

2006

# John J. Bradley and Darby G. Bradley v. Douglas J. Markham and Andrea Markham: Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOHN J. BRADLEY and DARBY  
G. BRADLEY,

Defendants/Appellants,

v.

DOUGLAS J. MARKHAM and  
ANDREA MARKHAM,

Plaintiffs/Appellees.

**BRIEF OF APPELLEES**

No. 20061022-CA

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Appeal from the Fifth Judicial District Court of  
Washington County, State of Utah  
The Honorable G. Rand Beacham

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

## **DETERMINATION OF CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES**

None.

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

This case deals with the sale of a home from John and Darby Bradley (“Bradleys”) to Douglas and Andrea Markham (“Markhams”) at a time the housing market saw home prices rapidly rising. The home was located in an area north of St. George called Dammeron Valley. It consisted of a home on eight acres with a pond and horse corrals. The property was actually a combination of three separate lots that had previously been subdivided on paper, but were then being used as one lot. The Bradleys were in the middle of a contested divorce at the time, and Mrs. Bradley was living out of state.

After the Bradleys and the Markhams had signed the written contract and the earnest money had been paid, the Bradleys, without saying anything to the Markhams, decided they no longer wanted to sell their home. The day before the deadline for the Markhams to produce certain financial information, the Bradleys told the Markhams that they did not want the financial documents for a couple of weeks and would follow up with them when they needed that information. The Bradleys then tried to kill the deal eight days later on the pretext that the Markhams had not turned in their financial information by the deadline.

The Markhams wanted to purchase the home and, therefore, when the Bradleys tried to claim the deal was off, the Markhams refused to accept this. They submitted their financial information to the Bradleys and stated they were prepared to move forward at the scheduled closing date. The Bradleys then sent another notice that the deal was off, this time on the pretext that the financial information was inadequate, citing to the quality of the fax transmission and the general appearance of the financial information as their key reasons. The Markhams again informed the Bradleys that they were ready to proceed to closing, would pay off the seller financing immediately (early) by having other financing made available at closing, and again insisted that the Bradleys close as scheduled. The Bradleys refused to close, and the Markhams filed their suit for specific performance to require the Bradleys to go through with the sale.

## **II. COURSE OF THE PROCEEDINGS AND DISPOSITION AT TRIAL**

The Markhams, concurrent with filing their Complaint for Specific Performance on October 21, 2004, also sought a preliminary injunction and temporary restraining order to prevent the Bradleys from trying to sell or further encumber the home or doing any harm to the home and property while the matter was pending. A Stipulated Injunctive Order was ultimately entered by the trial court and continued in full force and effect through the time of trial. The case proceeded to trial on January 24 and 25, 2006. The trial court took evidence regarding the issues presented in the Stipulated Pretrial Order, including evidence regarding the Bradleys' violation of the Stipulated Injunctive Order. At the conclusion of trial, the trial court asked counsel for both the Bradleys and the Markhams to submit

proposed Findings of Fact and Conclusions of Law. The trial court entered its Findings of Fact and Conclusions of Law on March 14, 2006, granting the specific performance relief the Markhams sought and attorneys' fees, and finding the Bradleys in contempt of court for violating the injunction.

On April 17, 2006, the trial court entered its Final Judgment and Order, and the Bradleys quickly filed an ex parte motion for a stay on the Final Judgment and Order and for extra time to file post-judgment motions, which the trial court rejected. On May 1, 2006, the Bradleys filed with the trial court a Motion to Stay, a Motion for Expedited Disposition regarding the Motion to Stay, a Motion to Amend the Findings or Make Additional Findings, and a Motion for New Trial.

In addition to filing those with the trial court, on May 18, 2006, the Bradleys filed with the Court of Appeals an "Ex Parte and Expedited Motion to Stay Proceedings to Enforce Judgment as Asserted Under Utah R. App. P. Rules 8 and 23" and an "Ex Parte Petition for Extraordinary Relief." (CA 20060455 docket). Both Motions were denied on May 30, 2006.

In the meantime, the date for closing under the trial court's order arrived, and the Bradleys came in on the closing date (May 18, 2006) in the evening and signed all of the necessary documents to complete the closing. The trial court ultimately denied the Bradleys' post-trial motions as well and ultimately granted the Markhams their attorneys' fees on the post-trial motions, including the motion to the Court of Appeals.

### **III. STATEMENTS OF FACTS RELEVANT TO ISSUES PRESENTED**

The trial court entered detailed Findings of Fact and Conclusions of Law, a complete copy of which is attached hereto as Addendum A. The facts most relevant to this appeal are set forth below.

1. The Markhams were looking at homes in Washington County at a time when the housing market was seeing big increases in prices and activity. (R. 881, TT 112:1-14).

2. While working with their real estate agent, Carolyn Norton (“Ms. Norton”), the Markhams were attracted to the Bradleys’ property because of its unique characteristics, including a pond and horse corrals, all on 8.25 acres which was subdivided as to allow two additional homes to be built. (R.881, TT 18:21-19:17; 20:4-8; R. 270 ¶ 9).

3. Mr. Markham called Mr. Bradley to discuss some of the financial terms regarding the Markhams’ purchase of the property, at which time Mr. Bradley requested that the Bradleys receive approximately one-half of the purchase price at closing and that they were willing to finance the balance, although nothing was said about any terms or special reasons for seller financing. (R. 881, TT 21:1-16; R.271 ¶ 12).

4. The Markhams did not need or prefer the seller financing idea, but were willing to accommodate the request if it was on reasonable terms, and only if they were able to pay off the balance early without penalty, which Ms. Norton told them was the standard language of the agreement and that she would not write it up any other way. (R. 271 ¶ 15).

5. When Ms. Norton presented the formal written offer to the Bradleys, she stated to Mr. Bradley that the Markhams did not have the seller financing addendum with the

formal written offer at that time, to which Mr. Bradley stated that, because Mr. Markham is a doctor and Mrs. Markham is a dentist, and that he was getting one-half of the purchase price as a down payment, he was not worried about the financial information. (R. 272-73 ¶ 20).

6. Ms. Norton was dealing directly with Mr. Bradley, as Mrs. Bradley was in Bellingham, Washington, at the time and was seeking a divorce from Mr. Bradley; however, Mr. Bradley was able to obtain Mrs. Bradley's signature on the final approved real estate contract. (R. 272 ¶¶ 17-18).

7. The parties stipulated, and through trial testimony it was established, that Mr. Bradley had authority to act on behalf of both himself and Mrs. Bradley and was designated to receive all communications and documents regarding the sale of the property, and that Mrs. Bradley had not designated any other real estate agent or her broker to act on her behalf or receive or review documents while she was out of town. (R. 233 ¶ 4; R. 283 ¶ A).

8. Ms. Norton delivered a fully signed copy of the contract to Mr. Bradley and, at that time, scheduled a meeting for September 12 between the Markhams and the Bradleys for the purpose of going over the financial information and other contingency items listed in the contract. (R. 274 ¶¶ 25-27).

9. The Markhams came to the property for the scheduled meeting on September 12, and when they arrived, they were approached by a very angry Mr. Bradley, who was yelling at them "what the hell are you doing here?" (R. 276 ¶ 31).

10. Mr. Bradley finally settled down enough to allow the Markhams to walk through the property and the home and, at the end of this quick walk-through, Mr. Markham pulled out his financial information to deliver it to Mr. Bradley and confirm whether there was any additional financial information that would be needed or in what format Mr. Bradley wanted the financial information. (R. 277-278 ¶¶ 36-40).

11. Mr. Bradley, refusing to accept the financial information, said he would deal with it in a couple of weeks. (R. 278 ¶ 39).

12. At the time Mr. Bradley refused the Markhams' tender of financial documents, he did not examine them and did not know whether they contained a credit report or not. (R. 881, TT 266:2-7).

13. The Markhams returned to their home, and Ms. Norton began trying to set a new meeting date with the Bradleys, but her calls went unanswered and she was unable to find Mr. Bradley at his various work sites. (R. 278 ¶ 41).

14. The next contact that the Markhams had from the Bradleys was Ms. Norton's receipt on September 20 of a fax claiming the Bradleys were canceling the contract because the Markhams had not given them the financial information by September 13. (R. 278 ¶ 42).

15. Ms. Norton immediately called Mrs. Bradley and explained to her that when Mr. Markham tried to give Mr. Bradley the financial information, Mr. Bradley refused to take it and said he did not want it for a couple of weeks, to which Mrs. Bradley replied that she "never wanted to sell the property anyway" and that she was "not going to sell the property now" – the Markhams had missed the deadline and that was that. (R. 279 ¶ 45).

16. The Markhams refused to consider that the deal was canceled and took this as an indication that they needed to provide their current financial information and to obtain a credit report. (R. 280 ¶¶ 48-49).

17. The Markhams felt very rushed in trying to get this information together immediately and then fax it to Ms. Norton. Therefore, they updated a prior financial statement with current bank information from their most recent bank statements, which required them to use whiteout to remove the old information from the form and put in new information. (R. 280 ¶ 49).

18. Once the Markhams had finished updating all of their financial information to make it as current as possible, they began trying to fax it to Ms. Norton from their home fax machine. However, because of the size of the fax and other technical problems, they had trouble getting the fax transmission to go through properly and had to refax many of the pages. (R. 280 ¶ 50).

19. Ms. Norton assembled as best as possible all of the information and the credit report the Markhams had faxed, and faxed it to the Bradleys on September 24 with a cover letter. (R. 280 ¶¶ 50-51).

20. In the meantime, the Markhams had been working with Countrywide Home Loans ("Countrywide") to obtain financing for their property in California, so they asked Countrywide to finance the entire purchase of the Bradley home and, by September 30, they had received formal notification from Countrywide that they were approved for the loan. (R. 280-281 ¶ 53).

21. The credit report they sent to the Bradleys showed a credit score of 689 for Mr. Markham and 705 for Mrs. Markham, which are not poor scores, and only four instances of late payments – two times in 2003 and two times in 2001 – all of which were only 30 days later. There was no reference of a judgment or bankruptcy on the credit report. (R. 281 ¶¶ 56-57).

22. On October 4, after receiving notification of the Markham's Countrywide loan approval, the Bradleys had their attorney, Robert Jensen, send a letter to the Markhams stating they were canceling the contract because they had not received financial information by September 13, and that the financial information they had received was rejected because it was difficult to read, poor fax quality, the pages seemed out of order, and they had found a reference to either a bankruptcy or a judgment. (R. 281 ¶ 55).

23. However, the bankruptcy was one Mr. Markham had filed approximately 12 years earlier due to a doctor group with which he had been involved and circumstances stemming from that business relationship over which he had no control. (R. 881, TT 50:9-15, 19-22; R-289 ¶ M(vi); R. 281 ¶ 56).

24. By this time, the Bradleys were beyond actually evaluating the documents to determine whether they should complete the transaction. Rather, their evaluation was a pretext to cancel, as they were just trying to kill the deal. (R. 881, TT 54:12-13; R. 290 ¶ N).

25. Not only had Mrs. Bradley never wanted to sell the property and did not want to sell it now, and the Bradleys had tried to cancel the contract on the pretext of a missed deadline and a poor-quality fax transaction of financial documents, but unbeknownst to the

Markhams at the time, the Bradleys had, on September 9, changed the real estate listing to withdraw the property from the market rather than showing it as being under a pending sales contract, further indicating the intent of the Bradleys to get out of the deal that they were contractually obligated to fulfill. (R. 282 ¶ 59).

### **SUMMARY OF ARGUMENT**

There are two linchpin issues. The first issue is whether the Bradleys waived or otherwise lost their right to strictly enforce the September 13 deadline for the Markhams to provide their financial information, including the waiver of the Bradleys' right to have a written extension of the deadline. The second issue is whether the Bradleys exercised good faith and fair dealing in evaluating the Markhams' credit worthiness as shown in the financial information the Bradleys later received.

