

2005

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

Utah Court of Appeals

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Recommended Citation

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

**WILLIAM MOORE and MARY
MOORE,**

Plaintiffs, Appellees and Cross-
Appellants

v.

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

Defendants, Appellants and Cross-
Appellees.

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

Appellate Case No. 20050626-CA

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

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**FILED
UTAH APPELLATE COURT
JUL 19 2006**

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Ann. § 78-2-2(3)(j).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. **Whether the trial court improperly granted partial summary judgment on Plaintiff's Fraudulent Nondisclosure claim?**

Standard of Review: A district court's grant of a motion for summary judgment is reviewed for correctness, granting no deference to the district court. *Swan Creek Vill. Homeowners Ass'n v. Warne*, 134 P.3d 1122, 1126 (Utah 2006). When reviewing an order granting summary judgment, we view the facts and all reasonable inferences that can be drawn therefrom in a light most favorable to the party opposing the motion. *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650, 651 (Utah 1990).

Issue Preserved at: Plaintiff's Memorandum in Oppositions to Motion for Summary Judgment (R. 957), Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion to Reconsider Ruling on Fraudulent Nondisclosure. (R. 1620) and Reply Memorandum in Support of Plaintiffs' Motion to Reconsider Ruling on Fraudulent nondisclosure. (R. 1701).

2. **Whether the trial court improperly granted partial summary judgment on Plaintiff's Breach of Contract claim?**

Standard of Review: The same standard of review applies here as above.

Issue Preserved at: Plaintiff's Memorandum in Oppositions to Motion for Summary Judgment (R. 957) and Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment on Breach of Contract Claims (R. 1519).

3. **Whether the trial court improperly granted summary judgment on Plaintiff's Negligent Misrepresentation claim?**

Standard of Review: The same standard of review applies here as above.

Issue Preserved at: Plaintiffs' Objection and Reply Memorandum in Support of Alternative Motion for Leave to Amend Complaint (R. 123, 132), Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Reconsider Ruling on Negligent Misrepresentation (R. 1629) and Reply Memorandum in Support of Plaintiff's Motion to Reconsider Ruling on Negligent Misrepresentation (R. 1697).

4. **Whether the trial court erred in failing to award Plaintiff compensation for her experts' time in preparation for depositions noticed up by the Defendants?**

Standard of Review: The legal conclusions of the trial court are accorded no deference, but are reviewed instead for correctness. *Pratt v. Mitchell Hollow Irr. Co.*, 813 P.2d 1169, 1171 (Utah 1991).

Issue Preserved at: Memorandum in Support of Plaintiff's Motion to Award Expert Witness Fees, Tender into Court, and Conditional Request for Oral Hearing (R. 1027) and Reply Memorandum in Support of Plaintiff's Motion to Award Expert Witness Fees, Tender into Court, and Conditional Request for Oral Hearing (R. 1178).

5. **Whether the trial court erred in ruling that Plaintiff was entitled to her attorney fees for only her breach of contract cause of action?**

Standard of Review: Whether attorney fees are recoverable in an action is a question of law, which we review for correctness. *Chase v. Scott*, 38 P.3d 1001, 1003 (Utah App. 2001).

Issue Preserved at: Plaintiff's Verified memorandum of Costs, Disbursements and Attorney Fees in Support of Plaintiff's Motion for an Order Awarding Attorney Fee's Expenses and Costs (R. 2148), Reply Memorandum in Support of Plaintiff's Motion for an Order Awarding Attorney Fees, Expenses and Costs (R. 2276) and (R. Hearing On Motions June 6, 2005 pg. 0044-0072).

6. **Whether the trial court's finding of fact support its reduction in attorney's fees and costs?**

Standard of Review: A determination of the trial court's findings of fact in support of an award of attorney's fees is reviewed for an abuse of discretion, granting considerable deference to the trial court. *Wiley v. Willey*, 951 P.2d 226, 230 (Utah 1997).

Issue Preserved at: Same locations as issue number 5.

7. **Whether the trial court erred in applying U.R.C.P. Rule 54(d) standards to the meaning of "costs" pursuant to the contract?**

Standard of Review: The trial court's interpretation of the meaning of "costs" in the contract is a question of law. Thus, the trial court's legal conclusions regarding the contract are accorded no deference and are reviewed for correctness. *Chase v. Scott*, 38 P.3d 1001, 1003 (Utah App. 2001).

Issue Preserved at: Same locations as issue number 5 and 6.

CONTROLLING STATUTORY PROVISIONS

Utah Code Ann. § 78-12-21.5. *See* Addendum No. 17 of Defendants' Brief.

STATEMENT OF THE CASE

Moore (Plaintiff) filed suit against the Smiths (Defendants) on August 24, 2000 pertaining to the Smiths' faulty construction of a home (42 Uniform Building Code and related Code violations) and then sale of the home to the Moores under theories relevant to this appeal of Breach of Contract, Negligent Misrepresentation and Fraudulent Nondisclosure. (R. 01). The following year Mr. Moore, who had been in ill health, passed away. (R. 146).

Over the course of the five year litigation extensive discovery ensued with both sides retaining experts. (R. 156-786). Defendants filed six (6) Motions for Summary Judgment which ultimately resulted in the trial court dismissing some of Mrs. Moore's causes of action and eliminating 37 defects which she could present to the jury. (R. 28, 917, 1351, 1358, 1367 and 1377). Mrs. Moore filed two motions requesting the trial court to reconsider its Order dismissing Plaintiff's Negligent Misrepresentation cause of action and its Order eliminating her 37 defects. (R. 1618, 1627). While the trial court did so reconsider, it refused to alter its prior rulings. (R. 1747). Prior to trial, Mrs. Moore decided to not pursue three (3) of the remaining five (5) defects submitting to the jury the defects of frost line depth and faulty insulation of windows. (R. 1953).

At trial Defendants argued that they disclosed the footings defect to William Moore, Mrs. Moore's deceased husband. (R. 2424 Jury Trial Transcript pg. 0445-0449).

Dan Smith testified that he informed Mr. Moore of the lack of dirt around the footings and the Mr. Moore agreed to take care of the finished grading to remedy the defect. (R. 2424 Jury Trial Transcript pg. 0445-0449, 0479-0482). However, Mrs. Moore testified that she was within an arms length of her husband during both of their trips to the home and that this conversation never took place between her deceased husband and Dan Smith. (R. 2424 Jury Trial Transcript pg. 0538-0539). She testified that no defects were ever disclosed to them and that there was no agreement to fix the footing defect. (R. 2424 Jury Trial Transcript pg. 0103, 0538-0539). The jury returned a verdict in favor of Mrs. Moore ruling that Dan Smith did not disclose the footing defect to the Moores and assessing damages at \$30,680.00 on the Breach of Contract and Fraudulent Non-disclosure of the frost line depth defect. (R. 2112). Defendants filed three post-trial motions all of which were denied. (R. 2116, 2139, 2194). Later, in response to Mrs. Moore's motion for attorney fees, costs and expenses, Judge Eyre awarded her \$40,000.00 for reasonable attorney's fees incurred and \$10,000 for costs and expenses. (R. 2400). Mrs. Moore's total claim was \$123,639.64 in reasonable attorney's fees and \$35,288.08 in costs and expenses. (R. 2308).

STATEMENT OF RELEVANT FACTS

In 1993 Defendant Dan Smith was a Utah licensed general contractor and master electrician who had built and, along with his wife co-defendant Carol Smith, sold over 200 homes in the state of Utah. (R. 806-807, 964). In August of 1993, the Smiths begin building another home in Fillmore, Utah and three months later moved into it while still

finishing up the construction. (R. 1269). They did not obtain a Certificate of Occupancy until January 28, 1994. (R. 1269).

A couple of weeks later the Plaintiffs William and Mary Moore, middle-aged first time home buyers who had no knowledge of construction or real estate transactions, were told by a mutual acquaintance that the Smiths, who the Moores knew, were selling the home they had just built. (R. 069, 966, 2424 Jury Trial Transcript pg. 0087). On February 11, 1994, the Moores contacted the Smiths and while meeting with them were told by Mr. Smith that he was a builder and that he knew what people liked and this was a beautiful home. (R. 2424 Jury Trial Transcript pg. 0090, 0178). Later that same day the Moores walked through the home discovering no defects. (R. 2424 Jury Trial Transcript pg. 0088-0090).

Four days later, on February 15, 1994, Smiths and Moores signed a standard Earnest Money Sales Agreement [hereinafter "EMSA"] for the purchase price of \$83,000.00. (*See* Defendants Brief Addendum No. 7). While the Smiths filled out the EMSA and were reviewing the "as is" language contained therein with the Moores, the Moores asked, "Is there anything we should know about?" Dan Smith replied, "It's a new house". (R. 2424 Jury Trial Transcript pg. 0103). The Smiths never disclosed to the Moores any defects or building code violations. (R. 2424 Jury Trial Transcript pg. 0103, 0538-0539). In light of the newness of the home and Mr. Smith being an experienced contractor the Moores felt no need to have a professional home inspection performed. (R. 2424 Jury Trial Transcript pg. 0199, 0591-0592).

The Smiths moved out of the home the following month with the closing occurring on May 2, 1994, Moores paying cash for the home which was the accumulation of nearly their life savings. (R. 809, 2424 Jury Trial Transcript pg. 0086). The Moores moved into the home immediately thereafter. (R. Jury Trial Transcript pg. 0049).

In April of 2000, the Moores were informed by a contractor, who was digging post-holes to erect a fence and gate on the property, that the footings on which the homes foundation rested were not buried to the required depth. (R. Jury Trial Transcript pg. 0120-121). He further informed them that this could cause substantial structural damage to the home and that an inspection should be done. (R. 070). Shortly thereafter, the Moores had a professional building inspector inspect the home which lead to the discovery of forty-two Uniform Building Code violations or defects that would require \$111,000.00 to repair. (R. 070-071, 810-812).

SUMMARY OF ARGUMENT

Defendants have raised several issues on appeal relating to the applicable statute of limitations, the discovery rule, the trial court's Special Verdict and Plaintiff's fraudulent nondisclosure claim. However, the Defendants have failed to preserve two of these issues for appeal and did not marshal the evidence on two other issues. Therefore, Defendants should be precluded from bringing those issues on appeal. Lastly, even if these issues were properly before this Court, Plaintiff argues that the trial court did not commit error.

Plaintiff also raises several issues on appeal. Plaintiff contends that the doctrine of merger should not have precluded her negligent misrepresentation claim that was

dismissed in summary judgment. Plaintiff further asserts that the trial court erred in dismissing 37 of her 42 original defects on her fraudulent nondisclosure claim as well as dismissing 41 of her 42 original defects on her breach of contract claim. Lastly, Plaintiff contends that the trial court erred in not awarding Plaintiff all of her attorney's fees and costs on this matter.

ARGUMENT

I. THE TRIAL COURT APPLIED THE CORRECT VERSION OF THE STATUTE OF LIMITATIONS

The Defendants contend that the trial court failed to correctly determine the appropriate version of the statute of limitations in this case. Even if the trial court did commit an error the Defendants failed to preserve the issue for appeal, the Defendants invited the error and the error was harmless. The Plaintiff further argues that the trial court correctly applied the appropriate version of the statute of limitations.¹

A. Defendants Failed to Preserve this Issue for Appeal, Invited the Alleged Error and the Alleged Error was Harmless.

"To preserve an issue for appellate review, a party must first raise the issue in the trial court, giving that court an opportunity to rule on the issue." *State v. Maguire*, 975 P.2d 476 (Utah App. 1999) (quoting *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998)). This Court is "precluded from reviewing it without a demonstration by

¹Additionally, Defendants have failed to follow numerous Utah R. App. P. such as Rule 24(a)(8) requiring a Summary of the Argument, Rule 24(a)(7) requiring all facts to have a reference to the record below and Rule 24(a)(9) by wholly failing to cite to the record in their argument. Defendants failure to cite to the record is basis to assume correctness of the trial court's findings and dismiss their claims on appeal. *State v. Tucker*, 675 P.2d 755, 756-757 (Utah 1982).

Defendant of plain error or exceptional circumstances.” *State v. Person*, 2006 UT App 288 (Utah App. 2006). Defendants fail to allege plain error or exceptional circumstances but instead make the inexplicable statement that they have indeed reserved this issue for appeal. *See* Appellate Brief of Defendants, Appellants and Cross-Appellees Dan Smith and Carol Smith pg. 1 (Hereinafter Defendants’ Brief).

Defendants claim that the trial court applied the wrong version of the applicable statute of limitations because it is impossible to know which version to apply without a specific finding by the jury of when Mrs. Moore should have discovered the defect. Defendants cite to five (5) different memorandums claiming that the issue was preserved in each of the memorandums. However, upon a quick review of those memoranda it is readily apparent that Defendants *never* objected to or questioned which version of the statute should be applied and *never* objected to the trial courts method of determining which version applied. At no point was this issue raised below, thus it was not preserved.

Additionally, the Defendants invited any error by proposing the 1999 version of Utah Code Annotated § 78-12-21.5 was applicable. (R. 803, Appellants Addendum 2) and quoted the exact language of the 1999 version of U.C.A. § 78-12-21.5(3)(a-b) in their memorandum. (R. 820, Appellants Addendum 2). The trial court agreed with Defendants’ argument and applied the 1999 version of U.C.A. § 78-12-21.5. (R. 1273-1274, Appellants’ Addendum 9). Furthermore, Defendants again agreed with the trial court in their memorandum on the motion for a judgment notwithstanding the verdict that the 1999 version of U.C.A. § 78-12-21.5 applied. (R. 2140, Appellants’ Addendum 4). “The doctrine of invited error prohibits a party from setting up an error at trial and then

complaining of it on appeal.” *Miller v. Martineau & Co., Certified Pub. Accountants*, 983 P.2d 1107, 1116 (Utah App. 1999). As the Defendants themselves have led the trial court down this path it would be inequitable to allow them to now claim the trial court erred.

Furthermore, if there was error in applying the version of the statute of limitations, this error was harmless. Defendants argue “It is readily apparent that the application of either of the 1991 version, the 1997 version, or the 1999 version could result in a very different outcome for Plaintiffs’ claims depending on which version applied.” See Defendants’ Brief pg. 17. Defendants fail to understand that the language in the various versions of the statute would have no effect on the trial courts ruling because the court in large part did not rely upon the language of U.C.A. § 78-12-21.5 as the basis for applying the discovery rule. The Utah Supreme Court explained in *Russell Packard Development, Inc. v. Carson*, 108 P.3d 741 (Utah 2005) an Equitable Discovery Rule (one not written in the statute for fixed Statute of Limitations periods like in U.C.A. 78-12-21.5(3)(a)) can be applied to toll a fixed statute of limitations. Defendants have failed to understand that a Statutory Discovery Rule (one written into the statute like in U.C.A. 78-12-21.5(3)(b)) is not the only means of tolling a statute of limitations. Because the trial court relied upon the theory of an equitable discovery rule, the language in the various statutes would not have changed the “outcome for Plaintiffs”. Therefore, Defendants dialogue on the language of the various versions of the statute of limitations is moot and if there was an error in applying this version of the statute of limitations it was harmless error.

B. The Trial Court Did not Commit Error in Applying the Statute of Limitations.

Defendants assert that the “trial court erred by non-discriminately applying the 2004 version of U.C.A. § 78-12-21.5”. *See* Defendants’ Brief pg. 13. Defendants’ confusion on which version of the statute of limitations was applied is perplexing considering the fact they originally suggested which version to apply! Even more perplexing is how the trial court could apply the 2004 version of the statute of limitations in an order entered on August 21, 2003. (R. 1274).

Defendants cite to *Sevy v. Security Title Co. of Southern Utah*, 902 P.2d 629 (Utah 1995) for the proposition that the trial court was required to first have the jury determine the exact date when Plaintiffs should have discovered the facts forming the cause of actions before the appropriate version of the statute could have been determined. *See* Defendants’ Brief pg. 13. This is not the holding of *Sevy* or any other case that Defendants have cited. In fact, the trial court in *Sevy* never determined an exact date of when plaintiff should have discovered their cause of action but, as in the case at bar, simply ruled that the discovery rule tolled the statute of limitations.

There is no requirement that a specific date must be established as to when it was reasonable to discover the defects. All that is required is for the jury to determine that the Plaintiffs should not have reasonably discovered the defects sooner. Even though there was no specific finding of fact in the Special Verdict (R 2112), the jury obviously concluded that the Moores should not have reasonably discovered the footings defects before April of 2000. At trial Mrs. Moore presented evidence that she did not discover

the footings defect until April 2000 when she was having a fence installed on her property. (R. 2424 Jury Trial Transcript 0120-0121). This defect was discovered because it was necessary for the fence installers to dig a posthole next to the house for one of the fence posts and the fence installers noticed the defect in the footings when they were exposed. (R. 2424 Jury Trial Transcript 0121-0123). Plaintiff argued that this was the earliest reasonable date that she should have discovered the defects. (R. 2424 Jury Trial Transcript 0591-0592). However, Defendants argued that Plaintiff should have reasonably discovered the defects sooner. (R. 2424 Jury Trial Transcript 0587-0589). Obviously the jury concluded that April of 2000 was the earliest date Mrs. Moore should have reasonably discovered the defects.²

Defendants further assert that there should have been findings of fact supporting the trial court's conclusions of law. *See* Defendants' Brief pg. 20. Defendants' assertion misinterprets the law. U.R.C.P. Rule 52(a) clearly states that the requirement for Findings of Fact applies only to "actions tried upon the facts without a jury or an advisory jury". Furthermore, the two cases cited by Defendants were cases where the judge was the finder of fact and not a jury. Defendants' argument fails because no specific findings of fact are required when a case is tried by jury.

Accordingly, the statute of limitations began to run in April of 2000 and the trial court did not err in applying the 1999 version of U.C.A. § 78-12-21.5.

II. THE TRIAL COURT DID NOT ERR IN APPLYING THE DISCOVERY RULE

² *See* page 22 below for further explanation.

Defendants claim that the trial court inexplicably denied Defendants' various motions regarding their statute of limitations defense because U.C.A. § 78-12-21.5(3)(a) does not state a written discovery rule in the statute. Apparently, Defendants have failed to grasp the difference in a statutory discovery rule and an equitable discovery rule. Defendants' entire argument is based on the fact that no discovery rule is written or provided in the language of the statute for the breach of contract claim. Defendants have not realized that a statute of limitations can be tolled by the application of the equitable discovery rule even when there is no written discovery rule in the applicable statute of limitations. The Utah Supreme Court recently stated,

We have limited the circumstances in which an equitable discovery rule may operate to toll an otherwise fixed statute of limitations period to the following two situations: (1) 'where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct,' and (2) 'where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action'.

Russell Packard Development, Inc. v. Carson, 108 P.3d 741, 747 (Utah 2005); citations omitted.

Clearly Plaintiff meets the first situation. The jury found that Defendants fraudulently concealed the defect in the footings. (R. 212-213). Defendants' failure to disclose and remedy the footings defect was the act that gave rise to Plaintiff's claims. Because of Defendants concealment of this information, Plaintiff was not aware of any defects in the home until April of 2000, two months after the six (6) year statute of limitations had run. (R. 2424 Jury Trial Transcript 0120-0121). This date was the earliest Plaintiff should have reasonably discovered the defect. (R. 2424 Jury Trial

Transcript 0591-0592). Therefore, the trial court appropriately applied the equitable discovery rule based upon the Defendants concealment of their actions and the fact that Plaintiffs actions were reasonable in not discovering her claims sooner.

Plaintiff also meets the second situation of exceptional circumstances. (R. 056-061). To determine if exceptional circumstances exist the court uses a balancing test that “weighs the hardship imposed on the claimant by the application of the statute of limitations against any prejudice to the defendant resulting from the passage of time.” *Sevy v. Security Title Co. of Southern Utah*, 902 P.2d 629, 636 (Utah 1995). Surely the hardship imposed on the Plaintiff in rigidly applying the statute of limitations in this case clearly outweighs any prejudice that the Defendants possibly could suffer. Mrs. Moore’s breach of contract claim would be completely barred if the discovery rule was not allowed to toll the statute of limitations. Such a result would be patently unfair and inequitable especially since the jury found that the Defendants fraudulently concealed the information that gave rise to Mrs. Moore’s claims. (R. 212-213). Furthermore, Plaintiff brought her suit in August of 2000; merely a few months after the six (6) year statute of limitations had run. (R. 9). The Defendants have never argued that any evidence had been lost through the passage of time and have not shown that they would be prejudiced in any way except that they might now be accountable for their actions.

Not only does the equitable discovery rule toll the statute of limitations, but U.C.A. § 78-12-21.5(5) states that the statute of limitations does not apply to a provider that “fraudulently concealed his act, error, omission, or breach of duty”... or for a “willful or intentional act, error, omission, or breach of duty”. Therefore, this

statute of limitations would not even apply in this case because the jury found that the Defendants fraudulently concealed their activities. *See* Interagatory 2(a) of the Special Verdict (Addendum No. 10 of Defendants Brief).

III. THE TRIAL COURT DID NOT SUBMIT QUESTIONS OF LAW TO JURY

Defendants contend that the trial court committed reversible err when it submitted a complicated question of law to the jury in the Special Verdict asking the jury to determine whether each of Plaintiff's claims were barred by the statute of limitations. *See* Defendants' Brief pg. 21-24. Defendants have failed to preserve this issue for appeal and furthermore, a detailed review of the record clearly shows that the jury was not asked to determine a question of law.

A. Defendants Failed to Preserve this Issue for Appeal.

As stated above, a party must first raise an issue in the trial court in order to preserve that issue on appeal. The Defendants never once raised any objections regarding the wording of the Special Verdict; in-fact the Defendants reviewed the proposed Special Verdict in chambers with the trial judge (R. 2424 Jury Trial Transcript 0549) and had no objections whatsoever to the wording of the Special Verdict. (R. 2424 Jury Trial Transcript 0552-0553). Defendants could have opposed the trial court's Special Verdict and drafted a proposed Special Verdict with the language they felt was appropriate. Defendants, however, failed to do this and agreed that the trial court's Special Verdict was proper. Defendants admit that this issue was not preserved on appeal but claim that the trial court plainly erred in submitting questions of law to the jury. *See* Defendants'

Brief pg. 2. The Utah Supreme Court has held that when a party considers the issue, consciously decides to not object and affirmatively leads the trial court to believe that there was nothing wrong with the instruction, then that party will be estopped from claiming the manifest error [plain error] exception. *State of Utah v. Medina*, 738 P.2d 1021, 1023 (Utah 1987). This Court further stated that “under the doctrine of invited error, we have declined to engage in even plain error review when ‘counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings].’” *State v. Person*, 2006 UT App 288 (Utah App. 2006) (quoting *State v. Winfield*, 128 P.3d 1171 (Utah 2006)). Because Defendants failed to object below, they should not be allowed to raise this issue on appeal.

Even if Defendants are not estopped from claiming the plain error exception, Defendants fail to meet the standard of plain error. “To demonstrate plain error, a defendant must establish that ‘(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.’” *Berkshires, L.L.C. v. Sykes*, 127 P.3d 1243, 1250-1251 (Utah App. 2005) (quoting *State v. Holgate*, 10 P.3d 346 (Utah 2000)). Defendants have not even attempted to show how the alleged error should have been obvious to the trial court or how there is a reasonable likelihood of a more favorable outcome. Further, Defendants have failed to follow Utah R. App. P. Rule 24(a)(9) by “including the grounds for reviewing any issue not preserved in the trial court” in their argument. Therefore, this issue should not be reviewed by this Court.

B. The Jury was not Asked to Determine Legal Questions.

Defendants' contention that the Special Verdict requested the jury to make legal determinations is simply incorrect. The question in the Special Verdict that Defendants object to states, "do you find that the statute of limitations barred or prohibited the Plaintiffs breach of contract claim?" (R. 2112). Looking at this question in isolation could possibly be confusing as to who was deciding the legal question regarding the statute of limitations. But, with a brief review of the record, it becomes clear that the jury was not asked to decide any legal questions; instead the jury merely decided the exact question Defendants propose in their brief. When should Plaintiff have reasonably discovered the defects? *See* Defendants' Brief pg. 21.

A reading of the various motions for summary judgment, the trial court's orders on those motions and the trial transcript make it abundantly clear that the trial court decided the legal question of the applicability of the statutes of limitation and the discovery rule with the jury deciding the reasonableness of Plaintiff's discovery of the defect. The trial court stated in its order on the first motion for summary judgment that,

"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.*"

(R. 154) emphasis added. The trial court's Memorandum Decision in August of 2003 reiterates that the legal questions of the application of the statutes of limitation and the discovery rule had already been decided and the only questions left were questions of fact

regarding when Plaintiff should have discovered the defects. (R. 1273-1274). That alone shows that the trial court appropriately decided the legal questions regarding the statutes of limitation and the application of the discovery rule.

With a further review of the closing arguments by both parties and the jury instructions, it becomes unmistakable that the jury was really deciding the reasonableness of Mrs. Moore's discovery of the footing defect in April of 2000. Jury Instruction #25 and #26 refer to Plaintiff's duty to exercise reasonable diligence in discovering the defects and the jury's duty to determine the reasonableness of Plaintiff's actions. (R. 2424 Jury Trial Transcript 0563-0564). Jury Instruction #31 refers to the statute of limitations. (R. 2424 Jury Trial Transcript 0565). This jury instruction is word for word identical to Defendants' Proposed Jury Instruction #30. (R. 1936). Defendant and Plaintiff proposed different jury instructions regarding the statute of limitations and discovery rule with Defendants prevailing by having the majority of their language being used in the final jury instructions. (R. 2022; 2424 Jury Trial Transcript 0565-0566). The language in Jury Instruction #31 stating that the statute of limitations for a cause of action for construction defects based on contract is six years came directly from Defendants Proposed Jury Instruction #30. (R. 1936). The first part of Jury Instruction #32 is word for word identical to Defendants Proposed Jury Instruction #31. (R. 1937; 2424 Jury Trial Transcript 0565-0566). The last part of Jury Instruction #32 dealing with the discovery rule was proposed by the Plaintiff but was not included in its entirety. (R. 2022, 2424 Jury Trial Transcript 0565-0566).

In closing arguments, Defendants' counsel argued that Mrs. Moore in-fact did discover the defects before April of 2000 and argued that even if she did not, she should have discovered the defects before April of 2000. They argued that she was unreasonable in failing to have a home inspected when she purchased the home. (R. 2424 Jury Trial Transcript 0586-0590). They even ask the jury the exact question that they now claim should have been in the Special Verdict, when should Plaintiff have discovered the defects through reasonable diligence? (R. 2424 Jury Trial Transcript 0588 line 10-11).

