eliminating the stated evils, and is constitutional under the open courts clause of the state constitution. *Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194 (Utah 1999).

Applicability.

This statute applies to products liability actions when they relate to improvements in real property. *Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194 (Utah 1999).

This section merely prescribes certain situations to which the periods of repose do not apply; it does not purport to set up a substitute remedy. *Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194 (Utah 1999).

Discovery doctrine.

The discovery doctrine was inapposite in an action for injuries sustained when plaintiffs struck a pole on a city-constructed sled-run, where the defect, if it was such, was patent, and there was no injury inflicted that was unknown at the time of its infliction. *Jackson v. Layton City*, 743 P.2d 1196 (Utah 1987).

Express warranty.

Without evidence of an express warranty period, let alone one extending beyond six years, plaintiff was unable to satisfy this section. *Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194 (Utah 1999).

Running of statute.

Plaintiff's slander of title and tortious interference claims against a builder did not accrue until after the house was sold at a foreclosure sale by the bank, when plaintiff first became able to demonstrate special damages. *Valley Colour, Inc., v. Beuchert Bldrs., Inc.*, 944 P.2d 361 (Utah 1997).

Proviso in Subsections (4) and (5) that both are "subject to" the discovery provision of Subsection (3) means that if an injured party discovers, or should have discovered, his cause of action before the end of the repose periods, then the applicable time period is the discovery limitations period and not the six-or twelve-year period of the statutes of repose. *Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194 (Utah 1999).

Statute of repose.

The former section was a statute of repose, and not a statute of limitations, because it barred all actions against planners, designers, and builders of improvements to real property for injuries occurring after seven years from the date of construction, as well as actions based on injuries occurring within the seven-year period if no action is filed within that period. *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989).

Fifteen year time between construction of building and collapse of its roof barred a cause of action because this section acts not as a statute of limitation but as a statute of repose, for which latency of a defect does not toll the limitation period. *Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194 (Utah 1999).

Where a faulty electrical system in an apartment building caused a fire approximately eighteen years after it was built, this section barred the plaintiffs' action. *Olsen v. McMillen Elec.*, 364 Utah Adv. Rep. 51 (Utah 1999).

Cited in Katsos v. Salt Lake City Corp., 634 F. Supp. 100 (D. Utah 1986); Lichtefeld v. Cutshaw, 784 P.2d 143 (Utah 1989); Stilling v. Skankey, 784 P.2d 144 (Utah 1989).

COLLATERAL REFERENCES

Am.Jur.2d. --13 Am. Jur. 2d Building and Construction Contracts § 114.

A.L.R. --What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor, 1 A.L.R.3d 914.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants, 11 A.L.R.5th 438.

U.C.A. 1953 § **78-12-21.5**

UT ST § **78-12-21.5**

END OF DOCUMENT

ADDENDUM 18

WEST'S UTAH CODE ANNOTATED

TITLE 78. JUDICIAL CODE

PART II. ACTIONS, VENUE, LIMITATION OF ACTIONS

CHAPTER 12. LIMITATION OF ACTIONS

ARTICLE 1. REAL PROPERTY

§ 78-12-21.5. Actions related to improvements in real property

(1) As used in this section:

- (a) "Abandonment" means that there has been no design or construction activity on the improvement for a continuous period of one year.
- (b) "Action" means any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty arising out of or related to the design, construction, or installation of an improvement, whether based in tort, contract, warranty, strict liability, indemnity, contribution, or other source of law.
- (c) "Completion of improvement" means the date of substantial completion of an improvement to real property as established by the earliest of:
 - (i) a Certificate of Substantial Completion;
 - (ii) a Certificate of Occupancy issued by a governing agency; or
 - (iii) the date of first use or possession of the improvement.
- (d) "Improvement" means any building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property.
- (e) "Person" means an individual, corporation, limited liability company, partnership, joint venture, association, proprietorship, or any other legal or governmental entity.
- (f) "Provider" means any person contributing to, providing, or performing studies, plans, specifications, drawings, designs, value engineering, cost or quantity estimates, surveys, staking, construction, and the review, observation, administration, management, supervision, inspections, and tests of construction for or in relation to an improvement.

(2) The Legislature finds that:

- (a) exposing a provider to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardships to the provider and the citizens of the state;
- (b) these costs and hardships include liability insurance costs, records storage costs, undue and unlimited liability risks during the life of both a provider and an improvement, and difficulties in defending against claims many years after completion of an improvement;
- (c) these costs and hardships constitute clear social and economic evils;
- (d) the possibility of injury and damage becomes highly remote and unexpected seven years following completion or abandonment; and
- (e) except as provided in Subsection (7), it is in the best interests of the citizens of the state to impose the periods of limitation and repose provided in this chapter upon all causes of action by or against a provider arising out of or related to the design, construction, or installation of an improvement.