Key to both issues was the actual trial testimony of the Markhams and their witnesses, as well as the testimony of the Bradleys. In this regard, it is significant that the trial court ultimately concluded that the testimony of Mr. Bradley on the critical facts was not credible, but was unreliable. The trial court specifically concluded that Mr. Bradley either gave false testimony at trial to fit a legal theory or that he withheld information and truthful responses during the deposition, but, in either event, the trial court did not consider Mr. Bradley's most critical testimony, particularly about his own actions, to be credible. The trial court noted that Mr. Bradley's demeanor at trial did not convey credibility. The trial court also concluded that Mrs. Bradley's testimony lacked credibility as well. On the other hand, the trial court concluded that the testimonies of Mr. Markham and his witness, Ms. Norton, were

credible and that the affidavits of Mr. Markham and Ms. Norton, admitted into evidence, were reliable.

As to the first linchpin issue, the facts at trial established that on September 12, the Markhams had scheduled a meeting with the Bradleys with one of the specific purposes being the delivery of financial information to the Bradleys and to discuss what format they would prefer for receiving further financial information. The Bradleys were to be represented by Mr. Bradley at this meeting, and he was aware of the deadline and the purpose of the meeting. At this September 12 meeting, Mr. Bradley specifically refused to accept any financial information, preferring to wait for at least a couple of weeks when Mrs. Bradley could review it.

The trial court properly concluded that the Bradleys had a known right, knew the benefits of that right, and waived the right to have the documents delivered to them on September 13 when they had rejected them on September 12. The trial court was correct in concluding that the contract could not be terminated based on the Bradleys not receiving the financial documents by September 13, because, by their own actions, they had waived the deadline. This waiver implicitly included a waiver of any requirement that the extension of the deadline be in writing.

The second linchpin issue is whether the Bradleys, in good faith, evaluated the Markhams' financial information once they received it. The evidence at trial established that the Bradleys did not evaluate the credit worthiness of the Markhams in reviewing the financial information. Rather than considering the information showing the Markhams'

financial stability, income, deposit accounts, and history with other creditors, the Bradleys focused on the form and appearance of the documents. The trial court concluded that the Bradleys had testified that the most important elements in their decision to reject the financial information was that it was handwritten and looked sloppy and they had no objection to the actual information on the report regarding the Markhams' monthly income, their net worth, or their credit scores. Therefore, it was objectively unreasonable for the Bradleys to reject the Markhams' financial information on such a basis.

Finally, for purposes of the appeal, there are other issues as well concerning:

- (a) whether the Bradleys truly preserved the issues they are now presenting to this Court;
- (b) whether they have identified the appropriate standard of review for any preserved issues;
- (c) whether they have properly marshaled the evidence in those instances where it is required;
- and (d) whether the Markhams should be awarded their attorneys' fees incurred on appeal.

## **ARGUMENT**

### **I. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD IN EVALUATING THE BRADLEYS' COMPLIANCE WITH THE COVENANT OF GOOD FAITH AND FAIR DEALING.**

There are two reasons why the trial court did not err in its rulings involving the covenant of good faith and fair dealing (the "Covenant"). *First*, the Bradleys never presented their notion of a subjective standard for evaluating compliance with the Covenant (the "Subjective Standard") to the trial court. *Second*, Utah law makes clear that compliance with the Covenant is measured by an *objective* standard, not the Subjective Standard that the Bradleys propose for the first time in their opening brief.

**A. The Bradleys Failed to Preserve Their Argument That Good Faith and Fair Dealing is Properly Measured by a Subjective Standard.**

In their Statement of the Issues, the Bradleys claim to have preserved their arguments about the Subjective Standard at R. 399 and TT 405:12 through 408-14. A review of these two locations in the Record makes clear that the Bradleys did not preserve their argument about a Subjective Standard.

Page 399 of the Record is a page from a memorandum supporting the Bradley's *post-trial* motion captioned as being brought pursuant to Utah Rule of Civil Procedure 59. However, Utah law makes clear that "raising an issue in a post-trial motion does not preserve that issue for appeal." *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 130 n.1 (Utah App. 1997) (citation omitted), *cert. denied*, 953 P.2d 449 (Utah 1997). Thus, the Bradleys did not preserve this argument at page 399.

Pages 405 through 408 of the trial transcript do not even contain the word "subjective," much less explain why the trial court should have evaluated the Bradleys' actions by a Subjective Standard. An appellant preserves a substantive issue such as the Subjective Standard for appeal only if at trial the appellant (i) timely raised the issue before the trial court: (ii) specifically raised the issue in a way that the issue rises to a "level of consciousness before the trial court"; and (iii) introduced to the trial court "supporting evidence or relevant legal authority" to support the argument. *See id.* at 130 (citations omitted). The "mere mention of an issue in the pleadings is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal." *Id.* (citation omitted).

The Bradleys fail each of these three requirements. The Markhams specifically set forth in their trial brief the heading “A party must exercise the discretion given him in a contract in an objectively reasonable manner.” (R. 243). In closing argument, when asked about the extent of discretion allowed to the Bradleys, the Bradleys’ attorney stated he agreed with the Markhams’ attorney about the Covenant. (R. 881, TT 406: 10-15). The purpose of these requirements is to “put the judge on notice of the asserted error and allow the opportunity for correction at that time in the course of the proceeding.” *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998). Because the Bradleys never gave the trial court the opportunity to rule on their arguments regarding the Subjective Standard, this Court should affirm the trial court’s application of an objective standard.

**B. Even If This Court Reaches the Bradley’s Subjective Standard Argument, Utah Law Makes Clear That Compliance With the Covenant is Evaluated by an Objective Standard**

The Bradleys rely heavily on *Oakwood Village, LLC v. Albertson’s, Inc.*, 2004 UT 101, 104 P.3d 1226, to make their argument that they could subjectively comply with the Covenant. Although this is the most recent Utah Supreme Court decision to examine the Covenant, that decision did not involve a situation analogous to this dispute. In *Oakwood Village*, landlord/appellant urged the Supreme Court to hold that the Covenant implied a duty of continuous operation that required tenant/appellee to remain open throughout the entire term of the ground lease between them (the “Lease”). *See id.* at ¶ 16. The Supreme Court declined to make that holding because the “plain and unmistakable language” of the Lease prevented it from inferring a covenant of continuous operations. *See id.* at ¶ 20. Neither the

Bradleys nor the Markhams asked the trial court to use the Covenant to infer anything, and the trial court did not do so.

Furthermore, the *Oakwood Village* opinion did not perform a detailed examination of the Covenant, and it announced no new legal principle. Its analysis of the Covenant occupies only two of the opinion's sixteen pages in the Pacific Reporter. Much of those two pages consist of a recitation of the facts in two earlier decisions, *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991) and *Olympus Hills Shopping Ctr. v. Smith's Food & Drug Ctrs.*, 889 P.2d 445 (Utah App. 1994), *cert. denied*, 899 P.2d 1231 (Utah 1995), which the *Oakwood Village* court recognized were "the controlling cases on the requirements and operation" of the Covenant. *Oakwood Village*, 2004 UT 101 at ¶ 47.

In *St. Benedict's*, express lease language required landlord/hospital to "actively assist" its existing tenant "in acquiring and holding good tenants until such time as [the existing tenant's] Office Building is completely occupied." *Id.* at ¶ 48. The *St. Benedict's* court simply held that the hospital's encouragement of a new developer could violate the Covenant arising from the express contract term. *See id.* As with *Oakwood Village*, the *St. Benedict's* opinion is not analytically useful in this appeal because neither party asked the trial court to imply provisions, and the trial court did not do so.

Rather, the Bradleys are asking this Court to hold that compliance with the Covenant is measured by a subjective, rather than an objective, standard. *Olympus Hills*, the other decision cited by the *Oakwood Village* decision as controlling, *see id.* at ¶ 47, expressly holds that an *objective* standard applies.

The *Oakwood Village* opinion summarized the relevant *Olympus Hills* facts:

*Olympus Hills* involved a lease between a developer and a Smith's grocery store, which contained an express covenant of continuous operation that obliged Smith's to continuously operate "any lawful retail selling business." Rather than defaulting on the lease, Smith's opened a warehouse box store in order to restrict competition with another grocery store it operated close to the Olympus Hills Shopping Center.

*Id.* at ¶ 50 (citations omitted). Accordingly, the critical phrase in *Olympus Hills* was "any lawful retail selling business." Smith's argued that "any" meant "any," and that, so long as Smith's operated a lawful retail business, it complied with the express lease provision at issue.

In rejecting Smith's argument, this Court held that "any" does not unqualifiedly mean "any," and that the Covenant prevents contractual words from being read literally if such a literal reading would lead to an absurd result:

[C]ontracting parties, hard as they may try, cannot reduce every understanding to a stated term. Instances inevitably arise in which one party exercises discretion retained in a way that denies the other a reasonably expected benefit of the bargain. For example, if taken to its logical extreme, the express provision of the lease in the instant case would allow Smith's to set up a cardboard box in the leased space and sell cigars, an action that would clearly deny Olympus Hills the expected benefit of its bargain. The law of good faith and fair dealing, though inexact, attempts a remedy for such abuse.

*Olympus Hills*, 889 P.2d at 450 (citations omitted).

Neither *Oakwood Village* nor *St. Benedict's* addressed the question of the restrictions that the Covenant places on a contracting party's exercise of discretion. On the other hand, *Olympus Hills* is the seminal Utah appellate decision regarding the limits that the Covenant

places on a contracting party's exercise of contractual discretion. In this regard, the *Olympus Hills* court wrote:

[I]n this case, our inquiry does not end with the recognition that Smith's had the discretionary power or contractual authority to operate "any lawful retail selling business." The question is whether . . . Smith's wrongfully exercised this power for a reason beyond the risks that Olympus Hills assumed in its lease with Smith's or for a reason inconsistent with Olympus Hills's "justified expectations."

The trial court correctly determined that Olympus Hills justifiably expected that Smith's would select a *reasonable* economic use for the property in good faith.

*Id.* at 451 (emphasis in original); *see also*, *Cook v. Zions First Nat'l Bank*, 919 P.2d 56, 60 (Utah App. 1996), *cert. denied*, 925 P.2d 963 (Utah 1996) ("When one party to a contract retains power or sole discretion in an express contract, it must exercise that discretion reasonably and in good faith"); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 311 (Utah 1982) (stating that a party breaches the Covenant if it fails to exercise all of its rights under the contract reasonably).

This Court continued in *Olympus Hills* to explain that "the essence of the covenant of good faith and fair dealing is *objectively reasonable conduct*." *Id.* (emphasis added); *see also*, *Weinstein v. Popiel*, 2003 UT App 385, 2003 WL 22682737 at \*1.<sup>1</sup>

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<sup>1</sup> This Court's application of an objective standard for compliance with the Covenant is unqualified. In two decisions with more limited application, the Utah Supreme Court has confirmed that compliance with the Covenant is measured by an objective standard. In *Berube v. Fashion Ctr. Ltd.*, 771 P.2d 1033, 1048 (Utah 1989) the Utah Supreme Court held that compliance with the Covenant is measured by reference to the "objectively reasonable expectations" of the party who claims that the Covenant was breached. More recently, in *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 465 (Utah 1996), the Supreme Court held that under an insurance contract "the overriding requirement imposed by the implied

Thus, the question for the trial court was whether the Bradleys' conduct was objectively unreasonable. The trial court found that, as an objective matter, the Bradleys acted unreasonably (R. 288-290 ¶ M) and that their actions violated the Covenant. (R. 290 ¶ N). These are factual questions. *See Olympus Hills*, 889 P.2d at 452. The trial court resolved that issue against the Bradleys. They have not marshaled the evidence supporting the trial court's finding and are thus precluded from attacking the finding on appeal. In short, the Bradleys have identified no basis for reversing the trial court's finding that the Bradleys' actions violated the requirements of the Covenant. Although the Bradleys purport to marshal the evidence regarding the Covenant as it relates to a different issue on appeal, they presented no evidence at trial, nor do they argue now, that they acted in an objectively reasonable way. Therefore, the trial court should be affirmed.

