1993

Farrell G. Forsberg and Vicki A. Forsberg v. Burningham and Kimball, a Utah general partnership, Christensen and Kimball, a Utah general partnership as partner of Burningham and Kimball; Victor M. Kimball, individually and as general partner of Christensen and Kimball: Brief of Appellee

Utah Court of Appeals

Duane R. Smith; Attorney for Defendants/Appellants/Cross-Appellees.
Harold A. Hintze; Attorney for Plaintiffs/Appellees/Cross-Appellants.

IN THE UTAH COURT OF APPEALS

FARRELL G. and VICKI A. FORSBERG, Plaintiffs/Appellees, Cross-Appellants, vs. BURNINGHAM & KIMBALL, a Utah general partnership, CHRISTENSEN & KIMBALL, a Utah general partnership as partner of Burningham & Kimball; VICTOR M. KIMBALL, individually and as general partner of Christensen & Kimball, Defendants/Appellants, Cross-Appellees.	Case No. 93-0418-CA Priority No. _____

BRIEF OF APPELLEE

APPEAL FROM A FINAL JUDGMENT
ISSUED BY THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY
HONORABLE MICHAEL R. MURPHY

HAROLD A. HINTZE (A-1499)
Eagle Gate Tower, Suite 1680N
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 355-7900

Attorney for Plaintiffs/
Appellees/Cross-Appellants

DUANE R. SMITH (A-2996)
310 South Main Street
Suite 1330
Salt Lake City, UT 84101
Telephone: (801) 521-6383

Attorney for Defendants/Appellants/
Cross-Appellees

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Salt Lake City, UT 84101
Telephone: (801) 521-6383

Attorney for Defendants/Appellants/
Cross-Appellees

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JURISDICTION OF APPELLATE COURT

This is an appeal and cross-appeal from a final judgment entered on January 14, 1993 by the Honorable Michael R. Murphy. The Utah Court of Appeals has jurisdiction pursuant to UTAH CODE ANN. §78-2a-3(2)(k) (1993).

ISSUES PRESENTED FOR REVIEW

The issues before this Court involve the initial appeal by BURNINGHAM & KIMBALL, CHRISTENSEN & KIMBALL, VICTOR M. KIMBALL and SPECTRUM DEVELOPMENT (hereinafter collectively referred to as "KIMBALL") and the cross-appeal by FARRELL G. and VICKI A. FORSBERG (hereinafter "FORSBERGS"). The issues raised by the appeal and cross-appeal are:

1. Whether the Trial Court's factual finding regarding negligent misrepresentation are supported by the evidence.

2. Whether there is an implied warranty of habitability in the state of Utah.

3. Whether the Trial Court erroneously adopted and applied a restrictive interpretation of the scope of the implied warranty of habitability.

4. Whether the Trial Court improperly found that the express one-year builders' warranty contained in the Earnest Money Sales Agreement had been waived.

The first issue involves the Trial Court's finding of fact. The next two issues involve conclusions of law, and the Trial

Court's factual findings on those issues are not in question on this appeal. The final issue involves the Trial Court's legal conclusion based on facts that were presented to it, but on which the Trial Court did not make specific findings of fact.

STANDARD OF REVIEW

The Court should give all defence and reasonable inference to all findings of fact made by the trial court following a plenary trial. The Court should review for correctness those conclusions of law reached by the trial court. Utah State Coalition of Senior Citizens v. Utah Power & Light Co., 776 P.2d 632, 634 (Utah 1989); English v. Kienke, 774 P.2d 1154, 1156 (Utah App. 1989).

DETERMINATIVE LAW
(NONE)

STATEMENT OF THE CASE

The only factual findings in issue on appeal relate to the finding of negligent misrepresentation. On cross-appeal facts concerning the Earnest Money Sales Agreement are reviewed. Therefore, only facts relevant to these issues are presented here. All other issues on appeal involve conclusions of law.

1. KIMBALL purchased approximately 20 lots in the Benchmark subdivision in 1985, or 1986. (R. 2048)

2. To help facilitate the sale of the lots, KIMBALL decided to build a home on one of the "more difficult lots." (R. 2051)

3. During the construction of the home, dirt from the excavation of the footings was moved to the back of the property which covered some survey stakes marking the back corners of the lot. (R. 2099)

4. After the survey stakes were covered, but before FORSBERGS first saw the home, KIMBALL had poplar trees planted between the home and the GMAC building (a business down the hill to the west). The trees were planted without regard to the actual boundaries of the property. (R. 2101)

5. Once the home was completed, KIMBALL placed a large banner along the back porch, facing west, which read "For Sale." (R. 1698)

6. KIMBALL left a "FACT SHEET" on a counter in the home with the intent that prospective buyers would read it. (R. 2096)

7. The FACT SHEET contained information regarding certain qualities and elements of the home including a statement that the yard was "98′ x 102′, flat backyard with room for a pool." (Appendix 1)

8. A realtor, hired by KIMBALL, had prepared the FACT SHEET for use while the realtor listed the home. (R. 2093)

9. When the listing contract between the realtor and KIMBALL expired, KIMBALL blocked out the name of the real estate company and continued to use the same FACT SHEET. In addition to

removing the name of the realtor, KIMBALL specifically removed the statement at the bottom of the FACT SHEET warning "Reliable but not guaranteed information." (R. 2093, 2095)

10. When FORSBERGS first entered the home, they found a stack of fact sheets on the kitchen counter. They picked one up and read it as they walked through the home. (R. 1702-03)

11. Upon reading from the FACT SHEET that the yard was 98′ x 102′ with room for a pool, FORSBERGS were impressed that it was a spacious backyard. (R. 1710, 1712)

12. FORSBERGS′ next visit to the house was with KIMBALL. (R. 1713)

13. With no survey stakes to mark the back property line, FORSBERGS were having difficulty visualizing how big this "98′ x 102′, flat backyard" really was. FORSBERGS asked KIMBALL about the size of the yard. In confirming where the back boundaries were, KIMBALL assured FORSBERGS that the poplar trees were "within the property line." (R. 1718)

14. Before closing, FORSBERGS and KIMBALL signed an Earnest Money Sales Agreement in which KIMBALL gave an express "one-year builders′ warranty." (Appendix 2 p. 4, para.No. 6) or (Earnest Money Sales Agreement p. 4, para.No. 6)

15. Later, several months after closing, FORSBERGS discovered that the poplar trees were not "within the property,"

but were up to fourteen feet beyond the property boundary. (R. 1804)

16. After the trial, but before the Trial Court rendered its decision, KIMBALL filed a supplemental brief outlining their position regarding the "one-year builders' warranty" contained in the Earnest Money Sales Agreement. KIMBALL argued that Clause "B" and "O" both operated to make the warranty effective beyond the date of closing. (Appendix 3, p. 6, 7, 10) or (Defendant Spectrum Development Corporation's Memorandum of Points and Authorities Regarding Implied Warranty of Habitability p. 6, 7, 10)

17. Based on KIMBALL's position, the decision rendered by the Trial Court, and their own understanding of the Agreement, FORSBERGS included a statement in their proposed findings of fact that the express builders' warranty was effective beyond the closing date. (Findings of Fact and Conclusions of Law, Appendix 4 p. 2, para. 5)

18. In response to this, well after the Trial Court had rendered its decision, KIMBALL filed objections to the findings, now claiming that the express warranty did not apply. (Defendant Spectrum Development's Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law p. 2-3) or (Appendix 5, p. 2-3)

19. After a hearing regarding the express warranty on November 16, 1992, the Trial Court issued a Minute Entry on November 24, 1992 that objections to the plaintiffs' recovery under the express builders' warranty were sustained. The Trial Court made no reference to any facts or law presented. (Minute Entry of Nov. 24, 1992) or (Appendix 6)

SUMMARY OF THE ARGUMENT

There is sufficient testimony within the record supporting the Trial Court's finding of negligent misrepresentation by KIMBALL. It is the special duty of the trier of fact to determine which witnesses are credible and which are not. After hearing all of the testimony on the issue the trier of fact determined that FORSBERGS reasonably relied on KIMBALL's misrepresentation regarding the size of the yard of the home. When all of the evidence and testimony supporting this finding is marshalled, it is clear that there is adequate foundation for the finding of negligent misrepresentation.