Plaintiff's counsel then explained the discovery rule and how it worked. (R. 2424 Jury Trial Transcript 0591). Plaintiff's counsel argued that Mrs. Moore was not aware of the defects until April of 2000 and that she could not have reasonably discovered the defects sooner. (R. 2424 Jury Trial Transcript 0120-0121 and 0591-0592). It was stated that pursuant to the discovery rule, the six (6) year statute of limitations would not run until after Plaintiff discovered the defects. (R. 2424 Jury Trial Transcript 0589 line 23-24). Plaintiff argued that she did not have a duty to have the home inspected and that she was reasonable in not having the home inspected. (R. 2424 Jury Trial Transcript 0593).

Upon this detailed review of the trial court's past orders, Jury Instructions and arguments given to the jury, it becomes clear that the jury was not requested to decide an issue of law. The general question in the Special Verdict was not asking the jury to determine the applicability of the statute of limitations (as that was already ruled on by the trial judge) but to determine if Mrs. Moore should have reasonably discovered the defects before April of 2000. The jury found that Mrs. Moore did not discover the defects until April of 2000 and that she acted reasonably. (R. Hearing On Motions June

6, 2005 pg. 0008-0009). Therefore the six (6) year statute of limitations did not run on her breach of contract claim and the two (2) year statute of limitations did not run on her fraudulent nondisclosure claim.

Lastly, as can be seen through the above analysis, this legal question is extremely fact-sensitive and Defendants should have marshaled all the evidence in support of the courts usage of the Special Verdict question. *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 WL 1528607 (Utah 2006). This argument is further explained below but applies to this issue as well and Defendants should be prevented from appealing this issue without marshalling the evidence.

IV. THE TRIAL COURT CORRECTLY RULED THAT DEFENDANTS HAD A VALID FRAUDULENT NONDISCLOSURE CLAIM

Defendants assert that the trial court erred in not dismissing Plaintiff's fraudulent nondisclosure claim. Defendants have failed to marshal all the evidence that supports the trial courts rulings and the trial court did not err in denying Defendants various motions on the fraudulent nondisclosure claim as to the defect in the footings.

A. Defendants Have Failed in Their Duty to Marshal the Evidence.

When an appellant challenges a trial court's ruling regarding a motion for directed verdict "the appellant is obligated to first marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *Neely v. Bennett*, 51 P.3d 724, 727 (Utah App. 2002).

Defendants assert that their appeal related to the various motions for summary judgment is a "question of law". However, this does not relieve them of their duty to marshal the

evidence if the “correctness of a court’s application of a legal standard is extremely fact-sensitive.” *United Park City Mines Co.* at ¶ 25.

In *Bearden v. Wardley Corp.*, 72 P.3d 144, 148 (Utah App. 2003) the appellant appealed the trial court’s ruling on his motion for summary judgment and/or directed verdict, exactly what Defendants in this case have done. In *Bearden*, this Court held that the appellant was required to marshal the evidence and that his failure to marshal such evidence made his claim on appeal lack merit. *Id.*

Defendants have craftily attempted to frame this issue as a legal question but the label that Defendants have given the issue does not preclude them from marshaling the evidence. The Utah Supreme Court stated “that the labels given particular issues by courts or counsel are not determinative. Rather, the critical element triggering the duty to marshal is factual inquiry. Parties seeking appellate review must marshal the evidence on those questions that require substantive factual inquiry...” *United Park City Mines Co.* at ¶ 38. Clearly this issue requires substantive factual inquiry. Defendants refer to numerous facts that they believe support their contention and state, “Based on the foregoing admitted facts, the trial court should have granted summary judgment...” *See* Defendant’s Brief pg. 31-33. Even though Defendants referred to all the facts that they believe support their argument, they have failed to refer to or cite the facts that support the courts ruling and have failed to argue how those facts support the courts rulings.

If Defendants were excused in the failure to cite to the record and to marshal the evidence, Plaintiff or this Court would then have the burden of attempting to locate this information and marshal evidence that supports the trial courts findings. The Utah

Supreme Court further stated, “We repeatedly have warned of the grim consequences parties face when they fail to fulfill the marshaling requirement. When parties fail to perform this critical task, we can rely on that failure to affirm the lower court’s findings of fact”. *United Park City Mines Co.* at ¶ 27. Plaintiff therefore requests that this Court affirm the lower courts rulings on their fraudulent nondisclosure claim.

B. Plaintiff Has a Valid Fraudulent Nondisclosure Claim as to the Footings.

Defendants argue that the Plaintiff’s claim for fraudulent nondisclosure should have been dismissed as a matter of law because the Plaintiff failed to get a professional home inspection. *See* Defendants’ Brief pg. 30. Defendants cite to *Maack v. Resource Design and Construction, Inc.*, 875 P.2d 570 (Utah. App. 1994), *Schafir v. Harrigan*, 879 P.2d 1385 (Utah App. 1994) and *Mitchell v. Christensen*, 31 P.3d 572 (Utah 2001) to support their claim. Defendants’ argument completely misstates the law.

The elements for Fraudulent Nondisclosure are (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. *Hermansen v. Tasulis*, 48 P.3d 235, 242 (Utah 2002). Defendants do not contend that Plaintiff failed to meet the first two elements of fraudulent nondisclosure but only argue that Defendants had no duty to disclose the footing defect because it could have been discovered by a professional home inspection. None of the cases quoted by the Defendants hold that a professional home inspection is required by law. Defendants had a duty to reveal any defects that were not discoverable by reasonable care on the part of Plaintiff. *Mitchell* at 575. Therefore, if Plaintiff could

not discover the defect by reasonable care then Defendants had a duty to reveal that defect.

In *Maack* this Court held that the plaintiff in that case was unreasonable in not having his home inspected. However, that holding was in support of that trial court's findings and not contrary to them. Furthermore, this Court stated that *Maack* presented "a close call, we hold that under these circumstances Jarvik [defendant] had no legal duty to disclose his doubts, if any, about the integrity of the stucco." *Maack* at 579. This Court specifically stated that the "question of whether a duty exists is answered by reference to all the circumstances of the case and by comparing the facts not disclosed with the object and end in view by the contracting parties." *Id.* 578. Therefore, the question of whether Defendant had a duty to reveal a defect or if Plaintiff was reasonable in not discovering a defect is not normally a question of law but a fact intensive inquiry.

This Court's finding that *Maack* was not reasonable in failing to have a professional home inspection was based on completely distinguishable facts. In *Maack* the plaintiff purchased the home from a third party owner who was not the builder; the house had been completed and lived in for over a year by the third party owner; there was no privity of contract between the buyer and the builder; and the third party owner did disclose some defects in the home putting the buyer on notice that there are defects in the home. Unlike *Maack*, Mrs. Moore had no reason to undertake a home inspection in this case. Mrs. Moore, purchased the home directly from Defendant Dan Smith who was a licensed contractor who had constructed over 200 homes in Utah (R. 806-807, 964); Dan Smith represented to them that he was a home builder (R. 2424 Jury Trial Transcript

0090); the certificate of occupancy was issued just a few short weeks before the Moores purchased the home (R. 2424 Jury Trial Transcript 0593); the Moores walked through the home before entering into the EMSA and Defendants did not disclose any defects to the Moores that might put them on notice of potential problems (R. 1270); Plaintiffs affirmatively asked if there was anything they needed to know about the house relating to any problems and Mr. Smith answered in the negative that it was a new house (R. 2424 Jury Trial Transcript 0103, 0199); this was the Moores first purchase of a stick built home (R. 964); and the Moores had no experience or expertise in construction (R. 1269, 2424 Jury Trial Transcript 0044, 0085).

Defendants had a duty to disclose any defect that was not discoverable by reasonable care. The proper standard for reasonable care is “whether the defect would be apparent to ordinary prudent persons with like experience, not to persons with specialized knowledge in the field of construction or real estate.” *Mitchell* at 575. Plaintiff argued that the question of her reasonableness was a question of fact for the jury to decide. (R. 971). *See Illott v. University of Utah*, 12 P.3d 1011 (Utah App. 2000). The trial court agreed that this was a question of fact for the jury. (R. 154). These arguments were presented to the jury at trial. (R. 2424 Jury Trial Transcript 0563-0565, 0586-0590, 0593). The jury ruled that Mrs. Moore’s actions were reasonable in not having the home professionally inspected when she purchased it. (R. Hearing On Motions June 6, 2005 pg. 0008-0009).

Defendants discuss the “as is” clause found in the Earnest Money Sales Agreement (hereinafter EMSA) but fail to brief their arguments regarding this clause.

Therefore, Plaintiff assumes that Defendants referred to this clause as an argument to Mrs. Moore's unreasonableness in failing to have a home inspection. As shown above, this was a question for the jury to decide and the "as is" clause argument was presented to the jury. (R. 2424 Jury Trial Transcript 0574). Defendants' argument that Mrs. Moore was unreasonable in failing to have a home inspection must fail because this is a question of fact that the jury decided in favor of Mrs. Moore.

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

In its Memorandum Decision on Defendants' second Motion for Summary Judgment filed August 21, 2003 the trial court ruled that when the Smiths sold the home to Mrs. Moore the home was "used" and therefore the doctrine of caveat emptor applied to preclude Mrs. Moore's fraudulent nondisclosure claim as to any defects in the home that were patent. (R. 1272). Further, the trial court ruled that all of the 42 defects in the home were patent except for 5 defects, thereby eliminating the vast majority of Plaintiff's recoverable damages on her fraudulent nondisclosure claim. The standard of review from a district court's grant of a motion for summary judgment is reviewed for correctness, granting no deference to the district court. *Swan Creek Vill. Homeowners Ass'n v. Warne*, 134 P.3d 1122, 1126 (Utah 2006). When reviewing an order granting summary judgment, we view the facts and all reasonable inferences that can be drawn therefrom in a light most favorable to the party opposing the motion. *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650, 651 (Utah 1990).

A. The Trial Court Erred in Ruling that All But Five of the Defects in Plaintiff's Home were Patent.

The trial court held in its Memorandum Decision on Defendants Motion for Summary Judgment that “Plaintiffs admitted that all of the defects items [sic] except items number 9, 11, 12, 26, 27, 38, 39 were patent and that they could have been discovered by a home inspection. Therefore, the doctrine of caveat emptor applies, and the court grants the Defendants motion for Summary Judgment regarding the admitted patent items because they could have reasonably been discovered by the Plaintiffs.” (R. 1272). To understand the basis for this ruling the following procedural history of the case is necessary.

On October 9, 2002 Defendants filed their Second Set of Requests for Admissions which contained two-hundred and sixty-eight requests for admissions. (R. 243, 527). Plaintiff objected to the requests for admissions for various reasons but specifically objected to a request to admit that the defects discovered in the home were not “latent”. This objection was on the basis that the request was vague and ambiguous and that it sought impermissible conclusions of law. (R. 527-530). Ultimately the Defendants brought a motion to compel discovery to force Plaintiff to answer these admissions. (R. 390). Over Plaintiff's objection the trial court mandated that Plaintiff answer this request for admission and mandated that Plaintiff use the trial court's definition of “latent” meaning hidden. (R. 759, 968, 1624). Plaintiff was then bound to answer the Defendants request which of the 42 defects were not latent. Based on the court's order Plaintiff was required to admit that all but defects no. 9, 11, 12, 26, 27, 38 and 39 of the original 42

defects in the home were in fact not “latent” or were not visibly hidden. (R. 1624).

These admissions were based solely on the trial court’s mandated definition of “latent” as hidden and not on any legal definition of a “latent” defect pertaining to the doctrine of caveat emptor.

On May 6, 2003 Defendants filed their second Motion for Summary Judgment with a 28 page Memorandum in Support of Defendants’ Motion for Summary Judgment. (R. 802). In their memorandum Defendants stated as an undisputed fact that all but seven (7) of the defects in the home were in fact patent (visible). (R. 812). Defendants then argued that all defects that were not latent were barred by the doctrine of caveat emptor (which apparently still governs the sale of used homes in Utah). (R. 825-829). Plaintiff’s vehemently disputed Defendants’ proposed Undisputed Fact that all but seven of the defects were patent as it pertains to the doctrine of caveat emptor. (R. 962, 958-959 and Transcript Motions Hearing July 21, 2003 pg. 0034, 0044-0046).

Based on these so-called admissions the trial court incorrectly granted summary judgment for fraudulent nondisclosure on all but 7 of the 42 defects. As already stated above, a claim for fraudulent nondisclosure has three elements, 1) the nondisclosed information is material, 2) the nondisclosed information known to the party failing to disclose and 3) that party had a duty to communicate the information. The trial court stated in its Memorandum Decision the correct standard of Defendants duty to communicate stating:

A duty to disclose in a vendor-vendee transaction of a used home exists only where a defect is “not discoverable by reasonable care,” and if the defect could be discovered by reasonable care, the doctrine of caveat emptor prevails and

precludes recovery by the vendee. *Mitchell*, 31 P.3d at 575; *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570, 579 (Utah App. 1994). **The standard of reasonable care is whether the defect would be apparent to ordinary prudent person with like experience, not to persons with specialized knowledge in the field of construction or real estate. *Mitchell*, 31 P.3d at 575.**

(R. 1272) emphasis added. In *Ilott v. University of Utah*, the Court of Appeals quotes Black's Law Dictionary as defining the term 'latent defect' as "a defect which reasonably careful inspection will not reveal." 12 P.3d 1011 (Utah App. 2000) quoting *Black's Law Dictionary* (Rev. 4th ed. 1968). Black's Law Dictionary also defines a 'patent defect' as "a defect that is apparent to a normally observant person **esp. a buyer on a reasonable inspection.**" *Black's Law Dictionary* (7th ed. 1999) emphasis added. Thus a patent defect is one that an ordinary buyer without any specialized knowledge in the field of construction or real estate would discover upon a reasonable inspection by the buyer. A clear example of a patent defect would be a large crack in the wall or wires protruding out of a light fixture. Consequently, latent defects can be defects that are in plain view, but are not apparent to an ordinary buyer without specialized knowledge in construction. In summary, the Smiths had a duty to reveal all known material "latent" defects as "latent" is defined by Utah law.

Plaintiff's forced admissions of what defects were not "latent" were based on a secular definition of "latent" meaning hidden from sight that the trial court mandated Plaintiff to use. Plaintiff was required to answer these requests based on this definition and not based upon the definition of "latent" defects as defined by Utah case law. Defendant most definitely would have answered these Requests for Admissions differently if the correct legal definition of "latent" defect was given by the trial court.

It is easy to conceive of a defect in a home that is in plain visible view but would not be apparent or discovered by reasonable care from an ordinary prudent buyer. For example, attics require a certain amount of ventilation area or the attic will get extremely hot which can cause problems in the home like the shingles warping and falling off. An ordinary prudent buyer would have no knowledge or expertise that would allow him to discover that a home is significantly lacking in attic ventilation. Even though the attic vents are completely visible, an ordinary prudent person would not discover this defect therefore it would be considered a “latent” defect pursuant to *Illot* which the owner would have to disclose if he had knowledge of it. This argument was presented to the trial court below. (R. Transcript Motions Hearing July 21, 2003 pg. 0045-0046 and Transcript Motions Hearing April 1, 2004 pg. 0064-0065, 0068-0069). It is clear that the trial courts definition of “latent” defect that Plaintiff was required to use did not coincide with the definition of a “latent” defect defined by this Court in *Illot*. Therefore the trial court erred in granting summary judgment based on these so-called admissions because virtually all the defects in the Moore’s home were “latent” as that term was defined by this Court in *Illot*.

B. The Trial Court Improperly Invaded the Province of the Jury in Granting Summary Judgment as to Defects No. 12 and 38.

In its Memorandum Decision on Defendants Motion for Summary Judgment the trial court further held that defect items number 12 and 38 were items “that could have reasonably been discovered by the Plaintiffs”. (R. 1273). In-fact, defect number 38 was the exact defect which was just used in the example above, lack of adequate attic

ventilation. This issue should not have been decided by the trial judge as this is a question of reasonableness. The question is, should the Moores have discovered these defects if they had used reasonable care? “Questions of reasonableness necessarily pose questions of fact which should be reserved for jury resolution. Only in the clearest cases should such questions be resolved in summary judgment situations.” *Ilott* at 1014 (Utah App. 2000) quoting *Darrington v. Wade*, 812 P.2d 452, 459 (Utah Ct. App. 1991). Plaintiff contends that defects 12 and 38 were not, as a matter of law, a clear case able to be resolved at summary judgment; rather, this was a question of reasonableness which should have been left for the jury to determine. (R. 1272).

C. The Trial Court Erred in Ruling that Plaintiff’s Purchased a “Used” Home.

Pursuant to the current status of the doctrine of caveat emptor in Utah it appears that the doctrine of caveat emptor does not apply in the sale of new residential homes. The trial court stated,

In the sale of new homes, the Utah Supreme Court has stated that the doctrine of caveat emptor has eroded, but in the area of used residences it is “reasonable to hold the purchaser to the caveat emptor doctrine.” See, *Shafir v. Harrigan*, 879 P.2d 1384, 1389 (Utah App. 1994)(quoting, *Utah State Medical Ass’n v. Utah State Employees Credit Union*, 655 P.2d 643, 645 (Utah 1982).

(R. 1271). Therefore, for the doctrine of caveat emptor to apply in this case, the home that Mrs. Moore purchased would have to be “used”.

Plaintiff argued that the doctrine of caveat emptor did not even apply to this case because Plaintiff bought a “new” home and because Plaintiff met “standards of when caveat emptor does not apply”. (R. 965-966). Plaintiff argued that she bought the home

directly from an experienced builder who had built over 200 homes; the certificate of occupancy on the home was issued only a few weeks before the Moores signed the EMSA; no other party except for the builder had lived in the home, the builder had only lived in the home for a short period before the EMSA was signed and this was the Moores first home purchase and they were inexperienced in the area of construction and real estate. (R. 966).

All facts and any inferences that could be drawn from them should have been viewed in a light most favorable to Mrs. Moore since she was opposing the motion for summary judgment. In spite of this, the trial court found “the Home is a used home because the Smiths intended it to be their home, they lived in the Home for a short period of time, and Plaintiffs have admitted these facts.” (R. 1272).

The trial court based this decision on a supposed admission of fact by Plaintiff in a prior motion for summary judgment filed two years previous to the above ruling. (R. 1272). In February of 2001, Defendants’ filed their first motion for summary judgment and they claimed as an undisputed fact that they had built the home “for their own residence” and that the Defendants had lived in the home for a short period of time. (R. 29). In Plaintiffs’ opposition to the motion for summary judgment, Plaintiffs stated that “for purposes of this motion” only, they did not contest any of Defendants’ “Undisputed Facts”. (R. 52). This first motion for summary judgment was before any fact discovery had taken place (R. 1620) and Plaintiff felt confident at that point that the law alone would preclude summary judgment on those issues. Indeed, the trial court denied Defendants’ motion to all issues except negligent misrepresentation. (R. 152). The trial

court did not make any findings of fact on the first motion for summary judgment. (R. 152). After this motion was denied, nearly two years of discovery took place and Plaintiff discovered additional facts that led her to not believe Defendants assertions. (R. 1621). On May 6, 2003 Defendants filed their second motion for summary judgment where they again claimed as an undisputed fact that they had built this home for their own residence. (R. 806). In Plaintiff's memorandum in opposition on the second motion for summary judgment Plaintiff vehemently disputed this fact. (R. 958). However, the trial court held that "In this case, Plaintiffs did not dispute that the Smiths lived in the Home or that the Smiths intended it to be their home in *their response to Defendants' first Motion for Summary Judgment, therefore, it is an admission.*" (R. 1272) (emphasis added).

Plaintiff contends that the trial court erred in holding that Plaintiff's failure to contest a fact in a prior motion for summary judgment means that the fact is deemed admitted for a later motion for summary judgment and trial. Plaintiff specifically limited the admission of this fact to the first motion for summary judgment, no findings of fact were made on the first motion, that motion was before any fact discovery had taken place and Plaintiff vehemently refuted that fact in the second motion for summary judgment. (R. Transcript Motions Hearing April 1, 2004 pg. 0066-0068). Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure states in the pertinent part, "Each fact set forth in the moving party's memorandum is *deemed admitted for the purpose of summary judgment* unless controverted by the responding party." (emphasis added). Plaintiff acknowledges that the lack of contesting the facts were admissions for purposes of the first Motion for

Summary Judgment, but she does not believe that she should be held to that at a subsequent Motion for Summary Judgment especially considering the facts in this case. The trial court erred in ruling that the Moores home was “used” based on this so-called admission.

Even if those facts were deemed admitted in regard to the second motion for summary judgment, the trial court still erred in ruling that the home was “used” and the doctrine of discovery applied. Defendant’s never claimed that the home was “used” in their undisputed facts. Plaintiff never admitted in either the first or second motion that the home was “used”. In any event, even Plaintiff did admitted that the Smiths built their home for their own residence and that they lived in it for a short time, this does not mean that the home should be legally defined as “used” for the purposes of caveat emptor. The Smiths built the home and Mr. Smith was a very experienced licensed general contractor. The Smiths only lived in the home for 3 weeks after the certificate of occupancy was given to the time the EMSA was signed. An experienced licensed general contractor should not be able to live in a home for a very brief time for the purpose classifying that home as “used” so the doctrine of caveat emptor can apply to the sale of the home. If this Court sanctioned such a holding then certainly it may become a customary habit for some general contractors to live in a home for a few short weeks and then sell it to an unsuspecting buyer who thinks he is buying a “new” home, when in-fact he may be buying a “used” home in which the doctrine of caveat emptor applies. When these facts are construed in a light most favorable to Plaintiff, the trial court should not have ruled that the home was “used” and that the doctrine of caveat emptor applied.

D. In Light of Smith v. Frandsen, Has Utah Abandoned the Doctrine of Caveat Emptor in the Sale of “Used” Residential Housing?

The application of the doctrine of caveat emptor in the sale of “new” and “used” residential housing is anything but clear in the state of Utah. This Court stated in *Maack* that “that Utah does not currently recognize an implied warranty of habitability relating to the construction of residential property and instead continues to adhere to the traditional rule of caveat emptor.” *Maack* at 582. However, the Utah Supreme Court has stated that the doctrine of caveat emptor has eroded in the sale of new homes, but in the area of used residences it is “reasonable to hold the purchaser to the caveat emptor doctrine.” *Shafir v. Harrigan*, 879 P.2d 1384, 1389 (Utah App. 1994) quoting, *Utah State Medical Ass’n v. Utah State Employees Credit Union*, 655 P.2d 643, 645 (Utah 1982).

In, *Smith v. Frandesen*, 94 P.3d 919 (Utah 2004) the Utah Supreme Court recently expounded on this issue:

As a result of their superior knowledge, residential home-builders in other jurisdictions have consistently been held liable to subsequent as well as immediate purchasers. *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1044-45 (Colo.1983) (citing cases from eight different states in which subsequent purchasers were held able to state a claim for negligence against a builder); *see also* Timothy E. Travers, American Law of Products Liability § 38:19 (3d ed.1987); Michael A. DeSabatino, *Liability of Builder of Residence for Latent Defects Therein as Running to Subsequent Purchasers from Original Vendee*, 10 A.L.R.4th 385 (1981). Just as the lack of purchaser sophistication motivated the initial exceptions to the doctrine of caveat emptor, the expansion of builder-contractor liability to encompass even remote purchasers is similarly driven. Like initial consumers of residential construction, subsequent homeowners typically possess no greater sophistication that would enable them to discover latent defects in the property. *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022, 1034 (1987) (“ ‘The same policy considerations that lead to [our adoption of the implied warranty of habitability for sales of new homes] ... are equally

applicable to subsequent homebuyers.’ ” (quoting *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 678 P.2d 427, 430 (1984)); see also Dwight F. Hopewell, *C. Oates v. Jag: Let the Buyer Beware-A Remedy for Subsequent Purchasers of Homes in North Carolina*, 64 N.C. L.Rev. 1485, 1493 (1986) (“[A] subsequent purchaser of real estate is in a very similar position to that of the initial purchaser. Both are innocent purchasers who lack the expertise and knowledge necessary to uncover every latent defect.... Thus, both classes of purchasers deserve equal protection”).

Smith v. Frandsen, 94 P.3d at 926-927 (emphasis added). Based on the holding in *Smith v. Frandsen* it appears that the Supreme Court of Utah adopted an implied warranty of habitability to the sale of all residential homes and abandoned the doctrine of caveat emptor. If this is the case, then the trial court erred in applying the doctrine of caveat emptor to this case. However, if the doctrine of caveat emptor has not been abandoned in the sale of “used” residential housing, Plaintiff would request that this Court certify this appeal pursuant to Utah R. App. P. Rule 43 so that the Utah Supreme Court can decide if this doctrine should be abandoned in the sale of “used” residential construction.

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

On November 17, 2003 Defendants filed five more motions for summary judgment, one of which sought to dismiss Plaintiffs breach of contract claim for the third time. (R. 1377). Defendants main argument relied upon language in Paragraph “C” of the EMSA. Paragraph “C” states:

C. SELLER WARRANTIES. Seller warrants that: (a) Seller has *received no claim nor notice* of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (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.

(Appellants Addendum No. 7.) (emphasis added). Defendants argued that under this Paragraph, “The Building Inspector gave no notice of any such claims except possibly the finish grading. No other contract claim could fit in this provision.” (R. 1381-1382). Apparently the trial court agreed with Defendants interpretation and their ‘notice’ argument because it ruled that “the only alleged defect that could fit within the terms of Paragraph “C” was item 27 (the matter of finish grading and the minimum frost line depth of the dirt around the house).” The trial court dismissed all other defects as it related to the breach of contract issue. (R. 1750).

Plaintiff admitted that Paragraph C was the only warranty specifically given to Plaintiff for which Plaintiff based her breach of contract claim. (R. 1528c). However, Plaintiff argued that Defendants did have notice of all the defects and, because Defendants personally built the home, they either knew or should have known of these defects. (R. 1528c-d). Plaintiff asserted that Dan Smith was aware of the manner in which he built the house, he was knowledgeable of the standards of the Uniform Building Code (UBC) and that he was personally held to the standards of the UBC. (R. 1528d). Furthermore, Plaintiffs argued that the Building Inspector discussed many of the defects in the home with the Defendants so that was notice as well. (R. Transcript Motions Hearing April 1, 2004 pg. 0023-0025). Lastly, Plaintiff asserted that at least the attic ventilation was not in proper working condition at the time of closing as warrantied in Paragraph C(c). (R. 1528e-f).

Defendants then made the outrageous argument that Dan Smith could have known of these defects and he still would not have been in breach of Paragraph C. Defendants stated, “One ‘receives’ notice from another, not from himself. One ‘receives’ notice of a building code violation from a building inspector. He may already know there is a violation but he does not ‘receive a notice or claim’ from himself.” (R. 1532; Transcript Motions Hearing April 1, 2004 pg. 0011). Defendants argued that “unless the Building Code Inspector “red-tagged” an item as a violation of the building code” then there could be no notice and that item must be dismissed from Plaintiff’s breach of contract claim.³ (R. 1733). Defendants argued that the Building Inspector issued a certificate of occupancy and approved all items with the exception that he allowed the finished grating around the house to be done after winter was over. Defendants admitted that there was a disputed fact about the finished grating around the house and this was the only defect that the Defendants could have possibly had notice of. (R. 1733).