(3)(a) 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. Where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period.

- (b) 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. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

(4) Notwithstanding Subsection (3)(b), an action may not be commenced against a provider more than nine years after completion of the improvement or abandonment of construction. In the event the cause of action is discovered or discoverable in the eighth or ninth year of the nine-year period, the injured person shall have two additional years from that date to commence an action.

(5) Subsection (4) does not apply to an action against a provider:

- (a) who has fraudulently concealed his act, error, omission, or breach of duty, or the injury, damage, or other loss caused by his act, error, omission, or breach of duty; or
- (b) for a willful or intentional act, error, omission, or breach of duty.

(6) If a person otherwise entitled to bring an action did not commence the action within the periods prescribed by Subsections (3) and (4) solely because that person was a minor or mentally incompetent and without a legal guardian, that person shall have two years from the date the disability is removed to commence the action.

(7) This section shall not apply to an action for the death of or bodily injury to an individual while engaged in the design, installation, or construction of an improvement.

(8) The time limitation imposed by this section shall not apply to any action against any person in actual possession or control of the improvement as owner, tenant, or otherwise, at the time any defective or unsafe condition of the improvement proximately causes the injury for which the action is brought.

(9) This section does not extend the period of limitation or repose otherwise prescribed by law or a valid and enforceable contract.

(10) This section does not create or modify any claim or cause of action.

(11) This section applies to all causes of action that accrue after May 3, 2003, notwithstanding that the improvement was completed or abandoned before May 3, 2004.

Laws 1991, c. 290, § 1; Laws 1997, c. 149, § 1, eff. May 5, 1997; Laws 1999, c. 123, § 1, eff. May 3, 1999; Laws 2004, c. 327, § 1, eff. May 3, 2004.

Codifications C. 1953, § 78-12-25.5.

HISTORICAL AND STATUTORY NOTES

Laws 2004, c. 327, in subsec. (4) substituted "nine" for "12" throughout and substituted "eighth or ninth" for "eleventh or twelfth"; in subsec. (11) substituted "2003" for "1998" and "2004" for "1999".

CROSS REFERENCES

Product liability, see § 78-15-3.

Survival of actions, see § 78-11-12.

Wrongful death, statute of limitations, see § 78-12-28.

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Limitation of Actions ¶ 10, 95(16), 95(7).

Westlaw Key Number Searches: 241k10; 241k95(16); 241k95(7); 95k329; 92Hk37.

C.J.S. Architects § 39.

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1 A.L.R. 3rd 914, What Statute of Limitations Governs Action by Contractee for Defective or Improper Performance of Work by Private Building Contractor.

Encyclopedias

Am. Jur.2d Products Liability § 1630, Generally.

Am. Jur.2d Products Liability § 1632, Validity.

Treatises and Practice Aids

American Law of Products Liability 3d § 47:77, Introduction.

American Law of Products Liability 3d § 47.79, Relationship to Other Statutes

American Law of Products Liability 3d § 47:80, Validity of Repose Legislation.

American Law of Products Liability 3d § 47:83, Parties in Possession or Control of Property.

American Law of Products Liability 3d § 47:84, Exclusion of Fraud Cases.

American Law of Products Liability 3d § 47:85, Commencement of Statutory Period Leading to Repose.

American Law of Products Liability 3d § 47:86, Tolling and Extension of Time Limitation Period Express Warranty.

American Law of Products Liability 3d § 47:89, Infancy, Mental Incompetency, or Imprisonment.

Bruner and O'Connor on Construction Law § 12:22, Duration of Performance Bond Obligation.

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1. Validity

Builders statute of repose limiting period in which to bring actions for injury arising from improvements to real property, while not providing adequate alternative remedy, sought to eliminate clear social and economic evils of costs to construction industry of liability insurance and records storage in reasonable and nonarbitrary manner, and thus did not violate open courts clause of State Constitution. Const. Art. 1, § 11; U.C.A.1953, 78-12-25.5. Craftsman Builder's Supply, Inc v Butler Mfg. Co., 1999, 974 P.2d 1194, 364 Utah Adv. Rep. 22, 1999 UT 18. Constitutional Law ¶ 328; Limitation Of Actions ¶ 4(2)

Remand of suit by injured golfer for new trial was required on limitations issue, given intervening state Supreme Court ruling in another case that applicable architects and builders statute of repose was unconstitutional. U.C.A.1953, 78-12-25.5; Const. Art. 1, § 11. Klatt v Thomas, 1990, 788 P.2d 510. Appeal And Error ¶ 1177(1)