The Trial Court also had ample evidence to calculate the damages caused by the negligent misrepresentation. Evidence admitted stated both an area map of the false representation of the backyard, and the actual dimensions of the backyard. By simply subtracting the area of the actual yard from the area that was represented the Court derived the area that FORSBERGS were told they were getting which they did not get. This area of land

has a value assessed by the square foot. Therefore the damages are easily calculated.

In addition, FORSBERGS cross-appeal the Trial Court's conclusions of law concerning the theory of implied warranty of habitability. Although FORSBERGS agree with the Trial Court that there is an implied warranty of habitability in the sale of new homes, the Trial Court did not properly apply the doctrine. As a matter of law, when a home is not built in a workmanlike manner which causes water to actually flow through the basement, snow to accumulate in the interior walls, and pipes inside the house to freeze and rupture in 26 places, the home is "uninhabitable." The Trial Court properly found that because the home was not built in a workmanlike manner these problems arose. However, the Trial Court improperly applied the law when it concluded that KIMBALL did not breach the implied warranty of habitability because the defects did not render the home "uninhabitable." Because the home was uninhabitable as a matter of law, FORSBERGS should be reimbursed the amount of money spent to bring the home up to a level of habitability.

In addition to the implied warranty, there was an express builders' one-year warranty against defects in workmanship. This express warranty exists as an express part of the Earnest Money Sales Agreement and is not included in the implied warranty of habitability. Even if this Court decides that, as a matter of

law, the home was habitable, the Trial Court's findings clearly show that the home was not built in a workmanlike manner. Because the defects complained of were discovered within the first year, they fall within this express warranty. Even KIMBALL has argued that this warranty was intended to apply. In discounting this express warranty, the Trial Court made no findings of fact, nor did it refer to any conclusions of law. The Trial Court's decision is not supported by the evidence, is contrary to KIMBALL's own admissions, and is contrary to Utah law. Therefore, this ruling should be reversed and the express builders' warranty should be held to apply.

ARGUMENT

I.

THE TRIAL COURT'S FINDING OF NEGLIGENT MISREPRESENTATION IS WELL SUPPORTED BY THE EVIDENCE AND SHOULD BE AFFIRMED.

The Trial Court's findings are not clearly erroneous, but are solidly founded in the evidence. The Utah Rules of Civil Procedure state that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses." Utah R.Civ.P. 52(a). The Utah Supreme Court explained how this is to be applied in Grayson Roper LTD. v. Finlinson, 782 P.2d 467 (Utah

1989). "To successfully attack a trial court's findings of fact, an appellant must first marshal all the evidence in support of the findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack under the rule 52(a) standard." Id. at 470 (emphasis added).

The Utah Supreme Court gave further instructions on how to apply the rule 52(a) standard in Reed v. Reed, 806 P.2d 1182 (Utah 1991). In Reed the Court stated:

> It is the province of the trier of fact to assess the credibility of witnesses, and we will not second-guess the trial court where there is a reasonable basis to support its findings. In order to challenge the court's findings of fact, the defendant must marshal all of the evidence in favor of the findings and then demonstrate that even when reviewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings. Id. at 1184 (footnote omitted) (emphasis added).

This standard has been summed up in Gillmor v. Wright, 850 P.2d 431 (Utah 1993) as the "clearly erroneous" standard. The Gillmor court stated:

> We review these findings of fact under the clearly erroneous standard. Appellants must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the findings are so lacking in support that they are against the clear weight of the evidence, thus clearly erroneous. Id. at 433.

Therefore, appellants must marshal all the evidence that supports, either directly or by inference, the findings of the trial court. Appellants must go further than merely showing that

testimony exists which is contrary to a trial court's findings. This did not happen in the case at bar. In the instant case, KIMBALL makes many references to Appellee's testimony on direct and cross examination, but omits Appellant's testimony from the first day of trial. This crucial testimony is included below.

KIMBALL claims three factual findings are in error: First, whether there was a misrepresentation concerning the size of the yard (Findings of Fact and Conclusions of Law (hereinafter "Findings") p. 5, para. No. 25); Second, whether the FORSBERGS reasonably relied on the misrepresentation (Findings p. 5, para. No. #26); Third, whether the yard size was actually smaller than what was represented causing $21,767.90 in damages (Findings p. 5, para. No. 27). Additionally, KIMBALL claims that the credibility of witnesses is not an issue because the witnesses "essentially agreed on the major points." (Brief of Christensen & Kimball and Victor M. Kimball p. 25)

The credibility of the witnesses is critical because FORSBERGS and KIMBALL disagree in testimony concerning the one pivotal point of the negligent misrepresentation issue. That point is whether KIMBALL told FORSBERGS the poplar trees were "within" the property. Dr. Forsberg stated that Kimball told him the property line was "beyond the trees." (R. 1718) Kimball testified that he did not tell Forsberg that the trees were on the property. (R. 1163). It is reasonable, therefore, to infer

that the court found Forsberg's testimony more credible than Kimball's.

That inference is important as the rest of the evidence is analyzed, for it highlights the importance of Kimball's testimony from cross examination which was omitted in KIMBALL's brief. First, there was evidence concerning the size of the yard. There are two important representations dealing with the size of the yard. First, the FACT SHEET which stated that the yard size was "98' x 102', flat back yard with room for a pool." (Appendix 1). Second, KIMBALL gave a verbal representation to FORSBERGS regarding the size of the yard. Dr. Forsberg testified on direct exam that:

Question: Did you have some discussion with Mr. Kimball about those poplar trees?

Answer: Yes, I did.

Question: Tell us what you said and what he said, as best you can.

Answer: Well, I was trying to confirm the boundaries of the backyard, and I asked him about the poplar trees. And he related to me that the poplar trees were a reflection of the backyard, roughly the back west boundary of the yard. In further pursuing that --

Question: Go ahead. In further pursuing that, did he describe it in any other way?

Answer: He described that the poplars -- because there were no landscape markers there, I was concerned as to exactly where the back corners and back property lines were, and he assured me that the poplar trees were within the property of the residence for sale.

Question: Within the property?