A. The Trial Court Erred in Interpreting Paragraph “C” of the EMSA.

Black’s Law Dictionary defines Notice as, “A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received a notice of it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording.” Further it defines implied notice as, “Notice that is inferred from facts that a person had a means of

³ Taken to its logical extreme, Defendants argument allows all licensed general contractors to claim no notice of building code violations as long as the building inspector passes them off. This is not only directly contrary to the Uniform Building Code but is not the legal definition of notice.

knowing and that is thus imputed to that person; actual notice of facts or circumstances that, if properly followed up, would have led to a knowledge of the particular fact in question. -- Also termed *indirect notice; presumptive notice.*” *Black’s Law Dictionary* (7th ed. 1999). Utah Law defines actual notice as being “personal knowledge”.

Diversified Equities, Inc. v. Amercan Sav. & Loan Ass’n, 739 P.2d 1133 (Utah App. 1987). Therefore, pursuant to the legal definition of “notice”, Dan Smith had notice of the defects if he had knowledge of them or if he had reason to know of them.

The Supreme Court of Utah expounded the issue of notice and knowledge for a builder in Utah. The Supreme Court stated that “a licensed general contractor in the state of Utah, and like developers, the law imputes to builders and contractors a high degree of specialized knowledge and expertise with regard to residential construction.” *Frandsen* at 925. In *Frandsen*, the builder (GT) had “no prior construction experience” but the Supreme Court stated, “Nevertheless, GT is deemed to possess the knowledge of a reasonably prudent builder-contractor under similar circumstances, and, as a matter of law, a builder of ordinary prudence would have discovered the insufficient compaction on lot 223.” *Id.* Therefore, even if Mr. Smith truly had no actual knowledge of the defects in the home, the law does impute to him knowledge or notice of these defects if a reasonable prudent builder would have known of these defects.⁴ The trial court erred in ruling that Defendants had not received notice of any defect in the home except as to the footing defect.

⁴ This conclusion is supported by the UBC Sec. 205 & the second paragraph of 305(a). (R. 1000-1001).

Plaintiffs further presented evidence to the trial court that Dan Smith received actual notice of the attic ventilation defect and of the defect in the stairs by the building inspector. (R. Transcript Motions Hearing April 1, 2004 pg. 0023-0025). Therefore, even if Defendants interpretation of the contract was correct, the trial court should not have dismissed these defects.

Lastly, the trial court also erred in dismissing the defect regarding the attic ventilation because Paragraph C(c) warrants that all ventilating systems would be in proper working order at the time of closing. Certainly when the Plaintiff closed on the house, no more attic ventilation existed than when the Moores discovered this defect in the home so it was not in proper working order at the time of closing. Therefore, Plaintiff respectfully requests this Court to reverse the trial court's order and reinstate all defects relating to her Breach of Contract Claim.

VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM

In the trial court's Order on Defendant's first Motion for Summary Judgment the trial court ruled that Plaintiff's negligent misrepresentation claim was barred as a matter of law by the doctrine of merger as set forth in *Robinson v. Tripco Inv., Inc.*, 21 P.3d 219 (Utah App. 2000). (R. 153). The trial court erred because the doctrine of merger does not apply in this case due to the specific language in the abrogation clause of the EMSA and because the collateral rights exception applies.

A. The Doctrine of Merger Does not Apply Because of the Specific Language in the Abrogation Clause.

The EMSA states that the warranty would survive the giving of the deed.

Therefore, none of the four exceptions to the merger doctrine is needed for the Plaintiffs' claim of negligent misrepresentation to survive the giving of the deed. Accordingly, the doctrine of merger does not apply.

In *Pavoni v. Nielsen*, 999 P.2d 595 (Utah App. 2000), the court of appeals held that a warranty in the earnest money agreement survived the delivery of the deed when an abrogation clause stated that it would not be abrogated. In *Pavoni* the earnest money agreement included a warranty that "Seller agrees to install additional 3-inch gravel from the driveway entrance on the property to 20 feet beyond...". *Id.* at 596. The earnest money agreement also contained an abrogation clause that stated, "Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement." *Id.* at 596. The trial court held that the Nielsens had no duty to perform this warranty because the warranty was abrogated when the deed was given; the doctrine of merger precluded the warranty. But the Appellate court reversed this ruling, stating,

"Nielsen argues that the abrogation clause extinguished any rights the Pavonis had under the earnest money agreement because all terms merged into the deed. However, by the plain language of the abrogation clause, the express warranties in the earnest money agreement survived the delivery of the deed. "Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement." Under the earnest money agreement, delivery of the gravel was warrantied, and survived the deed. Thus, the trial court erred in concluding that the earnest money agreement terms were abrogated and merged into the deed. Whether this warranty was performed, and if not, what, if any, damages the Pavonis suffered, are questions for the jury."

Id. at 596.

It is interesting to note that the EMSA between the Moores and Smiths had the exact same language as the EMSA in *Pavoni*. Paragraph O of the EMSA signed by the Defendants on February 15, 1994 states, “O. ABROGATION. Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.” Paragraph C of the EMSA states in part, “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.” See Defendants Addendum No. 7. It is obvious that according to the holding in *Pavoni* that this warranty survived the giving of the deed and was not precluded by the doctrine of merger. Mrs. Moore's claim for negligent misrepresentation is based upon this warranty language in the EMSA. Language in a contract can be the basis for a claim of misrepresentation; it does not have to be a verbal communication. *Lamb v. Bangart*, 525 P.2d 602, 604 (Utah 1974). Plaintiff argued that the Defendants never intended to remedy the building violations and their warranty that they would remedy defects was therefore a misrepresentation of their state of mind. “It is settled that a misrepresentation of a present promissory intention is a misrepresentation of a presently existing fact.” *Maack* at 584. This warranty is the representation that was made either carelessly or negligently by the Defendants. Furthermore, the Defendants were in a superior position to know the material facts, they had a pecuniary interest in the transaction and should have reasonably foreseen that the Moores were likely to rely upon the warranty. Since this warranty survives the giving of the deed, then so does Mrs. Moore’s claim for negligent misrepresentation. They are one in the same.

In *Robinson v. Tripco supra*, the court held that doctrine of merger precluded Robinsons' claim for negligent misrepresentation. However, the plaintiffs' claim of negligent misrepresentation in that case was not based on a specific warranty that was written into the earnest money sales agreement, as is here, but was based on a conversation. Furthermore, there was not an abrogation clause in *Tripco* that specifically stated that the warranties would not be abrogated at the time of the giving of the deed, as is in the present case. The abrogation clause in the Plaintiff's EMSA specifically bars the doctrine of merger from applying. The trial court therefore erred in granting summary judgment on Plaintiff's negligent nondisclosure claim.

B. Plaintiff's Claim for Negligent Misrepresentation Also Falls Under the Collateral Rights Exception.

Even if the doctrine of merger applied, Plaintiff's claim for negligent misrepresentation falls under the exception of collateral rights to the doctrine of merger.

The reason the trial court dismissed the Moores' claim for negligent misrepresentation was because it believed that the *Tripco* held that negligent misrepresentation can not survive the giving of the deed, or in other words, it was precluded by the doctrine of merger under *all* circumstances. (R. 153, Transcript Motions Hearing May 31, 2001 pg. 0048-0049). This, however, is not true. *Tripco* held that negligent misrepresentation does not fall under the fraud exception of the doctrine of merger. The doctrine of merger has four exceptions: (1) mutual mistake in the drafting of the final documents; (2) ambiguity in the final documents; (3) existence of rights collateral to the contract of sale; (4) fraud in the transaction." *Id.* at 222. In *Tripco* the

plaintiffs, unlike the present case, argued that their negligent misrepresentation claim fell only under the fraud exception. This Court held that although fraud and negligent misrepresentation are similar, negligent misrepresentation does not fall under the fraud exception.

In *Embassy Group, Inc. v. Hatch*, 865 P.2d 1366, 1372 (Utah App. 1993), this Court held as it pertains to collateral rights exception:

“The collateral rights exception applies when the seller’s performance involves some act collateral to the conveyance of title, with the result that those obligations survive the deed and are not extinguished by it... Collateral terms may take various forms. For example, the supreme court found collateral terms to exist in *Stubbs*, where the earnest money and exchange agreement required the seller to remove certain equipment from the property at issue. The court held that the agreed-upon removal was collateral to the conveyance and hence that it survived the delivery of the deed.”

Dan and Carol Smith warranted that they would remedy any known building code violations prior to closing. Plaintiff relied upon this representation that all known building violations would be repaired before closing. This warranty is collateral to the conveyance, as in *Embassy Group*, and hence it survives the delivery of the deed.

Therefore, Mrs. Moore’s claim of negligent misrepresentation falls under the collateral rights exception to the doctrine of merger. Based upon the forgoing arguments, Mrs. Moore’s claim for negligent misrepresentation should not have been dismissed by summary judgment and this court should reverse the trial court’s order.

**VIII. THE TRIAL COURT, IN CONFORMANCE WITH THE
MAJORITY RULE, SHOULD HAVE AWARDED A REASONABLE
FEE FOR PLAINTIFF’S EXPERTS TIME SPENT IN PREPARING
FOR DEPOSITIONS**

On June 18, 2003 Plaintiff filed their Memorandum In Support of Plaintiff’s Motion to Award Expert Witness Fees, Tender Into Court, and Conditional Request for Oral Hearing. (R. 1027). In this memorandum Plaintiff argued that she should be compensated for her experts’ time in preparing for the depositions that Defendants had noticed up. Oral arguments were heard on this motion. (R. Transcript Motions Hearing July 21, 2003 pg. 0056-0059). In the trial court’s Order on Motion to Compel Expert Fees the Plaintiff’s motion was denied. (R. 1263). Legal conclusions of the trial court are accorded no deference, but are reviewed instead for correctness. *Pratt v. Mitchell Hollow Irr. Co.*, 813 P.2d 1169, 1171(Utah 1991).

**A. This Court Should Adopt the Majority Rule and Compensate Plaintiff
for Her Experts’ Time in Preparing for Depositions.**

The Utah Rules of Civil Procedure provide that “the court shall require that the party seeking discovery pay the expert a reasonable fee for *time spent in responding to discovery*.” U.R.C.P. 26(b)(4)(C)(i) emphasis added. This is an issue of first impression as Utah courts have not ruled on whether “time spent responding to discovery” includes time spent in preparing for deposition. However, with regards to fees paid to an expert witness, the provision in the Federal Rules of Civil Procedure Rule 26(b)(4)(C)(i), is identical to that of Utah. Therefore, federal court decisions provide persuasive authority to define the scope of “time spent responding to discovery.”

Although there is division among the federal courts, the clear majority of federal courts have held that expert preparation time is compensable.⁵ One court recently affirmed what the majority rule is:

With respect to time spent by experts preparing for deposition, courts are divided as to whether such time is compensable. *Most courts have held in the affirmative.* (Citations omitted). Other courts have refused to award compensation for preparation time, at least in the absence of compelling circumstances, such as where the litigation is particularly complex and/or the expert must review voluminous records.

Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 646 (E.D.N.Y. 1997) emphasis added. As noted by the *Magee* court, even those courts that refuse to award compensation for preparation time make exceptions to that rule.

U.R.C.P. 26(b)(4)(C)(i) permits recovery for “time spent in responding to discovery”. “Time spent preparing for a deposition is, literally speaking, time spent in responding to discovery.” And because depositions are the only type of discovery under Rule 26(b)(4) “it would have been relatively easy for the Rule’s drafters to limit recovery to the time actually spent appearing for the deposition if that was what they had intended to do.” *Collins* at 357. Although the drafters did not make their intentions perfectly clear, a policy that allows an expert to be compensated by the opposing party for his reasonable preparation time for a deposition could actually lower the overall costs of the opposing party. An expert’s time spent reviewing documents and reports will actually

⁵ See, e.g., *Boos v. Prison Health Servs.*, 212 F.R.D. 578 (D. Kan. 2002); *Collins v. Vill. Of Woodridge*, 197 F.R.D. 354 (N.D. Ill. 1999); *McNerney v. Archer Daniels Midland Co.*, 164 F.R.D. 584 (W.D.N.Y. 1995); *McHale v. Westcott*, 893 F. Supp. 143 (N.D.N.Y. 1995); *Hose v. Chicago & N.W. Transp. Co.*, 154 F.R.D. 222 (S.D. Iowa 1994); *Hurst v. United States*, 123 F.R.D. 319 (D.S.D. 1988); *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 553 F. Supp. 45 (S.D.N.Y. 1982).

speed up the deposition process; the more costly alternative would be for the expert to refresh his memory during the deposition while the deposing party is paying not only for the expert's time but also the costs of counsel. *Hose* at 228. Additionally, the purpose of expert witness compensation under Rule 26(b)(4)(C) is to prevent a deposing party from benefiting from the other party's expert at the expense of the other party. *Magee* at 645. By adopting the majority rule this Court would promote a policy with greater economical efficiency and which is closer in harmony with the purpose of the statute. Plaintiff respectfully requests that this Honorable Court follow the majority rule rationale and "permit an expert to be compensated by the opposing party for the time reasonably necessary to refresh the expert's memory regarding the material reviewed and the opinions reached." *Collins* at 358.

B. In the Alternative, Plaintiff Should Recover Her Experts' Fee in Preparing for Depositions Based on Exceptions to the Minority Rule.

The rationale behind the minority rule is that "one party need not pay for the other's trial preparation." *Rhee v. Witco*, 126 F.R.D. 45, 47 (N.D. Ill. 1989). In *Rhee* the plaintiff requested the experts preparation time for not only "review of his conclusions and their basis, but also consultation between the responding party's counsel and the expert to prepare the expert to best support the responding party's case and to anticipate questions from seeking party's counsel." *Id.* However, that is not the case here. None of the time billed by Marry Moore's experts included conference time between the experts and her counsel. (R. 1175). After considering the rationale in *Rhee*, the court in *Hose* held that "much if not all of the rationale underlying the decision in *Rhee* [was] absent"

because the compensation sought there was not for any time spent in conference between expert and counsel. *Hose* at 228. Accordingly, this Court should likewise ignore the minority rule rationale as it does not apply in this case.

Even *Rhee* recognized that compensation of an expert's time in preparing for discovery may be appropriate in complex cases where a long period has elapsed from the time of the experts report to the time of depositions and when the expert must review voluminous documents. *Rhee* at 47. In the alternative, if this Court chooses to not adopt the majority rule, Plaintiff should still recover her costs under the exceptions of the minority rule. The expert reports were very complex and voluminous, dealing with 42 code violations and 292 pages of expert reports and 29 sections of the Uniform Building Code and other relevant codes. Furthermore, each expert performed their inspections and completed their report more than one full year before their depositions were taken. (R. 1175). Thus, it was necessary for them to review those voluminous reports and Plaintiff is entitled to those costs.

IX. THE TRIAL COURT ERRED IN RULING THAT PLAINTIFF COULD NOT RECOVER ATTORNEY FEES AND COSTS ON ALL HER CAUSES OF ACTION

Whether attorney fees are recoverable in an action is a question of law, which we review for correctness. *Chase v. Scott*, 38 P.3d 1001, 1003 (Utah App. 2001). Mrs. Moore is entitled to her attorney fees in this case pursuant to Paragraph "N" of the EMSA. Paragraph "N" states in the pertinent part:

Both parties agree that should either party default in any of the covenants or agreements herein contained, the **defaulting party shall pay all costs and expenses, including a reasonable attorney's fee**, which may arise or accrue

from enforcing or terminating this Agreement **or in pursuing any remedy** provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.

(*See* Appellants' Addendum No. 7) (emphasis added). The Defendants are the defaulting party. At trial on this matter the jury found Defendants in breach of Paragraph C(a) of the EMSA (*See* Appellants' Addendum No. 10). A finding that a party materially breached an agreement "is tantamount to a holding that they defaulted in the agreement". *Foote v. Clark*, 962 P.2d 52 (Utah, 1998).

Plaintiff filed a Verified Memorandum of Costs, Disbursements and Attorney Fees in Support of Plaintiff's Motion for an Order Awarding Attorney Fee's, Expenses and Costs on April 4, 2005. (R. 2148). This verified memorandum contained, pursuant to U.R.C.P. Rule 73(b), the basis for the award, a detailed description of the time spent and work performed for each item of work, the position of the person performing the work, that persons hourly rate and factors showing the reasonableness of the fee. Defendants claimed that Plaintiff's request for fees were excessive because Plaintiff "failed to designate the fees attributable to unsuccessful claims as opposed to successful claims". (R. 2188). At a hearing on this issue the trial judge ruled that Plaintiff was only entitled to attorney's fees and costs on their breach of contract cause of action. (R. Transcript Hearing on Motions June 6, 2005 pg. 0045, 0066). Therefore, the trial court mandated that Plaintiff resubmit their billings and eliminate any fees or costs that did not associate with pursuing Plaintiff's breach of contract claim that she was successful on. (R. Transcript Hearing on Motions June 6, 2005 pg. 0071).

The trial court erred in limiting Plaintiff to her attorney's fees and costs for solely her breach of contract cause of action. Plaintiffs claim for attorney fees and costs is based upon Paragraph "N". Paragraph "N" *does not require there to be a successful or prevailing party* in order for attorney's fees to be awarded. Paragraph "N" solely requires that that the defaulting party shall pay all costs, expenses and reasonable attorney's fee. The contract does not require any evaluation of the parties' respective success in an action. Paragraph "N" permits Plaintiff to pursue any remedy available under applicable law. Plaintiff could pursue any remedy under applicable law and still get her fees, not just a breach of contract remedy. Therefore, pursuant to Paragraph "N", Plaintiff was not required to prevail on all her causes of action to receive all of her attorney's fees and costs, Plaintiff merely had to show that the Defendants were the defaulting party and the contract provided that they shall pay all costs, expenses and reasonable attorney's fee.

The cases in Utah that require this designation of fees based upon successful claims and unsuccessful claims usually deal with attorney's fees clause that provides for the "successful party" to be awarded their fees. *See Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998) (holding that attorney's fees must be separated into successful and unsuccessful claims but was interpreting a contract that relied upon the prevailing party standard). Plaintiff should not be required to designate her fees based upon successful and unsuccessful claims when the "successful party" requirement is not found in the contract, such as here. Just because Plaintiff's basis for recovery was found

in a contract, does not necessarily mean that she could only recover for breach of that contract. If the contract provides for recovery of all fees whether or not the fees were incurred on a breach of contract action, then fees should be awarded for all actions, not just the breach of contract action. The language of the contract should govern what fees and costs are recoverable.

A. Plaintiff Eliminated all Attorney's Fees that did not Relate to the Breach of Contract Cause of Action.

Even if Plaintiff should have been required to designate the fees and costs based upon the successful claims and unsuccessful claims, Plaintiff met this requirement. Plaintiff resubmitted her request for fees and costs pursuant to the trial courts mandate. (R. 2308). Plaintiff removed every single fee that could be determined to not associate with Plaintiff's pursuit of her breach of contract cause of action. (R. 2308). In the prosecution and defense of Mrs. Moore's case the causes of action were so closely related and intertwined as to be indistinguishable. "Where the proof of a compensable claim and otherwise non-compensable claim are closely related and require proof of the same facts, a successful party is entitled to recover its fees incurred in proving all of the related facts." *Kurth v. Wiarda*, 991 P.2d 113, 116 (Utah App. 1999).

It would be impossible for Plaintiff to separate the time spent on the breach of contract claim compared to the Fraudulent Misrepresentation claim in the first two motions for summary judgment and discovery etc. Utah law holds that a Defendant who had successfully defended against a breach of contract claim, in connection with which costs and attorney fees were recoverable, was entitled to recover costs relating to factual

development which, while necessary to defeat contract claim, also bore on negligent and fraudulent misrepresentation counterclaims on which defendant prevailed, even though costs incurred in connection with those claims were not by themselves recoverable.

Brown v. David K. Richards & Co., 978 P.2d 470 (Utah App. 1999). The work and research done on fraudulent nondisclosure at the beginning of the case was vital to proving the breach of contract claim as well. For example, research done on the reasonableness of not getting a home inspection for purposes of the doctrine of caveat emptor as it related to fraudulent nondisclosure also was vital to the reasonableness of when Mrs. Moore should have discovered the defects for purposes of the discovery rule on her breach of contract cause of action. Every cause of action claimed by the Plaintiff stemmed from the exact same factual scenario, namely, that the Defendants built the house with many defects in it; that defendants knew or should have known of these defects; and that they did not inform Mrs. Moore of the defects in the home or repair the defects as they warranted in the EMSA. In-fact, Plaintiff's negligent misrepresentation and fraudulent misrepresentation causes of action were based upon the exact same clause in the contract as Plaintiff's breach of contract cause of action. The facts and law were so intermingled that it would be impossible to separate.

Lastly, the trial court ruled that Plaintiff could recover attorney's fees for only that portion of the breach of contract claim they were successful on. (R. 2401-2402). This meant that Plaintiff could only recover her fees on the improper grading or footings defect. This is illogical. First, Plaintiff prevailed on her fraudulent nondisclosure claim and the court held that she could not recover her fees as to that cause of action. Second,

Plaintiff never did research on any particular defect in the home. Plaintiff never incurred fees that related to any specific defect in the home. In-fact, the footing defect was the single most vital and damaging of all the defects. If this had been the only defect from the beginning it would not have altered the way Plaintiff proceeded with this case in any way. The dismissal of the other defects did not affect how the case was prosecuted; it only affected the final judgment obtained. Thus, the trial court erred in interpreting Paragraph “N” to hold that Plaintiff could only recover her attorney’s fees on the footings defect part of her breach of contract claim. Plaintiff respectfully request that she be awarded all of her attorney’s fees and costs pursuant to Paragraph “N” of the EMSA.

B. Plaintiff is Entitled to all her Attorney’s Fees and Costs on Appeal.

A party who is entitled to attorney’s fees below is entitled to attorney’s fees reasonably incurred on appeal. *Valcarce* at 319. Plaintiff is entitled to all her fees, costs and expenses on appeal pursuant to Paragraph “N” of the EMSA. Furthermore, Plaintiff is entitled to all her costs on appeal pursuant to Utah R. App. P. Rule 34.

Further, Defendants claim that they “would be entitled to recover their attorney’s fees and costs” should this Court reverse the trial court is patently incorrect. *See* Defendants Brief pg. 36. Defendants have failed to realize that Paragraph “N” of the EMSA does not provide for the prevailing party to recover attorney’s fees but provides that the defaulting party shall pay all costs, expenses and attorney’s fees. Defendants have never claimed that Plaintiff defaulted in any portion of the contract; therefore Defendants could never recover their attorney’s fees from Plaintiff.

X. THE TRIAL COURT'S FINDINGS OF FACT DO NOT SUPPORT ITS REDUCTION IN ATTORNEY'S FEES AND COSTS

In the alternative, if the trial court did not err in interpreting Paragraph "N" of the EMSA, the trial court erred in arbitrarily reducing Plaintiff's attorney's fees and costs without support in its Findings of Fact. To prevail on a claim that the trial court abused its discretion in reducing Plaintiff's award of attorney's fees and costs, Plaintiff must marshal the evidence to support the trial court's findings. *Stout v. Creekside East Condominium Homeowners Ass'n*, 2005 WL 2234845 (Utah App. 2005).

A. Marshaling the Evidence.

Plaintiff's alleged six separate causes of action in their complaint including, Breach of Contract, Fraudulent Nondisclosure, Negligent Misrepresentation, Fraudulent Misrepresentation, Violation of the Consumer sales Practices Act as well as Punitive damages and Rescission. (R. 01). Ultimately, Plaintiff only came to trial on her Breach of Contract and Fraudulent Nondisclosure causes of action because all other causes of action were dismissed in summary judgment. (R. 2400). Plaintiff originally claimed 42 code violations in the home and Plaintiff only recovered pursuant to the finished grating or footings defect. (R. 2401). The Defendants filed objections to Plaintiff's request for fees arguing that Plaintiff should not be able to recover all her fees because most of her causes of actions and defects were dismissed by this court. (R. 2236). The court ordered Plaintiff to resubmit her request for fees and costs and remove any fee or costs that did not associate with her pursuit of her breach of contract claim. (R. Transcript Hearing on Motions June 6, 2005 pg. 0071). Plaintiff resubmitted her request and only reduced the

amount requested in attorney's fees by \$3,822.24. (R. 2402). The trial court found that Plaintiff failed to provide any factual basis upon which the Court can determine the reasonableness of her fees and costs. (R. 2402). The trial court found that "substantial portion of the motions in the case especially the various motions for summary judgment involved causes of action other than the breach of contract cause of action. (R. 2403). The trial court found that there "were substantial unnecessary attorney's fees generated in Motions to Reconsider and in disputes over the language in proposed orders and unnecessary discovery disputes." (R. 2403). Furthermore, the trial court found "with respect to the reasonableness of the requested fee is that the \$120,000 plus requested attorney's fee is more than four times the monetary award given the Plaintiff by the jury and is substantially more than the \$83,000.00 total purchase price for the subject home." (R. 2403). The court found that a reasonable attorney fee was \$40,000.00 and costs in the amount of \$10,000.00. (R. 2404).

Based on the forgoing evidence, it could be argued that the trial court has abundant evidence to support its reduction of attorney's fees and costs. The trial court ruled that many of Plaintiffs motions were unnecessary and that many did not relate to the breach of contract cause of action. "The appellate court reviews such determinations for abuse of discretion, granting considerable deference to the trial court due to its familiarity with the facts and the evidence." *Wiley v. Willey*, 951 P.2d 226, 230 (Utah 1997). Defendants could argue that based upon the deference given to the trial court for its familiarity with the facts this Court should not overturn the trial court's ruling on fees and costs. Further, the argument could be made that the trial court should not be

responsible to go through all of Plaintiff's attorney bills and deduct the ones that did relate to breach of contract. Therefore, Defendants again could argue that the trial court acted appropriately in its discretion to reduce Plaintiff's fees and costs as to what it thought was reasonable.

B. The Trial Court Reduced Plaintiffs Fees and Costs without Relying on a Factual Basis.

As shown above, a basis to reduce Plaintiff's attorney's fees and costs possibly existed based on the trial courts interpretation of Paragraph "N". However, Plaintiff asserts that the trial court reduced Plaintiff's fees and costs without relying on the factual evidence in its Findings of Fact.