Architects and builders statute of repose violates open court's provision of Utah's Constitution in that it does not provide injured person with effective and reasonable alternative remedy for vindication of his or her constitutional interest, and elimination of cause of action was arbitrary and unreasonable means of achieving statutory objective of limiting stale claims and protecting construction industry from perpetual liability. Const. Art. 1, § 11; U.C.A.1953, 78-12-25.5. Horton v. Goldminer's Daughter, 1989, 785 P.2d 1087. Constitutional Law ¶ 328; Limitation Of Actions ¶ 4(2)

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Statute, which provides that no action to recover for damages arising out of defective or unsafe condition of an improvement to real property may be brought more than seven years after completion of the construction but which contains an exemption for persons who are in actual possession and control as owners of the improvement at the time that the defective and unsafe condition constitutes the proximate cause of an injury, is not unconstitutional. U.C.A.1953, 78-12-25.5. Good v. Christensen, 1974, 527 P.2d 223. Limitation Of Actions ¶ 4(2)

2. Construction and application

In action alleging taking of plaintiffs' property by low-level overflights and concomitant noise, there was genuine issue of material fact as to applicability of Utah seven-year statute of limitations and whether some or all of plaintiffs' remaining properties not directly beneath approach-departure corridor had also been taken, precluding summary judgment. U.C.A. 1953, 78-12-25.5; 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14. Katsos v. Salt Lake City Corp., 1986, 634 F.Supp. 100. Federal Civil Procedure ¶ 2498.3

Statute providing two-year limitations period for actions to recover for injury to person or property does not apply to actions to recover for purely economic injury. U.C.A.1953, 78-12-25.5. Cathco v. Valentiner Crane Brunjies Onyon Architects, 1997, 944 P.2d 365, 324 Utah Adv. Rep. 23. Limitation Of Actions ¶ 30

3. Statutory amendments

Validity of caselaw precedent holding that economic damages did not constitute "injury to persons or property" for purposes of two-year limitations period to recover for such injuries was not affected by subsequent amendments to relevant statute, where phrase "injury to persons or property" was not altered. U.C.A.1953, 78-12-25.5. Cathco v. Valentiner Crane Brunjies Onyon Architects, 1997, 944 P.2d 365, 324 Utah Adv. Rep. 23. Limitation Of Actions ¶ 30

4. Limitations statute applicable

Builders statute of repose, and not products liability statute of limitations, applies to products liability actions which relate to improvements in real property. U.C.A.1953, 78-12-22.5, 78-15-3. Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 1999, 974 P.2d 1194, 364 Utah Adv. Rep. 22, 1999 UT 18. Limitation Of Actions ¶ 30

Builders statute of repose, and not products liability statute of limitations, applied to products liability claims asserted against manufacturer of prefabricated metal building, and contractor which installed building, by building's owner after roof of building collapsed from weight of snow. U.C.A.1953, 78-12-22.5, 78-15-3. Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 1999, 974 P.2d 1194, 364 Utah Adv. Rep. 22, 1999 UT 18. Limitation Of Actions ¶ 32(1)

Breach of contract action by real estate development company against architects to recover economic damages in connection with remodeling project was governed by six-year limitations period applicable to actions founded upon an instrument in writing, rather than by two-year limitations period governing actions to recover for injury to persons or property, including those based on contract theory. U.C.A. 1953, 78-12-23(2), 78-12-25.5 Cathco v. Valentiner Crane Brunjies Onyon Architects, 1997, 944 P.2d 365, 324 Utah Adv. Rep. 23. Limitation Of Actions ¶ 24(1)

Statute providing six-year limitation period for action for liability founded upon an instrument in writing does not conflict with statute providing two-year limitation period for action to recover for injury to person or property, even though latter statute explicitly purports to cover actions based on contract theory, because two-year limitation period does not apply to purely economic injuries. U.C.A.1953, 78-12-23(2), 78-12-25.5 Cathco v. Valentiner Crane Brunjies Onyon Architects, 1997, 944 P.2d 365, 324 Utah Adv. Rep. 23. Limitation Of Actions ¶ 24(1); Limitation Of Actions ¶ 30

5. Commencement of period of limitations

Even assuming that property owner's claims against contractor that it had hired to perform remodeling work, for contractor's alleged slander of title and tortious interference in filing mechanic's lien on property, were subject to two-year statute of limitations on claims against provider of real estate design or construction services for "injury to persons or property," statute of limitations did not begin to run when contractor first filed its mechanic's lien, but only when property was sold at reduced price, when special damages sustained by property owner could be ascertained. U.C.A.1953, 78-12-25.5(3). Valley Colour, Inc. v. Beuchert Builders, Inc., 1997, 944 P.2d 361, 324 Utah Adv. Rep. 26. Limitation Of Actions ¶ 55(1); Limitation Of Actions ¶ 55(5)