Answer: Correct. (R. 1718, L. 2-21)

On cross-examination, Dr. Forsberg continued to give similar testimony that he was told that the property line was somewhere beyond the trees. (R. 1813-14)

The FACT SHEET and this testimony are adequate, even plentiful to show that the Trial Court properly found that there was a representation regarding the exact size of the property. KIMBALL has not met its burden of proving the Trial Court's finding is "clearly erroneous." The second finding in question is whether it was reasonable for FORSBERGS to rely on the representations about the yard size. This finding centers on the law regarding the duties of each party in a sale of property to know the size of the property being sold. In Dugan v. Jones, 615 P.2d 1239 (Utah 1980) the Utah Supreme Court detailed the duties of the different parties to the sale of property. A vendor of property, the Appellants in the case at bar, has "a special duty to know the truth of his representations or where the nature of the situation is such the vendor is presumed to know the facts to which his representation relates, a misrepresentation is fraudulent even though not made knowingly, willfully or with actual intent to deceive." Id. at 1246 (emphasis added).

The Dugan court further explained the right of the purchaser to rely on the assertions made by the vendor, stating:

In the Restatement, Torts 2nd, Sec. 538A, Comment e, p. 84, it is stated:

> "Quantity as a fact. A statement of the quantity of either land or chattels is a statement of fact. A purchaser of either is entitled to assume that the vendor knows the acreage of the land or the quantity of a lot of goods that he is selling. This is true although the vendor's statement does not assert or imply that it is based upon a survey of the land or a measurement, weighing or count of the goods."

> Furthermore, a vendee of real property, in the absence of facts putting him on notice, has no duty to investigate to determine whether the vendor has misrepresented the area conveyed. Neither is a vendee estopped from recovering for misrepresentation of the area of the land conveyed merely because he viewed or inspected the premises, so long as he did not endeavor to determine independently the exact quantity of land. Nor is a vendee estopped from recovering in an action for deceit because he had the opportunity to inspect or otherwise check the property prior to purchase. Id. at 1246-47 (footnotes omitted) (emphasis added).

This case shows that a builder, or vendor, has a duty to know whether his representations are truthful. This means the vendor has the duty to investigate to learn the truth of his representations. This case also shows that a buyer has the right to assume that the vendor has been truthful in his representations, unless there are facts which should put the buyer on notice. The fact that vendor does not do his duty to investigate is not sufficient to put a buyer on notice, or this simple omission would completely destroy the rule.

In the instant case, KIMBALL made a specific representation in the FACT SHEET regarding the size of the yard. Additionally,

KIMBALL removed the one statement from the FACT SHEET that may have actually put FORSBERGS on notice. KIMBALL testified:

> Question: And you took this fact sheet and blocked out or whited out or covered up the Ramsey Group name at the bottom and put in your brother's name at the bottom; correct?
>
> Answer: Yes. We removed a statement at the bottom, along with their name, that said, "Reliable but not guaranteed information," along with their name.
>
> Question: Sorry?
>
> Answer: Apparently at the bottom, from what I have been told, is that there was a statement that said, "This information is reliable but not guaranteed", and then the Ramsey Group. [question] Who told you that?
>
> Answer: Linda Wolcott told me that.
>
> Question: But you covered that up and put your name and Dave Kimball?
>
> Answer: Yes. (R. 2095, L. 12-25; R. 2096, L. 1-2)

Furthermore, this FACT SHEET was titled "FACT SHEET," not "General Information Sheet" or some other title. The title itself conveys an assurance that what is in the sheet is true. There is no notice within the title to alert FORSBERGS that the information is false or just a guess, just the opposite is true! It is reasonable for the Trial Court to infer from this that FORSBERGS were not on notice, and, therefore, had no duty to investigate further.

Additionally, the Dugan court puts a duty on the seller to know the size of his property. In the instant case, KIMBALL is a

licensed real estate broker. (R. 1200) He is experienced in the business of selling and developing homes. However, he failed in this duty to know the boundaries as shown by his direct examination:

> Question: At any time during the time that you were attempting to sell this home, Mr. Kimball,did you know where the specific corners of the lot were?
>
> Answer: I did not know where the back corners of this lot were. I believe in the front of the house there were nails driven into the sidewalk or into the gutter denoting the front line. (R. 1161, L. 17-23)

Furthermore, it was KIMBALL's desire that FORSBERGS rely on the information in the FACT SHEET. KIMBALL Appellants used the FACT SHEET with its reference to the size of the backyard for the express purpose of conveying information to prospective buyers when he was not at the home. In KIMBALL's own testimony during cross examination we learn:

> Question: (By Mr. Hintze) What was the purpose of that fact sheet, Mr. Kimball?
>
> Answer: To give general information as to the home.
>
> . . .
>
> Question: Did you intend that prospective buyers would look at this fact sheet?
>
> Answer: Yes.
>
> Question: And it was so disseminated for that purpose; right?
>
> Answer: Yes. (R. 2095, L. 1-3; R. 2096, L. 16-21)

This is exactly what happened. When FORSBERGS first entered the home they picked up a FACT SHEET and read it, as shown by Appellee Dr. Forsberg's testimony:

> Question: Okay. What transpired?
>
> Answer: We gained entry through the front door and walked through the house.
>
> Question: And let me ask you first of all, did you obtain a copy of a document called the fact sheet?
>
> Answer: Yes. We did.
>
> . . .
>
> Question: Did you read it? Did you personally read it as you went through that walk-through?
>
> Answer: Yes, we did. (R. 1702, L. 1-6, 25; R. 1703, L. 1-2).

Although there was nothing on the FACT SHEET to indicate to FORSBERGS that it contained false information, they did investigate further. When they were in the home with KIMBALL, they questioned him about the size of the backyard. Appellee Dr. Forsberg testified that "I was concerned as to exactly where the back corners and back property lines were, and he [Victor Kimball] assured me that the poplar trees were within the property of the residence for sale." (R. 1718). FORSBERGS had no reason to doubt Mr. Kimball, or question whether he had told them the truth.

FORSBERGS had read the FACT SHEET as to the size of the yard, but were not sure just how big that was. Upon questioning

Appellant, whom they rightfully presumed would know, they were given false information upon which they relied. FORSBERGS did not ask KIMBALL "How far is 98 feet from here?" They did not have to. FORSBERGS presumed that KIMBALL knew what was on the FACT SHEET as well as they did. Therefore, they asked for some type of visual reference point. KIMBALL gave them that reference point, indicating a row of poplar trees he had planted. Once the reference point was given, FORSBERGS presumed that KIMBALL was correct.

KIMBALL erroneously argues that FORSBERGS were on notice and had a duty to investigate further. However, the only fact that KIMBALL uses to support this claim is that it was clear that KIMBALL did not know how big the backyard was, or the location of the back boundary. Since KIMBALL had the duty to investigate and learn the truth of his representation, the Trial Court properly found that this was not sufficient notice to shift the duty to investigate to FORSBERGS. Any other conclusion would defeat the finding of Dugan that the vendor has a "special duty to know the truth of his representation."

The final part of the Trial Court's finding of negligent misrepresentation called into question is the issue of proper damages. The Dugan Court set out in clear and plain language the proper measure of damages stating "[t]he proper measure of damages in an action for fraud and deceit is the difference

between the value of the property purchased and the value it would have had if the representations were true, viz., the benefit of the bargain rule." Dugan, 615 P.2d at 1247.

This is the very formula that the Trial Court used. The backyard was represented as "98' x 102'" which calculates to 9,996 square feet. FORSBERGS did not receive a backyard that was 98' x 102'. Appellant Victor Kimball testified that the yard was not that large:

Question: Right. Now, is the back yard of this house 98 by one hundred two?