Even if the Plaintiff should have been required to separate her fees into those that were incurred on her prevailing causes, the trial court specifically found that it was "difficult to differentiate between what legal services were necessary for the prosecution of the subject of breach of contract claim and the Plaintiffs other causes of action." (R. 2403). Furthermore, Plaintiff's counsel submitted a verified memorandum that met the requirements of U.R.C.P. Rule 73(b). (R. 2148). Defendants never once objected to a single specific fee claiming that it was not incurred in relation to Plaintiff's breach of contract claim. (R. 2232; 2378; Transcript Hearing on Motions June 6, 2005 pg. 0060). The trial court pointed out that defendant did not object to the billing rate used and therefore found it reasonable. (R. 2402). Therefore, if Plaintiff presented facts supporting the reasonableness of the amount of attorney's fees and Defendants failed to

submit evidence in opposition to that then Plaintiff's facts regarding reasonableness should be accepted. Salmon v. Davis County, 916 P.2d 890, 893-894 (Utah 1996).

The court stated that many of the motions for summary judgment that Defendants filed dealt with causes of action other than the breach of contract. This is true. Of Defendants six (6) motions for summary judgment, one motion dealt directly with the breach of contract claim (R. 1377), two motions had the breach of contract claim as one of Defendants main arguments (R. 30; 802) and the remaining three motions did not deal with breach of contract at all. (R. 1353; 1360; 1369). Following the trial court's Order, Plaintiff removed the fees incurred on the latter three motions from the amount requested. (R. 2308). On the two motions that dealt with breach of contract and other causes of action, it was impossible for Plaintiff to distinguish what fees were incurred solely for the breach of contract part on drafting the memoranda in opposition, as well as researching and the time spent at hearings. This is because the issues were so intertwined that Plaintiff's counsel could not specifically allocate on his bill what part of his time he spent drafting on fraudulent nondisclosure compared to what part of his time he drafted on breach of contract or what part of his time he spent at oral argument on the breach of contract issue. Furthermore, there is no law in Utah that would require Plaintiff's counsel to be so specific on time spent in drafting a motion in opposition to summary judgment. Both of these motions took place in 2001 and 2003 and Plaintiff substantially prevailed on both. The trial court did not indicate any other work done or fees requested by the Plaintiff that did not relate to Plaintiff's breach of contract claim.

The trial court did state that Plaintiff's Motions to Reconsider, disputes over the language in proposed orders and discovery disputes were unnecessary. (R. 2403). Again, Plaintiff removed all fees incurred in researching and drafting her Motions to Reconsider from the amount of fees requested. (R. 2328-2329). Although Plaintiff disagrees with the trial court's statement that these items were unnecessary, Plaintiff admits that these other items were not removed from the amount Plaintiff finally requested. Even if the trial court deducted the amount for every single motion, objection to order and discovery dispute that it held was unnecessary or did not relate to the breach of contract cause of action, Plaintiff's amount of attorney's fees in this case would still easily exceed \$100,000.00. In fact, if you added all of Plaintiff's attorney's fees that she incurred after May 1, 2004 it still totals more than \$41,000.00 in fees alone. (R. 2308). April 26, 2004 is the date the judge entered his Memorandum Decision and Ruling on Defendants five Motions and Plaintiffs two Motions to Reconsider. (R. 1710, 1716). All the motions for summary judgments, motions for reconsiderations, discovery, discovery disputes and disputes over orders had already taken place. Everything that the trial court alluded to in its findings of fact took place before May 1, 2004. Everything after May 1, 2004 dealt directly with Plaintiff's breach of contract claim. Surely, a great deal the work that Plaintiff's counsel did in drafting the complaint, briefing and arguing the first motion for summary judgment, conducting discovery, attending depositions, briefing and arguing a second summary judgment and many more of the items related to Plaintiff's breach of contract claim. Even after eliminating every single fee from August 11, 2000 to May 1,

2004 Mary Moores total attorney's fees still exceed the amount the judge awarded. This is inexcusable.

There is no evidence or basis in the findings of fact to support a reduction in attorney's fees from \$123,639.64 to \$40,000.00. (R. 2400). "The trial court in exercising its discretion must make the findings of fact explicit in support of its legal conclusions." *Willey* at 230. The trial court did not find any fact that would support his reduction of attorney's fees to the exact amount of \$40,000.00. It appears that this was an arbitrary number that was chosen out of thin air. Even if every finding in the trial court's Memorandum Decision was supported by the evidence, there still would not be a justification for such an immense reduction in attorney's fees requested. The same argument applies in the reduction of costs from \$35,288.08 to \$10,000.00. Therefore, Plaintiff respectfully requests this Court to award Plaintiff all her attorney's fees and costs that she requested as they are reasonable as evidenced by Plaintiff Verified Memorandum of Costs, Disbursements and Attorney Fees in Support of Plaintiff's Motion for An Order Awarding Attorney Fee's Expenses and Costs. (R. 2148).

XI. THE TRIAL COURT ERRED IN APPLYING U.R.C.P. RULE 54(d) STANDARDS TO THE MEANING OF COSTS

Paragraph "N" states that all costs and expenses shall be paid by the defaulting party. The trial court stated that "Plaintiff is entitled to recover those normal costs awarded to a prevailing party pursuant to Rule 54 and any other costs or expenses associated with the breach of contract claim." (R. 2404). The trial court further stated that "Recoverable costs are usually associated with things such as filing fees, witness

fees, deposition expenses, if the depositions are used at the time of trial, and similar type fees.” (R. 2403). Because Paragraph “N” provided for all costs and expenses, the trial court erred in limiting the meaning of costs to fit within the confines of Rule 54.

When a contract provides for the award of costs, the contract should be interpreted to include those costs that were associated with litigation costs awarded pursuant to interpretation of U.R.C.P. Rule 54(d), in order to not render the contract provision superfluous. *Chase v. Scott*, 38 P.3d 1001, 106 (Utah App. 2001). Therefore, the term costs under a contract include any cost that is necessary to the litigation. “[T]here may be expenses associated with litigation that are necessary, but which nonetheless are not properly taxable as [statutory or rule-based] costs. Again, in order to give effect to the term ‘costs’ in the Contract, we hold that ‘costs’ should not be limited by case law interpreting Rule 54(d)” *Id.* (citations omitted). Plaintiffs’ contract not only provides for “costs” but also further provides for “expenses”. Since the term costs in a contract is broader than costs defined under Rule 54(d), then certainly “expenses” would include every item that Plaintiffs listed as costs and expenses.

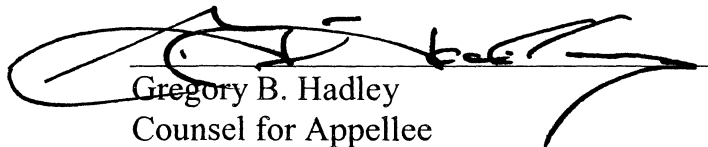
The trial court made no findings to support the reduction of costs, instead it arbitrarily reduced it to \$10,000.00. (R. 2400). Accordingly, the trial court must have relied on an interpretation of costs pursuant to U.R.C.P. Rule 54(d) in reducing Plaintiffs requested costs from \$35,288.08 to \$10,000.00. Therefore, the trial court erred in reducing those costs and Plaintiff should be awarded all her expenses and costs pursuant to Paragraph “N” of the EMSA.


CONCLUSION AND PRECISE RELIEF SOUGHT

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

Further, Mrs. Moore requests this Court to Order a reinstatement of (1) her negligent misrepresentation cause of action; (2) her 37 and 41 defects respectively under her fraudulent nondisclosure and breach of contract claims; (3) her expert fees incurred in preparing for Defendants' discovery and (4) all of her reasonable attorney fees, costs and expenses incurred before the trial court including those for defending and prosecuting this appeal.

RESPECTFULLY SUBMITTED this 19th day of July 2006.


Gregory B. Hadley
Counsel for Appellee


Paul D. Dodd
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered two (2) true and correct copies of the foregoing Brief of Appellee/Cross-Appellants, on this 19th day of July, 2006 to the following:

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



ADDENDA

Addendum No. 1: Transcript Motions Hearing May 31, 2001

Addendum No. 2: Order on Defendants' Defendants' Motion to Compel entered
February 20, 2003

Addendum No. 3: Transcript Motions Hearing July 21, 2003

Addendum No. 4: Order on Motion to Compel Expert Fees entered on August 21, 2003

Addendum No. 5: Memorandum Decision entered on August 21, 2003

Addendum No. 6: Transcript Motions Hearing April 1, 2004

Addendum No. 7: Order for Summary Judgment on Consumer Sales Practices Act,
Fraud, Mutual Mistake of Fact and Breach of Contract entered June
23, 2004

Addendum No. 8: Jury Trial Transcript March 7-9, 2005.

Addendum No. 9: Transcript Hearing on Motions June 6, 2005

Addendum No. 10: Memorandum Decision entered on August 01, 2005.

ADDENDUM NO. 1

1 merger doctrine.

2 MR. HASLAM: Well, and apparently it was. But
3 the only basis that was brought before the court of
4 appeals, Your Honor, was the appellant's argument that
5 negligent misrepresentation falls within the fraud in the
6 exception rule. And that was the only basis they
7 presented to the court of appeals and that is why the
8 court of appeals said our analysis will focus specifically
9 on that exception because that's what appellant asks us to
10 do.

11 THE JUDGE: But they draw this conclusion that,
12 that this claim cannot survive the merger doctrine.

13 MR. HASLAM: Well, that's what the trial court
14 held, Your Honor, the trial court held that.

15 THE JUDGE: And the appellate courts upheld it.

16 MR. HASLAM: They upheld it because, well the,
17 the court of appeals is--

18 THE JUDGE: I mean, for whatever reason.

19 MR. HASLAM: Sure. Well, Your Honor, though
20 my, my opinion is that they upheld it because they
21 asserted that negligent misrepresentation fell within the
22 fraud--

23 THE JUDGE: Well, so what?

24 MR. HASLAM: -- and it doesn't.

25 THE JUDGE: Aren't they, aren't they... We
PENNY C. ABBOTT, COURT REPORTER

0048

1 don't disagree it's not fraud. We disagree that it's not,
2 we don't disagree that it is not fraud.

3 MR. HASLAM: Right. They affirm the trial
4 court--

5 THE JUDGE: We disagree that it's not, we don't
6 disagree that it is not fraud.

7 MR. HASLAM: Right. They affirmed the trial
8 court--

9 THE JUDGE: We all agree that negligent
10 misrepresentation is not fraud. But regardless it's
11 applied, that case applies it in a contract case and
12 they're saying it doesn't, it doesn't survive a merger
13 doctrine.

14 MR. HASLAM: I disagree, Your Honor, I think
15 it--

16 THE JUDGE: Why do they apply it then?

17 MR. HASLAM: Well, because that's apparently
18 what was applied for the trial court. Now the appellate
19 court, their only job was to review what the trial court
20 has done in light of the errs being asserted by the
21 appellant.

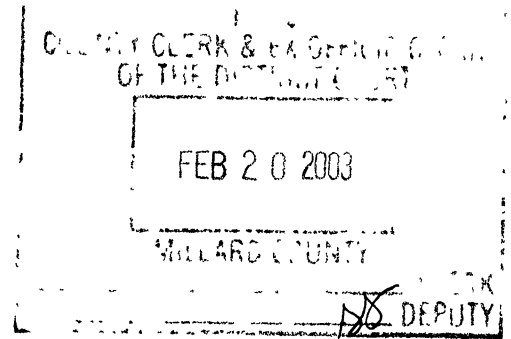
22 THE JUDGE: Well, don't they have to say that's
23 an err?

24 MR. HASLAM: No, not if it's--

25 THE JUDGE: They're, they're saying it doesn't
PENNY C. ABBOTT, COURT REPORTER

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ADDENDUM NO. 2



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NATHAN K. FISHER, ESQ. (#7522)
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192 East 200 North Suite 203
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Attorneys for Defendants

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

WILLIAM MOORE and MARY MOORE,	)	ORDER ON DEFENDANTS'
	)	MOTION TO COMPEL AND
Plaintiff,	)	ON DEFENDANTS' MOTION
	)	FOR PROTECTIVE ORDER
vs.	)	AND TO BIFURCATE
)	
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 Donald J. Eyre
)	

Defendants' Motion for Sanctions or In the Alternative to Compel Discovery and the Defendants' Motion for Protective Order and Motion to Bifurcate came regularly before the Court for decision and a hearing was held on Thursday, February 6, 2003, at which Plaintiffs were represented by Gregory B. Hadley and Defendants were represented by Nathan K. Fisher. The Court having fully reviewed the record, including the parties' memoranda, and having heard oral argument, and being fully advised in the premises,

HEREBY ORDERS, ADJUDGES AND DECREES that

- 1 Defendants shall deliver to the Plaintiffs on or before Friday, February 14, 2003, responses to Plaintiffs' Second Set of Interrogatories and Requests for Production of Documents which relate to Defendants' financial information and documents. Defendants are not required to respond to discovery which seeks financial information which is not available for attachment or execution such as retirement accounts.
- 2 The financial information and documents provided in response to the Plaintiffs' Second Set of Interrogatories and Requests for Production of Documents shall be delivered directly to Mr. Hadley and shall not be seen, shown to, shared with, or disclosed to anyone, including the Plaintiffs. Mr. Hadley is ordered to maintain the financial information and documents received from the Defendants in response to the interrogatories and document requests and obtained during deposition in the strictest confidence and to not disclose any part of it to anyone, including the Plaintiffs, and to not permit the information and documents to be seen by anyone until further order of this Court. Any information concerning the Defendants' financial information and documents discovered during deposition shall also be protected as set forth herein. If any inquiry is made into the Defendants' financial information or documents during the Defendants'

depositions, all persons shall be excluded from the room during such inquiry. Plaintiffs' counsel and the Court Reporter, along with any person approved by Defendants, may remain in the room during the inquiry. A transcript of the Defendants' depositions shall not be shown to any person, including the Plaintiffs, without first redacting all references to Defendants' financial information and documents. The financial information and documents contained in the Defendants' depositions shall not be disclosed to any person, including the Plaintiffs, until further order of the Court.

3. On or before February 28, 2003, Defendants shall take the deposition of those of Plaintiffs' experts Defendants' desire to depose. In the event that a problem arises such that the experts' depositions, which are currently scheduled for February 18, 19 and 20, 2003, cannot be completed, Defendants may request a continuance of the February 28, 2003, deadline.
4. Plaintiffs shall properly and completely respond to Defendants' Second Set of Requests for Admission dated October 7, 2002, as follows. Plaintiffs shall respond to Requests 1 through 4 individually, and respond to Requests 5 through 9 with respect to each of the 42 alleged defects identified in the report provided by Rex Radford and Lloyd Steenblik. Plaintiffs are not required to respond to Request No. 10 with respect to each of the 42 alleged defects. In responding to

the Requests for Admission, Plaintiffs shall comply with rule 36(a)(2) of the Utah Rules of Civil Procedure

- 5 Plaintiffs shall deliver to Defendants on or before Friday, February 14, 2003, the Plaintiffs' responses to the Defendants' Second Set of Requests for Admission dated October 7, 2002, ordered in the preceding paragraph
6. With respect to Jason Bullock and Stephen Hatch, Plaintiffs shall deliver to Defendants on or before Friday, February 14, 2003, a complete response to Subsection 1 to Interrogatory No. 1 in Defendants' First Set of Interrogatories to Plaintiffs, which pertains to prior testimony. The response shall be limited to the preceding four years
- 7 The definition of "home inspector" is a person qualified, by training or by experience, to perform home inspections
- 8 The definition of "without destructive testing" is an inspection that does not result in physical damage to the structure
9. The definition of "latent" is hidden

DATED this 14 day of February, 2003


JUDGE DONALD J. EYRE
DISTRICT COURT JUDGE

(Court signed for
copy filed
2/14/03)

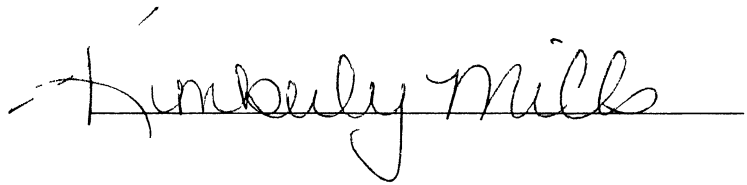
NOTICE TO PLAINTIFFS' ATTORNEY

TO. Gregory B. Hadley

You will please take notice that the Attorneys for Defendants, will submit the above and foregoing Order to the Honorable Donald J. Eyre, for his signature, upon the expiration of five (5) days from the date of this Notice, which is hand-delivered to.

Gregory B. Hadley
Hadley & Associates
2696 North University Avenue, Suite 260
Provo, UT 84604

DATED this 14th day of February, 2003

A handwritten signature in cursive script, reading "Kimberly Mills", is written over a horizontal line.

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ADDENDUM NO. 3

1 of these admissions. They'd sent other requests for
2 admissions, other discovery. But no definitions in this
3 other than one little definition of what they said was
4 latent. And they referred to Judge Howard's decision. Well
5 that's four pages. You find a definition in there that's a,
6 that's a clean definition of latent. We responded but we
7 raised objections of vagueness, overbroad, no definitions,
8 you're trying to make us prove your case, you fellows do the
9 work on latent and patent. We came and we argued that
10 motion because they said we need to do it. And Your Honor
11 agreed and said well, I mean, you wanted to move the case
12 along, I understand that, let's move this forward.
13 Your Honor then gives the definitions, you then give to Mary
14 Moore how she is to answer those given your definitions, or
15 why she should answer them, not how. Excuse me,
16 Your Honor. One of the things you define is you defined
17 latent as hidden. We're going to look at a definition of
18 that in a moment. Those admissions, Your Honor, were based
19 on your definitions that you gave us forcing us to respond
20 according to your definitions.
21 Twenty six (26). There is no evidence
22 of serious damage to the integrity of the
23 house. There is no allegations the roof
24 leaks. There's no known damage to the
25 footings.

COURT PROCEEDINGS

0034

1 start curling but hey, it's not a big problem because I don't
2 think it will leak on you, and he starts reciting all of
3 these problems with the home, do you think the Moores in a
4 heartbeat would have bought that house? They would had said
5 see you later. He didn't reveal them and he knew about
6 them, and that's an issue for the jury.
7 Latent versus patent. Let's go back to the Ilott
8 case, Your Honor. How am I doing on time? I'm on a rush,
9 Your Honor.
10 THE JUDGE: You've got 10 minutes.
11 MR. HADLEY: Okay. I won't need it.
12 Questions as to whether a reasonable
13 careful inspection would have revealed a
14 latent defect necessarily posed questions
15 of fact which should be reserved for jury
16 resolution.
17 I'm going to read that again.
18 Questions as to whether a reasonable
19 careful inspection would have revealed a
20 latent defect necessarily pose questions
21 of fact which should be reserved for jury
22 resolution.
23 That's page 1011 of the Ilott case which is a court
24 of appeals case barely three years old in the State of
25 Utah.

COURT PROCEEDINGS

0044

1 And only in the clearest cases should
2 such questions be resolved in summary
3 judgment.
4 They go on to help us out even further,
5 Your Honor. They define. Now we're going to have a legal
6 definition. They wouldn't provide it to us, and bless you,
7 you gave us a definition to move this case along. Here's
8 what they define, this is the Ilott case, a latent defect is,
9 it's defined, and they quote Black's Law Dictionary, it's on
10 page 1014 of the Ilott case, a defect which reasonable
11 careful inspection will not reveal.
12 Now Judge, nowhere in there is the word hidden.
13 That's what you defined hidden or latent as. You said
14 Mr. Hadley, we'll define, and you thought and I, you know,
15 you said it's hidden, it's in your order, it's in your order
16 that emanated from that hearing, it's hidden. Well, where
17 in the case law, or at least in this case which is the only
18 one cited does that word appear? A defect which reasonable
19 careful inspection will not reveal.
20 You know, we hope we've made the fact, the point
21 that because of their lack of knowledge, Your Honor, they did
22 not realize that these defects had occurred. They didn't
23 have the knowledge that Mr. Smith had to we contend he should
24 have told him aware instead of warranting they were not aware
25 of any defects. Not aware of a single code violation.

COURT PROCEEDINGS

0045

1 The court goes on to say about the questions of
2 reasonableness.
3 Okay. Your Honor, they also, Black's Law
4 Dictionary defines a patent defect, this is interesting, a
5 patent defect as a defect that is apparent to a normally
6 observant person, especially a buyer on a reasonable
7 inspection. There's an issue for a jury. Reasonable,
8 there's the word again, reasonable.
9 Now let's go to the admissions. I alluded to this
10 but, Your Honor, you directed given certain definitions for
11 us to respond. We did respond, and we responded according to
12 your definition of, you know, physical, a latent is it's
13 hidden, it's physically hidden. No, you can look at that
14 attack crawl space, you can look at the windows and the
15 peeled paint, you can see a piece of concrete out on the
16 southwest corner, or you could, it's not now, there's a
17 little sand pile there on the southwest corner of the
18 house. You can look at many of these.
19 And I mean, if I was there New Guiney and I walk in
20 to this room and you go tell me to pick up the glasses, what
21 are glasses. It's the same analogy. They said the tables
22 it has to do with joists. We're saying these defects you had
23 to have the knowledge. That's an issue for a jury.
24 Lastly, Your Honor, the Mitchell case. And then
25 I'm going to hit the statute of limitations in one minute

COURT PROCEEDINGS

0046

1 the one for fees as it pertains to expert fees, that was also
2 noticed up.
3 THE JUDGE: Well--
4 MR. DIXON: We can wait on that, Your Honor.
5 It's, it's not urgent.
6 MR. HADLEY: Well, we're here. Of course he can
7 wait, it's our motion.
8 THE JUDGE: Well just, I can give you two minutes
9 to just indicate what, what you're, what you're asking for,
10 Mr. Hadley.
11 ARGUMENT BY MR. HADLEY RE: EXPERT FEES
12 MR. HADLEY: Okay. What we're asking for,
13 Your Honor, is, is that they pay... I'm not going to ask it
14 for a judgment because if you rule for us we're just going to
15 ask them if they sent us a check. We don't want it reduced
16 to a judgment. We ask that they pay \$2,363.75. That's
17 based on the majority viewpoint of law which frankly,
18 Your Honor, a little more difficult than the summary judgment
19 one because there is no Utah law, both sides concede that.
20 We cite cases to you, numerous cases along with the statute
21 that, that hold bearing different opinions.
22 They contend first, Your Honor... And by the way,
23 the issue here is the statute says that
24 a deposing party shall pay all
25 reasonable costs associated with the
COURT PROCEEDINGS

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1 experts responding to the discovery. That's the
2 exact wording. That's in your order in fact, your May 4th
3 order. I copied that exact wording when I put it in your
4 order.
5 The dispute is now this. We have contended from
6 the beginning that preparation time of our experts is indeed
7 part of responding to discovery. We have cited to you the
8 majority holding and in two cases they so hold. They say in
9 their statement oh, this is not the majority holding. You
10 read the cases, Your Honor. Even their own case that they
11 rely on says this is not the majority holding. The majority
12 holding is that preparation time should be compensated.
13 THE JUDGE: Any response?
14 MR. HADLEY: Well, Your Honor--
15 MR. DIXON: Your Honor, this is--
16 MR. HADLEY: -- I'm not done. Can I-- one minute.
17 THE JUDGE: You have 15 seconds.
18 MR. HADLEY: Fifteen seconds?
19 THE JUDGE: I gave you two minutes.
20 MR. HADLEY: Okay. First of all, Your Honor, the
21 policy, the policy behind this is, is that experts are more
22 prepared, if they're able to review documents they're more
23 prepared thus expedites the deposition, it's less costly.
24 And the last one is, the majority holding is is that if they
25 only wanted them to pay for the times they sit in the
COURT PROCEEDINGS

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1 deposition the drafters of Rule 26 would have so stated.

2 They didn't say that.

3 ARGUMENT BY MR. DIXON

4 MR. DIXON: Your Honor, I've been practicing law
5 for 23 years in three, three or four, five states. I've been
6 doing depositions, hundreds of depositions of expert
7 witnesses. Never, not one time has anybody ever asked for
8 experts preparation time before. They want 20 hours of
9 expert preparation time. The majority rule is not that.
10 We have, we have informed the court what the majority rule
11 is. And I can assure you that I've had this ruled by the
12 discovery commissioner in the state of Nevada--

13 MR. HADLEY: Your Honor, is this, is this
14 admissible? Custom, his experience?

15 THE JUDGE: Well you've all acknowledged,
16 Mr. Hadley, that there is no definite rule in Utah, there's
17 no case law. And I can tell you what he's telling me,
18 telling the court is my understanding totally. I've never,
19 I've never had anyone request preparation because the reason
20 being is that we'd have a dispute every time we took the
21 deposition of an expert.

22 MR. DIXON: Right. And that's all I was going to
23 say, Your Honor, that was the rest of it.

24 THE JUDGE: And, and so, you know, this, this
25 issue it's not unique. It's that the rule is, you know, and

COURT PROCEEDINGS

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1 I might be wrong given the fact that maybe the language has
2 changed in this new rule, in the new version of Rule 26.
3 But can you, can you imagine that if, that the court having
4 to determine every time the deposition of an expert was taken
5 what was reasonable for him to prepare for this deposition.
6 It would, you know, it would be unwieldy and, and it would
7 result in what we have here, litigation over that particular
8 issue.

9 The court will award the expert's fee for the time
10 that he was in the deposition. That's, that's the
11 standard.

12 MR. DIXON: Thank you, Your Honor.

13 MR. HADLEY: Are you going to review and issue a
14 ruling?

15 THE JUDGE: Huh (questioning)?

16 MR. HADLEY: Are you--

17 THE JUDGE: That's my ruling.

18 MR. HADLEY: Oh, you've ruled.

19 MR. DIXON: Do you want me to prepare an order on
20 that one, Your Honor?

21 THE JUDGE: Yes.

22 MR. DIXON: Thank you. Thank you very much for
23 your patience, Your Honor.

24 WHEREUPON, the hearing was concluded.

25 =====

COURT PROCEEDINGS

0059

ADDENDUM NO. 4

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

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

WILLIAM MOORE and MARY MOORE,)	
)	
Plaintiffs,	)	ORDER ON MOTION TO COMPEL
	)	EXPERT FEES
vs.)	
)	
DAN SMITH, individually and as Trustee of	)	Civil No. 000700142 MI
the Dan Irvin Smith Inter Vivos Trust, and	)	Judge EYRE
CAROL SMITH, individually and as Trustee)	
of the Carol L. Smith Inter Vivos Trust,)	
Defendants.)	
)	
)	

ORDER

Plaintiffs filed a document dated June 16, 2003 entitled "Motion to Award Expert Witness Fees, Tender into Court, and Conditional Request" by which Plaintiffs moved to have Dan and Carol Smith pay for the time the Plaintiffs' four experts spent in preparing for the depositions taken by the Smiths' counsel. That motion came on duly for hearing on July 21, 2003, the Plaintiffs represented by Gregory B. Hadley and the Smiths by A. Bryce Dixon. The court having heard the argument of counsel and considered the written briefs therefore makes the following ruling and order.