Seven-year limitation period for injuries caused by defective or unsafe improvement to real property began to run when all construction and improvements on city's tubing hill were completed, even if statute could be applied to city as "improver" of hill. U.C.A.1953, 78-12-25.5. Jackson v. Layton City, 1987, 743 P.2d 1196. Limitation Of Actions ¶ 55(4)

Under statute requiring claims for damage to real property caused during construction of

improvements to be brought within seven years of completion of construction, the limitations period for consultant engineer's alleged negligence in supervising the construction of a water well commenced running at the completion of construction and not at the time of discovery of negligence. U.C.A 1953, 78-12-25 5 Hooper Water Improvement Dist v Reeve, 1982, 642 P 2d 745. Limitation Of Actions ↵ 55(5); Limitation Of Actions ↵ 95(10.1)

6. Improvement

Developer's activities in determining the boundaries, size, location, and placement of the Plat B lands were not an "improvement to real property" within the meaning of statute of repose barring action against provider more than twelve years after completion of the improvement or abandonment of construction; the activities did not constitute a building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property. U.C.A 1953, 78-12-25 5(1)(c, e), (5) (1998). State Farm Fire & Cas Co v Sundance Development Corp., 2003, 78 P.3d 995, 485 Utah Adv. Rep. 32, 2003 UT App 367, rehearing denied, certiorari denied 90 P.3d 1041. Limitation Of Actions ↵ 30

The definition of "improvement" under the statute of repose barring action against provider more than twelve years after completion of the improvement or abandonment of construction focuses upon the activity of a provider and, therefore, contemplates more than determining the boundaries, size, location, and placement of lands. U.C.A 1953, 78-12-25 5(1)(c, e), (5) (1998). State Farm Fire & Cas. Co. v. Sundance Development Corp., 2003, 78 P.3d 995, 485 Utah Adv. Rep. 32, 2003 UT App 367, rehearing denied, certiorari denied 90 P.3d 1041. Limitation Of Actions ↵ 30

7. Completion of improvement

Developer's filing of plat did not result in completion of improvement and improvement within the meaning of statute of repose barring action against provider more than twelve years after completion of the improvement or abandonment of construction. U.C.A.1953, 78-12-25.5(1)(b)(iv), (1)(c), (5) (1998). State Farm Fire & Cas Co v Sundance Development Corp., 2003, 78 P.3d 995, 485 Utah Adv. Rep. 32, 2003 UT App 367, rehearing denied, certiorari denied 90 P.3d 1041. Limitation Of Actions ↵ 30

8. Provider

One cannot be a provider within the meaning of statute of repose barring action against provider more than twelve years after completion of the improvement or abandonment of construction, unless the activity listed in the definition of a provider is performed for, or in relation to, an improvement; thus, while surveying and staking for or in relation to an improvement may implicate the statute of repose, surveying and staking for some other purpose does not amount to an improvement, and the surveyor or staker will not come within the definition of provider in such situations. U.C.A.1953, 78-12-25.5(1)(c, e), (5) (1998). State Farm Fire & Cas. Co. v. Sundance Development Corp., 2003, 78 P.3d 995, 485 Utah Adv. Rep. 32, 2003 UT App 367, rehearing denied, certiorari denied 90 P.3d 1041. Limitation Of Actions ↵ 30

9. Subsequent purchaser rights

Under statute which provided that no action to recover for damages arising out of defective and unsafe condition of improvement of real property could be brought more than seven years after the completion of the construction and which also provided that the limitation would not apply to any person in actual possession and control of the improvement at the time that the defective and unsafe condition of such improvement constitutes the proximate cause of injury, owners who purchased house from former owners who had had carport built on to the house could not, more than seven years after the carport was completed, bring action against the contractor for damage incurred when the carport fell after a heavy snowfall. U.C A 1953, 78-12-25.5. Good v Christensen, 1974, 527 P.2d 223. Limitation Of Actions ↵ 10

10. Warranties

Contract for construction of prefabricated metal building, which contained specifications for roof which would support 40 pounds per square foot, did not contain express warranty extending beyond six years, as would come within exception to builders statute of repose, where even assuming that language constituted a warranty, no indication was given as to the period of such a warranty. U.C.A.1953, 78-12-25.5(6)(c). Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 1999, 974 P.2d 1194, 364 Utah Adv. Rep. 22, 1999 UT 18. Limitation Of Actions ⇐ 47(1)