Answer: The back yard itself?

Question: Yes.

Answer: No, it's not. It's 98 from the front to the back on each of the --

Question: I understand what you're -- just respond to my question. Just respond to the question I ask. I understood that the entire dimensions of the -- I understood that's the entire dimensions of the lot. But this doesn't say it's describing the lot, does it?

Answer: No. It says "Yard Size". (R. 2098, L. 14-25)

On cross-examination, Dr. Forsberg similarly testified:

Question: You have testified earlier that the yard as presented by Mr. Vic Kimball had something to do with these poplar trees, I guess; is that correct?

Answer: That's correct.

Question: And how far beyond the actual property line were those poplar trees?

Answer: They were -- the representations of my measurements there on this poster, and they vary

from anywhere from three to four feet on the northeast to approximately fourteen to fifteen feet.

Question: And fourteen to fifteen feet here in the center?

Answer: Correct. (R. 1804, L. 3-15)

Later, after the backyard was surveyed, Dr. Forsberg measured the size of his backyard. This measurement was roughly drawn to scale on a diagram that the Trial Court accepted as Exhibit P-34. (R. 1721-22). From these measurements, FORSBERGS calculated that the back yard was actually only 4,342 square feet. If the representation of the FACT SHEET had been true, FORSBERGS would have received another 5,654 square feet of property. At the time of the sale, the property was valued at $3.85 per square foot. Damages of $21,767.90 is calculated by multiplying 5,368 square feet by $3.85 per square foot.

As this Court reviews this evidence, and applies the "clearly erroneous" standard as set forth, it must affirm the Trial Court's finding of negligent misrepresentation. None of the Trial Court's findings "are so lacking in support that they are against the clear weight of the evidence." Rather, each finding is well supported by the evidence, and reasonable inferences drawn therefrom.

II.

AN IMPLIED WARRANTY OF HABITABILITY IS GROUNDED IN SOUND PUBLIC POLICY AND SHOULD BE ADOPTED BY THE UTAH COURTS.

Utah should join with its sister states and adopt the warranty of habitability in the sale of new homes. Utah is one of the few states which has not addressed the issue and adopted the warranty. (Cf. Wade v. Jobe, 818 P.2d 1006 (Utah 1991); P.H. Inv. v. Oliver, 818 P.2d 1018 (Utah 1991).) Recently the Nevada Supreme Court adopted the warranty in Radaker v. Scott, 855 P.2d 1037 (Nev. 1993). Commenting on the prevalence of the warranty, it stated "At least thirty-eight of the forty-one states which have addressed the issue of whether a builder/vendor impliedly warrants habitability have ruled in favor of the warranty. Of the thirty-eight states embracing the warranty, only Maryland has done so through the legislative process." Id. at 1042.

A quick review of the reasoning of several of the courts which have adopted the warranty reveals a natural conclusion to adopt the warranty. Nevada discovered this stating "We agree with the virtual consensus among courts in our sister states that the implied warranty of habitability reflects a naturally expected and sound public policy. We accordingly recognize and adopt the warranty in this jurisdiction." Id. At least thirty-

nine states have now adopted the warranty including Nevada supra, Idaho[1], Montana[2], Wyoming[3], Colorado[4], Arizona[5], and California[6].

A. A warranty of implied habitability is needed to protect the public

One of the main purposes of the warranty, as shown by its history, is to put liability on the person who has the most expertise and ability to make certain of the quality. The history of the warranty has been stated by many courts. The Illinois Supreme Court summed it up in Redarowicz v. Ohlendorf, 441 N.E.2d 324, 328 (Ill. 1982):

> The implied warranty of habitability was first recognized in the English case of Miller v. Cannon Hill Estates, Ltd. (1931), 2 K.B. 113. The court said that in the purchase of an unfinished house the builder was aware that his buyer intended to live in the house and therefore impliedly warranted that it would be suitable for that purpose. (2 K.B. 113.) In 1957 an Ohio court in Vanderschrier v. Aaron (1957), 103 Ohio App. 340, 140 N.E.2d 819, applied the Miller rule for the first time in the United States. In 1964 the Colorado Supreme Court extended the implied warranty to a completed house. Carpenter v. Donohoe (1964), 154 Colo. 78, 388 P.2d 399.

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[1]Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966).

[2]Chandler v. Madsen, 642 P.2d 1028 (Mont. 1982).

[3]Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975).

[4]Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1961).

[5]Richards v. Powercraft Homes, Inc., 678 P.2d 427 (Ariz. 1984).

[6]Pollard v. Saxe & Yolles Development Co., 525 P.2d 88 (Cal. 1974).

Many cases also refer to the demise of the doctrine of caveat emptor as applied to the sale of new homes in explaining why the implied warranty should be effective. This was summarized in Chandler v. Madsen, 642 P.2d 1028 (Mont. 1981). There the Montana Supreme Court stated:

> Caveat emptor, which traditionally has applied to sales of real estate, developed at a time when a buyer and seller were in equal bargaining positions. They were of comparable skill and knowledge and each could protect himself in a transaction.
>
> In the modern marketplace that equality of position no longer necessarily exists, and a growing number of jurisdictions have abandoned caveat emptor in favor of implied warranties where a builder-vendor sells a new residence. [Citations]
>
> . . .
>
> The doctrine of caveat emptor no longer serves the realities of the marketplace. Therefore we hold that the builder-vendor of a new home impliedly warrants that the residence is constructed in a workmanlike manner and is suitable for habitation. Id. at 1031 (citations omitted).

The Utah Supreme Court has already acknowledged this demise of caveat emptor, stating "[i]n this state, it is apparent that the rule of caveat emptor does not apply to those dealing with a licensed real estate agent." Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980). From Dugan, it is a small step for Utah to reach an implied warranty of habitability in the sale of new homes.

Courts have taken this changed view for good reason, it is good public policy. As the Illinois court explained:

> The warranty of habitability is a creature of public policy. It is a judicial innovation that has evolved to protect purchasers of new houses upon discovery of latent defects in their homes. While the warranty of habitability has roots in the execution of the contract for sale, we emphasize that it exists independently. Redarowicz, 441 N.E.2d at 330 (citations omitted).

In Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975), the Wyoming Supreme Court gave the reason at the core of this public policy. The Tavares court stated:

> Building construction by modern methods is complex and intertwined with governmental codes and regulations. The ordinary home buyer is not in a position, by skill or training, to discover defects lurking in the plumbing, the electrical wiring, the structure itself, all of which is usually covered up and not open for inspection.
>
> A home buyer should be able to place reliance on the builder or developer who sells him a new house. The improved real estate the average family buys gives it thoughtful pause not only because of the base price but the interest involved over a long period of time. This is usually the largest single purchase a family makes for a lifetime. Id. at 1279 (emphasis added).

In other words, this warranty is based on the relationship between the builder and the buyer of the home.

The Colorado Supreme Court realized this in Sloat v. Matheny, 625 P.2d 1031, 1033 (Colo. 1981) (emphasis added) stating "[t]he position of the builder-vendor, as compared to the buyer, dictates that the builder bear the risk that the house is fit for its intended use."