## **II. THE TRIAL COURT PROPERLY DENIED THE BRADLEYS' MOTION FOR DIRECTED VERDICT.**

At trial and in their appellate brief, the Bradleys have mistakenly referred to their motion made at the close of the Markhams' case in chief as a "motion for directed verdict." However, since this was a bench trial, and since the motion was made immediately after the Markhams concluded their evidence and before the Bradleys put on their evidence in defense, the motion was actually a motion to dismiss under Rule 41(b) of the Utah Rules of Civil Procedure. *Grossen v. DeWitt*, 1999 UT App 167, ¶ 8, 982 P.2d 581. This, however, is only a minor formality, as this Court should look past the motion's label to its substance

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covenant is that insurers act reasonably, *as an objective matter*, in dealing with their insureds." (emphasis added)

and treat it accordingly. *Id.* at ¶ 6. The Markhams will refer to this motion by its true substantive character and call it the “Motion to Dismiss.”

The Bradleys misunderstand both the role of the trial court and the standard of review for this Court as it relates to their Motion to Dismiss. The issue before the trial court was whether the evidence put on by the Markhams was sufficient to establish a *prima facie* case. *Id.* at ¶ 8. *See also, Sorenson v. Kennecott-Utah Cooper Corp.*, 873 P.2d 1141, 1144 (Utah App. 1994). This is a question of law for this Court to review for correctness. *Grossen*, 1999 UT App 167 at ¶ 8. The first step is to identify the issue the Bradleys presented in their Motion to Dismiss, for this is the only issue that is preserved for an appeal of the denial of their Motion to Dismiss. However, the Bradleys do not identify the substance of their Motion to Dismiss, nor do they analyze the evidence that was available to the trial court at the time they made their Motion to Dismiss.

**A. The Markhams Established at Least a *Prima Facie* Case Through Their Testimony and Evidence.**

The Markhams, as set forth above, only needed to show a *prima facie* case to overcome the Motion to Dismiss. The Bradleys argued before the trial court that the Markhams failed to make a *prima facie* case based on the following points: (a) there was a written contract with a “time is of the essence” clause (R. 881, TT 250:16-20); (b) the Markhams were required to submit a credit report by a September 13 deadline (R. 881, TT 250:24-25); (c) the Markhams failed to tender the credit report by the required deadline (R. 881, TT 251:1-7); and (d) assuming all the evidence presented by the Markhams to be true, they cannot prevail because they did not have the credit report with them at the meeting on

September 12 (R.881, TT 254:20-23). That is the sum total of the argument preserved for appeal from their Motion to Dismiss, all of which address only the waiver issue, which the Markhams discuss later in this brief.

The Bradleys challenge the trial court's denial of their Motion to Dismiss by attempting to marshal evidence. However, they do not try to marshal evidence discussed by the trial court in entering its ruling. Rather, the Bradleys try to marshal evidence unrelated to the waiver issue they argued in their Motion to Dismiss.

The trial court evaluated the Markhams' testimony regarding the Bradleys' waiver of strict compliance with the September 13 deadline and, after hearing legal argument, denied the Motion to Dismiss, concluding that the Markhams had met their burden of establishing a *prima facie* case. (R. 881, TT 267:1-4, 16-20, 23-25). In so doing, the trial court concluded that it "is to accept all evidence as stated and all reasonable inferences on the evidence that might be drawn" (R. 881, TT 265: 18-20), and then listed several key points of evidence on which it based its ruling:

- a. At the September 12 meeting, Mr. Bradley refused to look at the financial information and, at that point, did not know whether there was a credit report included or not (R. 881, TT 266:2-6);
- b. Mr. Bradley did not take the opportunity to look at or accept the financial information; rather, he refused the offer (R. 881, TT 266:6-7);
- c. The meeting was specifically scheduled on September 12 for the purpose of delivering the financial information to the Bradleys (R. 881, TT 266:12-13);

- d. Mr. Bradley “foiled” the purpose of the meeting by refusing the financial information (R. 881, TT 266:14-15);
- e. It is reasonable to infer that any further efforts to give the financial information to Mr. Bradley on either September 12 or September 13 would have been idle efforts, because Mr. Bradley had said not to talk to him about it for a couple of weeks (R. 881, TT 266:21-25);
- f. The Markhams made a tender of the financial information, and full information could have been given by the September 13 deadline, but they were put off by Mr. Bradley’s actions at the September 12 meeting (R. 881, TT 267:1-4);
- g. “There was hardly a point in sending [Mr. Bradley] a credit report when he wouldn’t even look at what was offered to him before the day that was the deadline” (R. 881, TT 267:9-11).

As set forth in *Grossen v. Dewitt*, on appeal the Bradleys must show that the trial evidence, and reasonable inferences, do not support the ruling by the trial court, and that it was an error of law for the trial court to deny their Motion to Dismiss. The Bradleys have not done this. They have not evaluated the trial court’s ruling from the bench, nor have they marshaled the evidence that had been presented up to that time in the trial. In fact, their marshaled evidence does not address the issue of whether a credit report was presented on time or that the Markhams’ waiver argument was upheld by the trial court. Rather, the Bradleys attempt to marshal, and argue, that they subjectively acted in good faith in trying

to cancel the contract based on their subjective review of the financial information they later received. The Bradleys' argument is irrelevant to the issue they preserved and which they set forth as their second issue on appeal.

**B. The Issues Raised in the Bradleys' Motion for New Trial are Not the Issues Raised on Appeal**

As with the Motion to Dismiss, the actual Motion for New Trial (hereafter "New Trial Motion") presented to the trial court is what must be evaluated on appeal. The Bradleys do not analyze their New Trial Motion in their brief, nor do they evaluate the trial court's ruling on the New Trial Motion. Rather, they simply attack one legal conclusion, para. M, regarding the Covenant. However, they do not challenge this conclusion as not being supported by the findings of fact.

On appeal, this Court applies an abuse of discretion standard to a trial judge's decision to deny a new trial. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064, 1070. The Record is examined to determine whether the evidence supporting the trial court's findings "was completely lacking or was so slight and unconvincing as to make the [ruling] plainly unreasonable and unjust." *McCloud v. Baum*, 569 P.2d 1125, 1127 (Utah 1977). Under this standard of review, the reviewing court should reverse only if there is no reasonable basis for the decision. *Smith*, 2003 UT 41 at ¶ 25.

In their brief, the Bradleys do not show that the evidence was completely lacking. The Bradleys claim there were "six fact sets" the "trial court relied upon" in determining the Bradleys breached the Covenant that are not supported by the evidence. (Br. of Appellant 31, ¶ 1). However, the Bradleys did not raise these "six fact sets" in their New Trial Motion.

(R. 398-401). In their New Trial Motion, they simply argued that they had the right to be dissatisfied with the financial information regardless of the reason. Because their arguments and marshaling do not address their New Trial Motion, it is difficult to determine just what is to be opposed and argued by the Markhams. Such an inadequate briefing shifts the burden and need not be analyzed by this Court. *State v. Sloan*, 2003 UT App 170, ¶ 13, 72 P.3d 138.

First, the fact sets to which the Bradleys refer are contained in the trial court's "Conclusions of Law," and are therefore a recap of various unchallenged findings of fact and showing how, as a matter of law, the Bradleys did not act reasonably. Second, since the Bradleys have not challenged the sufficiency of the findings of fact to support the conclusions of law, the findings are accepted by this Court, and the Bradleys had the duty to identify each of the specific findings of fact that support this conclusion by the trial court. Third, once the specific findings of fact were identified, the Bradleys had a duty to search out any fatal flaw in the trial court's findings by citing to every scrap of evidence in the Record, whether testimony or exhibit, that supports the trial court's conclusion and not omit certain evidence to paint a more favorable picture for their argument. Fourth, the Bradleys were required to then demonstrate that the findings cannot be supported by the evidence and reasonable inferences therefrom, which they did not do.

**C. The Bradleys' Marshaling of Evidence Throughout Their Brief is Inadequate.**

"In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *West Valley City*

*v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991). After presenting every scrap of competent evidence introduced at trial, the appellant then “must ferret out a fatal flaw in the evidence.” *Id.* The gravity of this flaw must be sufficient to convince the appellate court that the trial court’s findings are clearly erroneous. *Id.* If the appellants fail to properly marshal evidence, the appellate court has grounds to either affirm the trial court’s findings on that basis alone or assume that the findings are supported by the clear weight of evidence. *Chen v. Stewart*, 2004 UT 82, ¶ 80, 100 P.3d 1177 (holding that failure to marshal allows the appellate court to affirm the trial court’s findings); *State v. Christofferson*, 793 P.2d 944, 946-47 (Utah App. 1990) (holding that failure to marshal allows the appellate court to assume findings are supported by clear weight of evidence). This analysis applies equally to the Bradleys’ attempt to marshal in their later arguments, as discussed *infra*.

A challenge to a trial court’s factual findings usually requires the appellant to marshal only evidence for *contested* findings. *Chen*, 2004 UT 82, ¶ 76, 100 P.3d 1177. When appealing a trial court’s denial of either a motion to dismiss or a motion for a new trial, the appellant is obligated to first marshal the evidence in support of the ruling and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the ruling. *Brewer v. Denver & Rio Grande Western Railroad*, 2001 UT 77, ¶ 33, 31 P.3d 557. “In other words, demonstrating insufficiency of the evidence requires an appealing party to show that all the evidence in favor of the [ruling] cannot support the verdict.” *Id.* The Bradleys do not show that the trial testimony is so lacking that it cannot support the facts they

challenge. They do not show any fatal flaws. They do not show that the Markhams' strongest evidence is still insufficient to support the trial court's verdict.

**D. The Evidence Supports the Trial Court's Denial of a New Trial.**

Although the Bradleys attempted to marshal all the evidence, they do not point to any evidence showing that the trial court erred in its findings of fact or conclusions of law. The Bradleys did not present every scrap of evidence supporting their first identified marshaled fact, which reads:

(1) Mr. Bradley testified that he expected the credit report to be from "Experian," one of the three major credit reporting agencies, and not the "Landsafe" company shown on the front of the credit report, yet while on the witness stand, Mr. Bradley acknowledged that the credit report did show the Experian credit score on both of the Markhams and that the credit information was gathered from Experian.

(Br. of Appellant 31, ¶ 2; R288 ¶ M(i)). The Bradleys' marshaled evidence for this finding suggests that Mr. Bradley's mistake was not a result of inadequate review of the credit report, but rather that he simply did not understand the acronyms that were used, thereby trying to create an impression that the testimony does not support any court finding. This is not the case. Testimony to which the Bradleys did not refer indicates: (a) Mr. Bradley said that one of the reasons he did not like the credit report was because it was from a group he did not recognize (R. 881, TT 312:13-15); (b) Mr. Bradley testified that he would probably have "felt differently about getting a report from Experian instead of from Land Save [sic]" (R. 881, TT 312:15-17); (c) while on the witness stand Mr. Bradley himself pointed out that the credit report clearly states that the acronym XPN stands for Experian and that the credit report is a summary from Equifax, Experian, and Trans Union (R. 881, TT 318:21-25; Pls.' Ex. 1, tab

5, pg. 12); and (d) Mr. Bradley had experience in evaluating credit reports, having evaluated about 50 in the past (R. 881, TT 309:1-3). The reliable testimony at trial does not contradict this first fact set.

The second identified fact set the Bradleys attempt to marshal states:

(2) The Markhams' credit scores of 689 and 705 were sufficient for Countrywide to qualify the Markhams for a loan for twice the amount that the Bradleys agreed to finance. I conclude that it would not be objectively reasonable for the Bradleys to claim this as a ground to cancel the REPC.

(Br. of Appellant 31, ¶ 4; R. 288 ¶ M(ii)). The Bradleys' only reference to the Record was to the trial exhibits of the credit report and the letter from Countrywide. Not only do these two exhibits support the trial court's conclusion, but the Bradleys show no testimony that contradicts the trial court. Furthermore, the trial court's Finding of Fact, paragraph 56, (R. 281) shows its favorable evaluation of the credit report, and paragraph 57 (R. 282) shows that there was no evidence to indicate that the credit scores were poor.

In the third fact identified by the Bradleys, they again fail to include important testimony. The statement they challenge states:

(3) The Bradleys both testified that one of the most important elements in their decision to reject the financial information was that it was handwritten on the form and looked sloppy and that they would not present such a sloppy form to anyone in seeking credit for themselves, yet they testified that they had no objection to the information on the report showing the Markhams' monthly income or their net worth or their credit scores. I conclude that this objection to the form or appearance of the Markhams' papers had nothing to do with the merits of the information provided to them, so that it was objectively unreasonable for the Bradleys to reject the Markhams' financial information on this basis.