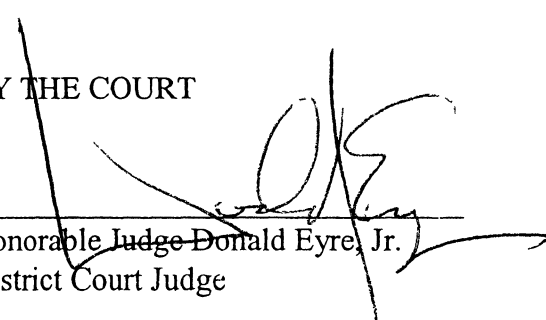
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs motion is denied completely. The parties shall each bear the expense of their own experts' preparation for

deposition and review of any deposition transcripts. The party who took the deposition of an expert shall only be obligated to pay for the actual time that expert spent in deposition.

The Smiths are awarded attorney's fees in the amount of \$ 0.

DATED this 18th 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 Aug. 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 30th day of July, 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 30th day of July, 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 NO. 5

CLERK & EX OFFICER
OF THE DISTRICT COURT
AUG 21 2003

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

CLERK
DEPUTY

WILLIAM MOORE and MARY
MOORE,

Plaintiffs,

v.

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

Defendant.

MEMORANDUM DECISION

Case No. 000700142 MI

Judge Donald J. Eyre

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

PROCEDURAL HISTORY

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

Defendants filed this second Motion for Summary Judgment.

UNDISPUTED FACTS

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

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

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

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

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

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

7. The Agreement stated in pertinent part that:

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

8. The relevant general provisions state:

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

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

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

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

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

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

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

DISPUTED FACTS

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

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

ANALYSIS AND RULING

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

Fraudulent Nondisclosure

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

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

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

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

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

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

Judgment regarding the admitted patent items because they could have reasonably been discovered by the Plaintiffs.

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

Fraudulent Misrepresentation

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

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

Statute of Limitations

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

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

CONCLUSION

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

DATED this 21st day of August, 2003.


DONALD J. EYRE, JUDGE



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CERTIFICATE OF NOTIFICATION

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

METHOD NAME

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

Dated this 21 day of Aug, 2003.


Deputy Court Clerk

1275

ADDENDUM NO. 6

1 except for every code deviation that there could possibly
2 be. In other words, the, the four provisions that we've
3 talked about, own examination, no representation, as is,
4 accept it in its present condition, all of that manifesting a
5 clear intention of the parties that this, this property is to
6 be taken subject to any potential defects, and then all of a
7 sudden because of the language in paragraph C, it wipes out
8 all of those provisions. That's what essentially the
9 plaintiffs you're arguing in this case.

10 THE JUDGE: So what is your position as to does
11 the C mean then?

12 MR. DIXON: Well, our position of C is it's really
13 clear what it means. It means a building violation.

14 If Dan Smith had been presented with what is known
15 by in the industry as a red tag violation, that is if Jack
16 Petersen the building inspector had noticed a code deviation
17 of some sort and he, he would have red tagged that deviation
18 and he would say to Mr. Smith you've got to fix this for me
19 to pass it off. In fact what happened in this case,
20 Your Honor, is that there were, and it's undisputed, there
21 were no red tags. Mr. Petersen gave a certificate of
22 occupancy in this case, he passed a final inspection. I can,
23 you know, can, you know the certificate of occupancy is in
24 here, it's got, it's got, it's got his signature right on it,
25 it's there, you know. The certificate of occupancy, it's

COURT PROCEEDINGS

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1 the court's interpretation of the, of the legal aspects with
2 respect to contract enforcement. I don't think implied
3 notice is, is going to meet this particular requirement.

4 MR. HADLEY: And I'm not speaking of implied.

5 THE JUDGE: Okay.

6 MR. HADLEY: I'm speaking of actual knowledge.

7 THE JUDGE: Okay. What, what evidence do you have
8 that he had actual notice of those defects?

9 MR. HADLEY: Okay. Well, what we have evidence
10 is the code itself. It says that he is held liable to follow
11 the law right in the code itself.

12 THE JUDGE: That's, that's not going to hold with
13 respect to breach of contract. It might if, if, if you
14 were here on a, a criminal violation of the Uniform Building
15 Code, a, then yes he is held to that. But that's not what,
16 this is, you're trying to enforce, trying to hold him to a
17 breach of a contract. And it says has received no claim nor
18 notice of any zoning violation or building violation.

19 MR. HADLEY: Okay. We have in our prior opposing
20 memorandum that was filed on the issue before the court
21 that's in, was filed back in July, testimony by Jack Petersen
22 that there were discussions not only the footings but
23 discussions regarding the ventilation, discussions regarding
24 the stairs. Now, it's true and we do not contest the fact
25 that Jack Petersen did indeed issue a certificate of

COURT PROCEEDINGS

0023

1 occupancy. He did that. He did that on about, oh,
2 January 28th or so. A certificate of occupancy was
3 issued.

4 But, Your Honor, if we could read to you just
5 briefly from the code which we have cited in our memorandum.

6 Approval as a result of an inspection
7 shall not be construed to be an approval
8 of a violation of the provisions of this
9 code or of other ordinances of the
10 jurisdiction. Inspections presuming to
11 give authority to violate or cancel the
12 provisions of this code or of the other
13 ordinances of this jurisdiction shall not
14 be valid.

15 Now, there is evidence according to Jack Petersen
16 in his deposition that there were violations discussed, not
17 necessarily every one of these, but there were violations
18 discussed.

19 Let me go on a bit with the notice. Notice can be
20 as received notice of it. Well, Jack Petersen gave him
21 notice, not on all claims but definitely on some. He had
22 reason to know about it. That's notice. If you had a
23 reason to know about it. Again, we refute defense theory
24 that Jack Petersen is completely to blame for any building
25 code violations because he didn't catch them.

COURT PROCEEDINGS

0024

1 Number 4, he knows about a related fact or is
2 considered as having been able to ascertain it by checking on
3 official filing or recording. All of those are deemed
4 notice. There is no definition in the law that says notice
5 has to be by a third live body as it were coming up to you
6 and giving you notice. That is not notice.

7 Jack Petersen, or excuse me, Dan Smith has built,
8 Your Honor, 200 homes in Salt Lake City. He is a licensed
9 general contractor up until a year or two ago, he did let it
10 lapse. He is still as we know a master licensed electrician
11 and has been for decades in this state. He has held to
12 that standard. So for them to say Jack Petersen didn't
13 give us notice first, that's not true because it was
14 discussed, he did know. And second of all he is held to
15 that standard.

16 Another point that is made, and this is in their
17 memorandum that, that apparently there's no proof that none
18 of these defects existed at closing, Your Honor. Well,
19 Your Honor, it just takes a cursory review of the 42 defects
20 that we have claimed to show that it would be virtually
21 impossible for the Moores somehow to have changed the
22 structure of the building to now bring about subsequent to
23 the sale these defects. These defects just as a matter of
24 pure logic existed at the time of closing.

25 I didn't catch Mr. Dixon raising that in the

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0025

1 guess to the jury. I guess one thing that may be considered
2 that if we have to go to a jury on fraudulent
3 misrepresentation on virtually all of the defects and then we
4 suddenly say but on fraudulent nondisclosure there's only
5 going to be five or seven that you're going to be able to
6 hear then somebody, and it's probably going to be Mary Moore
7 say well, we're going to have to clarify that to the court,
8 to the jury. And then we're going to have to tell the jury
9 well yes, it's true that those defects but the court defined
10 them as visible and so we admitted they're visible and
11 therefore you can't hear those because they're visible.

12 And then we have to come back and then tell them
13 well, same example we used before is the bottle of ink,
14 Your Honor, you take a man in New Guiney and say bring him
15 into this room and say would you please hand me bottle of
16 ink, he isn't going to have the foggiest idea of what we're
17 talking about. That's, that's the standard.

18 Do you know, there is another one, Your Honor.
19 There was a little surprise. And with all respect to the
20 court you gave the correct definition because you lifted it
21 out of our brief on the Mitchell case. The Mitchell case
22 for the standard of reasonable care is to whether the defect
23 would be apparent to ordinary prudent person not just
24 visibility, Your Honor, it talks about the defect would be
25 apparent to an ordinary prudent person, I'm quoting from your

COURT PROCEEDINGS

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1 brief--

2 THE JUDGE: I know.

3 MR. HADLEY: -- with like experience, not to
4 persons with specialized knowledge in the field of
5 construction or real estate. There's no question, we've got
6 some specialized knowledge over here in the field of
7 construction and real estate.

8 And you don't know this yet because you haven't
9 read all the depositions, but Mary Moore and her husband knew
10 zero. In fact in their deposition they state that's why we
11 bought a new home. We didn't know how to do repairs, that's
12 why we bought a new house because we didn't want to mess with
13 doing stuff that we don't know what to do.

14 When I read that in your memorandum I thought well
15 great, he adopted what the legal, and then boy you went on to
16 just shoot us down based on the admissions that we made which
17 we did argue. But then you had a zinger, your zinger was you
18 said you know what, Mary Moore you admitted in that first
19 deposition back in, back in February of 2001, you admitted
20 there these facts. We didn't have a chance to respond to
21 that because that was in your memorandum decision. You
22 admitted that Dan and Carol Smith built the home for your own
23 residence. You admitted that the construction was completed
24 on the home early in November of '93. And you admitted,
25 Mary, that the Smiths moved into the home in mid-November of

COURT PROCEEDINGS

0065

1 '93.

2 Those admissions, Your Honor, as set forth in that
3 first motion for summary judgment and our answering
4 memorandum was for the purpose of this motion only, it was
5 stated right in there. It was because, and frankly I wasn't
6 directly involved but Mr. Haslam was, he felt as I agreed in
7 reviewing that, that they were so strong on the law we're not
8 going to mess right now. We hadn't even done discovery yet,
9 we hadn't even seen Mary's home, we hadn't seen his
10 financial, we hadn't seen the home he now lives in, we
11 didn't have all that evidence. True, we knew he was in it a
12 really short time that seemed suspicious, but no, we didn't
13 refute those. But we, we confined it to that motion only.

14 THE JUDGE: Well, do you have any case law to the
15 effect. Clearly it's either a used home or a new home and
16 it was not, and it been lived in.

17 MR. HADLEY: Amen to that. And boy you are right
18 there, Judge. Used home we got, we've got Maack, we've got
19 the other cases that have been cited by both, both sides that
20 says, you know. But there's homes, Your Honor, in both cases
21 that are one, two, three and four years old. None of them
22 under a year old. And indeed none of them, none of them
23 were ones where the, the builder of the home was the occupant
24 for an extremely short term and then selling it.

25 Bottom line is you can fashion what's used based on
COURT PROCEEDINGS

0066

1 supreme court rulings. You cannot fashion what's new
2 because that has not been defined. And indeed the term used
3 was never in one of their facts that they set forth as
4 undisputed. Used was a term that you pulled out in reaching
5 your conclusion. Used was not something we ever admitted.
6 We believe that indeed that is something for the jury to
7 decide whether or not this home was new or used based on the
8 facts.

9 The court stated, and I again I go back to
10 Judge Howard in that motion for summary judgment where you
11 held that admission against you, will be considered by the
12 court until after the close of discovery, they're not going
13 to consider any other motions for summary judgment. They
14 did state this, Judge Howard did say this.

15 The Smiths may have had a legal duty to
16 disclose to plaintiffs any latent and
17 material defects in the home of which
18 they were aware.

19 Further, and this is probably the most important
20 argument that we make based on, you know, you holding that
21 admission against us, and we appreciate that, and that's
22 Rule 56. Rule 56, by the way that was a motion for summary
23 judgment back in 2001, says that a judge in denying a motion,
24 which he did, 90% of their motion was denied at that stage,
25 it says,

COURT PROCEEDINGS

0067

1 The court can ascertain what material
2 facts exist without substantial

3 controversy and what material facts are
4 actually and in good faith
5 controverted. It shall thereupon make
6 an order specifying the facts that appear
7 without substantial controversy.
8 And, you know, nobody took Judge Howard to task for
9 that. But he didn't, he didn't make any findings of fact
10 frankly other than to say well it's possible they had a duty
11 to make some disclosures here and, and I'm going to deny the
12 motion that pertains to those issues. But he made no
13 special findings. So that is a new argument to you,
14 Your Honor, that's a new argument because that, that truly
15 surprised us.
16 As the court recalls, and I guess I don't need to
17 belabor the point, but procedurally and substantively we had
18 a myriad of objections to that discovery that they sent us
19 some three months after discovery cutoff had occurred. We
20 had all kinds. The most salient objection was even though
21 they had two or three pages of definitions they never defined
22 the salient term latent. And, you know, we objected and
23 they filed a motion to compel and you took us to task and you
24 said you need to answer these. We felt it was in an effort
25 to move the case along, let's, you know, and I'm all for
COURT PROCEEDINGS

0068

1 that.
2 But the fact is then you just said what was the,
3 you said hidden, it's hidden or it's not visible, and I'd use
4 that example, hey I can see that. But if I don't know what a
5 bottle of ink is I've got no idea. And that's the legal
6 standard.
7 THE JUDGE: Well, but we defined it, we defined it
8 when you made those answers, didn't we?
9 MR. HADLEY: That's true. But now, now what has
10 occurred is we agreed, and I'm assume we're recording this,
11 we agree that many of those defects, building code violations
12 were visible, we agree with that. But the standard is not
13 that they're visible, the standard is that indeed they may be
14 visible, but as you correctly cited in, in your memorandum,
15 its defect would be apparent to an ordinary prudent person
16 with like experience, not to persons with specialized
17 knowledge in the field of construction. And that's our
18 whole argument on that issue. She did not know what she was
19 looking at was a defect. She could see it but she didn't
20 know it was a defect. You cited the right standard but then
21 you ruled against us based on admissions that were not the
22 correct standard.
23 THE JUDGE: Okay. Mr. Dixon?
24 MR. DIXON: Do I need to do anything,
25 Your Honor?

COURT PROCEEDINGS

0069

ADDENDUM NO. 7

FILED
COUNTY CLERK & EX-OFFICE CLERK
OF THE DISTRICT COURT

JUN 23 2004

MILLARD COUNTY

CLERK
DEPUTY

WILLIAM MOORE and MARY MOORE,)	
)	
Plaintiff,)	
)	ORDER FOR SUMMARY
vs)	JUDGMENT ON CONSUMER
)	SALES PRACTICES ACT,
DAN SMITH, individually and as Trustee of)	FRAUD, MUTUAL MISTAKE
the Dan Irvin Smith Inter Vivos Trust, and)	OF FACT AND BREACH OF
CAROL SMITH, individually and as Trustee)	CONTRACT
of the Carol L. Smith Inter Vivos Trust,)	
)	Case No. 000700142 MI
Defendants.)	
)	Judge Donald J. Eyre
)	

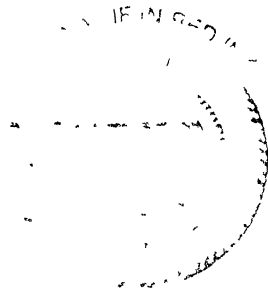
2749

length that the only alleged defect that could fit within the terms of Paragraph "C" was item 27 (the matter of finish grading and the minimum frost line depth of the dirt around the house) because Defendants admitted that the building inspector had given them permission to finish the grading after the ground dried up in the spring. The court heard argument on these four motions on April 1, 2004, took the matter under advisement and issued a memorandum decision dated April 26, 2004. Therefore,

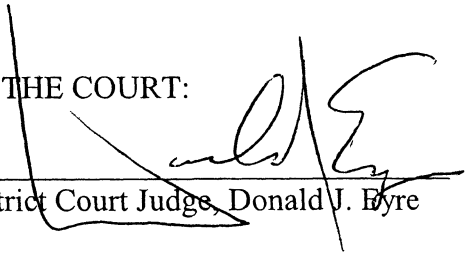
IT IS HEREBY ORDERED AS FOLLOWS:

1. Defendant's Motions for Summary Judgment are all granted in full with the exception noted below.
2. Defendant's Motion for Summary Judgment on the breach of contract is denied as to the issue of finish grading.
3. The finish grading issue presents an issue of fact as to whether paragraph "C" of the contract has been breached. No other provisions of the contract are at issue under Plaintiff's breach of contract claim.

DATED this 21st day of June, 2004.



BY THE COURT:


District Court Judge, Donald J. Byre

NOTICE TO DEFENDANTS' ATTORNEY PURSUANT TO URCP 7

TO: Gregory B. Hadley

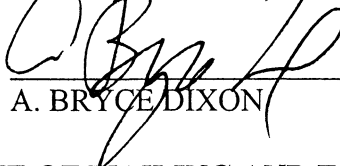
You will please take notice that the undersigned will submit the above and foregoing ORDER FOR SUMMARY JUDGMENT ON CONSUMER SALES PRACTICES ACT, FRAUD, MUTUAL MISTAKE OF FACT AND BREACH OF CONTRACT to the Honorable Donald J. Eyre, for his signature, on Tuesday, May 4, 2004

Pursuant to Utah Rule of Civil Procedures 7, this proposed ORDER ON DEFENDANTS' ORDER FOR SUMMARY JUDGMENT ON CONSUMER SALES PRACTICES ACT, FRAUD, MUTUAL MISTAKE OF FACT AND BREACH OF CONTRACT ON DEFENDANT 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 was mailed to the following, postage prepaid, and faxed to the following:

Gregory B. Hadley
HADLEY & ASSOCIATES
2696 North University Avenue Suite 200
Provo, UT 84604
Fax No.: (801) 377-4411
Attorney for Defendants

DATED this 29th day of April, 2004.

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


A. BRYCE DIXON

CERTIFICATE OF MAILING AND FACSIMILE

I hereby certify that I am an employee of DIXON, TRUMAN, BANGERTER & FISHER, P.C., and that on this 29th day of April, 2004, 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 that I faxed the foregoing to the following:

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

An Employee of Dixon, Truman, Bangerter & Fisher, P.C.

ADDENDUM NO. 8

1 here in your county, or I realize some of you may not all be
2 from Millard County but filed here in Millard County.
3 Actually you are, even Delta, that's Millard County.
4 Thanks. Okay. Sorry. Hope no one is from Delta. I don't
5 mean to offend anyone.

6 Mr. and Mrs. Moore met in 1970, married, well, a
7 little bit before 1970, married and moved to Millard County
8 in 1972, '73 to begin running a farm. They'd never owned a
9 home other than a little mobile home I guess I'd call it, a
10 manufactured home that was given to the Moores by their
11 parents, by Mrs. Moore's parents. They made payments on
12 that paying the parents back. But that was their, that was
13 there sole ownership of any home. They worked on a farm,
14 they worked on a farm here in this county, they did that for
15 almost 20 years.

16 One of the things that you'll find out from
17 Mrs. Moore is neither of them had any knowledge or ability to
18 fix things at least as it pertains to a home. They didn't
19 know how to fix things. In fact, you will hear Mrs. Moore
20 testify that her greatest Mother's Day presents is when Bill
21 would say what do you need fixed around here and she would
22 make a list and hire it done.

23 Let's go back to the construction of this
24 structure that we're talking about. In August of 1993
25 Mr. and Mrs. Smith filed for an application for a building

COURT PROCEEDINGS

0044

1 THE JUDGE: You may proceed.

2 MR. HADLEY: -- the document.

3 Also during that exchange as they are going
4 through and Carol Smith is filling out this earnest money
5 agreement, filling in the blanks as she turns it and spins it
6 and shows it to them and fills in as they're sitting on the
7 other side of the table, they come to a certain paragraph
8 that you will see and be given a copy of where it talks
9 about purchasing the home in a, in the condition that it
10 exists. At that point the Moores ask of the Smiths is there
11 something about the house we should know about? And the
12 response was from Dan Smith, it's a new house. Upon hearing
13 that you will hear Mrs. Moore turned to Bill and said they're
14 right it's a new house.

15 The agreement is signed, the closing is held in May
16 of, of 1994, possession is surrendered, the Smiths move out
17 the Moores move in.

18 The Judge has alluded to what the causes of
19 action are. Breach of contract is one cause of action and
20 that is only relating to the footings, the footings that are,
21 you know, we've discussed that are underneath the foundation
22 and you'll maybe see some diagrams and charts, and some of
23 you have some construction experience so you probably know
24 what we're talking about. The other cause of action is
25 for a fraudulent nondisclosure of indeed defects in the

COURT PROCEEDINGS

0049

1 and paid my parents back. And that's the only move we had
2 until we moved up here into Utah.
3 Q. Tell the jury about Bill's ability at fixing things
4 up, handyman work around the house?
5 A. He wasn't a handyman. He didn't do anything
6 around the house. He could sweep, he could vacuum but he
7 couldn't fix anything.
8 Q. How about you?
9 A. I can't fix anything. We changed light bulbs,
10 that's about it.
11 Q. Were you here at the opening statement?
12 A. Yes, I was.
13 Q. Okay. Did you hear me tell the jury about a
14 Mother's Day--
15 A. Yes.
16 Q. -- gift that you... Just describe to the jury
17 that process so they can hear it from you.
18 A. For Mother's Day he went out, came in and asked me
19 to make a list of all the things that I wanted done in the
20 house, and then he went out and hired a handyman to come in
21 and fix them. It was things like putting things in to hang
22 plants on. They weren't real hard things, they were just,
23 but we don't do that. And it took him three days to get all
24 my odds and ends done. But that was a fantastic Mother's
25 Day.

COURT PROCEEDINGS

0085

1 Q. Now, when you say house are you speaking of a house
2 prior to the one that you're previously living in?
3 A. Yes, I am. It's the house that I lived in in
4 Flowell.
5 Q. On the farm?
6 A. On the farm.
7 Q. Okay. Now, with this intended move from Flowell
8 where was it exactly you, you desired to move to knowing that
9 you were going to move?
10 A. We wanted to move to Fillmore.
11 Q. And why to Fillmore?
12 A. We liked the area.
13 Q. Okay. Was this a move where you would, would get
14 another rental unit, or tell the jury what your plan was.
15 A. We never considered rental. I have animals, I love
16 my animals, most places don't want you to have animals if you
17 rent. We never considered renting ever.
18 Q. What was it you wanted to do?
19 A. We wanted a new home because we just didn't want to
20 get into... We had, couldn't fix things up. We'd had to
21 hire it done, and why do it when you can buy a brand new
22 home.
23 Q. Tell me about the... Well, how were you going to
24 pay for this home?
25 A. We were going to pay cash for the home.

COURT PROCEEDINGS

0086

1 Q. And how were you able to have cash to pay for a
2 home?
3 A. We saved and saved. It was in the bank for a
4 home.
5 Q. If you could describe to the jury how you first
6 heard or came across the fact that the home that the Smiths
7 built was for sale?
8 A. We... Somebody called us and told us it was for
9 sale. Several... Well, my friends knew we were looking for
10 a home, that we were going to be coming up town. So any time
11 they'd find a home that was new they would let us know about
12 it
13 Q. Did you know the Smiths at all prior to this
14 incident of kind of looking for a place and wanting to
15 move? Did you know Mr. and Mrs. Smith?
16 A. I knew them to see them in the store and say hello
17 to them.
18 Q. Okay. Tell the jury about your first contact with
19 the Smiths regarding the house that they had built?
20 A. We called them on the phone--
21 Q. Okay.
22 A. -- and asked them if their home was for sale, that
23 we'd heard that it was. And they said it was for sale. We
24 asked the price that they were asking, it was 85,000, and we
25 asked if we could see the home.

COURT PROCEEDINGS

0087

1 Q. And what was their response?
2 A. Yes, we could.
3 Q. Okay. So what was the next thing to happen now?
4 A. We went up the next day and they took us through
5 the home.
6 Q. Do you recall what the date was?
7 A. The 11th of February.
8 Q. And how do you, how do you know it was the 11th of
9 February?
10 A. Because I kind of wanted to do it on my daughter's
11 birthday on the 20th but it was too far down on the line.
12 It's just a date for me, it was her birthday.
13 Q. Okay. When you arrived at the home was it, was it
14 you and Bill together?
15 A. Yes, it was.
16 Q. Okay. And, and just tell the jury now you're, I
17 assume you're pulling in the driveway and just kind of start
18 telling the jury what happened as you now came to the house.
19 A. We went into, it was about 12:30 and we went into
20 the driveway. And there was a two car garage and I'd never
21 had a house with a garage on it. This was fantastic, there
22 was two of them. And went up and rang the doorbell. They
23 came and, or Carol answered the door and we went in, we went
24 up the stairs. The stairs were carpeted. And just walking
25 in the front door was beautiful. And we went through the

COURT PROCEEDINGS

0088

1 livingroom and it was gorgeous, it was big. The diningroom
2 was real nice size.
3 Q. Let me just interrupt. I'm sorry. Who was it
4 that was in the, the home of the Smiths when you arrived?
5 A. Dan and Carol.
6 Q. Was there anyone else there?
7 A. No.
8 Q. Okay. And as you're kind of describing this are
9 you all together or are you kind of just everybody
10 wandering?
11 A. At that point we're all together.
12 Q. Okay. Go ahead.
13 A. We got into the, the kitchen part and looked at the
14 stove and I kind of panicked because the buttons, it's set
15 with buttons and you turn the timer on with a button and
16 press another button to put how much time you want on it and
17 push start to, it was just really modern and it really
18 impressed me but I wasn't sure I was going to get that one
19 down right.
20 But there was a lot of room. We went down and
21 Carol showed us the pantry and the coat closet. And in my
22 other home I had no coat closet so that was very nice. Went
23 down and saw the main bathroom. Went into the master
24 bedroom and that totally impressed me because it was so
25 large.