The Colorado Court continued:

> These implied warranties are also consistent with the expectations of the parties. "Clearly every builder-

> vendor holds himself out, expressly or impliedly, as having the expertise necessary to construct a livable dwelling. It is equally as obvious that almost every buyer acts upon these representations and expects that the new house he is buying, whether already constructed or not yet built, will be suitable for use as a home. Otherwise there would be no sale." McDonald v. Mianecki, supra. See also Pollard v. Saxe & Yolles Develop. Co., 12 Cal.3d 374, 525 P.2d 88, 115 Cal.Rptr. 648 (1974); Duncan v. Schuster Graham Homes, Inc., supra; Petersen v. Hubschman Const. Co., Inc., supra. Another rationale for the rule is to "inhibit the unscrupulous, fly-by-night, or unskilled builder and to discourage much of the sloppy work and jerry building that has become perceptible over the years." Capra v. Smith, 372 So.2d 321, 323 (Ala. 1979) (Id.)

Other courts have agreed. "The court reasoned that the skill and integrity of the builder-vendor is relied upon by the purchaser who is not capable of making a meaningful inspection of the house." Redarowicz, 441 N.E.2d at 329. The Illinois court further declared "[i]f construction of a new house is defective, its repair costs should be borne by the responsible builder-vendor who created the latent defect." Id. at 330.

Arizona added "[t]he guiding principle of Richards v. Powercraft is that innocent purchasers should be protected and builders held accountable for their work." Nastri v. Wood Bros. Homes, Inc., 690 P.2d 158, 161 (Ariz.App. 1984) (emphasis added). The Montana Supreme Court stated:

> The concept here is not one of fault or wrong-doing but, rather, where one of two innocent parties will suffer, which was in the better position to prevent the harm?
>
> Whether or not there was reason for Madsen to suspect the problem, as the builder-vendor he clearly

was in the better position to prevent the problem. Chandler, 642 P.2d at 1032.

A review of these cases reveals several key factors to this public policy of impliedly warranting habitability. First, habitability is the basis of the bargain between the builder-vendor and the buyer. Second, the builder-vendor is in a superior position over the buyer in technical knowledge as well as knowledge of the defects. Third, the builder-vendor is in the best position to prevent the defects through proper workmanship. Fourth, the builder-vendor is in the best position to bear the risk that the home is fit. Fifth, it is necessary to protect buyers from unscrupulous builder-vendors.

Now, more than ever, Utah needs to acknowledge the warranty of habitability. Although this is a policy good for all times, there is a particular vulnerability among buyers at this time. New homes are being sold nearly as fast as they are built. This leaves the door open for the "fly-by-night" and other unscrupulous builder-vendors to take advantage of buyers. The average buyer does not have the technical skill and knowledge of the average builder-vendor. Without the implied warranty of habitability there is no route of recovery, or method of protection for the buyer. This Court should adopt the implied warranty of habitability doctrine in the sale of new homes.

B. This Court should adopt a broader view of the scope of the implied warranty of habitability than that acknowledged by the Trial Court.

Only a view broader than mere "livability" encompasses all of the public policy concerns that are at the heart of the implied warranty of habitability. Determining the scope of the warranty is a legal conclusion. "When reviewing the district court's conclusions of law, we give no deference to the court but review those conclusions for correctness." Reed, 806 P.2d at 1184-85. Therefore, this Court is not bound by the Trial Court's narrow and restrictive view in interpreting the implied warranty of habitability, but should apply the view that best fits the policy reasons for adopting the warranty.

The scope of the warranty is directly tied to the meaning of the term "habitability." Some courts have viewed this to mean that if it is at all possible to live in the structure, it is habitable. However, other courts give a broader interpretation. Illinois has done this, stating "[i]n defining the scope of the warranty the court found that the house must be reasonably suited for its intended use and not simply inhabitable." Redarowicz, 441 N.E.2d at 329 (emphasis added). Before reaching its own conclusion regarding the scope of the warranty, an Arizona court explained how Illinois rejected a narrow interpretation of "habitable," stating:

The first, Goggin v. Fox Valley Construction Corp., 48 Ill.App.3d 103, 38 Ill.Dec. 271, 365 N.E.2d 509 (1977) contains the following holding:

> The primary function of a new home is to shelter its inhabitants from the elements. If a new home does not keep out the elements because of a substantial defect of construction, such a home is not habitable within the meaning of the implied warranty of habitability. . . .

We do not agree with this strict standard and neither does the Supreme Court of Illinois. That court expressed its disagreement in Petersen v. Hubschman Construction Co., supra.

> . . . The mere fact that the house is capable of being inhabited does not satisfy the implied warranty. The use of the term "habitability" is perhaps unfortunate. Because of its imprecise meaning it is susceptible of misconstruction. It would more accurately convey the meaning of the warranty as used in this context if it were to be phrased in language similar to that used in the Uniform Commercial Code, warranty of merchantability, or warranty of fitness for a particular purpose. 389 N.E.2d at 1158. Nastri v. Wood Bros. Homes, Inc., 690 P.2d 158, 162-3 (Ariz.App. 1984) (emphasis added).

The Arizona court concluded that the warranty is one "of workmanship and habitability. We believe that to be the law in our state, i.e., that there is no distinction except insofar as the extent of the damage arising from latent defects may be greater if the home has actually become unlivable." Id. at 163.

The Colorado Appellate Court took the same view in Roper v. Spring Lake Development Co., 789 P.2d 483 (Colo.App. 1990). After reviewing several cases it stated:

> These cases strongly indicate that prior case law did not require the buyer to prove both that the house was not built in a workmanlike manner and that it was unsuitable for habitation. Thus, a buyer is entitled to relief based on the theory of implied warranty of habitability if he proves the house was not built in a workmanlike manner or that it was not suitable for habitation. Id. at 485 (emphasis added).

The Roper court then listed examples of when the warranty was breached for different types of defects in the home, stating:

> Courts in other jurisdictions have extended implied warranty of habitability to situations in which the house is defective or unhabitable for reasons other than the workmanship in constructing the house. See McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283 (1979) (well water not potable and bad odor present); Jeanguneat v. Jackie Hames Construction Co., 576 P.2d 761 (Okla. 1978) (bad well water); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966) (basement flooded periodically and offensive odor forced inhabitants to move out); Park v. Sohn, 89 Ill.2d 453, 60 Ill.Dec. 609, 433 N.E.2d 651 (1982) (water puddles formed in crawl space causing odors); Kirk v. Ridgway, 373 N.W.2d 491 (Iowa 1985) (peeling paint on exterior of house); Waggoner v. Midwestern Development, Inc., 83 S.D. 57, 154 N.W.2d 803 (1967) (high water table caused water to seep into basement); Hoye v. Century Builders, 52 Wash.2d 830, 329 P.2d 474 (1958) (continual discharge of raw sewage); Pickler v. Fisher, 7 Ark.App. 125, 644 S.W.2d 644 (1983). Id. (emphasis added).

In Deisch v. Jay (790 P.2d 1273, 1276 (Wyo. 1990)) the Wyoming Supreme Court also found that the home buyer may prevail by showing either poor workmanship or uninhabitability, stating "the implied warranty rule accommodates either a recovery of money damages for minor defects susceptible of remedy or rescission and restitution for major defects which render the house unfit for habitation and which are not readily remediable."

The Arizona Court of Appeals summed up this theory in one sentence, stating "it would be the height of cynicism to allow a shoddy builder to escape liability because his work was not shoddy enough." Nastri, 690 P.2d at 163.