(Br. of Appellant 32, ¶ 1; R. 288 ¶ M(iii)).

The trial testimony supports the trial court's conclusions. Mr. Bradley testified that the financial statement "bugged us more than the credit – than this – if this is a credit report. This financial statement bugged us more." (R. 881, TT 312:20-22). Mr. Bradley stated that the reason he did not like the financial statement was all the "white outs." (R. 881, TT 312:17-25). Mr. Bradley, when asked on redirect about why the financial statement was a bigger concern than the credit report, again stated that it was "[j]ust the condition" of the documents, that it was not typed. (R. 881, TT 322:1-8). Mrs. Bradley also listed a concern as "the financial statement being whited out and rewritten and – it just was very sloppy." (R. 881, TT 345:15-16). The Bradleys' attorney referenced in his letter "poor fax copies," "sloppy," "package out of order," "missing pages," and the "sheer length of the Consumer Credit Report" as the basis for cancelling the sale (Pls. Ex. 1, tab 9).

The trial court reviewed the exhibits and found that the credit report only had four references of late payments, which were only 30 days late, and which occurred in 2001 and 2003. (R. 281 ¶ 56). The financial records show strong income, high net worth, and several sources of income – none of which were claimed as inadequate by the Bradleys (Pls. Ex. 1, tab 6). Furthermore, the only reason the financial information may have looked sloppy is because of the sudden change by the Bradleys. Instead of setting a new deadline with notice to the Markhams and indicating a preferred format for the financial information, the Bradleys just tried to end the deal with no time for the Markhams to properly prepare the information. Therefore, it is not clear error for the trial court to reach its conclusion.

The fourth fact as identified by the Bradleys states:

(4) The Bradleys also testified that they had a concern as to whether the Markhams could meet a monthly payment obligation if they could not meet the REPC deadline to furnish the financial information, yet the Markhams had shown the Bradleys that the Bradleys would not need to carry the note for any extended period of time, as the Markhams had lined up Countrywide to immediately pay off the seller financing, completely eliminating that claimed concern.

(Br. of Appellant 32–33).

The Bradleys' only reference to evidence was to the credit report and letter from Countrywide. These two documents do not refute this statement, nor do they refer to any specific part of these documents to show they contradict the trial court. Therefore, the conclusion must stand. The Bradleys do refer to their own self-serving testimony, even though the trial court found the Bradleys lacked credibility. "The testimony of Mr. Bradley on the critical facts is not credible, but is unreliable." (R. 293 ¶ W). The trial court also observed that "Mr. Bradley's demeanor at the trial did not convey credibility." (R. 293 ¶ X). "Mrs. Bradley's testimony lacks credibility as well." (R. 293 ¶ Y). The trial court also observed that Mrs. Bradley's "testimony is not sufficiently credible to refute the testimony of Norton and Mr. Markham, the admitted documentary evidence regarding the Markhams' credit worthiness, or the evidence that it was unreasonable and in bad faith for her and Mr. Bradley to refuse to sell the Property." (R. 294 ¶ Y).

However, the trial court properly examined the claimed issue – ongoing monthly payments – and found that since the Markhams had the contractual right to pay off the seller financing early, without penalty, they were within their right to pay it off at closing with

another loan. (R. 290 ¶ O). Since the Bradleys had notice that the seller financing would be paid off early – the day of closing – there was no reason to be concerned about whether ongoing payment would be made. Neither this conclusion nor the underlying facts were challenged by the Bradleys.

The marshaled evidence for the fifth fact set consists solely of a reference to the credit report to support the trial court’s finding that:

(5) The credit report shows only four historical delinquencies, all being only 30-day delinquencies, and two of them showing the last delinquency date in 2003 and two of them showing the last delinquency date in 2001, which is a very small and insignificant number of delinquencies in comparison to the many timely payments.

(Br. of Appellant 33).

The credit report is easily analyzed, and the trial court’s summary of the report is accurate. The Bradleys have not challenged the credit report itself, nor do they challenge the trial court’s analysis of the credit report. Therefore, it stands as the true measure of the credit history. The credit report does not contradict the trial court’s statement.

The second half of the sixth marshaled fact set reads: “Mrs. Bradley’s broker testified that she never mentioned a bankruptcy to him until just before their depositions were taken.” (Br. of Appellant 33, ¶ 5; R. 290 ¶ M (vi)). The description of the marshaled evidence for this finding inaccurately attempts to summarize what the broker stated. The broker was asked at trial, “[Mrs. Bradley] had only brought [the bankruptcy] up to you during that week just prior to your deposition; isn’t that right?” (R. 881, TT 361:14–16), to which the broker responded, “correct.” (R. 881, TT 361:17).

The Bradleys have failed to marshal any contradictory evidence and have omitted evidence vital to the trial court's rulings. Based on such failures to marshal, this Court has grounds to affirm on this basis alone, or assume that the evidence supports the findings. *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶38, 140 P.3d 1200.

The follow findings which support the trial court's conclusions that the Bradleys breached the Covenant are not marshaled, nor are they contradicted by the Bradleys:

- a. Mr. Bradley told Ms. Norton that since Mr. Markham is a doctor, Mrs. Markham is a dentist, and he was getting one-half of the purchase price as a down payment, he was not worried about the financial information. (R. 272–73 ¶ 20).
- b. The reference to the bankruptcy or judgment was from the financial form Mr. Markham had used which references Mr. Markham's filing bankruptcy over ten years earlier in relation to a business deal in a shared chiropractic office. (R. 281 ¶ 56).
- c. There was no reference to bankruptcy or judgments on the credit report. (*Id.*).
- d. Mr. Markham and Mr. Bradley gave their opinions [about the credit scores] and there was no objective evidence that such credit scores were poor. (R. 282 ¶ 57).
- e. Mr. Jensen's letter came after the Markhams had already tendered their proof of financing through Countrywide, and the Markhams were ready and willing

to proceed to closing by immediately paying off seller financing. (R. 282 ¶ 58).

- f. During the first week of October, Ms. Norton pulled an additional MLS listing on the Property, which shows that on September 9 – three days before the scheduled meeting with the Bradleys at the Property – Mr. Bradley had already initiated a change to the MLS listing to show it as "withdrawn," and not showing that it was under a pending sales contract. Ms. Norton was surprised to discover this, because the normal practice in Washington County is to alter the MLS listing to show that a sale is "pending" while it is under contract as was this one. The change request admitted as evidence shows that Mr. Bradley signed and submitted the change on September 9. (R. 282 ¶ 59).
- g. Mrs. Bradley stated to Ms. Norton before even looking at the financial information that she never wanted to sell the property and was not going to sell it now. (R. 288 ¶ M).
- h. Instead of establishing a new date with the Markhams to receive their financial information as demanded by Mr. Bradley, the Bradleys sent a notice that the Markhams had failed to comply with the September 13 deadline, and therefore the Bradleys purported to cancel the REPC. (R. 286 ¶ I).
- i. The Bradleys' so-called evaluation was merely a pretext as they had already determined they would not sell the house. (R. 290 ¶ N).

The Bradleys have failed to marshal all evidence supporting the trial court's findings. As shown above, the trial court had ample evidence upon which to base its ruling.

### **III. THE BRADLEYS WAIVED THEIR RIGHT TO STRICTLY ENFORCE THE MARKHAMS' DEADLINE.**

The Bradleys waived two particular rights under the Real Estate Purchase Contract. There are three elements to establish waiver: (1) existing right; (2) knowledge of the right; and (3) intention to relinquish the right. *Soter's Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935, 940 (Utah 1993). The Bradleys appear to only challenge the third element – the relinquishment of the right – which can be inferred. *Id.* at 941 (“a fact finder need only determine whether the totality of the circumstances ‘warrants the inference of relinquishment’”) (citation omitted).

First, the Bradleys waived the deadline by which the Markhams were to perform the production of certain financial documents. This waiver was unique and specific as to the Markhams. It is not a general waiver of the parties as to all deadlines within the contract, but was a specific waiver as to the Markhams' responsibility to perform the production of the financial documents. In addition, the Bradleys waived another right under the contract that is implicit with this waiver, and that is the right to have an extension set forth in writing.

The Bradleys' waiver of their right to receive the financial documents could not affect any deadlines imposed by the contract on the Bradleys, and the Bradleys would still have to perform under the contract according to their requirements and all associated deadlines regardless of having waived the Markhams' strict performance under the contract. There was no testimony or evidence to even suggest that the Markhams waived the Bradleys' deadline

to provide seller disclosures. The Bradleys mistakenly argue that, because they still had obligations under the contract and performed them, this Court cannot conclude that they did not want the Markhams' deadlines strictly enforced. Their argument simply does not hold water, and they point to no case law that would indicate that their waiver of the other parties' rights under the contract automatically would alleviate their duty to perform their own obligations under the contract.

In addition, the Bradleys did not ask for an extension in time to review or receive the financial documents from the Markhams. They simply refused the documents, demanding at least a couple of weeks to pass before they would accept them. Although the Bradleys had the right to require the parties to set forth in writing a specific time when the Bradleys would accept the financial documents, the Bradleys needed to elect that remedy on September 12 while the parties were together.

The trial court did evaluate the "totality of the circumstances," as the credible testimony showed. The Bradleys had canceled the listing three days prior to the September 12 meeting. Mr. Bradley had lost his temper at the time of the September 12 meeting. His lack of control over his temper was evident in court as well, which led to the trial court's conclusion that Mr. Bradley's demeanor at trial did not convey credibility. (R. 293 ¶ X). Trial testimony established that Mr. Bradley was angry, refused to accept documents that Mr. Markham pulled out of his briefcase and handed to him, and refused to talk about the financial information in any format, saying they would not do it until a couple of weeks later.

That is what was conveyed in an angry manner at the time of the meeting, and that is what was conveyed similarly at the time of trial.

The Bradleys have pointed to no credible trial testimony that contradicts the findings and conclusions. The trial court was correct in an unchallenged conclusion that “it would have been a futile act for the Markhams and their real estate agents to continue to try to present the financial information to Mr. Bradley on Monday, September 13, after his angry refusal on Sunday afternoon.” (R. 286 ¶ I). The trial court correctly applied Utah law on the subject and determined that the Markhams would not be required to do such a futile or useless or idle act in the face of Mr. Bradley’s actions. *Fitzgerald v. Corbett*, 793 P.2d 356, 359 (Utah 1990) (“tender requirement may be excused where tender would be an ‘idle ceremony’”). Moreover, separate from a waiver analysis, a contract analysis causes the same result, because “one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused.” *Zion’s Properties, Inc. v. Holt*, 538 P.2d 1319, 1321 (Utah 1975).

**A. The Bradleys Raise New Arguments on Appeal to Support Their Nonwaiver Argument.**

The Bradleys invent six novel and unsupportable arguments for their appeal which were not raised at trial, all in support of their claim that they did not waive the Markhams’ September 13 deadline. Of the following seven arguments the Bradleys raise, the only one raised at trial was that the contract could not be modified orally:

- (1) Undisputed facts establish that both parties performed on the contract as if there was not a waiver;

- (2) The Bradleys did not believe that Mr. Bradley's actions waived their right to rely on the September 13 deadline;
- (3) If the Bradleys had waived the deadline, it is unlikely that they would have been concerned about delivering the required disclosures to the Markhams by the September 13 deadline;
- (4) The trial court ignored the statute of frauds;
- (5) The trial court ignored that Section 14 of the REPC specifically prohibits oral modification of its terms;
- (6) Ms. Norton did not understand Mr. Bradley's actions to waive his right to rely on the September 13 deadline;
- (7) There can be no distinct, intentional waiver when uncontested evidence shows that neither party behaved in a manner consistent with waiver.

(Br. of Appellant 37–43). In their Statement of the Issues, the Bradleys claim to have preserved these arguments. (R. 392–98 and R. 881, TT 405:1–4). A review of these two locations in the Record show that the Bradleys did not preserve those arguments below.

Page 392–98 of the Record are pages from a memorandum supporting the Bradley's *post-trial* motion captioned as being brought pursuant to Utah Rule of Civil Procedure 59. However, as pointed out *supra*, this post-trial motion does not preserve the issue for appeal. Furthermore, page 405, lines 1 through 4, of the trial transcript only shows that, in closing arguments, the Bradleys claimed there was no written extension as required by the contract. They did not raise any of the other points now brought on appeal.