COURT PROCEEDINGS

0089

1 Q. Who is with you in the master bedroom when you're
2 there?
3 A. Mr. Smith.
4 Q. And who else?
5 A. Bill and I. I don't remember--
6 Q. What about--
7 A. -- Carol being there, that part.
8 Q. Okay. All right. Go ahead.
9 A. But I commented on how big the bedroom was because
10 I liked, I wanted a lot of room in there. And Dan says he
11 had built homes before so he knew what people liked. And it
12 was gorgeous. Carol had done a beautiful job of putting
13 everything up. We went into the guest room--
14 Q. Excuse me. What do you mean by putting everything
15 up?
16 A. It was to where she had her furniture there.
17 Q. All right.
18 A. The furniture she had it was just, it just looked
19 beautiful. And we went into what I call the guest bedroom
20 and that would be the one on the east side of the home and it
21 had deep shelves on the two, that window and also the next
22 smaller bedroom. And that, I've always wanted those and I
23 thought that was really neat. Then we went, from there we
24 went downstairs and--
25 Q. Just if you'd describe the basement as you went

COURT PROCEEDINGS

0090

1 where it says fire inspection. Okay?
2 A. We asked if there was anything we needed to know
3 about the house.
4 Q. Did, did Carol read you that phrase 1-E?
5 A. She read the, the sentence to us.
6 Q. Okay.
7 A. And we said is there anything we need to know about
8 the house.
9 Q. Okay.
10 A. Dan said well, it's a new house.
11 Q. Okay.
12 A. And we looked around and it is.
13 Q. Okay. Again, let's go to paragraph 2, purchase
14 price and financing.
15 A. Okay.
16 Q. Is it here that you because of the way the form is
17 filled in discussed about a cash--
18 A. Yes.
19 MR. DIXON: Your Honor, the issue of how the
20 house was financed or paid for is not before this jury.
21 THE JUDGE: What do you claim for that,
22 Mr. Hadley?
23 MR. HADLEY: Well just, just wanting to show that
24 indeed it was understood as the document does explain.
25 THE JUDGE: Well, the document speaks for itself.
COURT PROCEEDINGS

0103

1 pictured there in #2-B.
2 A. (THE WITNESS:) That's more window damage on the
3 side that does not open.
4 Q. Okay. And this is the same window?
5 A. Yes, sir. It is.
6 Q. Okay. All right. And again you took the
7 photo?
8 A. Yes, I did.
9 Q. Okay. All right. Does anyone, does anyone have
10 #2-C?
11 MR. DIXON: I have #2-C.
12 THE JUDGE: Yes.
13 Q. (MR. HADLEY:) Everybody has it but me. I want
14 you to tell the jury what you see in #2-C.
15 A. (THE WITNESS:) #2-C is window damage that has
16 occurred into the spare bedroom in the windowsill.
17 Q. Okay.
18 A. And I took that picture.
19 Q. All right.
20 A. But it goes, the little holes and stuff are further
21 out.
22 Q. Let's, let's go to the footings. Tell the jury
23 when you first became aware that a, there was a problem with
24 the footings.
25 A. When they installed my fence, chainlink fence--
COURT PROCEEDINGS

0120

1 Q. Okay.
2 A. -- in my back yard in 2000 in April.
3 Q. And tell the, tell the jury what happened and, and
4 just describe to them the story.
5 A. While they were putting the gate posts in on the
6 east and on the west side of my home, the first one they
7 called my attention to was on the east side of the home.
8 The gentleman Bardall (phonetic) that was doing the digging
9 called me out and said that the footings were not deep
10 enough in the ground to, that he felt to call the city and
11 ask what the measurements should be. So I went upstairs
12 and I called, and at the city building and she told me 30
13 inches was frostline, below frostline. So I went out and
14 told the boy and he says I think you should get a picture of
15 this.
16 Q. Okay.
17 A. So I got a tape measure and a camera and I went
18 back down, and Alan held the tape measure and I took the
19 picture. And then he went over to the west side of the home
20 and we, he dug that fence post and we took that picture
21 also.
22 Q. Do you have #3-A and #3-B there?
23 A. I do.
24 Q. Okay. You mentioned, did you say Steve? Who did
25 you say was holding the tape?

COURT PROCEEDINGS

0121

1 A. Alan.
2 Q. Oh, Alan. I'm sorry. And he's one--
3 A. Bardall (phonetic).
4 Q. -- of the workers. Okay. All right.
5 A. He and his father were doing the fencing.
6 Q. Okay. Just if you would describe, describe to the
7 jury what, what these depict then.
8 THE JUDGE: Let's talk about #3-A why don't you?
9 A. (THE WITNESS:) Well, #3-B was the first one that
10 we discovered.
11 Q. (MR. HADLEY:) Okay. #3-A.
12 A. No. #3-B was the first hole that he called me, my
13 attention to.
14 Q. Okay. Let's go to #3-B.
15 A. And that was on the east side of the home.
16 Q. All right.
17 A. And so we took a tape measure down and put it on
18 the footing, and he measured and said take a picture.
19 Q. Okay.
20 A. And at that point I did.
21 Q. Okay. Can you tell from that picture where the
22 footing ends? At what, at what inch?
23 A. The footing at the one inch is on the footing.
24 Q. Right.
25 A. And then the dirt comes up.

COURT PROCEEDINGS

0122

1 Q. That's the bottom of the footing?
2 A. Yes, sir.
3 Q. Okay. And where does the footing end, at what
4 inch?
5 A. About 10 inches.
6 Q. Okay. And can you tell the jury the same on #3-A
7 what you, what you saw as this picture kind of depicts. And
8 where was this hole? Let's go to #3-A. Where was this hole
9 dug?
10 A. #3-A is on the west side of my home.
11 Q. And, and why were they digging, where was the fence
12 being put in?
13 A. There was gates being put--
14 Q. Oh, okay.
15 A. -- on each side of my home. A car gate went on
16 the west side, on the east side and a walk through gate was
17 on my west side.
18 Q. Okay. And where is the bottom of that tape
19 resting on #3-A?
20 A. The bottom would be resting on the footing.
21 Q. Okay. The bottom of the footing?
22 A. Yes.
23 Q. Okay. And again, where do we see the top of the
24 footing and the inch marker?
25 A. Well, the dirt is at a 10.

COURT PROCEEDINGS

0123

1 look out the, you're looking south?
2 A. Yes.
3 Q. And just so that the jury can be refreshed on the
4 point, that's the door you walked out when you were looking
5 at the house on February 11th when you described the back
6 door?
7 A. Yes, sir.
8 Q. Okay. Other than the grass that you're looking
9 at in that picture is there anything else that's different
10 from when you first saw that view out the back door in
11 1994?
12 A. I have a dresser there, a rug on the floor, a
13 little white thing to wipe your feet on outside.
14 Q. Okay.
15 A. And then there's another thing that I have there
16 that I use to wipe mud off my feet, and a chair.
17 Q. Okay. Let's go to #4-E.
18 A. Yes, sir.
19 Q. Describe what #4-E depicts.
20 A. #4-E is a picture of the back of my house from the
21 south looking towards the north towards my house.
22 Q. Okay. And did you take that photo?
23 A. I did.
24 Q. And when did you take that photo?
25 A. I would say the same roll of film that I took

COURT PROCEEDINGS

0178

1 Q. Okay.
 2 A. Never a new home.
 3 Q. You're taking it as-is with all of the risks.
 4 Correct?
 5 A. On an older home, yes. Not a new home.
 6 Q. Well, did you... This particular home had an as-is
 7 clause in it and you didn't look?
 8 A. That I don't know. It wasn't shown.
 9 Q. That's fine. You didn't ask for any warranties
 10 to be inserted in that one place where it said none, did
 11 you?
 12 A. We asked if there was anything we needed to know
 13 and Mr. Smith said it's a new house.
 14 Q. Okay.
 15 A. We agreed.
 16 Q. And that's, and you didn't ask for any warranties
 17 of any kind, did you?
 18 A. It was a new home. No, sir.
 19 Q. All right. Thank you very much, ma'am.
 20 THE JUDGE: Mr. Hadley,--
 21 MR. HADLEY: Yes.
 22 THE JUDGE: -- any redirect?
 23 REDIRECT BY MR. HADLEY.
 24 Q. (MR. HADLEY:) Do you have these two photographs
 25 with the tape there Mary, #3-A and #3-B?
 COURT PROCEEDINGS

0199

1 day?
 2 A. I did.
 3 Q. Where were you... Tell me about your discussions
 4 with Mr. Moore. First of all, tell me about your first
 5 discussion with Mr. Moore. Where were you when that
 6 discussion took place?
 7 A. We were probably in the basement.
 8 Q. Okay.
 9 A. What we did, we met upstairs and we walked around
 10 through the house and they were looking at the home, so
 11 forth. And then Mary and Carol went out in the kitchen and
 12 sat down at the kitchen table and were visiting out there.
 13 And Bill and I went outside, down in the basement and looked
 14 around and then outside. And that's when we had some
 15 discussions.
 16 Q. All right. And a, tell me about these
 17 discussions.
 18 A. Well, Bill started talking about price and so forth
 19 like that. And a, we were on the end of the a, east end of
 20 the house. And it was a nice sunny day about like today.
 21 And a, we were, and the reason we were on the east because
 22 that's the sunny side. And a, we stood there talking and one
 23 of the conversations was about the aluminum siding. And we
 24 were, Bill reached up there and he kind of felt it and he
 25 said he liked that, he liked that aluminum siding on there.
 COURT PROCEEDINGS

0445

1 And we also while standing there Bill told me that a, one of
2 the first things that he was going to do was if he bought the
3 home would, he would level that off there.
4 Q. Level what off?
5 A. The dirt that we had backfilled against the
6 foundation.
7 Q. And that--
8 A. And because it sloped off to a pretty good slope
9 and--
10 Q. On what, what side of the house are we talking
11 about?
12 A. We're talking about the east end of the home.
13 Yes.
14 Q. And that's where he reached up to see the siding?
15 A. Yes.
16 Q. Touch the siding?
17 A. Uh-huh (affirmative).
18 Q. And what's the significance of him reaching up to
19 feel the siding to you?
20 A. Well, you've got to realize we were high enough
21 so he could. Otherwise, if it had been cut down he
22 couldn't have, wouldn't have been able to. But he did just
23 mention that the aluminum siding that he liked it. We was
24 kind of talking about it about how a, maintenance free and so
25 forth and that's what--

COURT PROCEEDINGS

0446

1 Q. All right. So now tell me, tell the jury again
2 what, what did he say about the dirt on that occasion just
3 then?
4 A. Well what, what Bill said was that he wanted to use
5 that for a driveway through there and that one of the first
6 things he was going to do was remove that dirt down so that
7 it would be level across there.
8 Q. Okay. And he's talking about on the east side of
9 the house?
10 A. Yes.
11 Q. Did you have a response to that?
12 A. I did.
13 Q. What was your response?
14 A. My response was that Bill, you can't remove the
15 siding, or the dirt there, and the reason you can't is
16 because you will expose the footings and take it down so
17 that you wouldn't have the, the 30 inch frostline that's
18 required.
19 Q. Did he respond to that?
20 A. Yes, he did.
21 Q. What did he say?
22 A. He told me, he says, you let me worry about that.
23 That was... I also told him at that time that you wouldn't
24 have to do that because you could add dirt further out and
25 still add. And there was, there was a pile of dirt in the

COURT PROCEEDINGS

0447

1 back yard at that time.
2 Q. What was the pile of the dirt in the back yard
3 for?
4 A. That was for the finish grade. That was top
5 soil.
6 Q. All right. Had the house at that time had the
7 finish grade?
8 A. It had the rough grade.
9 Q. All right. Did it have backfill to the 30 inch
10 level?
11 A. Right close.
12 Q. Okay. And the dirt, and the piles of dirt in the
13 back yard were for what purpose?
14 A. Top soil for spreading out over it when you planted
15 lawn and so forth.
16 Q. Okay. And when did you intend to do that?
17 A. In the spring when you would plant grass or do your
18 landscaping.
19 Q. Okay. All right, what other conversations did
20 you have with Mr. Moore, if any, about the dirt situation?
21 A. I think that was about it as far as the dirt was
22 concerned.
23 Q. Okay. And then did you then arrive at a, an
24 agreement to a, purchase the house?
25 A. Yes. Bill and I walked, we kept walking around
COURT PROCEEDINGS

0448

1 different things. And, and Bill said to me at that time he
2 said a, gosh he says, you've got a commission in here, and I
3 said no, there's no commission in this, in the price. We
4 talked price prior to that.
5 Q. All right.
6 A. And--
7 Q. All right. When you, you had seen pictures of the
8 house, we've shown these pictures over and over again--
9 A. Yes.
10 Q. -- about what the house looks like now, how it's
11 flat on the east, level with the driveway. You've seen that
12 picture.
13 A. Uh-huh (affirmative).
14 Q. Right?
15 A. Uh-huh (affirmative).
16 Q. Was the house that way when you talked with
17 Mr. Moore on February 14th, 1994?
18 A. Definitely not.
19 Q. What, what did... What is the difference?
20 A. That all of the dirt has been taken out underneath
21 the patio or the porch up above all along the back and the
22 east side.
23 Q. All right. Now--
24 A. And--
25 Q. Go ahead. Excuse me.
COURT PROCEEDINGS

0449

1 Q. And basically that's how you went through the
2 form.
3 A. Yes. I passed it around so they could see what
4 they wanted to.
5 Q. And so, I realize it's been a while ago, but do
6 you have a memory of turning it over and saying at any given
7 time well now this, this little phrase here has to do with,
8 you know, this little paragraph here? Or, or is it just more
9 that generally what you felt the important items were on the
10 boilerplate language you just brought up and discussed
11 together?
12 A. Pretty much.
13 Q. Okay. Now you said that your recollection was
14 February 14th when the Moores first came to view the home?
15 A. That's how I remember.
16 Q. Okay. I'm not sure the date is exactly
17 relevant. But we do know on the 15th--
18 A. Yes.
19 Q. -- the earnest money--
20 A. Right.
21 Q. -- was signed. You testified that a, that there
22 was a, there was a time when Mr. Smith said Bill, you know,
23 come on, I want to show you some things.
24 A. Exactly.
25 Q. And, and he left the house with Bill and you and

COURT PROCEEDINGS

0479

1 Mary were I think you said upstairs. Is that correct?
2 A. Yes, we were at the table.
3 Q. Tell me just quickly, I know we're all eager to
4 move on, the process of when that hey Bill, come on, I've got
5 to show you some things, where was that in the sequence of
6 what happened?
7 A. Well, they had already looked through the house
8 oh, they had already seen the house upstairs.
9 Q. The upstairs.
10 A. And to my recollection, now I may have gone
11 downstairs with them and Mary may have in the basement
12 because I'm sure she would have wanted to look down there so
13 that probably did happen.
14 Q. Okay.
15 A. And for some reason we were back upstairs, the four
16 of us were upstairs at the time.
17 Q. Okay.
18 A. And Dan said to Bill come on, I need to talk to you
19 about some things because, I mean, I could tell you what I
20 would assume they would have talked about but I'm sure you'd
21 rather just get that from Dan because, you know, he has to
22 tell him where the water shuts up and show him the furnace
23 and water heater, show him the property line and stuff.
24 Q. So, so your recollection is we all go downstairs
25 now. Now yesterday you stayed upstairs but you seem pretty

COURT PROCEEDINGS

0480

1 certain that--
2 A. I may have gone down. I don't know. But I--
3 Q. All right.
4 A. I know there was a time when Dan and Bill went down
5 without Mary and I.
6 Q. Okay. So I'm going to give you two scenarios
7 because I just--
8 A. Okay.
9 Q. -- you know, you're a good story teller--
10 A. Go ahead.
11 Q. -- so just tell me what happened here. You all
12 four go downstairs, you look around in the basement. Mary
13 testified that you walked out the back door along some wood
14 planks because it was muddy over to--
15 A. I don't remember me walking out the back.
16 Q. Okay. And then everybody back upstairs because
17 it's, it's definitely upstairs where Dan said Bill--
18 A. Yes.
19 Q. -- come on, I want to show you?
20 A. Absolutely.
21 Q. So apparently rather than just show him while they
22 were downstairs and going across the plank and already in the
23 back yard, Dan for whatever reason chose to go back upstairs
24 with everybody and then take Bill back down and outside a
25 second time? Okay.

COURT PROCEEDINGS

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1 A. And I think probably--
2 Q. (Short inaudible, away from mic).
3 A. Okay. Never mind.
4 Q. Let's just move forward.
5 A. That's fine.
6 Q. Now, and I'm just going to say February 14th, I'm
7 not necessarily going to argue that date, but we're going to
8 say it was what you said on the 14th, or that's your
9 recollection, but prior to the signing, the day before at
10 least prior to the signing the earnest money which exhibit
11 you have, that when they first came that was the same day
12 that Mr. Smith I'm going to say cut the deal so to speak with
13 Bill for Bill to do the final grade, you know, move that
14 dirt, you know, and etcetera. Correct?
15 A. Correct.
16 Q. Okay. Now, it's later that day after the Moores
17 have left, this was the 14th, that Mr. Smith told you that
18 Bill had agreed to do the final grade. Is that correct?
19 A. That's partially, that's part of what was said.
20 Q. All right. Please tell me the rest.
21 A. Okay. I can remember that we had to discuss
22 because they had discussed price so Dan had to discuss the
23 difference of what they were going to do with price with me,
24 which he did. I can remember--
25 Q. This was after they had left?

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0482]

1 here a minute there's some stuff I want to show you. Do you
2 recall them saying that?
3 A. I recall them saying it in court, yes.
4 Q. Okay. From the moment that you walked into that
5 house on February 11th, 1994 until the time that you and Bill
6 left together in that same day were you and Bill ever
7 separated for so much as five seconds?
8 A. I testified to that Monday. No, we were not.
9 Q. Were you always within eyesight and hearing of each
10 other?
11 A. Uh-huh (affirmative).
12 Q. Strike that. Strike that.
13 I want to know how far the, the maximum length that
14 you two were ever separated while you were viewing the home
15 together that day. I want to know the furthest you were ever
16 apart.
17 A. My arm length would be the furthest I'd have been
18 from him. We're together looking at a home. And it's our
19 first home.
20 Q. From, from February 11th, '94, that day--
21 A. Yes.
22 Q. -- until Bill passed away in 2001--
23 A. Yes.
24 Q. -- did Bill ever say to you Mary, I cut a deal
25 with Dan, we're doing the landscaping, we're doing the finish

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0538

1 grading and we're bringing that soil right up to that
2 frostline level. Did he ever once ever say anything like
3 that to you?
4 A. Bill told me everything, we talked about
5 everything. No.
6 Q. Did he ever say to you, you know honey, as soon as
7 you get that place I'm going to move around to the west, east
8 side of that house there that we've got and I'm going to
9 scrape that dirt away, I'm going to scrape all that dirt out
10 of there so I've got it just nice and flat so I can use it to
11 get access to the back lot. Did he ever say anything like
12 that?
13 A. We didn't need to. We backed a big truck down
14 there and dumped, we dumped manure and sand back there in a
15 big dump truck off the farm.
16 Q. Answer my question.
17 A. No.
18 Q. Did you ever, did you ever, Mary, from
19 February 11th to this date as we stand here take so much as a
20 teaspoon full of dirt out of that property?
21 A. No, we did not, I did not.
22 Q. Did Bill?
23 A. No.
24 Q. Did you so much as... Well, let me...
25 You know this big pile of dirt that, that we have

COURT PROCEEDINGS

0539

1 consult one with another.
2 So we'll be in recess and if counsel will meet with
3 me in chambers.
4 MR. HADLEY: Your Honor.
5 THE JUDGE: What?
6 MR. HADLEY: I have to ask you a question.
7 (Tape turned off.)
8 THE JUDGE: Okay. Will let's bring in the jury.
9 MR. DIXON: Judge, are we going to make a record
10 of--
11 THE JUDGE: Oh, let's see. Before you, yes,
12 before you bring in the jury. I'm sorry. Thank you,
13 Mr. Dixon. You may be seated.
14 Okay. We'll go back on the record in the case of
15 Mary Moore versus Dan and Carol Smith. The Court has met
16 with counsel in chambers and we've reviewed the jury
17 instructions and the proposed verdict form.
18 Mr. Hadley, at this time does the plaintiff take
19 any exceptions to a, instructions that were offered that were
20 not given or to any a, that the Court is going to give that
21 you oppose?
22 MR. HADLEY: No, Your Honor. No exceptions.
23 THE JUDGE: Okay. Mr. Dixon, does defendant take
24 any exceptions to the, to the jury instructions that that
25 they, that you proposed that are not to be given and to any
COURT PROCEEDINGS

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1 your as-is clause request the, the Court find, found that to
2 be argument, clearly it's argument that you can make and the
3 Court found it not inappropriate, not appropriate to include
4 as an instruction.
5 MR. DIXON: The other thing I, I object to,
6 Your Honor, is I would like instruction number 30 statute of
7 limitations defense clearly imposes upon the, it clearly
8 defines for the jury that a, the, the statute of limitations
9 for any breach of contract in this type of case is a six
10 year statute of limitations and that there is no a,
11 discovery period or tolling period applied to that. That,
12 and--
13 THE JUDGE: Well, I gave your exact statute of
14 limitations instruction.
15 MR. DIXON: Number 30?
16 THE JUDGE: I don't know if it's, it's... Does it
17 started out plaintiffs claims against defendant are barred
18 and invalid if they do not, did not file their suit within
19 the applicable statute of limitations?
20 MR. DIXON: Okay. Well, then I object to the,
21 any jury instruction that, that they gave that tended to a,
22 find that there is, that a tolling or a discovery period
23 applicable to a contract. That's what I object to.
24 THE JUDGE: Okay.
25 MR. DIXON: I'm not sure what the number is
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1 because it doesn't have a number in here but, but that's what
2 I'm objecting to.

3 THE JUDGE: Okay. Thank you.

4 Okay. Let's bring the jury in.

5 Okay. You may be seated. The record may
6 reflect that the jury is now on the courtroom. I apologize
7 it took a little bit longer than I thought it would, but I
8 can tell you that we, we did work continually and diligently
9 since we last saw you. The Court is going to now read the
10 jury instructions to you. They are somewhat lengthy but I'd
11 ask that you pay close attention to them, you'll have a copy
12 of them with you in the, in the juryroom for you, your
13 deliberations.

14 Instruction #1. Members of the jury, I would like
15 to thank you for your attention during the trial. I will now
16 explain to you the rules of law that you must follow and
17 apply in deciding this case. When I have finished you will
18 go to the juryroom and begin your deliberations, what we
19 call, begin your discussions, what we call your
20 deliberations.

21 Please pay attention to the legal instructions I'm
22 about to give you. This is an extremely important part of
23 the trial.

24 You are not to single out one instruction alone as
25 stating the law but must consider the instructions as a

COURT PROCEEDINGS

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1 defects in the house; and

2 2. Such construction defects were material; and

3 3. Defendants had a duty to disclose to the
4 plaintiffs the existence of these material construction
5 defects and failed to do so.

6 Instruction #24. Plaintiff claims that the
7 defects in the house are material. A defect is material if
8 it is something which a buyer or seller of ordinary
9 intelligence and prudence would think to be of some
10 importance in determining whether to buy or sell a home.

11 Instruction #25. The plaintiffs had a duty to
12 discover the, to discover by exercise of reasonable diligence
13 any construction defects before they bought the house.
14 Plaintiffs are obliged to exercise care to discover those
15 construction defects which a reasonable prudent person would
16 ordinarily find after examination and an inspection.

17 Instruction #26. In determining whether plaintiff
18 exercised reasonable care you may consider whether the
19 plaintiffs could have reasonably obtained a house inspection
20 before they bought the house. If you determine the
21 plaintiffs have, should have obtained a house inspection and
22 that such a reasonable home inspection would have disclosed
23 to the plaintiffs the alleged construction defects then they
24 are not entitled to recover for fraudulent nondisclosure.
25 Even determining the reasonableness of the actions of the

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1 plaintiffs you may... In determining the reasonableness of
2 the actions of the plaintiffs you must consider the newness
3 of the home, the fact the seller was a licensed general
4 contractor and that the plaintiff was an unsophisticated
5 buyer

6 Instruction #27. The plaintiff must proof by
7 clear and convincing evidence that as a result of the
8 fraudulent nondisclosure the plaintiff has suffered injury or
9 loss.

10 Instruction #28. Damages are not recoverable for
11 loss beyond an amount that the evidence permits to be
12 established with reasonable certainty.

13 Instruction #29. The fact that I have instructed
14 you concerning damages is not to be taken as an indication
15 that I either believe or do not believe that the plaintiff is
16 entitled to recover such damages. The instructions in
17 reference to damages are given as a guide in case you find
18 that from the evidence that the plaintiff is entitled to
19 recover. However, if you determine that there should be no
20 recovery then you will entirely disregard the instructions
21 given you upon the matter of damages.

22 Instruction #30. If you decide that the defendant
23 is liable to the plaintiff you must decide how much money
24 will reasonably compensate the plaintiff for any injury or
25 loss proximately caused by the defendant's fraud. In

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1 awarding the plaintiff compensation you should consider the
2 amount needed to place the plaintiff in the same position in
3 which the plaintiff would have been had the defendant,
4 defendants made the nondisclosed representations.

5 Instruction #31. Plaintiffs claims against
6 defendants are barred and invalid if they did not file their
7 suit within the applicable statute of limitations.
8 Plaintiffs filed their suit on August 24th, 2000. Utah law
9 provides that an action for, for construction defects based
10 in contract or warranty shall be commenced within six years
11 of the date of the closing of the sale of the house. Utah
12 law provides that an action for fraudulent nondisclosure
13 shall be commenced within two years of the time that the
14 plaintiffs discover their cause of action for fraudulent
15 nondisclosure, or the date upon which cause of action should
16 have been discovered through reasonable diligence.

17 Instruction #32. Discovery of an injury occurs
18 when a plaintiff knows, knows or through the use of
19 reasonable diligence should know that the house has a
20 construction defect. A plaintiff need not have certain
21 knowledge of the existence of the defect in order to have
22 discovered it. All that is necessary is that the plaintiff
23 be aware of the facts that would lead the ordinary person
24 using reasonable diligence to conclude that a claim for
25 construction defect may exist.

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1 Plaintiffs are deemed to have discovered their
2 claim or cause of action for fraudulent nondisclosure when
3 they learned of facts putting them on notice of such claim
4 The discovery rule benefits a plaintiff by operating to toll
5 or extend the time period of the statute of limitations until
6 the discovery of the defect in the home that form the basis
7 for the cause of action. If you find that plaintiff did not
8 know or would not have discovered the defects if she
9 exercised reasonable diligence, then the statute of
10 limitations does not bar the plaintiff's claim.

11 Instruction #33. It is your duty to make findings
12 of fact as to questions I will submit to you. In making
13 your findings of fact you should bear in mind that the burden
14 of proving any disputed fact rests upon the party claiming
15 the fact to be true, and that the fact must be proved by a
16 preponderance of the evidence for the breach of contract
17 questions and clear and convincing evidence for the
18 fraudulent nondisclosure questions.

19 This is a civil action and six members of the jury
20 may find and return a verdict. At least six jurors must
21 agree on the answer to each question but they need not be the
22 same six on each question. As soon as six or more of you
23 have agreed on the answer to each question have the verdict
24 signed and dated by your foreperson and then return it to
25 this room.

COURT PROCEEDINGS

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1 MR. DIXON: Thank you, Your Honor.