This broader view is not unreasonable, nor does it unduly tax the ability of the builder-vendor. Perfection is not the standard. The Arizona court explained "The test for breach of that warranty is reasonableness, not perfection; the standard being, ordinarily, the quality of work that would be done by a worker of average skill and intelligence." Id. Simply stated, a worker of average skill and intelligence builds a home in a workmanlike manner. If facts of an individual case show that the home was not built in a workmanlike manner, then the worker of average skill and intelligence has breached the implied warranty of habitability.

It took several years for the Illinois' court to reach this view. Other courts like Arizona, Colorado, and Wyoming, as shown above, saw the strength of the broader view quicker because of the example of Illinois' experience. Similarly, this Court should not require Utah home-buyers to go through years of trials to establish that the scope of the warranty should be more than mere livability. It is plain that the policy reasons behind the warranty cannot be fully achieved unless this Court applies a broader standard than did the Trial Court. The implied warranty

of habitability was meant to protect against a broader range of defects due to poor workmanship than simply whether the person is driven from their home, or the home completely collapses. This Court should set forth this broader, proper interpretation of the implied warranty of habitability which encompasses the full power of the policy reasons creating it.

Under the theories described above, KIMBALL has breached the implied warranty of habitability. The Trial Court specifically found that FORSBERGS' home was not built in a workmanlike manner:

> 9. This flooding was the result of the Home not being built in a workmanlike manner sufficient to keep it watertight. (R. ____)
>
> 13. The burst water pipes were cause by a lack of workmanlike construction. (R. ___)
>
> 21. The painting of the exterior decks and railings was not done in a workmanlike fashion. (R.____)

This factual conclusion is not in dispute, the home was not built in a workmanlike manner.

This Court should adopt the view as stated in Roper above "a buyer is entitled to relief based on the theory of implied warranty of habitability if he proves the house was not built in a workmanlike manner . . .." That is, if the Trial Court finds that the house was not built in a workmanlike manner, it must find for the buyer as a matter of law. Therefore, as a matter of law, KIMBALL breached the warranty of habitability.

The Trial Court's conclusion that the implied warranty of habitability does not apply should be reversed, and FORSBERGS should be awarded damages incurred due to the poor workmanship. The damages stemming from the flooding, burst water pipes, and poor painting are set forth in the record:

> 1. The damages flowing from the failure to build the home in a workmanlike manner sufficient to keep it watertight are reflected in Exhibits 71 through 73 and Exhibit 64, plus a total of $450 attributable to time spent by the Plaintiff Farrell Forsberg, for a total of $10,591.21. All these costs are reasonable and were reasonably incurred.
>
> 2. With respect to the frozen and burst pipes caused by a lack of workmanlike construction, but for the insurance, Plaintiffs would have suffered damages as reflected in Exhibits P-46 through P-52, 57-62, and 66-70, totaling $5,169.92, all of which were reasonable in amount.
>
> 4. With respect to the flaking paint on the railings and the decks, this was not a latent defect. Nevertheless, for the eventuality of the Defendant being found liable for the painting defects, the cost to repair is reflected in Exhibit 44 and is the sum of $3,049.00 which the court finds reasonable and necessary.

The total of damages caused by the defects is $18,810.13. In other words, FORSBERGS had to spend an additional $18,810.13 in order to bring their home up to the level of a workmanlike product. KIMBALL promised, through the implied warranty of habitability, that they were selling a home built in a workmanlike manner, but they did not sell such a home. It will be a windfall to KIMBALL if they are not held responsible for their shoddy work.

This Court should give no deference to the Trial Court's conclusion of law, and reverse the finding that the implied warranty of habitability is limited to defects causing the home to be unlivable. This Court should follow courts such as Illinois, Arizona, Colorado, and Wyoming in interpreting the scope of the warranty to include defects caused when the home is not built in a workmanlike manner. In doing so, this Court will give the full meaning to the public policy on which the warranty is centered.

III.

THE TRIAL COURT IMPROPERLY CONCLUDED THAT FORSBERGS WAIVED THE EXPRESS BUILDER'S WARRANTY AND SHOULD BE OVERTURNED.

The Trial Court disregarded claims and admissions of both parties in finding a waiver of the express builders' warranty. This finding of the court is contrary to reasoned Utah law, and goes against the intent of both KIMBALL and FORSBERGS. "It is well settled that '[c]ontracts are to be construed in light of the reasonable expectations of the parties as evidenced by the purpose and language of the contract.' Nixon and Nixon, Inc. v. John New & Assocs., 641 P.2d 144,146 (Utah 1982)" HCA Health Serv. v. St. Mark's Charities, 846 P.2d 476 (Utah App. 1993). "The intent of the parties at the time they entered into the agreement controls the meaning of the written contract."

Founders Bank and Trust Co. v. Upsher, 830 P.2d 1355, 1361 (Okl. 1992).

In the case at hand, the Trial Court attempts to rewrite the contract between FORSBERGS and KIMBALL to exclude the one-year builder's warranty on workmanship. This goes against the intent of both parties, both as expressed in the Earnest Money Sales Agreement, and as expressed through the course of the trial. The Earnest Money Sales Agreement was accepted as Plaintiffs exhibit no. 28. These relevant sections are as follows:

> **B. INSPECTION** . . . Buyer accepts the property in "as-is" condition subject to Seller's warranties as outlined in Section 6.
>
> **O. ABROGATION.** Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.
>
> **6. SELLERS WARRANTIES.** In addition to warranties contained in Section C, the following items are also warranted: Seller to give a 1 year builders warranty on the entire home. (Appendix 2, p. 1, 4, 5)

There is no dispute between the parties that Sections B and O of the agreement were to preserve both section C and section 6 beyond closing. KIMBALL very carefully set out its position in this regard in a supplemental brief to the Trial Court after the trial was concluded.

After the trial, but before rendering its decision, the Trial Court requested some additional information on the implied warranty of habitability. KIMBALL filed a supplemental brief to the Trial Court to better set forth their position on this issue

(attached hereto as Appendix 3). In this final word to the Court, KIMBALL explained their view of the applicability of section B of the Earnest Money Agreement, and how it related to the one-year builder's warranty, stating "the Plaintiffs [FORSBERGS] specifically negotiated a one-year builder's warranty on the entire home. By the very terms of Section O of the Earnest Money Sales Agreement, this and any other express warranties survived the execution and delivery of final closing documents." (Appendix 3, p. 6)(emphasis added) "Plaintiffs included an express one-year builders' warranty in their offer, which was accepted by the Seller." (Appendix 3, p. 7)(emphasis added) "F. Plaintiffs, with the exception of the one-year builders' warranty and the warranties set forth in Section C of the Earnest Money Sales Agreement (Ex. 28), expressly accepted the property 'as is.'" (Appendix 3, p. 10)(emphasis added).

FORSBERGS agree with this position that the one-year builders' warranty was accepted by KIMBALL and was effective beyond the closing date. There is no dispute and no ambiguity. The Trial Court has no authority to sua sponte evaluate the agreement and impose its own interpretation. A case that stands for this is Resource Management Co. v. Weston Ranch, 706 P.2d 1028 (Utah 1985). Both parties meant what they have said. There is no waiver of the builders' warranty. The Trial Court erred

when it interpreted the agreement to waive the builders' warranty and should be reversed.