As stated *supra*, an appellant preserves a substantive issue for appeal only if at trial the appellant (i) timely raised the issue before the trial court; (ii) specifically raised the issue in a way that the issue rises to a level of consciousness before the trial court; and (iii) introduced to the trial court supporting evidence or relevant legal authority to support the argument. The Bradleys fail each of these three requirements. They failed to give the trial court the opportunity to rule on these additional arguments. Therefore, this Court should affirm the trial court's determination that Mr. Bradley waived the right to enforce the Markhams' September 13 deadline.

If this Court evaluates this waiver issue, the maximum amount of deference available to a mixed question of fact and law is the appropriate standard of review. Whether a party has effectuated a waiver is a mixed question of law and fact. *Chen v. Stewart*, 2004 UT 82, ¶ 23, 100 P.3d 1177. When reviewing mixed questions, where both findings of fact and determinations of law are at issue, the appellate court must determine the appropriate amount of deference to give to the trial court. *State v. Levin*, 2006 UT 50, ¶ 24, 144 P.3d 1096. There, the Utah Supreme Court revised its guideline to determining the proper standard of review to a three-part test:

(1) The degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the legal rule relies on "facts" observed by the trial judge, "such as a witness appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts"; and (3) other policy reasons that weigh for or against granting discretion to trial courts.

*Id.* at ¶ 25.

The greater the variety among fact patterns to which the law is applied, the stronger the case for appellate deference. *Levin*, 2006 UT 50 at ¶ 26. When a variety of fact-intensive circumstances are involved, this weighs heavily against the appellate court lightly substituting its judgment for that of the trial court. *Glew v. Ohio Savings Bank*, 2007 UT 56, ¶ 19, 582 Utah Adv. Rep. 27, --- P.3d ----. In applying the second factor, “the greater the importance of the trial court’s credibility assessments, that cannot be adequately reflected in the Record, the stronger the case for appellate deference.” *Levin*, 2006 UT 50 at ¶ 26. Here, the trial court found that the Bradleys’ testimony was not credible, but was unreliable as stated above.

To apply the third factor, the appellate court must take into consideration policy factors related to the degree of deference that should be applied. *Levin*, 2006 UT 50 ¶ 26. The Utah Supreme Court held in *State v. Pena*, 869 P.2d 932, 938–39 (Utah 1994), that policy factors favor appellate deference in waiver cases. For a number of years, Utah courts “developed hopelessly inconsistent elaborations on the basic statement of waiver principles.” *Id.* at 938. When it was clear that continuing to provide such elaborations was futile, the statement of the law was stripped back to its most basic form, and trial courts were told to apply it. *Id.* “The net effect was to say that waiver is a highly fact-dependent question, one that. . . cannot. . . profitably [be] reviewed de novo in every case because [the court] cannot hope to work out a coherent statement of the law through a course of. . . decisions.” *Id.* (quoting *Soter’s, Inc. v. Deseret Federal Savings & Loan Association*, 857 P.2d 935, 939 (Utah 1993)).

Because there is a wide variety of facts to which the legal rule for waiver is applied, witness credibility becomes even more critical. The Record adequately reflects the fact that the trial court found Mr. and Mrs. Bradley to be noncredible witnesses. As policy reasons suggest the need for deference to the trial court's fact-dependent analysis, this Court should give the maximum amount of deference available to the trial court's determination that the Bradleys waived their right to enforce the September 13 deadline. When that deference is combined with the unchallenged findings and trial testimony, the trial court should be affirmed.

**B. The Bradleys Have Marshaled No Evidence Suggesting the Trial Court's Findings are Incorrect.**

Because the question of waiver is so dependent on factual findings, appellants must marshal the evidence if they seek to challenge the trial court's determination. *United Park City Mines Co.*, 2006 UT 35 at ¶ 25. As discussed *supra*, the Bradleys have failed to adequately marshal the evidence.

Specifically, the Bradleys have not pointed to a single instance in the Record that contradicts the findings they challenge. For example, the trial court held that “[b]y Mr. Bradley’s statements and actions, and Mrs. Bradley’s intentional and persistent unavailability, the Bradleys intentionally waived their known right as to the September 13 deadline.” (R. 285 ¶ H). Yet the Bradleys in their appellate brief state “[u]ndisputed facts establish that both parties performed on the contract as if there was not waiver” (Br. of Appellant 42, ¶ 8). No citations from the Record are provided to support the Bradleys’ statement.

On the other hand, the trial court's conclusions are supported by the findings of fact, which were not challenged, and the trial testimony:

- a. Mrs. Bradley was out of town and all contact should be through Mr. Bradley. (R. 269 ¶ 7).
- b. Mr. Bradley said he would handle the paperwork, as Mrs. Bradley was very hard to get in touch with. (R. 272 ¶ 18).
- c. Mr. Bradley refused to give Mrs. Bradley's phone number to Ms. Norton. (R. 272 ¶ 18).
- d. Mrs. Bradley did not try to contact Ms. Norton, even after the contract was signed. (R. 273 ¶ 23).
- e. When Mr. Bradley refused the financial information, Mr. Markham put it back into his briefcase and left, knowing he would have to wait to hear from the Bradleys about when to submit it. (R. 881, TT 40:15-25).
- f. After the September 12 meeting, Ms. Norton tried to set a new appointment with Mr. Bradley by calling and visiting job sites, all to no avail. (R. 278 ¶ 41).

The other marshaled evidence actually supports the trial court's findings and conclusions. Because the Bradleys have failed to ferret out any fatal flaw in the evidence, this Court should either affirm the trial court's findings or assume that the findings are supported by clear weight of evidence.

#### **IV. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE BRADLEYS ARE ESTOPPED FROM STRICTLY ENFORCING THE SEPTEMBER 13 DEADLINE.**

The concept of waiver and estoppel are equitable remedies that are closely related. The trial court concluded that Mr. Bradley's actions not only amounted to waiver, but, because of his refusal to discuss finances and Mrs. Bradley's refusal to make herself available, the Bradleys would be estopped from strictly enforcing or relying on the September 13 deadline for the Markhams to produce their financial information, and that it would be inequitable to allow the Bradleys to take advantage of their own obstructive and misleading conduct. Therefore, it is appropriate for this Court to estop the Bradleys from utilizing their own bad acts to further damage the Markhams.

Estoppel, in basic terms, is applied when one of the parties later tries to contradict themselves from an earlier position taken and, within that contradiction, tries to bring about harm or injury to the other party. *Brixen v. Elton*, 777 P.2d 1039, 1043-44 (Utah App. 1989).

Here, the Bradleys later took the position on September 20 that the Markhams had not submitted the financial information before the deadline; therefore, they were canceling the contract. This was directly contrary to the Bradleys' earlier action of refusing the financial information on September 12, the day before the deadline. The Markhams reasonably relied on the Bradleys' statements that they did not want the documents at that time, so Mr. Markham put the documents back in his briefcase, returned to his home in California, and waited for the notice of the new date to submit the financial information. The Bradleys,

rather than contacting Ms. Norton or the Markhams to set a specific date, simply tried to cancel the contract.

There can be no purer example of when estoppel is critical in the field of law than the one in this case. To specifically tell another not to provide a document required under a contract because the person does not want it and then turn around and tell the other that the contract is now void because the document was not delivered simply cannot be tolerated. To uphold such action flies in the face of equity and justice, yet that is the argument the Bradleys want this Court to accept.

As previously stated, the trial court observed that Mr. Bradley likely gave false testimony at trial to fit a legal theory. Likewise, the Bradleys attempt now to ignore the Markhams' and Ms. Norton's testimony at trial and focus only on their own self-serving comments appears to be an attempt to form their trial testimony to legal arguments developed for the purposes of appeal. However, the Bradleys did not make this type of legal argument to the trial court and should not have made it on appeal.

In their Statement of the Issues, the Bradleys claim to have preserved these arguments, suggesting they were not estopped from enforcing the September 13 deadline. (R. 392–98 and R. 881, TT 405:1–4). A review of these two locations in the Record makes clear that the Bradleys have failed to preserve their arguments. Page 392–98 of the Record are pages from a memorandum supporting the Bradley's *post-trial* motion captioned as being brought pursuant to Utah Rule of Civil Procedure 59. Again, Utah law is clear that raising the issue

in a post-trial motion fails to preserve the issue. Likewise, page 405, lines 1 through 4, of the trial transcript does not discuss their estoppel argument.

**V. THIS CASE IS THE PERFECT EXAMPLE OF WHY SPECIFIC PERFORMANCE IS APPROPRIATE IN REAL ESTATE CONTRACTS.**

The contract between the Markhams and the Bradleys was one for the purchase of real estate. Specific performance has long been recognized as an appropriate remedy in Utah when a seller of real property refuses to convey the property at issue to the buyer. *Kelley v. Leucadia Fin. Corp.*, 846 P.2d 1238, 1242 (Utah 1992). This is particularly true when a real estate contract specifically grants specific performance as an optional remedy. *Id.* Because specific performance sounds in equity, a court has wide discretion in formulating and applying it as a remedy. *LHIW, Inc. v. DeLorean*, 753 P.2d 961, 963 (Utah 1988).

The Bradleys claim to have preserved the issue of whether specific performance is an appropriate remedy by citing to the Record, pages 395-397, which is part of their New Trial Motion. As stated succinctly above, an issue cannot be preserved for appeal when it is brought up for the first time in a post-trial motion such as a motion for a new trial. However, even if this Court were to allow their New Trial Motion, particularly pages 395-397 of the Record, to be a sufficient basis to preserve an issue for appeal, the Bradleys do not even raise the issue of whether specific performance is an appropriate remedy under the circumstances. The term “specific performance” is not raised in their New Trial Motion. The pages to which they refer are those wherein they are arguing whether waiver was appropriately adopted by the trial court. In fact, throughout the process of trial preparation and discovery, as well as

the trial itself, the Bradleys never questioned whether specific performance was an appropriate remedy. Therefore, this Court should affirm the trial court regarding its ordering specific performance on that basis alone.

Even if this Court were to conclude that the issue was preserved below and that it is properly before this Court now for review, this Court should still affirm the trial court's Final Judgment and Order. In a nutshell, the Bradleys argue that the Markhams were required under the theory of specific performance to make an unconditional tender of performance on the contract. They then apply this legal standard and state that the unconditional tender of performance applies to the September 13 deadline to deliver financial information regardless of the trial court's legal conclusions on the issue of waiver. In other words, the Bradleys argue that, because the Markhams did not have a credit report among their financial documents presented on September 12 when the Bradleys refused to even look at them, and in spite of Mr. Markham's testimony that they would pull a credit report once the Bradleys told them a preference for the source of the credit report, the Markhams were not prepared to unconditionally perform by the deadline of September 13.

First of all, this ignores the factual findings of the trial court and trial testimony that established that a credit report can be run very quickly with a few key strokes on the Internet. Therefore, the Markhams had all the information they needed in order to proceed with the financial information and would have pulled the credit report on September 13. The only reason they did not was because they had been told that the Bradleys were not interested in their financial information for another couple of weeks. Therefore, they did not pull the

report. The Markhams tender on September 12 was proper and adequate. The trial court specifically found in paragraph K of the Conclusions of Law (R. 286) that the Markhams' production of their financial information was sufficient to meet the contract's requirements to timely provide the financial information, including the credit report. The Bradleys have not challenged that conclusion on appeal and have done nothing to marshal and contradict that conclusion.

In addition, the Markhams informed Mr. Bradley that they had all of the financial information and could request and print out a credit report the next morning on September 13 and get that to him as well. (R. 278). It was in light of all of this information presented to Mr. Bradley that he rejected the financial information *in toto*. The Markhams had tendered performance by September 13 and were fully capable and ready to complete that tender had the Bradleys not rejected the financial information on September 12 and told the Markhams to wait a couple of weeks. Therefore, the Markhams are entitled to the remedy of specific performance.