2 CLOSING ARGUMENT BY MR. DIXON

3 MR. DIXON: I don't want to repeat all the
4 evidence. And you've been, you know, I've never said this
5 before, you have been a very attentive jury, everybody has
6 been so attentive. Typically speaking in cases that are
7 somewhat technical or there was not a crime or anything
8 committed, you know, there's no murder or blood or anything,
9 any pictures, you know, people have a little more interest.
10 But you've paid such close attention and I thank you very
11 much for your attention and for your diligence and your
12 willingness to serve as, as jurors.

13 This case is pretty simple. The, I'll bet you can
14 guess the part of the contract that I'm going to mention
15 first, this is an as-is contract. I don't need to have to
16 show it to you again, you've already seen it. The Smiths
17 sold a house to the Moores as-is. They sold it with no
18 warranties. They bought, the Smiths take this house as-is
19 all, whatever it is, whatever the house is.

20 What did the Moores know about this house? We had
21 a lot of discussion and a lot of dispute about what was the
22 status of the dirt at the time of, that the house was sold
23 February 15th of 1994. You know, that really can be all set
24 aside. It doesn't, it's not even really necessary because
25 the Smiths sold it as-is. The Moores took that house

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1 Plaintiffs had a duty to discover by
2 exercise of reasonable diligence any

3 construction defects before they bought
4 the house. Plaintiffs are obligated to
5 exercise care to discover these
6 construction defects which a reasonably
7 prudent person would ordinarily find
8 after examination and inspection.
9 You know, she can't just say well, I didn't do
10 anything. She has to act with a certain degree of
11 responsibility, ordinary responsibility. She has to take,
12 the Moores have to take responsibility for themselves. They
13 could have hired a lawyer, they could have had somebody look
14 into this thing, they could have had a home inspection done
15 and they didn't do it. And it's not for them to blame us
16 seven, six years later and have, and take us through this
17 trial until 2005 because they didn't exercise the
18 responsibility for themselves that they should have done in
19 the first place.
20 26. Whether the plaintiff could have
21 reasonably obtained a home inspection is
22 one of the things that you may consider
23 in deciding whether she acted properly.
24 This one I won't show but it does show that you
25 have to prove, there has to be damage too that's proven by

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1 clear and convincing evidence on the fraudulent
2 nondisclosure. And I submit there isn't been any damage
3 whatsoever. There has to be, there has to be reasonable
4 certainty about damages. There isn't any reasonable certain
5 here. There hasn't been any damage. There's been the
6 slightest little bit of damage to the windows and no damage,
7 ladies and gentlemen of the jury, has ever been proven to the
8 footings of the foundation. Not one person testified with
9 any degree of certainty at all about damages. That is not
10 even an element of this case, and Mrs. Moore isn't even
11 concerned about it.

12 And this just says... I won't go over that one.

13 Now, ladies and gentlemen of the jury, we have to
14 talk about the statute of limitations. Just because we talk
15 about the statute of limitations doesn't mean that I assume
16 that there's any fraudulent nondisclosure or any breach of
17 contract. It's just something that is a defense, and it's a
18 very proper defense. It's, the statute of limitations keeps
19 us from having to go back years and years and years. You
20 know, we're talking a long time before this case is finally
21 brought, and the statute of limitations in this case starts
22 on August 24th, 2000. Utah law provides that an action for
23 construction defect based in contract or warranty shall be
24 commenced within six years of the date of the closing of the
25 sale of the home. We know the sale of this home closed in,

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1 on May of 1994 and the suit was brought on August 24, 2000.

2 Six years, later than six years on this contract claim. That
3 alone takes care of their contract claim.

4 Utah law provides in an action for fraudulent
5 nondisclosure shall be commenced within two years of the time
6 that plaintiffs discovered their cause of action for
7 fraudulent nondisclosure or the date upon which the cause of
8 action should have been discovered through reasonable
9 diligence.

10 Well, when should it have been discovered through
11 reasonable diligence? Instruction number 32 addresses
12 that.

13 Discovery of an injury occurs when a
14 plaintiff knows, or with the use of
15 reasonable diligence should know that the
16 house has a construction defect. A
17 plaintiff may need not have knowledge of
18 the existence of the defect in order to
19 have discovered it.
20 You don't have to know it exactly.

21 All that is necessary is the plaintiff
22 be aware of facts that would lead an
23 ordinary person using reasonable
24 diligence to conclude that a claim for
25 construction defect may exist.

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1 Plaintiffs are deemed to have discovered
2 their claim or cause of action for
3 fraudulent nondisclosure when they learn
4 of facts putting them on notice of such
5 claim.

6 Ladies and gentlemen of the jury, with respect to
7 the windows what is the undisputed evidence? That Mary
8 Moore saw some water intrusion in the first winter, and it
9 was slight but it wasn't, it never did get very big so
10 that's not really consequential one way or the other. The
11 first winter would have been 1995. There's two years....
12 That's when she has been put, when she learned of facts
13 putting her on notice of such a claim. That's when she
14 started. That's when she asked Jack Peterson to come look
15 at her windows. And he told her that it's just
16 condensation on cheap aluminum windows. That's what he told
17 her. And she still decides to bring this lawsuit against
18 us.

19 Thank you very much.

20 Ladies and gentlemen of the jury, they, the, if
21 there's any issue at all about when the plaintiffs should
22 have known about this breach of contract I say six years is
23 the time, but counsel is going to argue it's six years from
24 the date they discovered it. But I say remember this. When
25 you look at that contract it says that the breach occurs on

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0589

1 on the closing. And if Mary Moore was, and the Moores were
2 concerned about that particular thing it was on the date of
3 the closing that the breach occurred. That's when they
4 could have if they wanted to have checked it out and found
5 out if there were any building violations. But you know
6 what, if they had checked it out to find out if there were
7 any building violations they wouldn't have been able to find
8 any because there weren't any red tags.

9 Ladies and gentlemen of the jury, I ask you and
10 implore you don't turn away people like the Smiths from
11 justice. This I consider to be an unjust, an unjust
12 lawsuit. It should not have been brought. Please,
13 please validate them and their refusal to concede to any of
14 these unjust claims against them. They are people of
15 integrity. Please, do not disparage their integrity.
16 Because they are good people and they are deserving of a
17 verdict from you, a defense verdict. And that's what I ask
18 you to give them.

19 Thank you very much.

20 THE JUDGE: Okay. Thank you, Mr. Dixon.

21 Mr. Hadley, you may make your final closing
22 argument

23 FINAL ARGUMENT BY MR. HADLEY

24 MR. HADLEY: Yes, Your Honor.

25 Let's talk about the statute of limitations just
COURT PROCEEDINGS

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1 quickly. The discovery doctrine applies to the defects for
2 the breach of contract and fraudulent nondisclosure claims.
3 I'm going to read this. Actually the Judge has (short
4 inaudible, away from mic) copies.

5 The discovery rule benefits a plaintiff by
6 operating to toll, stop or extend the time period, as it
7 were, of the statute of limitations until the discovery of
8 the defects of the home that form the basis for the cause of
9 action. A rigid application of the statute of limitations
10 may be irrational and unjust in some circumstances. That is
11 why the discovery rule is available.

12 Let's talk about the windows. You have those
13 pictures. Do you remember when Mike Barrett was on the
14 witness stand? And I was, I was trying to get some
15 guidance. We got picture, I think it's #2-A and #2-B.
16 #2-A, wow, we've got damage. #2-B, I thought it looked
17 pretty bad. But Mr. Barratt said no, I don't think that's
18 damage. Give me a line, give me a line between #2-A and
19 #2-B, where do you say there's damage. He couldn't do it.
20 You're going to have to be asked to do that. You're going
21 to have to be asked to do that. Those pictures were taken
22 about 2003 was the evidence that came in.

23 Mary Moore discovered that she had a foundation
24 footing problem when fence hole posts were dug in order to
25 put in a gate on the east side of her house. That's when it

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1 was discovered in 2000. Would the discovery rules say that
2 well, that's probably pretty reasonable, she didn't have to
3 be out there digging around her footings to find out she had
4 a problem. And quite frankly, would she have even known?
5 I mean, Mary Moore knows nothing about construction. There
6 is the construction knowledge over there.

7 As-is, as-is, that is a doctrine. Fraudulent
8 nondisclosure and breach of contract are exceptions to the
9 as-is clause that's found in this agreement. They're
10 exceptions to it. The as-is clause does not prevent
11 Mrs. Moore from filing suit or recovering damages on defects
12 that breach the contract. You're going to read that one,
13 and I've read it to you. Or were fraudulently concealed.

14 I mean, why would we even be here? If the as-is
15 clause was an up front defense why are we chatting today?
16 And why are you folks missing out on other things in life?
17 It's because it's a defense. That's, that's why we're
18 here.

19 Notice. For a breach of contract claim
20 plaintiff asserts that defendant had
21 notice of the footing defect in the
22 home.

23 I don't know how that could be more plain, quite
24 frankly. They knew, they absolutely knew. Notice isn't red
25 tag, by the way. Notice is just you have knowledge. The

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1 defense is trying to say well, if Jack would have red tagged
2 it then they would have had notice. That's not what the
3 code says and that's not what the law says. And the fact is
4 Jack told them at least twice we've got a problem with the
5 foundation footings.

6 An inspection. Would the reasonable person
7 purchasing a home from a licensed general contractor who had
8 built hundreds of homes in Salt Lake City go out two weeks
9 after a certificate of occupancy has been issued and hire
10 someone to do an inspection? But they say we have that
11 duty.

12 The law in Utah imputes a high degree of
13 specialized knowledge and expertise with regard to
14 residential construction to contractors. The defendant is
15 held to possess the knowledge of a reasonable prudent
16 contractor under similar circumstances.

17 You know, how convenient, how absolutely convenient
18 that the core defense to this litigation, the core defense is
19 well, Bill's dead, Bill's dead, he's gone, and it just so
20 happens that during that nub of conversation Mary wasn't
21 present. You think about that.

22 Thank you.

23 THE JUDGE: Okay. Thank you, Mr. Hadley.

24 Okay. Members of the jury, now is the time that
25 we encourage you to discuss the case among yourselves.

COURT PROCEEDINGS

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ADDENDUM NO. 9

1 THE JUDGE: Let me just ask you this question.
2 MR. HEIDEMAN: Yes, Your Honor.
3 THE JUDGE: There's two different kinds of
4 discovery rules, there's the statutory discovery rule,
5 there's the equitable discovery rule.
6 MR. HEIDEMAN: That is correct.
7 THE JUDGE: And your, is it your position that the
8 equitable discovery rule doesn't apply to this particular
9 section?
10 MR. HEIDEMAN: In this particular instance,
11 Your Honor, it does not apply to (3)(a), specifically the
12 contract actions as I've argued with regard to the statute of
13 repose.
14 Equitable causes or discovery occur at the point in
15 time when there is a reason why an injury would not be
16 discovered. For instance, if a, well, let's use the typical
17 medical malpractice. If sponge or a scalpel were left inside
18 of a patient it's unlikely they would notice that for some
19 period of time, a scalpel might be a little more noticeable
20 than a sponge but still there would be a time lag.
21 THE JUDGE: But you understand in the jury
22 instructions in this case the court, you know, instructed the
23 jury concerning, you know, that they, that it would only be
24 tolled if a reasonable person would not have, would have not
25 discovered it, and they found that a reasonable person would

COURT PROCEEDINGS

0008

1 not have discovered it.
2 MR. HEIDEMAN: That is correct, Your Honor. But
3 I believe that there is a difference in what was being asked
4 of the jury and what is being asked of the court today.
5 What was being asked of the jury is a reasonable man's
6 standard, something akin to negligence, a finding of fact
7 that a jury would specifically make. What I am requesting
8 the court consider today is whether or not the law--
9 THE JUDGE: Which is the same point that's been
10 argued several times previously.
11 MR. HEIDEMAN: Your Honor, I would agree with
12 that with one small change. I do not, I did not in my
13 perusal of the prior docket find an argument with regard to
14 the statute of repose. And the statute of repose when
15 coupled with this I think makes a substantial difference in
16 the interpretation simply because it does not mention
17 (3)(a). If the statute of repose is to be believed then
18 there can be no extension beyond nine years. So why then
19 would it not say if a contract could be extended beyond--
20 THE JUDGE: This clearly was not brought, this was
21 brought within nine years.
22 MR. HEIDEMAN: That's correct, Your Honor.
23 Absolutely. The statute of repose is not what I'm arguing
24 is the bar.
25 THE JUDGE: Okay.

COURT PROCEEDINGS

0009

1 THE JUDGE: Thank you. Okay. Let's take up the
2 plaintiff's request for award of attorney's fees and costs.
3 Who is going to speak to that? Mr. Dodd?

4 MOTION REGARDING ATTORNEY'S FEES

5 ARGUMENT BY MR. DODD

6 MR. DODD: I will, Your Honor.
7 Your Honor, plaintiff has requested her attorney
8 fees, costs and expenses pursuant to paragraph N of the
9 earnest money sales agreement. Paragraph N states in part
10 that

11 Both parties agree that should either
12 party default in any of the covenants or
13 agreements herein contained the
14 defaulting party shall pay all costs and
15 expenses including a reasonable
16 attorney's fee which may arise or accrue
17 from enforcing or terminating this
18 agreement, or in pursuing any remedy
19 provided hereunder or by applicable law
20 whether such remedy is pursued by filing
21 a suit or otherwise.

22 The defendants qualify as defaulting party pursuant
23 to this agreement. The Utah Supreme Court in Foote v. Clark
24 held that a finding that a party has materially breached an
25 agreement is tantamount to holding that they defaulted in the

COURT PROCEEDINGS

0044

1 agreement. The jury found that the defendants breached the
2 earnest money sales agreement. Therefore, plaintiff is
3 entitled recover all of her fees pursuant to the earnest
4 money sales agreement.

5 THE JUDGE: You had, this has gone on for five
6 years and you had a lengthy complaint. Most of all the
7 causes of action were dismissed except, the only one you can
8 recover attorney's fees under is the breach of contract one
9 provision of that, and you only, and the only portion of your
10 breach of contract cause of action that you recovered on was
11 the a, failure to disclose violations of the building code.
12 And you're asking this court to award reasonable attorney's
13 fees for that, where you're only, you were only successful in
14 that portion, for all of your attorney fees and costs?

15 MR. DODD: Yes, Your Honor.

16 THE JUDGE: That's not going to happen.

17 MR. DODD: Your Honor, we request that under two
18 theories. First, we request it because the plaintiffs are
19 not required to categorize--

20 THE JUDGE: Yes, they are.

21 MR. DODD: -- their claims as successful claims
22 or unsuccessful claims--

23 THE JUDGE: Yes, they are.

24 MR. DODD: --under the earnest money sales
25 agreement.

COURT PROCEEDINGS

0045

1 THE JUDGE: We do it all the time. I mean, all

2 the time we have cases on which there can only be recovery
3 for attorney's fees under one of the causes of action and,
4 and we require attorneys to differentiate what attorney's
5 fees were associated with that particular portion of which
6 they can recover and, and the court's only going to award
7 attorney fees for, for the work that they were successful and
8 had, the right and obligation to be awarded attorney's fees
9 for.

10 MR. DODD: I respectfully disagree. In
11 Cottonwood Mall the Supreme Court specifically stated that a
12 party who requests an attorney's fees award has the burden of
13 presenting evidence sufficient to support the award, except
14 in the most simple cases the evidence should include hours
15 spent in the case, the hourly rates, the rates charged for
16 those hours and the usual customary rates for such work.
17 This is the specific requirements under Rule 73.

18 THE JUDGE: Those are the requirements for any
19 award of attorney's fees. But you have to have a basis for
20 the award of attorney's fees, and the only, the only basis
21 you have a right to recover attorney's fees is under the
22 earnest money agreement.

23 MR. DODD: Well, in Foote V. Clark, a case that
24 was cited by the defendants for their, for their own
25 propositions, Foote V. Clark the Supreme Court held that

COURT PROCEEDINGS

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1 under a, they had an earnest money sales agreement almost
2 exactly the same as our paragraph N has for the attorney's
3 fees clause. In Foote V. Clark the claim for the attorney's
4 fees the court stated that this contract, the earnest money
5 sales agreement, does not require any evaluation of the
6 parties respective success in an action brought to remedy a
7 default. It says the reason why it doesn't require any
8 evaluation of the parties respective success is because
9 earnest, paragraph N does not require you to be successful in
10 your claims to recover, paragraph N only requires that there
11 be a defaulting party, and the defaulting party is therefore
12 required to pay all of the attorney's fees and costs in the
13 action. It says or any, or any remedy provided hereunder or
14 by applicable law. Paragraph N as Foote V. Clark, the
15 Supreme Court, Supreme Court case of Utah specifically states
16 does not require an evaluation of the party's success in the
17 action.

18 Furthermore, even if this court did decide that we
19 were, we were required to differentiate between the
20 successful claims and the unsuccessful claims we would still
21 be able to recover under an alternate theory. In Kurth V.
22 Wiarda the Appeals Court of Utah specifically held that where
23 the proof of a compensable claim and otherwise noncompensable
24 claim are so closing related and require proof of the same
25 facts, a successful party is entitled to recover it's fees

COURT PROCEEDINGS

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1 incurred in proving all of the related facts. And in Brown,
2 in Brown V. David K. Richards and Company the Utah Supreme

3 Court held that a defendant who successfully defended against
4 a breach of contract claim in connection with costs and
5 attorney's fees incurred were recoverable, he was entitled to
6 recover costs relating to the factual development which while
7 necessary to defeat the contract claim also bore on the
8 negligent and fraudulent misrepresentation claims on which
9 the defendant prevailed, even though those costs incurred in
10 connection with those claims were not by themselves
11 recoverable.

12 So what these, what these cases hold is that where
13 the facts required to prove separate causes of, action
14 actions are so enter mingled and intertwined to be
15 indistinguishable then--

16 THE JUDGE: I would take it, I would agree with
17 you, you know, clearly you had a breach of contract claim and
18 a, and a fraudulent nondisclosure claim that were identical
19 as to the, as to the building code violation with respect to
20 the frost line.

21 MR. DODD: Uh-huh (affirmative).

22 THE JUDGE: And, you know, no question on that.
23 But you had 40, listed 40 other alleged defects and when we
24 came down to trial only, only one, you only prevailed on one.

25 MR. DODD: Your Honor, as you can recall though
COURT PROCEEDINGS

0048

1 the defense is not the present defense that, you know, that
2 was previously. They brought up numerous times of all those
3 41 defects how small, how minor, how minute they were, this,
4 this laundry list of defects the defendants have. Clearly
5 throughout the entire time of the trial the major defects
6 that, the major defects in the home were the ones we went to
7 trial on, those are the ones the time were spent on, those
8 are the time that the experts spent their time on, those were
9 the defects to--

10 THE JUDGE: Only, only on about the last six
11 months of this five, five year odyssey.

12 MR. DODD: To be able to try to differentiate the
13 time spent on the footings, on the footings defect and the
14 time spent, the research is all the same. Whether or not
15 there's a... You don't have defects on whether or not, you
16 don't have research to go and find whether or not a defect
17 that's a footing defect that's latent is different than a
18 defect that's a window defect that's latent, or a defect
19 that's a stair rise defect that's latent. But all of the
20 research, all of the memorandums written, all of the
21 depositions, everything would have been taken place the exact
22 same--

23 THE JUDGE: So if you--

24 MR. DODD: -- besides maybe a few, a few of the
25 motion that's were filed.

COURT PROCEEDINGS

0049

1 THE JUDGE: And you think it's reasonable for this
2 court to award \$100,000 in attorney's fees for an ultimate
3 claim that was, that the jury found to be 30,000?

4 MR. DODD: Well, Your Honor, since the Utah
5 Supreme Court specifically has held on numerous occasions
6 that the amount of damages awarded has no bearing whatsoever
7 on attorney's fees--
8 THE JUDGE: No. They, they've awarded just the
9 opposite.
10 MR. DODD: What's that, Your Honor?
11 THE JUDGE: The amount, the amount in dispute is
12 one of the factors that the court can look to to determine
13 what the reasonableness of attorney's fees is.
14 MR. DODD: Well, Your Honor, right here in Foote
15 V. Clark,
16 Utah has consistently held...
17 This is from Foote V. Clark.
18 ... consistently held that the amount of
19 attorney's fees awarded in a case cannot
20 be said to be unreasonable just because
21 it is greater than the amount of judgment
22 attained.
23 THE JUDGE: Well--
24 MR. DODD: So of course you asked, you asked me
25 the question do I feel it's reasonable to have an award of in
COURT PROCEEDINGS

0050

1 excess of \$100,000 of attorney's fees on a case that was
2 \$30,000 judgment. Yes, I think it's reasonable. First of
3 all, this case has gone on for five years not because it
4 couldn't have happened very soon or not because... There's
5 been 25 motions that the plaintiffs have had to defend
6 against in this case. The three motions that we're here
7 today are frivolous, Your Honor, we shouldn't be here
8 speaking about these motions besides the attorney's fees.
9 The reason why there's over \$100,000 in attorney's fees is
10 because the defense has tried to drown Mary Moore in her
11 attorney's fees and keep her from litigating this case.
12 That is their specific intent.
13 THE JUDGE: Well they weren't, they weren't
14 frivolous if the court granted them.
15 MR. DODD: That was their specific intent. And
16 no, they weren't granted, only the last five were granted.
17 Utah has hinted in Valcarce versus Fitzgerald that
18 a defendant might be estopped from arguing excessive
19 attorney's fees when the plaintiff's fees were increased many
20 times over what they should have been by the litigation
21 tactics employed by the defendants. Plaintiff's large
22 attorney fees are a reflection of the tactics that the
23 defendants have employed in trying to run up Ms. Moore's
24 expenses. To now try to reduce her expenses to a minimum
25 would be unjust to her because of the tactics that the, that
COURT PROCEEDINGS

0051

1 the Smiths have employed to try to drown her in her own fees
2 so that she could not take this to trial. And in fact, they
3 almost succeeded in having that take place.
4 To now go and claim that the attorney's fees are

5 exorbitant or in excess because of their own tactics would be
6 unjust. I think in light of this it would be, if they claim
7 our attorney's fees are exorbitant or, or too much I think it
8 would be very educational to know what the defense attorney's
9 fees has been during the prosecution of this matter and the
10 defense of this matter, specifically since the defense on the
11 first day of trial revealed to the plaintiffs that theirs has
12 also been well in excess of \$100,000 and that was before
13 trial.

14 So to now ask me whether or not these, these
15 attorney's fees are reasonable, yes, they're reasonable.
16 They're reasonable because Mary Moore has had to, has had to
17 go through five years of litigation, motion after motion
18 after motion, two motions after the judgment has already been
19 given. The judgment nov and the 60(b) motion, both of those
20 have been heard and, and decided by this court. Why, why
21 force Mary Moore to spend thousands of more dollars to come
22 down here today to relitigate issues that have already been
23 decided. That's been the tactics of the defense the entire
24 time.

25 So yes, they are reasonable.

COURT PROCEEDINGS

0052

1 And third, the defense, the plaintiffs claim costs
2 and expenses under paragraph N. This is not a Rule 54(d)
3 cost and expense as the defense is trying to lead you to
4 believe. Costs, taxable costs as under Rule 54(d), yes,
5 they are restricted to specific criteria that has been
6 enumerated by the court on numerous occasions. The courts
7 have interpreted what a cost is on a Rule 54(d) numerous
8 times and many of the costs that the plaintiff is requesting
9 are not costs pursuant to Rule 54(d). We are not
10 requesting costs pursuant to Rule 54(d). We are requesting
11 costs pursuant to paragraph N of the earnest money sales
12 agreement.

13 Paragraph N specifically states all costs and
14 expenses, not just costs, all costs and expenses will be
15 awarded. That has been interpreted by, by the Utah Supreme
16 Court in Chase V. Scott. The Utah Supreme Court has said
17 that costs recoverable pursuant to Rule 54(d), sorry.

18 Where a contract exists that provides
19 for award of costs the contract should be
20 interpreted to include those costs that
21 were associated with the litigation but
22 would not be included in costs awarded
23 pursuant to interpretation of the
24 Rule 54(d) in order to not render the
25 contract provisions superfluous.

COURT PROCEEDINGS

0053

1 Basically what that is saying is if you're going to
2 have a contract that awards costs, well, it's going to
3 include more costs that are under Rule 54(d) because if it
4 didn't include more costs under Rule 54(d) it would be a
5 meaningless provision in the contract. Why would it be

6 meaningless? Because all costs are, are awarded to the
7 prevailing party pursuant to Rule 54(d). It doesn't matter
8 if you have a contract or not. No contract, you get the
9 costs. But where you have a contract that says you get the
10 costs, the costs, the definition of costs then expands, it
11 expands to include more costs that aren't included under
12 pursuant to Rule 54(d). So not only does our contract
13 provide for costs, it also provides for expenses.

14 The term costs under the contract has been, has
15 been interpreted in Kraatz V. Heritage Imports that any, any
16 litigation expense can be recovered so long as they are
17 reasonable. So if defense went to Hawaii to depose Mary
18 Moore that might not be a recoverable cost, it's not
19 reasonable, but--

20 THE JUDGE: But you've got \$34,000 in costs,
21 Mr. Dodd.

22 MR. DODD: And we have analyzed each and every
23 one. The defense has had opportunity to look at each and
24 every one, and the only ones that they have pointed out that
25 they object to is they have pointed out to the telephone, the

COURT PROCEEDINGS

0054

1 long distance telephone charges, they pointed out to the
2 copies, the postage stamps and the expert witnesses. Those
3 are the only ones that they specifically enumerated. They
4 did not specifically enumerate any other costs they opposed
5 to--

6 THE JUDGE: Well, your expert witnesses come to
7 about \$20,000.

8 MR. DODD: Exactly. And Your Honor, in Kraatz V.
9 Heritage Imports this case was specifically regarding expert
10 witnesses costs under, under a attorney's fees clause that
11 was almost identical to the attorney's fees clause in our
12 paragraph N.

13 THE JUDGE: You think it's reasonable to pay, to
14 pay an expert \$20,000 when the only possible recovery was
15 between 30 and \$40,000?

16 MR. DODD: Well, Your Honor, pursuant to Kraatz V.
17 Heritage Imports yes, it is reasonable.

18 THE JUDGE: I don't think so. It's not
19 reasonable.

20 MR. DODD: Your Honor, those expert witnesses fees
21 were, were incurred at the, at the time to, to create, to
22 create the facts and the causes of actions in the case, to be
23 able to have many of the--

24 THE JUDGE: You've got to, you've got to use some
25 common sense, Mr. Dodd.

COURT PROCEEDINGS

0055

1 MR. DODD: Well, Your Honor, to be frank the only
2 reason we recovered \$30,000 is because all of our causes of
3 action and defects were in fact dismissed by you on an
4 incorrect ruling about the latent and patent defects. If
5 this was to go up on Supreme Court to determine whether or
6 not those defect were latent or patent 95% of every one of

7 those defect would be determined they were in fact latent and
8 this judgment would be for the entire price for the home.