Because there is no waiver of the warranty, the warranty applies to all damages incurred by FORSBERGS. All defects complained of were discovered within the one year time limit on the express warranty, and were found to be due to poor workmanship. As noted above, the damages stemming from the frozen pipes, flooding basement, and poor painting is $18,810.13. These damages were all found by the Trial Court to be reasonable. FORSBERGS should be awarded this sum under the one-year builders' warranty.

One further point on this issue is the Trial Court's finding regarding paragraph three of the supplemental findings. This is not based on applicable law, and should be reversed. The fact that FORSBERGS paid for the repairs to the frozen pipes, and the rooms, with money received from an insurance company does not take away KIMBALL's liability.

FORSBERGS bargained for a home that was built in a workmanlike manner. KIMBALL warranted the home to be built in a workmanlike manner. Because the home was not built in a workmanlike manner, KIMBALL received more money than the home was worth. If KIMBALL is not held liable for the defect, KIMBALL will receive a windfall of $18,810.13

Although the court made proper findings of law, based on the evidence before it, that the home was not built in a workmanlike manner, it did not properly apply the law. The Trial Court should not have altered the Earnest Money Sales Agreement entered by the parties but should have let it stand as intended. As intended, KIMBALL breached the express builders' warranty and should pay the $18,810.13 in damages caused by the breach.

CONCLUSION

KIMBALLS have not met their burden of showing that the Trial Court's findings are "clearly erroneous." The Trial Court had sufficient evidence on each point concerning the negligent misrepresentation to reach its conclusions. When the evidence is reviewed, and proper inferences taken, it is clear that the Trial Court reached a supportable position. The damage award based on negligent misrepresentation should stand as awarded by the Trial Court.

On the other hand, the Trial Court did make two rulings in law that should be reversed. Although the Trial Court properly found that there does exist, as a matter of public policy, an implied warranty of inhabitability, it improperly applied a narrow and restrictive view of the scope of "habitable." This Court should adopt the warranty as applicable when the buyer of new home can prove the builders work was not in a workmanlike

manner. Applied to the instant case, FORSBERGS should be awarded $18,810.13, the amount associated with the defects of poor workmanship.

Furthermore, the Trial Court improperly re-wrote the Earnest Money Sales Agreement, changing it against the intent and understanding of both parties. The Trial Court's conclusion that the express one-year builders' warranty was waived must therefore be reversed. This is an alternate theory by which FORSBERGS can recover for the poor workmanship. If this Court finds that the implied warranty of habitability does not apply in this case, the damages of $18,810.13 should be awarded under the express builders' warranty.

Respectfully submitted this 28th day of January, 1994.

Harold A. Hintze

HAROLD A. HINTZE
Attorney for FORSBERGS

CERTIFICATE OF MAILING

I hereby certify that I caused two true and correct copies of the foregoing BRIEF to be mailed, postage prepaid, to the following:

DUANE R. SMITH (A-2996)
310 South Main Street
Suite 1330
Salt Lake City, UT 84101
Attorney for KIMBALLS

Dennis R. James
Mitchell T. Rice
MORGAN & HANSEN
Kearns Building, 8th Floor
136 South Main Street
Salt Lake City, UT 84101
Attorney for Spectrum Development

HAROLD A. HINTZE

ADDENDUM

Appendix 1

FACT SHEET

Appendix 2

Earnest Money Sales Agreement

Appendix 3

Defendant Spectrum Development Corporation's Memorandum of Points and Authorities Regarding Implied Warranty of Habitability

Appendix 4

Findings of Fact and Conclusions of Law

Appendix 5

Defendant Spectrum Development's Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law

Appendix 6

Minute Entry of Nov. 24, 1992

2364 South Scenic Drive (2745 East)

EDUCED ~~$275,000.00~~ $260,000.00

PANORAMIC VIEWS from almost every room in this new home in Benchmark.

Be the first owner of these gorgeous hardwood floors, customized kitchen with adjoining family room, and all that is included in this exciting three-level contemporary design. Vaulted ceilings, light, bright and spacious as designed by architect David Rohovit. Some of the details include:

Price:	Reduced to $260,000.00
Construction:	Brick and stucco with charming lattice-work trim.
Style:	Customized three-level contemporary.
Entry Level:	Gorgeous entry into living room with fireplace, formal dining, kitchen/family room, office or library with fabulous three-quarter bath.
Second Level:	Master suite and bath with Jacuzzi tub, separate shower, and double sinks. Two additional bedrooms and full bath, large laundry room with sink, and cozy family room with fireplace. Room under garage could be a terrific exercise area.
Third Level:	An additional 1,072 square feet of unfinished space allowing for family expansion or game rooms, storage, etc. Walk-out to level back yard area.
Square Footage:	Main: 1,590 1st Level: 1,500 2nd Level: 1,072 3,090 Finished Square Feet
Yard Size:	98' x 102', flat back yard with room for a pool.
Garage:	Two-car and parking pad.
Schools:	Beacon Heights Elementary Hillside Junior High Highland High

Imagine having dinner on this beautiful deck overlooking the valley! The quality of this home speaks for itself.

Call: Vic or Dave Kimball
355-4300 - OFFICE
295-1916 - Vic
[illegible] - DAVE

PLAINTIFF'S EXHIBIT P-27

Legend Yes (X) No (O)

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

REALTOR®

GENERAL PROVISIONS
(Sections)

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

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

SELLER WARRANTIES. Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not ill not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall rought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in factory working condition at closing.

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

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

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

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

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

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

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

Yes(X) No( ) EARNEST MONEY RECEIPT

DATE: Nov 17, 1997

undersigned Buyer [illegible] hereby deposits with Brokerage
NEST MONEY, the amount of [illegible] Dollars ($ [illegible]).
orm of
hall be deposited in accordance with applicable State Law.
[illegible] Received by [illegible]
ge Phone Number

OFFER TO PURCHASE

OPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at [illegible] in the City of Salt Lake County of Salt Lake, Utah,
to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in nce with Section G. Said property is owned by [illegible] as sellers, and is more particularly described [illegible]

K APPLICABLE BOXES:

NIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other
IPROVED REAL PROPERTY ☐ Commercial ☑ Residential ☐ Condo ☐ Other

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

Excluded items. The following items are specifically *excluded* from this sale: NONE -

CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price:

ublic sewer ☑ connected	☐ well ☐ connected ☐ other		☑ electricity ☑ connected
eptic tank ☐ connected	☐ irrigation water / secondary system		☐ ingress & egress by private easement
her sanitary system	# of shares	Company	☑ dedicated road ☑ paved
ublic water ☑ connected	☐ TV antenna ☐ master antenna ☐ prewired		☑ curb and gutter
ivate water ☐ connected	☑ natural gas ☐ connected		☐ other rights

Survey. A certified survey ☐ shall be furnished at the expense of prior to closing, ☐ shall not be furnished.
Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present physical dition, except: [illegible]

RCHASE PRICE AND FINANCING. The total purchase price for the property is One hundred Twenty Five Thousand and 00/100 Dollars ($125,000) which shall be paid as follows:

[illegible] which represents the aforedescribed EARNEST MONEY DEPOSIT:
[illegible] representing the approximate balance of CASH DOWN PAYMENT at closing.
-0- representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer, which obligation bears interest at % per annum with monthly payments of $
which include: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance; ☐ condo fees; ☐ other .
-0- representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be assumed by Buyer, which obligation bears interest at % per annum with monthly payments of $
which include: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance; ☐ condo fees; ☐ other .
[illegible],000 representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows: Buyer to get proceeds of new loan
-0- Other
[illegible],000 TOTAL PURCHASE PRICE

r is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best efforts e and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer agrees application within 5 days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at st rate not to exceed 10 %. If Buyer does not qualify for the assumption and/or financing within 45 days after Seller's acceptance reement, this Agreement shall be voidable at the option of the Seller upon written notice. Seller agrees to pay up to -0- mortgage loan discount ot to exceed $ ———. In addition, seller agrees to pay $ -0- to be used for Buyer's other loan costs.