## **VI. ATTORNEYS' FEES WERE AWARDED BELOW AND SHOULD BE AWARDED ON APPEAL.**

The underlying contract between the Markhams and the Bradleys allows for the prevailing party to recover attorneys' fees. The trial court awarded the Markhams their attorneys' fees incurred through trial in its original Final Judgment and Order. In addition, the trial court awarded the Markhams their further attorneys' fees incurred in dealing with the post-trial motions brought by the Bradleys. Likewise, on appeal the Markhams have

again incurred attorneys' fees and this Court should award the Markhams their attorneys' fees as the prevailing party on appeal. *Brown v. Richards*, 840 P.2d 143 (Utah App. 1992).

### CONCLUSION

Based on the foregoing, this Court should affirm the trial court in all respects, deny each of the issues raised by the Bradleys on appeal, and award the Markhams their fees and costs on appeal.

Respectfully submitted this 10<sup>th</sup> day of August, 2007.

JONES, WALDO, HOLBROOK & McDONOUGH, PC

Bruce Wyss, #4448, for  
Russell S. Mitchell  
Attorneys for Plaintiffs/Appellees

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of August, 2007, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEES** to be mailed, postage prepaid, to:

Justin D. Heideman  
Justin R. Elswick  
ASCIONE, HEIDEMAN & McKAY, L.L.C.  
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Provo, Utah 84064  
Telephone: (801) 812-1000

Bruce W. [Signature], # 4448

## **ADDENDUM**

### **ADDENDUM A: Findings of Fact and Conclusions of Law**

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

DOUGLAS J MARKHAM and  
ANDREA MARKHAM,

Plaintiffs,

vs.

JOHN J. BRADLEY and  
DARBY G. BRADLEY,

Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Civil No. 040501848  
Judge G. Rand Beacham

This case came before me for trial on January 24 and 25, 2006. Plaintiffs appeared in person and were represented by their counsel of record, Russell S. Mitchell. Defendants appeared in person and were represented by their counsel of record, Aaron D. Randall. I heard the testimonies of Douglas Markham, Carolyn Norton, Stuart Shumway, John Bradley, Darby Bradley, and Roger Hamblin. I allowed counsel to submit proposed findings of fact and conclusions of law after the trial. I have now reviewed and considered the testimonies of the witnesses, the exhibits received into evidence, and the arguments of counsel. Due to the direct contradictions among the witnesses' testimonies, the witnesses' credibility has been a significant concern for me. On this basis, I have made the following:

FINDINGS OF FACT

1. Plaintiffs Douglas J. Markham and Andrea Markham ("Markhams") became interested in the Washington County area for a second home and possible early retirement area.
2. They retained real estate agents, Carolyn Norton ("Norton") and Stuart Shumway

("Shumway"), to help them locate properties in the St. George area.

3. On Friday, August 27, 2004, Norton took the Markhams out to show them the Washington area generally and, after viewing many properties, ended up in the Dammeron Valley area and saw a "for sale" sign on the property located at 979 North Dammeron Valley Drive (the "Property"). The Markhams immediately liked the Property and asked Norton to get more information about it. Later that evening, the Markhams drove back to Dammeron Valley to drive by and again look at the Property.

4. By the next day, Saturday, August 28, Norton had pulled up the Multiple Listing Service ("MLS") information for the Property and saw that it was listed with an "owner/agent," being Defendant Darby Bradley ("Mrs. Bradley").

5. Norton called the number for Mrs. Bradley shown in the MLS printout, and Defendant John Bradley ("Mr. Bradley"), the co-owner, answered the phone. He stated that Mrs. Bradley was out of town, but that he could show the Property and home and agreed to show the home that Saturday morning.

6. Norton and the Markhams went to the Property and met Mr. Bradley.

7. While doing the walk-through, Mr. Bradley told the Markhams and Norton that his wife was out of town and that all contact regarding the Property should be directed through him and that he would pass all information and required documents on to Mrs. Bradley.

8. Mr. Bradley was very friendly and cordial and took them through the house, showing them the improvements he was making, including some remodeling of the kitchen. He stated that he was a builder and did new home construction under the name of Pride Homes.

They spent well over an hour at the Property with Mr. Bradley. While there:

- a. Norton asked the price, to which Mr. Bradley replied that it was listed at \$650,000.00, but they were willing to take \$550,000.00.
- b. Mr. Bradley pulled out a map of the Property, and showed them the boundaries of the Property and that it was already sub-divided into three parcels.
- c. Mr. Bradley also stated he was willing to sell some of the special-order furniture in the home.
- d. The Markhams told Mr. Bradley that they were interested in building one or two more homes for Mr. Markham's retiring brother and to allow his mother to live close as well.
- e. Mr. Bradley gave Mr. Markham his business card showing his business name and phone number.

9. While at the Property that day, the Markhams fell in love with the Property and its unique characteristics, such as the log-style home, horse corrals, pond, and the ability to build additional homes for family. They decided they wanted to purchase the Property.

10. After the first walk-through and after the Markhams returned to California, Mr. Markham then called Mr. Bradley directly by phone on or about August 30 telling him they wanted to buy the Property and asking what the Bradleys wanted for the Property.

11. Mr. Bradley told Mr. Markham that they could do the deal directly without involving Norton, but Mr. Markham insisted that Norton be involved.

12. There was no negotiation regarding the sales price. Mr. Bradley stated they wanted \$550,000.00 for the Property, and the Markhams agreed. Mr. Bradley also stated he needed \$265,000.00 down in order to buy out a partner, and that the Bradleys could carry the balance as seller financing. Mr. Bradley did not insist on or even suggest an interest rate for the seller financing, nor did he discuss any detail with Mr. Markham about why he suggested seller financing. Mr. Markham was not opposed to seller financing as long as he had the right to pay it off early at any time without penalty.

13. During this phone call, Mr. Markham discussed his intended use of the Property, including the building of two additional homes for Mr. Markham's brother and Mr. Markham's mother. They talked about the Bradleys' request that their daughter be able to keep her horses on the Property after the sale in exchange for taking care of horses the Markhams intended to purchase. They also discussed Mr. Bradley's new home construction business and whether he would be available to build two additional homes.

14. After their phone conversations, Mr. Markham then called Norton to have her prepare a written offer in the form of a Real Estate Purchase Contract ("REPC") consistent with the terms Mr. Bradley and Mr. Markham had discussed.

15. As Mr. Markham and Norton discussed the terms of the REPC, they discussed the seller financing issue. Mr. Markham wanted to make sure he could pay off the balance at any time without penalty, and Norton told him the standard language of the REPC provided for this and that she would not write the offer up any other way. Norton also suggested an interest rate of 5.5% because the Markhams could easily qualify for the best rates on traditional financing and,

therefore, should not pay any more interest than the current common rate.

16. The REPC prepared by Norton on behalf of the Markhams set the purchase price at \$550,000.00, with \$265,000.00 cash due at closing, while permitting seller financing of \$285,000.00 at 5.5% interest on a 15-year term, requiring a \$100,000.00 balloon payment at the end of the first year, and utilizing the standard Seller Financing Addendum. It also provided for the parties to meet in early September to discuss remodeling issues and finalize what furniture would stay with the house.

17. Norton and Shumway presented the written REPC offer to Mr. Bradley at one of his construction job sites. Norton asked how they could contact Mrs. Bradley to present the written REPC offer to her, and Mr. Bradley told Norton that Mrs. Bradley was living in Bellingham, Washington, and was seeking a divorce from him. He further stated that the divorce was not a friendly matter, but that he would make sure she got the REPC and see if he could get it accepted.

18. Mr. Bradley again affirmed that he would be handling the paperwork, as it was very difficult to contact Mrs. Bradley. However, Mr. Bradley would not give Shumway or Norton any contact information for Mrs. Bradley at that time.

19. At the time Norton and Shumway presented the written REPC offer to Mr. Bradley, Norton discussed the Seller Financing Addendum with Mr. Bradley and the fact that they did not have the Markhams' financial information with the offer, but would be providing it later in whatever form the Bradleys wanted to designate.

20. Mr. Bradley told Norton that since Mr. Markham is a doctor, Mrs. Markham is a

dentist, and he was getting one-half of the purchase price as a down payment, he was not worried about the financial information.

21. Norton, who has an educational background in banking and finance, had completed this standard Seller Financing Addendum showing the monthly payments as well as the effect of the \$100,000.00 balloon payment on the monthly payments, as she is fully capable of calculating amortization schedules, monthly payments, interest, and other financing matters associated with the regular purchase of residential real estate.

22. Shortly after presenting the REPC to Mr. Bradley and after he had reviewed it with Mrs. Bradley, Mr. Bradley presented a written counteroffer back to Norton which the Bradleys had both signed demanding a \$10,000.00 earnest money payment, increasing the amount of down payment by another \$10,000.00, and reducing the amount of the seller financing to \$265,000.00. The sales price of \$550,000.00 and interest rate of 5.5%, as well as the standard terms of the Seller Financing Addendum, remained unchanged.

23. Mrs. Bradley did not call Norton regarding the offer or counteroffer, even though Mrs. Bradley was listed as the selling agent. Mrs. Bradley did not question the use of the standard Seller Financing Addendum, nor did she give any instruction or direction to Norton to deliver papers to her broker's office rather than going through Mr. Bradley.

24. The Markhams signed the counteroffer, and Norton called Mr. Bradley to let him know. After the REPC was fully accepted and executed, the Markhams immediately sent a check for the \$10,000.00 earnest money deposit, which is still deposited with Century 21 at the Rockies.

25. After several tries, Norton was able to deliver a copy of the fully signed REPC to Mr. Bradley around September 4, 2004. At this time, Norton scheduled the follow-up meeting with Mr. Bradley for September 12.

26. Norton set the date for September 12 because the following day, September 13, was the deadline for producing financial information. Norton discussed the need and purposes for the meeting with the Markhams as well as with Mr. Bradley, the purposes being to go over the financial information and two of the other contingency items listed in the REPC regarding finishing the remodeling of the home and what furniture the Bradleys would want to sell along with the house, as well to go over house plans for the other two homes the Markhams wanted to build on the Property.

27. After presenting the REPC, Norton spoke with Mr. Bradley several times regarding the upcoming meeting as well as other matters. During one of the conversations, Mr. Bradley asked Norton to find some vacant lots for him on which he could possibly build homes. Norton deferred the request, telling him that he should be getting that information from his wife, to which Mr. Bradley responded that he wanted Norton to do it because of the difficult divorce he was having with his wife. In these various conversations and meetings over the next several days:

- a. Norton did find some MLS listings of vacant lots and delivered them to Mr. Bradley prior to the September 12 meeting, and again confirmed the upcoming meeting.
- b. In one of the conversations, Mr. Bradley told Norton that he wanted to

extend the closing time by at least a month, as he was having trouble getting the remodeling done and would not be able to complete it in time, asking Norton to prepare an addendum for him to sign.

- c. In response to Mr. Bradley's desire to extend the closing deadline, Norton gained permission from the Markhams to extend the date and prepared part of an addendum, telling Mr. Bradley that he would need to fill it out in full, sign it, and present it back to the Markhams, as it would be considered a counteroffer from the Bradleys.
- d. During one of the conversations, Mr. Bradley stated that the September 12 meeting could not be so early in the afternoon and asked that it be set around 4:00 or 5:00 p.m., at which time Norton again emphasized to Mr. Bradley the critical nature of the September 12 meeting to review financial information, go over house plans, check the status of the remodeling, and determine which items of furniture the Bradleys would want to sell.
- e. During this time, prior to the September 12 meeting, there were other conversations in person and on the phone between Norton and Mr. Bradley which were very friendly and cordial and during which he expressed a desire to continue to have his daughter have horse stables on the Property, even after the sale of the Property had closed. The Markhams had stated they had no problem with this and were willing to work out terms to accommodate his daughter's desires in that regard.

28. In preparing for the upcoming meeting, Norton told the Markhams they needed to bring financial information with them for the September 12 meeting with the Bradleys.

29. When the Markhams arrived in St. George on September 12, they first met with Norton in her office. Mr. Markham had a briefcase from which he pulled a stack of papers with his financial information at the top of the stack. Mrs. Norton saw the financial information, although she did not review it in detail at that time.

30. Later in the afternoon, the Markhams then went to the Property with Norton and Shumway. They were also accompanied by Mr. Markham's brother, Dirk Markham, and his wife, who had flown in from New York, as one of the homes to be built was for Dirk Markham.