11. Injury to person or property

Property owner's claims against contractor that it had hired to perform remodeling work, for economic losses that it sustained due to contractor's alleged breach of contract, repudiation of contract, unjust enrichment, and breach of the covenant of good faith and fair dealing in abandoning project before remodeling had been completed, did not involve claim for "injury to persons or property," within meaning of two-year statute of limitations on claims for "injury to persons or property" against provider of real estate design or construction services. U.C.A.1953, 78-12-25.5(3). Valley Colour, Inc. v. Beuchert Builders, Inc., 1997, 944 P.2d 361, 324 Utah Adv. Rep. 26. Limitation Of Actions ⇐ 21(1); Limitation Of Actions ⇐ 28(2)

12. Governmental entities

Seven-year limitation period for injuries caused by defective or unsafe improvements to real property did not apply to personal injury action filed against city for injuries sustained on tubing hill where city was owner in possession of property. U.C.A.1953, 78-12-25.5. Jackson v. Layton City, 1987, 743 P.2d 1196. Municipal Corporations ⇐ 857

Plaintiffs could not invoke claim that seven-year limitation period for injuries caused by defective or unsafe improvements to real property violated "by due course of law" provision of State Constitution where plaintiffs had effective remedy against city as owner in possession of property that could have been filed within four years from date of injury. U.C.A.1953, 78-12-25(2), 78-12-25.5; Const. Art. 1, § 11. Jackson v. Layton City, 1987, 743 P.2d 1196. Constitutional Law ⇐ 308; Limitation Of Actions ⇐ 4(2)

13. Landlord and tenant

Builders statute of repose, prohibiting commencement of cause of action against provider more than 12 years after completion of construction, barred tenants' negligence action against participants in construction of apartment building for damage to personal property which resulted from fire caused by faulty electrical system, where construction of apartment building was completed approximately 18 years prior to fire and filing of complaint. U.C.A.1953, 78-12-25.5. Olsen v. McMillen Elec., 1999, 976 P.2d 606, 364 Utah Adv. Rep. 51, 1999 UT 19. Limitation Of Actions ⇐ 170

14. Ignorance of cause of action

While provisions of builders statute of repose, which limits period in which to bring actions for injury arising from improvements to real property, are made subject to two-year limitations provision, this does not make repose provisions subject to discovery rule, but rather, simply means that if an injured party discovers, or should have discovered, his cause of action prior to running of the applicable repose period, then period for bringing suit is the two-year limitations period, and not the repose period. U.C.A 1953, 78-12-25.5. Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 1999, 974 P.2d 1194, 364 Utah Adv. Rep. 22, 1999 UT 18. Limitation Of Actions ⇐ 95(3)

Discovery doctrine did not apply to personal injury action against city arising out of accident on city's tubing hill where defect, if any, was patent and plaintiff was aware of collision, even if discovery rule could be read into seven-year limitation period for injuries caused by defective or unsafe improvements to real property. U.C.A 1953, 78-12-25.5. Jackson v. Layton City, 1987, 743 P.2d 1196. Limitation Of Actions ⇐ 95(4.1)

U.C.A. 1953 § **78-12-21.5**, UT ST § **78-12-21.5**

Current through the end of the 2004 4th Spec. Sess.

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ADDENDUM 19

INSTRUCTION NO. 31

Plaintiffs' claims against Defendants are barred and invalid if they did not file their suit within the applicable statute of limitations. Plaintiffs filed their suit on August 24, 2000.

Utah law provides that an action for construction defect based in contract or warranty shall be commenced within six years of the date of the closing of the sale of the house.

Utah law provides that an action for fraudulent nondisclosure shall be commenced within two years of the time that Plaintiffs discovered their a cause of action for fraudulent non-disclosure or the date upon which such cause of action should have been discovered through reasonable diligence.

CERTIFICATE OF SERVICE

On the 7 day of May, 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

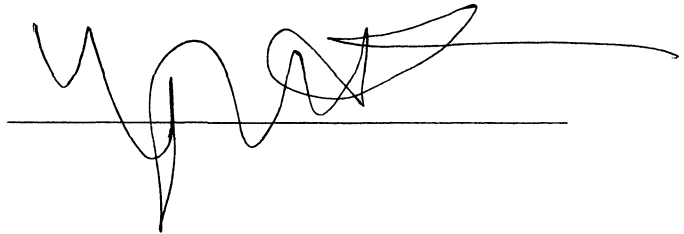
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A handwritten signature in black ink, appearing to be "W. M. [unclear]", written over a horizontal line.