9 The Supreme Court has specifically stated many
10 times that--

11 THE JUDGE: Well you should, you know, you have
12 your option to choose remedies. If you would have chosen a
13 remedy of rescission I'm sure that Mr. Smith would have
14 bought back the house for \$85,000.

15 MR. DODD: Well, Your Honor, the plaintiffs, the
16 defense has never once been willing to do anything whatsoever
17 to try to settle or resolve this issue. They've--

18 MR. HEIDEMAN: Your Honor, I'm going to object.
19 I think that counsel is speaking toward settlement
20 negotiations and his--

21 THE JUDGE: Let's just, let's get back to the fees
22 and costs.

23 MR. DODD: Okay, Your Honor. The, in Chase V.
24 Scott the court specifically held that photocopying expenses
25 and deposition costs are awardable under a contract--

COURT PROCEEDINGS

0056

1 THE JUDGE: I have no problem with those.

2 MR. DODD: -- that provides for costs.

3 In Kraatz V. Heritage Imports the court
4 specifically held that expert witnesses costs are, are
5 awardable.

6 THE JUDGE: Reasonable expert witness costs.

7 MR. DODD: Yes. All of it is done by a, it has to
8 be done by a reasonable standard. If not a reasonable
9 standard then anything would go. And there was, I can't
10 remember what case it was, I think it was Kraatz where they
11 said if it wasn't a reasonable, if it wasn't a reasonable
12 standard it would be absurd. So of course, it's pursuant to
13 a reasonable standard. If I, I, if we want to go through
14 and determine the reasonableness of each and every one of
15 those costs the plaintiff would be very very willing to do
16 so. They, there's not been a single cost that's been charged
17 that has not been a reasonable cost.

18 If... The reasonable standard of whether or not it
19 was reasonable is, it's a reasonable, it's reasonable in
20 pursuing the litigation in the matter. It does not
21 determine whether or not the... In Kraatz the expert
22 witnesses, Your Honor, never testified at trial, they never
23 even stepped on the stand and the court still held that those
24 fees can be reasonable. Why? Because when they were
25 incurred, when the, when the party incurred those expenses of

COURT PROCEEDINGS

0057

1 an expert witness they were doing it in depositions, they
2 were doing it in pursuing their case, they were doing it in
3 litigation. It was not an unreasonable cost at the time
4 even though it never brought fruit, even though it never
5 actually, the experts testified. Kraatz Utah Supreme Court
6 specifically held that those can be reasonable charges.

7 In this case the defendants had expert witnesses,

8 defendants had expert charges. I would, I would love to see
9 what their, their charges have been for their expert
10 witnesses. If our charges aren't reasonable why would the
11 defense go through the same exact process of expending that
12 amount of money to have expert witnesses as well. Of course
13 it was reasonable. It was reasonable because it was the
14 only way that this woman would have got a \$30,000 judgment.
15 Without the expert witnesses none of the judgment would even
16 have been given. And that's the same reason that the
17 defense went through the process of their expert witnesses
18 and the same reason they went through having the costs of
19 theirs. I think it would be very educational to know what
20 their expenses have been because our expenses would be deemed
21 very reasonable pursuant to theirs.

22 This case has endured for almost five years. The
23 plaintiff finally had an opportunity to have this case
24 presented to a peer of jury, to a jury of her peers to hear
25 and decide this case. The jury found that the defendants

COURT PROCEEDINGS

0058

1 breached the earnest money sales agreement, therefore,
2 they're the defaulting party. They found that they
3 committed fraudulent nondisclosure in not disclosing the
4 defects in the home. Plaintiff is entitled all of her
5 attorney's fees. Even the attorney's fees that, even the
6 attorney's fees that have been incurred after the final
7 judgment in pursuing this matter. This... The plaintiffs
8 request that all of the attorney's fees that, that Mary Moore
9 has requested including the attorney's fees for preparing for
10 these motions here today which amount to \$4,907 since
11 March 10th and attorney's fees, and \$156.55 in costs in
12 recording, in recording fees. We ask that that be augmented
13 to the original amounts requested in the motion and we
14 request that all of the attorney's fees be awarded to the
15 plaintiff pursuant to the contract.

16 Thank you, Your Honor.

17 THE JUDGE: Let me just ask you one question,
18 Mr. Dodd, just reviewing. You have, in your detailed billing
19 you have carryovers of costs, you know, bounced forward I
20 haven't gone to taking the time to add them all up but it
21 would appear to me that the balance forwards have been added
22 twice. And then you have these fees do project analysis
23 that were paid directly by Mrs. Moore, 5,852 and then, for
24 periods back in 2001, 2002. And then you have project
25 analysis, you know, separate billings.

COURT PROCEEDINGS

0059

1 Are they, are they all, have you, has your office
2 reviewed to make sure that the balance forwards aren't being
3 added twice?

4 MR. HADLEY: Can I respond to that?

5 THE JUDGE: Go ahead, Mr. Hadley.

6 MR. HADLEY: I was involved, Mr. Dodd was not.

7 The \$5,820, that was paid directly by Mary Moore to
8 two project analysts and was never entered on our bill

9 because heretofore we had, you know, we'd pay it and then
10 we'd bill her so we would have a record of it in our billing
11 system. So the reason the 5,820 is an add-on is it's not in
12 our, it's not in our system. 5,787 is what she shows here.
13 So that's--

14 THE JUDGE: Okay. So they got, they got over 13,
15 \$14,000?

16 MR. HADLEY: Including trial. That's correct.

17 THE JUDGE: Okay.

18 MR. DODD: And, Your Honor, I appreciate that you
19 bring up a few of those specific a, fees that you were
20 concerned about. I would just like to point out the defense
21 has not pointed to one single fee that they dispute, not
22 one. And in light of that, Your Honor, the, the
23 plaintiff's request all their fees and costs and expenses
24 be awarded in this matter pursuant to the, to the attorney's
25 fees clause.

COURT PROCEEDINGS

0060

1 THE JUDGE: Okay. Thank you. Mr. Heideman?

2 MR. HEIDEMAN: May I approach, Your Honor?

3 THE JUDGE: You may

4 ARGUMENT BY MR. HEIDEMAN

5 MR. HEIDEMAN: Thank you, sir. My wife tells me
6 I like to draw because it means my fingers get to breathe.

7 Let's start with just a moment with the language
8 from the case that I just passed to the court. This is the
9 Foote case, Your Honor.

10 The language of the contract does not
11 permit assessing fees against the Clarks
12 that relate to the noncontract claims
13 against either Hatch or the brokers.

14 You can read the rest of the paragraph but it's
15 very clear from the court's comments that there is a
16 substantial disagreement between plaintiff's counsel and the
17 law. The law is very clear that if you have a contract you
18 can recover your fees on the contract. That does not give
19 you the ability to recover your fees on a tort. And in this
20 particular instance that's what they're seeking.

21 To begin with, Your Honor, I would like to simply
22 say this. There are multiple factors involved in looking at
23 what is a reasonable attorney's fee. There's a list of
24 them, they comprise approximately six elements. Those
25 elements deal with the difficulty of litigation, the

COURT PROCEEDINGS

0061

1 efficiency of an attorney in presenting the case,
2 reasonableness of hours spent, fees customarily charged in
3 the area and by the types of attorneys involved, an amount in
4 controversy, and a result attained and the expertise required
5 to try the matter.

6 This case is the model of what should never happen
7 in litigation. If counsel's representation is accurate they
8 spent \$120,645 and change. And if his assumption is even
9 remotely correct that the defense spent that same amount of

10 money we have spent nearly \$300,000 on a case that's worth 30
11 grand. That's ridiculous. If our job as attorneys is to
12 resolve cases beneficially for our clients everyone in this
13 litigation has failed.

14 Now having said that, paragraph N is an
15 interesting paragraph because it deals with defaulting
16 parties. It doesn't say prevailing, it says defaulting.
17 And there's a substantial difference there because prevailing
18 means you win, default means you defaulted on a contract.
19 So as a result we're automatically reduced to one cause of
20 action.

21 I'd like to present the court with some math. As
22 I reviewed this case there was approximately 42 defects and
23 there was six causes of action, or as my old torts professor
24 used to call substantive causes of action, which I equate to
25 approximately 48 issues. Now, we just heard counsel admit

COURT PROCEEDINGS

0062

1 that of these 48 approximately five were actually issues and
2 everything else was just thrown out. That's a little
3 surprising and frankly a little concerning. But be that as
4 it may if we have \$120,000, let me get to my math so I get it
5 right, 120,645.88 that's asserted as the actual fee and we
6 break that down and do the math, 48 divided into 120 comes
7 out to be \$2,513.45 per cause of action. Your Honor, I
8 would suggest that that's fair. And what we'd like to have
9 the court do is award approximately \$5,000 attorney's fees to
10 opposing counsel and then we'll put that as the credit
11 against the other 40 that we had to defend that they either
12 dismissed, dropped or threw out the window.

13 It seems a little bit ridiculous that what they're
14 trying to do is augment by 621% their judgment.

15 THE JUDGE: Well, you'd have to agree though,
16 Mr. Heideman, that there is some duplication of efforts with
17 respect--

18 MR. HEIDEMAN: Sure.

19 THE JUDGE: -- to the, to the causes of action
20 that, that are recoverable, their attorney's fees and--

21 MR. HEIDEMAN: Yes.

22 THE JUDGE: And clearly it took them, just look at
23 the trial, it took them the three days of the trial to
24 recover that, you know, for the one contract claim.

25 MR. HEIDEMAN: That's correct.

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1 THE JUDGE: And, you know, maybe even if we broke
2 down the trial time and divided by the two, because they
3 were successful on the one tort claim or one, one contract
4 claim, you know, it's going to be more than what you're
5 asking but--

6 MR. HEIDEMAN: Well, that's correct. Except for
7 the fact that they wouldn't be entitled to the tort claim,
8 they'd be entitled to the one.

9 THE JUDGE: Well, I know that. That's what I
10 said that--

11 MR. HEIDEMAN: That's right.
12 THE JUDGE: And even if you divided the attorney's
13 fees portion of the trial in half it would be--
14 MR. HEIDEMAN: No, I agree. I agree entirely,
15 Your Honor. And I think that counsel for the plaintiffs
16 would also have to admit that to beat 46 causes of action
17 also required something. In other words, and particularly
18 when we've just had an admission that only the big ones were
19 what were tried so that means only two out of the 48 that
20 were raised. And there's an allegation that the defense is
21 somehow trying to break the bank of the plaintiff. That's
22 troubling.
23 Your Honor, fees in Utah under the Tuttle case, or
24 Turtle Management case are only allowed when there's a
25 specific statute or a specific contract term. And in this
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1 particular case there's a contract term. And we agree with
2 that. But before this court can even determine whether or
3 not attorney's fees are appropriate this court is going to
4 have to determine whether or not plaintiffs win, because
5 we've already presented this court with a very specific
6 reason why under 60(b) this court should reverse the
7 ruling.
8 But the thing that's more concerning, the thing
9 that I think is important for this court to understand is
10 that in order for them to be able to claim the fee that they
11 have sought they have to have delineated the fee in three
12 ways, they have to have shown exactly which fees correlate
13 with the items that they were successful on oh, they have to
14 show exactly which items correlate with the items they were
15 not successful on, and they have to show exactly which items
16 correlate with the items they could not have been successful
17 on. That's been, they have failed to do that. And at the
18 point in time that they failed to do that case law allows you
19 to completely eliminate their attorney's will fees. You
20 have that jurisdiction and that discretion.
21 THE JUDGE: I'm only going to do that if I rule in
22 your favor on the other one.
23 MR. HEIDEMAN: Fair enough.
24 THE JUDGE: They're going to, they're going to get
25 their attorney's fees.
COURT PROCEEDINGS

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1 MR. HEIDEMAN: Fair enough.
2 THE JUDGE: The reasonable attorney's fees on the
3 contract claim.
4 MR. HEIDEMAN: And so I guess the question then
5 becomes how do we determine what's reasonable and at that
6 point, Your Honor, I guess it comes down to one thing. We
7 had hoped to spare the court the, the necessary hassle but we
8 would simply make a motion to the court for an evidentiary
9 hearing to try each one if that's what needs to be done
10 because they have filed to outline it. We'll make that
11 motion, we're entitled to it under the rule, and we'll simply

12 have the hearing and we'll, well put them on and we'll go
13 through each one of those items unless we can come to some
14 type of agreement as to what is reasonable.
15 But quite frankly, given the level of fee that
16 they're requesting and the level of fee that we think they
17 ought to get I would be surprised if they would be willing to
18 do that. So absent, absent some stipulation that's what our
19 request would. Be, and I guess I need not go further because
20 we'll make the rest of our argument at the hearing. Unless
21 the court would prefer me to go--

22 THE JUDGE: Anything else?

23 MR. HEIDEMAN: I'm sorry?

24 THE JUDGE: Anything else then?

25 MR. HEIDEMAN: If the court would prefer I can.

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1 THE JUDGE: Well--
2 MR. HEIDEMAN: If the court--
3 THE JUDGE: What my, what I'm going to do is I'm
4 going to request that the plaintiffs review their billings
5 and that they with the, with the indication that the court
6 is only going to award attorney's fees for the contract
7 portion of, of the litigation and a, and to review their
8 attorney's fees and a, indicate which portions of those
9 attorney's fees were necessary, were required to pursue the
10 contract portion, the contract portion that was successful.
11 Clearly, you know, clearly when they, when one of, I can't
12 remember if, if they alleged more than one violation of the
13 building code.

14 MR. HEIDEMAN: 42 to be specific.

15 THE JUDGE: Well, I mean that, that, it's
16 pursuant to the contract the earnest money agreement the only
17 ones that they're recoverable on under the contract would be
18 those that, that Mr. Smith was aware of and, you know, the
19 evidence that came out at trial was was that, at least the
20 jury believed that he was aware of this a, grading issue.
21 And--

22 MR. HEIDEMAN: With respect, Your Honor, I would
23 suggest also perhaps that the court take a look at one final
24 thing and that's that of the six causes of action the breach
25 of contract was modified on September 29th, 2003, so anything

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1 prior to that would be inapplicable because of the
2 modification. The fraudulent--

3 THE JUDGE: Well not, not necessarily.

4 MR. HEIDEMAN: Okay.

5 THE JUDGE: They had, they had a breach of
6 contract claim in their original complaint, didn't they?

7 MR. HEIDEMAN: That's correct. But it was
8 modified. I'm not saying it was dismissed, it was modified.
9 So the causes of action aside from those that survived would
10 be wiped out. Maybe I didn't say that clearly enough.

11 I would also suggest that there would have to be a
12 serious and very hard look made with regard to fraudulent, or

13 negligent misrepresentation which was dismissed on
14 August 16th, 2001, fraudulent misrepresentation dismissed
15 August 26th, 2004, violation of the Consumer Protection Act
16 was dismissed that same day.

17 THE JUDGE: Well I'm not awarding, I'm not
18 awarding attorney's fees for any of those.

19 MR. HEIDEMAN: I'm just saying that we would want
20 to make sure that it is noted in their delineation that those
21 items were spelled out so that when they were dismissed we
22 can see how this pares itself down because those items they
23 would not be entitled to. And clearly they're asking for it
24 even though it was dismissed before the trial. That's why
25 we would fall underneath, we believe under Stevenett versus

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1 Wal*Mart. This is simply not reasonable. It's not right to
2 ask for all of your attorney's fees when at the end of the
3 day you come down with two, and hopefully we believe strongly
4 that at the end of the day you'll come down with none.

5 And so as a result, Your Honor, we would simply
6 request that we have an opportunity to review that and then
7 we can determine whether or not we can stipulate.

8 THE JUDGE: Okay. Thank you. Mr. Dodd?

9 FURTHER ARGUMENT BY MR. DODD

10 MR. DODD: Your Honor, the defendants, the
11 plaintiff should not be restricted to their fees solely for
12 the contract claim because the, the earnest money sales
13 agreement specifically states that all reasonable attorney's
14 fees--

15 THE JUDGE: Well--

16 MR. DODD: It says all reasonable--

17 THE JUDGE: I DON'T want you to argue any more
18 because I've already made up my mind on that, Mr. Dodd.
19 You're not going to recover your attorney's fees for your
20 tort claims. There's no way this court is, you know, if
21 you'd, if you'd been successful under the Consumer Sales
22 Practices Act and it permits attorney's fees then yes under
23 that, you know. But you can only recover if you have a
24 contractual right to do so or if you have a statutory right
25 to do so.

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1 MR. HEIDEMAN: Uh-huh (affirmative).

2 THE JUDGE: And--

3 MR. DODD: And we have a contractual right,
4 Your Honor. Contractual right is the contract states that
5 we can recover our fees for any remedy hereunder or
6 applicable law. A remedy of fraudulent nondisclosure is
7 applicable under law.

8 THE JUDGE: Well, don't argue any more. I'm not
9 going to, I'm not going to permit you to recover it.

10 MR. DODD: Furthermore, there's case law that
11 states that fees for, for fraud can be recovered under
12 contract. And if, and apparently you've decided. But
13 Your Honor, we would be more than willing to go through each

14 and every single fee and demonstrate the reasonableness on
15 each one. And furthermore, Your Honor, if we're going to be
16 required to do so, if you're going to determine our
17 reasonableness of our fees we think it would be very
18 beneficial if you were able to determine our reasonableness
19 of the fees based on the same fees as the opposing party in
20 the same litigation.

21 THE JUDGE: Well, they're not asking to recover
22 theirs.

23 MR. DODD: Yes, Your Honor. But to be able to
24 determine reasonableness of fees it would be beneficial to
25 you to determine whether or not the fees were reasonable or

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1 not.

2 THE JUDGE: Well, there's no question in my mind
3 that, that Mrs. Moore has expended attorney's fees for these
4 other things and, but that's between her and her attorney
5 whether they're reasonable or not. It's my obligation to
6 determine if I'm going to award attorney's fees the
7 reasonableness of requiring someone else to pay those
8 attorney's fees. And you only have the right to recover
9 attorney's fees if you have a contractual right to do so.
10 And, you know, it's unreasonable for this court to award
11 \$120,000 in attorney's fees for recovery under one item of
12 contractual breach.

13 MR. DODD: Well, Your Honor, I've gone through
14 numerous Supreme Court cases that have stated the
15 opposite, I've gone through numerous cases that--

16 THE JUDGE: Well, don't argue it any more.

17 MR. DODD: Okay. Well, we would request that
18 you do a, perform a findings of fact for, for the fees and
19 determine--

20 THE JUDGE: Well, I'm asking you to review your
21 proposed billing and submit a new billing with those fees
22 associated with pursuing the breach of contract claim that
23 you were successful on.

24 MR. DODD: Okay. Your Honor.

25 THE JUDGE: And, and then the court will determine
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1 whether that is a reasonable fee.

2 MR. DODD: And under that when you do that
3 determination we request that you--

4 THE JUDGE: And also go review your costs to, to,
5 and identify which costs are associated with pursuing the
6 contract dispute.

7 MR. DODD: With the costs?

8 THE JUDGE: Yes. You can only recover, you know,
9 if you were just going after Rule 54 costs then I could, you
10 know, that's easy enough, you know, that's filing fee,
11 deposition fees and those type of things, witness fees. But
12 you're asking, you know, you're asking for a lot more than
13 that, as you pointed out in your memorandum.

14 MR. DODD: Your Honor, when you make that

15 determination we request that you have a findings of fact
16 regarding the fees with it.
17 THE JUDGE: Well, you know, I'm asking you to do
18 that, then I'll make a determination as to what a reasonable
19 fee is.
20 MR. HADLEY: We'll comply, Your Honor.
21 MR. DODD: Thank you, Your Honor.
22 THE JUDGE: Okay. The court will take that as
23 indicated, that matter under advisement, will rule on that
24 particular issue on the 60(b) issue and then we'll make a
25 ruling with respect to the reason, a reasonable attorney's
COURT PROCEEDINGS

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ADDENDUM NO. 10

FILED BY

<p>WILLIAM MOORE and MARY MOORE,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>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,</p> <p>Defendant</p>	<p>MEMORANDUM DECISION</p> <p>CASE NO. 000700142</p> <p>DATE: July 27, 2005</p> <p>JUDGE: Hon. Donald J. Eyre</p> <p>TYG</p>
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1. This case was tried to a jury over three days, March 7-9, 2005
2. By the time of trial either the Court or the Plaintiff had dismissed all their claims except their two claims for fraudulent non-disclosure regarding the improper grading and the alleged improper installation of windows and Plaintiff's breach of contract claim with respect to the violation of the building code for improper grading.
3. At the conclusion of trial, the jury was asked to respond to special verdict questions. The jury found there was a breach of contract for the violation of the building code as to grading. The jury further found fraudulent non-disclosure with respect to the improper grading, but not for the installation of the windows. The jury awarded \$30,680 00 in monetary damages for the improper grading.

4. The only basis for the plaintiff's claim for recovery of her attorney's fees is paragraph N of the Ernest Money Sales Agreement (which is the contract upon which the breach of contract claim is based). It states in part as follows: "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 fees, 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."
5. The Plaintiff on or about April 4, 2005 filed a verified Motion for Attorney's Fees and costs asking for \$120,645.88 in attorney fees and costs of \$35,131.53 for a total request of \$155,777.41.
6. The Defendants filed objections to the requested attorneys fees and costs, in part alleging the Plaintiff's were not entitled to recover attorney's fees for pursuing causes of actions other than the breach of contract claim. The Defendants noted that the Plaintiffs had alleged six separate causes of action in their Complaint and Amended Complaint, and that they were only entitled to recover attorney's fees under the breach of contract cause of action. The Defendant further noted that the Plaintiff's claims were based upon forty two alleged defects in Plaintiff's home, and that the Plaintiff's ultimately only recovered under one of the defects.
7. On June 6, 2005 the Court held a hearing upon the Plaintiff's Motion for Attorney's Fees and Costs. At the hearing the Court ruled that the Plaintiff was only entitled to recover that portion of its attorney's fees associated with pursuing their successful breach of contract claim, and directed the Plaintiff to review its detailed request for attorney's fees and costs and resubmit the attorney's fees and costs that were accrued only in pursuing the successful breach of contract claim.
8. The Plaintiff on June 20, 2005 filed its Response to Court's Directive Regarding Attorney's Fees, Costs and Expenses, wherein the Plaintiff made only minor modifications to the prior request. In the Court's opinion Plaintiff's attorney made no real effort to comply with the Courts

directive to submit a claim for attorney's fees and costs associated with the successful breach of contract claim. In fact the new submission totals \$158,927.72 given the fact the Plaintiff is now requesting an additional \$6,717.00 in new attorney's fees since the last motion, and only reduced the requested attorney's fees \$3,822.24 pursuant to the Court's directive.

Since the Plaintiff has failed to provide any factual basis upon which the Court can determine the reasonableness of the Plaintiff's claim for attorney's fees and costs the Court will have to make its own evaluation of the request based upon its knowledge of the case and evaluation of the claimed fees and costs and the Court's experience and knowledge of attorney's fees in similar cases.

The Utah Supreme Court in the case of Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988) set forth the factors the trial court should consider in determining a reasonable attorneys fee. They are as follows: "1. What legal work was actually performed? 2. How much of the work performed was reasonably necessary to adequately prosecute the matter? 3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services? 4. Are there circumstances which require consideration of additional factors , including those listed in the Code of Professional Responsibility?" The Utah Supreme Court also noted in Dixie State Bank v. Bracken that what an attorney bills or the number of hours spent on the case is not determinative, citing Cabrera v. Cothell, 694 P.2d 622 (Utah 1983). The Court also noted that the amount in controversy was a factor but not a determinative factor.

In reviewing that Plaintiff's request for attorney's fees against these factors, the Court first notes that there has not been any objection to the billing rate used by the Plaintiff and the Court finds that it is consistent with the rates customarily charged in the locality for similar services. The task before the Court is what legal work was actually performed in pursuing the breach of contract claim for improper grading, and if all the legal work performed in that area was reasonably necessary to adequately prosecute the matter, and if there are other factors the Court should consider in determining the reasonableness of the requested fees.

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

With respect to the issue whether the work performed was reasonably necessary to adequately prosecute the matter, it is the Court's observation that there were attorney's fees generated by both sides that were not reasonable or necessary. There were substantial unnecessary attorney's fees generated in Motions to Reconsider and in disputes over the language in proposed orders and unnecessary discovery disputes.

Other circumstances the Court may consider with respect to the reasonableness of the requested fee is that the \$120,000 plus requested attorney's fee is more than four times the monetary award given the Plaintiff by the jury and is substantially more than the \$83,000.00 total purchase price for the subject house. Although these factors should not be determinative of its reasonableness of the subject fee, the Court does believe they are factors it should review in determining the reasonableness of the fee.

In reviewing the itemized claim for costs in the total amount of \$35,131.53, the Court notes that many of the items listed are not the types of costs that are usually recoverable by the prevailing party pursuant to Rule 54 of the Utah Rules of Civil Procedure. Recoverable costs are usually associated with things such as filing fees, witness fees, deposition expense, if the depositions are used at the time of trial, and similar type fees. The Plaintiff has listed in addition to the traditionally recoverable costs, things such as phone expense, copy expense, expert witness fee, hotel and travel expense. The Plaintiff states that it has the right to recover such costs and expenses from the language of the subject contract where it states 'the defaulting party shall pay all costs'.

and expenses ...which may arise or accrue from enforcing ...this agreement ...". A substantial portion of Plaintiff's requested costs are associated with expert witness fees and reports. There was no attempt by Plaintiff to allocate which costs, especially the expert witness fees, that should be attributed to the breach of contract claims for which recovery was awarded by the jury. The Plaintiff is entitled to recover those normal costs awarded to a prevailing party pursuant to Rule 54 and any other costs or expenses associated with the breach of contract claim

Given the fact the Plaintiff failed to respond to the Court directive to recalculate her attorney's fees and costs to those associated with the breach of contract claim only and for the reasons stated above, the Court finds that it is reasonable that the Plaintiff be awarded an attorney's fee in the amount of \$40,00.00 and costs in the amount of \$10,000.00. The Judgment previously entered in this case in the amount of \$30,680.00 should be augmented in the amount of \$50,000.00 for a total Judgment in the amount of \$80,680.00.

DATED this 27th day of July, 2005.

ORIGINAL IF IN RED INK


DONALD J. EYRE, JUDGE

CERTIFICATE OF NOTIFICATION

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

METHOD NAME

Mail	PATRICK J ASCIONE ATTORNEY DEF 2696 N UNIVERSITY AVE STE 180 PROVO, UT 84604
Mail	GREGORY B HADLEY ATTORNEY PLA 2696 N UNIVERSITY AVE STE 260 PROVO UT 84604

Dated this 1st day of August, 2005.

Glenn Scott
Deputy Court Clerk

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