31. They went to the Property a little early to see if Mr. Bradley might have arrived home early and, when he was not home, left the Property and came back again around 4:30 or 5:00 p.m. This second time they came by the Property, Mr. Bradley was there, but instead of greeting them with the same cordial and friendly attitude he had in the past, he approached them yelling at Norton, "What the hell are you doing here?" He also yelled about there being no appointment.

32. This behavior shocked the Markhams, and they were not sure what to do. Norton continued to talk to Mr. Bradley to calm him down, and while she was doing this, Shumway took the Markhams to walk around the outside of the Property. Norton reminded Mr. Bradley that they did have an appointment at this scheduled time and that it was very important to go over the financial information, the house plans, the remodeling, and the furniture issues.

33. Norton reminded Mr. Bradley that the Markhams were not only buying the

Property, but were looking to him as the most likely builder of the two additional homes they wanted to build on this eight-acre parcel and that he should get control of his emotions and proceed with the meeting they had planned.

34. Mr. Bradley did finally acknowledge the appointment and the meeting and apologized to the Markhams for his rude behavior. He explained to them that he had just returned from meeting with attorneys regarding the divorce and it was not going well.

35. Mr. Markham tried to reassure Mr. Bradley that they did not want to add to his apparent problem of a difficult divorce and if he did not want to sell furniture, it was okay, but they did want to talk about the financial and other issues.

36. Inside the home, Mr. Markham set his briefcase on a table just inside the house. He opened it up and took out his stack of papers, including the financial information at the top of the stack.

37. Mr. Markham had information and records with him at that time, including the following:

- a. A prior financial statement Mr. Markham had prepared and submitted to a bank regarding a financial transaction unrelated to this matter, which Mr. Markham was going to use to transfer updated information to a financial statement form of the Bradleys' choice.
- b. A sample form from Mr. Markham's bank that could be completed with the Markhams' financial information if the Bradleys decided to adopt such a form.

- c. Additional bank records and statements from which the Markhams could obtain any needed account information.

In addition, the Markhams informed Mr. Bradley that they had all of the necessary information to request and print out a credit report the next morning on September 13 and could get that to him as well.

38. Mr. Bradley was still angry, however, and said he did not have time for any of the financial information and refused to take any of it or even look at it. He told them that they had walked through the house, that was all he could do, and they would need to arrange a time to deal with the financial and other matters later.

39. Norton again told him that now is time to discuss these matters, that the Markhams had prepared all of their financial information, and that they were here ready, willing, and able to go over whatever questions he might have or fill out whatever forms he needed, but Mr. Bradley said he would deal with it in “a couple of weeks.”

40. It was an uncomfortable situation for the Markhams, Norton, and Shumway. They were at the home less than 30 minutes and they left.

41. Norton tried to set the new meeting date by calling Mr. Bradley and dropping by the house and work project sites to catch Mr. Bradley. However, she was unable to find him, and her calls went unanswered.

42. Finally, approximately one week later on September 20, Norton received a faxed letter claiming that the Bradleys were declaring the REPC null and void and that they wanted to cancel the deal based on the fact that the Markhams had failed to provide the required financial

information on September 13.

43. Norton called Mr. Bradley to see what the problem was and was able to talk to him. He said it was all Mrs. Bradley, as she is the one who wanted to cancel the deal. He stated that Mrs. Bradley had come back to St. George and was now going to live in the house.

44. Norton reminded Mr. Bradley that she still did not have any contact information for Mrs. Bradley and would be unable to talk to her unless Mr. Bradley gave her good contact information, at which time Mr. Bradley finally gave Norton a cell phone number for Mrs. Bradley.

45. Norton called Mrs. Bradley, left a message, and Mrs. Bradley later returned the call, at which time Norton asked her what she felt it would take to make this deal actually work. Norton told Mrs. Bradley that the Markhams had tried to give all of the financial information to Mr. Bradley and tried to go over it with him, to which she simply replied "Well, I didn't have the information that day." She further went on to state that she "never wanted to sell the Property, anyway," that she was "not going to sell the Property now," and that the Markhams "missed the deadline."

46. In this conversation with Norton, Mrs. Bradley did not give any instructions to alter the delivery of documents to the Bradleys from the existing arrangement of going through Mr. Bradley and using the fax number and addresses previously used.

47. The Markhams refused to accept the Bradleys' attempt to cancel the REPC, because they had tried to provide the financial information on September 12 and Mr. Bradley had refused it and had told them not to give it to him for a couple of weeks.

48. After learning of the September 20 letter, the Markhams immediately contacted Countrywide Home Loans (“Countrywide”), which had just approved a home equity loan on the Markhams’ California residence. Countrywide printed a credit report and began processing a loan application for the Property in case it was needed.

49. Mr. Markham immediately began updating the financial statement he had used for an earlier bank loan, but, because of the rush to get the information in as quickly as possible, he was unable to locate a blank form and had to use white-out to update the various figures on a previously used form in order to provide current information.

50. The Markhams faxed this financial information from their home fax machine to Norton. Because of the size of the fax, they had trouble getting the fax to go through properly and had to re-fax many of the pages. Norton assembled the information and credit report as received by fax.

51. On September 24, Norton prepared and faxed a letter to the Bradleys stating that the Markhams rejected the Bradleys’ attempt to cancel the REPC. Norton also sent the financial information and credit report to the Bradleys with this September 24 letter, as well as informing them that the Markhams had obtained independent financing to fully pay the purchase price and were ready, willing, and able to close under the REPC.

52. Norton did not hear back from the Bradleys, so she faxed another letter dated September 27. Unknown to the Markhams or Norton, Mrs. Bradley had returned to Washington and Mr. Bradley was also out of town.

53. Norton continued to try to reach the Bradleys, and Mr. Bradley finally called

Norton and left a message on September 30 that she should direct all further communications to their attorney, Robert M. Jensen. By September 30, the Markhams had received formal notification from Countrywide that they were approved for a loan on the Property. On September 30, Norton faxed a letter to the Bradleys and their attorney with a copy of this notification from Countrywide.

54. The Bradleys received and reviewed all letters and the financial information. They then met with Mr. Jensen and instructed him to send another notice to cancel the REPC.

55. Mr. Jensen sent a letter dated October 4 stating that his clients would not close on the REPC, claiming that the Bradleys were excused from doing so because they had not received the financial information by September 13. He also claimed that the financial information they received was difficult to read and of poor fax quality, the pages seemed out of order, and the Bradleys were uncomfortable with a reference to a bankruptcy or judgment, and therefore they were canceling the REPC.

56. The credit report sent to and received by the Bradleys is straightforward in showing the credit history and a high credit score of 689 for Mr. Markham and 705 for Mrs. Markham. It also shows references to full on-time payments with only four instances of late payments, all four being only 30 days late, two times in 2003 and two times in 2001. The reference to the bankruptcy or judgment was from the financial form Mr. Markham had used that did not limit the time period regarding bankruptcies and was a reference to Mr. Markham's filing bankruptcy over ten years earlier in relation to a business deal in a shared chiropractic office. There was no reference to bankruptcy or judgments on the credit report.

57. No expert witness was called to establish whether the Markhams' credit scores were good or poor, although Mr. Markham and Mr. Bradley gave their opinions and there was no objective evidence that such credit scores were poor.

58. Mr. Jensen's letter came after the Markhams had already tendered their proof of financing through Countrywide and the Markhams were ready and willing to proceed to closing by immediately paying off seller financing.

59. During the first week of October, Norton pulled an additional MLS listing on the Property, which shows that on September 9, three days before the scheduled meeting with the Bradleys at the Property, Mr. Bradley had already initiated a change to the MLS listing to show it as "withdrawn," and not showing that it was under a pending sales contract. Norton was surprised to discover this, because the normal practice in Washington County is to alter the MLS listing to show that a sale is "pending" while it is under contract as was this one. The change request admitted as evidence shows that Mr. Bradley signed and submitted the change on September 9.

60. Countrywide sent an appraiser to the Property during October, but Mr. Bradley turned him away.

61. Because of these breaches by the Bradleys, the Markhams have had to retain legal counsel to protect their rights and interest in the Property and have incurred attorneys' fees and costs in protecting their rights, and the REPC provides for the prevailing party to be awarded attorneys' fees and costs.

62. To protect their property rights, the Markhams obtained a Temporary Restraining

Order, which was later changed by stipulation to a Stipulated Temporary Restraining Order and Preliminary Injunction, prohibiting the Bradleys from transferring the Property or doing anything to damage the Property or the landscaping.

63. In violation of the Court's Order, beginning sometime in July 2005, the Bradleys have brought over 300 truckloads full of rock, debris, and dirt and dumped them on the Property, treating it as a type of holding property for excavation of materials from a different lot on which Mr. Bradley is working.

64. Mrs. Bradley was asked during her deposition in September 2005 if she would remove that debris and rock from the Property during the next 30 days, which she agreed to do. However, 30 days later, the rock had not been removed.

65. The Bradleys did not remove any of the dirt, rock, or debris during September, October, or November. During the last few weeks prior to the trial, they may have begun to remove some of the material, but well over 100 truckloads of dirt, rock, and debris remain on the Property in violation of the Court's Order.

66. Testimony at trial established that it will cost approximately \$30,000 to have the remaining dirt, rock, and debris removed from the Property. Therefore, it is appropriate to have \$30,000 held in escrow out of the sales price of the Property to cover the cost of removing all of the rock and debris and restoring the Property to its original condition.

#### CONCLUSIONS OF LAW

A. The parties stipulated and the evidence establishes that Mr. Bradley had authority to speak for both himself and Mrs. Bradley and was designated to receive all communication and

documents regarding sale of the Property. Mrs. Bradley did not designate her broker, Roger Hamblin, or any other sales agent to act on her behalf or to receive or initiate communications or documents while she was out of town.

B. Neither the Markhams nor their real estate agents ever received any notice, directive, or request from the Bradleys that their communications or documents should be sent through Mrs. Bradley's broker's office. Therefore, it was appropriate for the Markhams and their real estate agents to deal directly with Mr. Bradley for communications, including the delivery and/or exchange of documents.

C. The evidence establishes that the method of communication to Mrs. Bradley was through Mr. Bradley by calling his cell phone, by fax transmission and, when feasible, by personal delivery to Mr. Bradley at one of his work sites or at the Property. At no time were the Markhams or their real estate agents required to provide documents to Mrs. Bradley's real estate broker's office.

D. Mr. Bradley's verbal representations and specific acts directed to the Markhams and their real estate agents are binding on both Mr. and Mrs. Bradley.

E. The REPC is a binding agreement between the parties and it includes the implied covenant of good faith and fair dealing.

F. The original settlement date set forth in the REPC was October 29, 2004, and the Markhams were ready, willing, and able to perform in full then and are ready, willing, and able to perform in full now.

G. One of the Bradley's rights under the REPC is timely performance of all

deadlines, and the Bradleys knew of those deadlines and their associated rights. The knowledge of a contract right may be inferred by the party's signature on a contract. See, e.g., *John Call Eng'g, Inc. v. Manti City Corp.*, 743 P.2d 1205, 1208 (Utah 1987).

H. The Bradleys waived their right to rely on the September 13, 2004 deadline because (1) the Markhams, through their agent, set up a September 12 meeting with Mr. Bradley to discuss their financial information, (2) Mr. Bradley was aware of the meeting and its purpose and had lead the Markhams and Norton to believe that he was the only contact person for the sellers, (3) Mr. Bradley did meet briefly with the Markhams and their real estate agents on September 12, but when Mr. Markham tried to present the financial paperwork, Mr. Bradley refused to take the documents and said that he did not want anyone to talk to him about it for "a couple of weeks," and (4) despite being the listing agent for the Property, Mrs. Bradley had never made herself available to discuss anything about the REPC prior to the deadline. By Mr. Bradley's statements and actions, and Mrs. Bradley's intentional and persistent unavailability, the Bradleys intentionally waived their known right as to the September 13 deadline. See *Soter's Inc. v. Deseret Fed. Sav. & Loan Ass'n.*, 857 P.2d 935, 940 (Utah 1993). Furthermore, due to Mr. Bradley's refusal to talk about the issue and Mrs. Bradley's refusal to make herself available, the Bradleys are estopped to rely on the September 13 deadline; it would be inequitable to allow the Bradleys to take advantage of their own obstructive and misleading conduct. The Court concludes that, under the totality of the circumstances, the Bradleys relinquished their contractual right to a strict adherence to the September 13 deadline. See also *IHC Health Servs., Inc. v. D&K Mgmt., Inc.*, 2003 UT 5, ¶ 7, 73 P.3d 320 (quoting *Soter's*, 857 P.2d at 942).

I. Based upon Mr. Bradley's angry attitude and his statement that a new meeting time, no sooner than "a couple of weeks," would be needed for him to receive the financial documents, it was both appropriate and reasonable for the Markhams and their real estate agents to not provide any financial documents, including a credit report, until such time as the new meeting time was set. It would have been a futile act for the Markhams and their real estate agents to continue to try to present the financial information to Mr. Bradley on Monday, September 13, after his angry refusal on Sunday afternoon. The Markhams were not required to do a useless act by making a further attempt to tender financial information on September 13. Furthermore, the Bradleys had accepted the REPC and Seller Financing Addendum without a Buyer Financial Information Sheet, thereby waiving the right to receive financial information in that particular form.

J. Instead of establishing a new date with the Markhams to receive their financial information as demanded by Mr. Bradley, the Bradleys sent a notice that the Markhams had failed to comply with the September 13 deadline, and therefore the Bradleys purported to cancel the REPC. This act by the Bradleys was in breach of the implied covenant of good faith and fair dealing, as they had already waived strict compliance with this deadline.

K. Because of the circumstances of receiving the September 20 cancellation letter, the Markhams felt rushed and pressed for time to assemble all financial information and complete a form to submit. In this rushed activity, the Markhams obtained a credit report from a company in California, sent it along with a financial information form that they had used in a prior transaction by hurriedly using white-out to be able to handwrite in up-to-date information

regarding their financial condition, and faxed all of this from their home fax machine to their realtor in an effort to provide the information as quickly as possible. This was sufficient to meet the REPC requirement to timely provide the financial information, including the credit report. To the extent this resulted in the “sloppy” appearance complained of by the Bradleys, the appearance was due, at least in part, to the Bradleys’ attempt to cancel the REPC rather than set up the new meeting as Mr. Bradley had demanded. However, the form of the financial information does not change the substance.

L. Paragraph 8 of the Seller Financing Addendum to the REPC states that the purpose of the credit report and the financial information to be provided by the Markhams was to allow the Bradleys to evaluate the “credit worthiness” of the Markhams. The provisions of paragraph 8.1 should not be read to create an unfettered right to cancel the REPC regardless of credit worthiness, because then the Bradleys would not have made a promise to perform anything and their promises under the REPC would be illusory. Therefore, the implied covenant of good faith and fair dealing required that the Bradleys, in evaluating the acceptability of the financial information and credit report, must do so in good faith and with regard to the merits of the information provided. Since paragraph 8 states that the purpose of evaluating the financial information is to determine the credit worthiness of the Markhams, the Bradleys were required, in good faith, to evaluate for that purpose and not merely go through the motions as a pretext and then cancel the REPC. Furthermore, the Bradleys were required to exercise their rights under the REPC in a way so as not to deny the Markhams the “expected benefit of [their] bargain.” See, e.g., *Olympus Hills Shopping Ctr. Ltd. v. Smith’s Food and Drug Ctrs., Inc.*, 889 P.2d 445, 450

(Utah App. 1994).

M. By the time the Bradleys had sent the first notice on September 20, 2004, they had determined they no longer wanted to sell the Property to the Markhams. Mrs. Bradley stated to Norton that she never wanted to sell the Property. Once the Bradleys received the financial information from the Markhams, their review of it was not done in good faith. Rather, it was an attempt to put form over substance, as shown by the following:

- i. Mr. Bradley testified that he expected the credit report to be from “Experian,” one of the three major credit reporting agencies, and not the “Landsafe” company shown on the front of the credit report, yet while on the witness stand, Mr. Bradley acknowledged that the credit report did show the Experian credit score on both of the Markhams and that the credit information was gathered from Experian.
- ii. The Markhams’ credit scores of 689 and 705 were sufficient for Countrywide to qualify the Markhams for a loan for twice the amount that the Bradleys agreed to finance. I conclude that it would not be objectively reasonable for the Bradleys to claim this as a ground to cancel the REPC.
- iii. The Bradleys both testified that one of the most important elements in their decision to reject the financial information was that it was handwritten on the form and looked sloppy and that they would not present such a sloppy form to anyone in seeking credit for themselves, yet they testified that they had no objection to the information on the report

showing the Markhams' monthly income or their net worth or their credit scores. I conclude that this objection to the form or appearance of the Markhams' papers had nothing to do with the merits of the information provided to them, so that it was objectively unreasonable for the Bradleys to reject the Markhams' financial information on this basis.

- iv. The Bradleys also testified that they had a concern as to whether the Markhams could meet a monthly payment obligation if they could not meet the REPC deadline to furnish the financial information, yet the Markhams had shown the Bradleys that the Bradleys would not need to carry the note for any extended period of time, as the Markhams had lined up Countrywide to immediately pay off the seller financing, completely eliminating that claimed concern.
- v. The credit report shows only four historical delinquencies, all being only 30-day delinquencies, and two of them showing the last delinquency date in 2003 and two of them showing the last delinquency date in 2001, which is a very small and insignificant number of delinquencies in comparison to the many timely payments.
- vi.. In the "Notice of Cancellation" from their attorney, the Bradleys' only specific comment on the merits of the Markhams' credit-worthiness was as to "the admission of bankruptcy or judgment." The evidence established that Countrywide did not consider this ten- or twelve-year-old bankruptcy

to disqualify the Markhams from a loan for twice the amount that the Bradleys agreed to finance. Furthermore, Mrs. Bradley's broker testified that she never mentioned a bankruptcy to him until just before their depositions were taken. I conclude that it was not objectively reasonable for the Bradleys to claim this as a ground to cancel the REPC.

N. It was unreasonable for the Bradleys to reject the Markhams' credit worthiness based on the documents presented to them. The Bradleys did not rely on credit worthiness issues. Rather, their "evaluation" was a pretext to cancel the REPC because they had already changed their minds about selling. This was in breach of the implied covenant of good faith and fair dealing.

O. The REPC included the Seller Financing Addendum with its standard language giving the Markhams the right to pay the full seller-financed amount prior to maturity without penalty. The Bradleys did not counteroffer or otherwise require any change to this provision to mandate that they be able to collect interest over a period of time for an investment purpose. Therefore, the Bradleys did not have any contractual expectation to receive payments over a period of time or to collect any interest on the note. The Markhams had the right to pay off the amount to be seller financed as early as they wanted, and to do so without penalty. It is a breach of the "without penalty" clause and a breach of the implied covenant of good faith and fair dealing for the Bradleys to refuse to close when they could have received a full payment of the amount of seller financing at closing or soon thereafter, whichever they wished.

P. It was unreasonable for the Bradleys to reject the Markhams' financial

information on the basis of a conclusion that the Markhams would pose an unreasonable credit risk, for seller-financing of less than one-half of the purchase price of the Property, after the Markhams would have paid more than one-half of the purchase price in cash. Therefore, the Bradleys also breached the implied covenant of good faith and fair dealing by unreasonably and improperly rejecting the financial information and refusing to close.

Q. The Bradleys have breached the REPC and the Markhams have requested and are entitled to the remedy of specific performance. Real estate is assumed to possess the necessary qualities to impose specific performance. Specific performance has long been recognized as an appropriate remedy in Utah when a seller of real property refuses to convey the property at issue to the buyer. *Kelley v. Leucadia Fin. Corp.*, 846 P.2d 1238, 1242 (Utah 1992). Furthermore, the REPC specifically provides for the remedy of specific performance to the Markhams. In addition, the unique aspects of the Property include:

- i. The Property was already subdivided into three (3) parcels, which the Markhams were interested in using for their mother and a brother to be able to join them on the Property.
- ii. The Property has horse corrals already on it and is zoned for the use of horses.
- iii. There is a pond on the Property.
- iv. There is a total of 8.25 acres.

R. Under the terms of the REPC, the Markhams are entitled to recover their attorneys' fees and costs incurred in these proceedings, and furthermore are entitled to have

attorneys' fees and costs offset against the final purchase price to be paid. The Markhams should submit a bill of costs and an attorneys' fee affidavit pursuant to the Utah Rules of Civil Procedure, and the final judgment will be entered after determining the amount of attorneys' fees and costs to be offset against the purchase price of \$550,000.00.

S. Had the Bradleys acted reasonably in evaluating the Markhams' credit score and financial information, they would have had approximately 30 days prior to closing to move out of the Property. Therefore, it would be fair and equitable for the judgment in this matter to also include that closing will occur within 30 days of the entry of the judgment.

T. The Markhams also obtained a Temporary Restraining Order and Preliminary Injunction and the Bradleys stipulated to its terms. Under its terms, the Bradleys were prohibited from bringing any material onto the Property for any reason or for any type of excavation or grading work.

U. In violation of the Court's order, the Bradleys brought approximately 300 truckloads of dirt, debris, and rock onto the Property. Furthermore, after being advised of this violation and request being made to have the rock and debris removed, the Bradleys continued to store the debris on the Property and refused to remove all of the debris, only starting to finally remove some of the material in the few weeks just prior to trial. Therefore, the Court concludes that the Bradleys are in contempt of court, and the Markhams are entitled to their attorneys' fees relating to this contempt of court. Furthermore, given the potential cost for the removal of the debris, \$30,000.00 of the sales price should be held back in escrow from the sale proceeds until all of the rock and debris are removed. After closing of the sale, all costs incurred by the

Markhams to have the rock and debris removed should be charged against this escrow account, with invoices being submitted directly to the escrow company and the escrow company paying such invoices for the removal. Once the rock and debris have been removed and the Property restored to its former condition, any funds remaining in the \$30,000.00 hold-back should be turned over to the Bradleys. If the amount of the hold-back account is insufficient to cover all of the costs of the removal and restoration of the Property, the Markhams may submit a motion to the Court for further judgment against the Bradleys regarding any such additional costs.

V. Regarding the credibility of the witnesses, the Court concludes that the testimonies of Mr. Markham, Norton, and Shumway are credible, and the affidavits of Mr. Markham and Norton admitted into evidence are reliable.

W. The testimony of Mr. Bradley on the critical facts is not credible, but is unreliable. Mr. Bradley repeatedly testified under oath at his deposition, at a time only eight months after the events occurred, that he did not recall any of the specific facts and circumstances of his conversations with Mr. Markham or Norton, nor did he recall details of meetings. Then at trial, nearly sixteen months after the events occurred, Mr. Bradley testified that he remembered many details of these same conversations and meetings. I conclude that Mr. Bradley may have given false testimony at trial to fit a legal theory or that he withheld information and truthful responses during his deposition. In either event, I do not consider his most critical testimony, particularly about his own actions, to be credible.


X. In addition, Mr. Bradley's demeanor at the trial did not convey credibility.

Y. Mrs. Bradley's testimony lacks credibility as well. To the extent it has credibility,

she does not have any personal knowledge regarding the critical aspects of the Bradleys' waiver, and her other testimony is not sufficiently credible to refute the testimony of Norton and Mr. Markham, the admitted documentary evidence regarding the Markhams' credit worthiness, or the evidence that it was unreasonable and in bad faith for her and Mr. Bradley to refuse to sell the Property.

Z. Judgment should be entered in favor of the Markhams against the Bradleys consistent with these Findings of Fact and Conclusions of Law, as well as finding the Bradleys in contempt of court. The Markhams should be awarded their attorneys' fees and costs as established by affidavit.

DATED this 14<sup>th</sup> day of March, 2006.


  
G. RAND BEACHAM, District Court Judge

CERTIFICATE OF DELIVERY

I hereby certify that on this 14 day of March, 2006, I provided true and correct copies of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to each of the attorneys/parties named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah:

Russell S. Mitchell  
Attorney for Plaintiffs

Aaron D. Randall  
Attorney for Defendants

  
DEPUTY CLERK OF COURT