ADDENDUM/COUNTER OFFER
TO EARNEST MONEY SALES AGREEMENT

This ADDENDUM/COUNTER OFFER constitutes: ( ) a COUNTER OFFER (✓) an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 17th day of Nov 19 91, between Farrell & Vicki Forsberg as buyer(s), and Victor Kimball as seller(s), covering real property described as follows: 2864 S Scenic Dr. Salt Lake City, UT.

The following terms are hereby incorporated as part of THE AGREEMENT:

AT NO additional cost To Buyer-Seller will do THE Following ADDITIONS &/OR CORRECTIONS IN A Professional & Competent MANNER

(1) INSTALL CENTRAL AIRCONDITIONING TO EXISTING FURNACE SYST
(2) " ADDITIONAL FURNACE TO HEAT LOWER LEVEL Playroom
(3) " FIREPLACE IN EAST WALL OF KITCHEN AREA
(4) " (GENIE) ELECTRIC GARAGE DOOR OPENER
(5) " NEW UTILITY SINK IN UTILITY RM.
(6) RUN LD DRAIN UNDER GARAGE FLOOR.
(7) INSTALL (PAINTED WHITE) 4" Shield around Kitchen CEILING-CORNER
(8) REPLACE Kitchen CARPET WITH ONE OF EQUAL QUALITY FOR ONE OF SATISFACTORY COLOR TO BUYER.
(9) REMOVE FAMILY RM WALL A/C TO HALL & REPAINT & PAINT
(10) INSTALL BALANCE OF MOLDING & ANY MISSING LIGHT FIXTURES
(11) REPAIR MISC ITEMS, I.E. CRACKS, CHIPS, OPEN RUG ETC -

All other terms of THE AGREEMENT shall remain the same. (✓) Seller (✓) Buyer shall have until — (A.M./P.M.) Nov 19 91 to accept the terms specified above. Unless so accepted this Addendum shall lapse.

Date _____

Time _____ (A.M./P.M.)

Signature of ( ) Seller (✓) Buyer

ACCEPTANCE/COUNTER OFFER/REJECTION

Check One

( ) I hereby ACCEPT the foregoing on the terms specified above.

( ) I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum.

Signature	*Signature*	*Date*	*Time*

( ) I hereby reject the foregoing _____ (Initials)

DOCUMENT RECEIPT

( ) I acknowledge receipt of a final copy of the foregoing bearing all signatures.

Signature of Buyer(s)	*Date*	*Signature of Seller(s)*	*Date*

( ) I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on _____

19___ by Certified Mail and return receipt attached hereto to the ( ) Seller ( ) Buyer.

Sent by _____

...mbrances and exceptions noted herein, evidenced by ☑ a current policy of title insurance in the amount of purchase price ☐ an abstract of title brought current, ... attorney's opinion (See Section H).

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

...VESTING OF TITLE. Title shall vest in Buyer as follows: As directed at time of closing

...SELLERS WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: Seller to give 1 year builders warranty on entire home

...tions to the above and Section C shall be limited to the following: ______________________

SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied ...o closing: [illegible] (2) Buyer has 7 days to [illegible] (3) See Addendum

CLOSING OF SALE. This Agreement shall be closed on or before [illegible], 1987 at a reasonable location to be designated by ... subject to Section Q. Upon demand, Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with ...greement. Prorations set forth in Section R shall be made as of ☐ date of possession ☑ date of closing ☐ other ______________

POSSESSION. Seller shall deliver possession to Buyer on upon closing unless extended by written agreement of parties.

AGENCY DISCLOSURE. At the signing of this Agreement the listing agent Vic [illegible] represents (✓) Seller ( ) Buyer, ...e selling agent [illegible] represents ( ) Seller (✓) Buyer. Buyer and Seller confirm that prior to signing this Agreement ... disclosure of the agency relationship(s) was provided to him/her. ([illegible]) ([illegible]) Buyer's initials ( ) ( ) Seller's initials.

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

AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions. Seller shall ...ntil [illegible] (AM/PM) [illegible], 19 [illegible], to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST ...Y to the Buyer.

[illegible]

...'s Signature) (Date) (Address) (Phone) (SSN/TAX ID)

[illegible]

...'s Signature) (Date) (Address) (Phone) (SSN/TAX ID)

...K ONE

...CEPTANCE OF OFFER TO PURCHASE: Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

...EJECTION. Seller hereby REJECTS the foregoing offer. ______________ (Seller's initials)

...UNTER OFFER. Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and ...ents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until __________ (AM/PM) ______________________, 19 _____ to accept the terms ...ified below.

...s Signature) (Date) (Time) (Address) (Phone) (SSN/TAX ID)

...s Signature) (Date) (Time) (Address) (Phone) (SSN/TAX ID)

...K ONE:

...CEPTANCE OF COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER

...JECTION. Buyer hereby REJECTS the COUNTER OFFER. ______________ (Buyer's Initials)

...UNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum.

...s Signature) (Date) (Time) (Buyer's Signature) (Date) (Time)

DOCUMENT RECEIPT

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

...] I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:

...RE OF SELLER | SIGNATURE OF BUYER

________________ Date ________________ Date

________________ Date ________________ Date

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

...hree of a four page form

or her authority to do so and to bind Buyer or Seller.

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

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

. **DEFAULT/INTERPLEADER AND ATTORNEY'S FEES.** In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition ontingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to er. Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, ıding a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by apble law, whether such remedy is pursued by filing suit or otherwise. In the event the principal broker holding the earnest money deposit is required to file an interleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the est money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall nterpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's incurred by the principal broker in bringing such action.

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

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

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

CLOSING COSTS. Seller and Buyer shall each pay one-half (½) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing nsurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest ısumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer ısing.

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

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

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

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

FOUR OF A FOUR PAGE FORM.

DENNIS R. JAMES, No. 1642
MITCHEL T. RICE, No. 6022
MORGAN & HANSEN
Attorneys for Spectrum Development Corporation
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 531-7888

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

FARRELL G. and VICKI A. FORSBERG, Plaintiffs, v. BURNINGHAM & KIMBALL, a Utah general partnership, CHRISTENSEN & KIMBALL, a Utah general partnership, as partner of Burningham & Kimball; VICTOR M. KIMBALL, individually and as general partner of Christensen & Kimball; SPECTRUM DEVELOPMENT CORPORATION, a Utah corporation, as partner of Burningham & Kimball, Defendants.	DEFENDANT SPECTRUM DEVELOPMENT CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES REGARDING IMPLIED WARRANTY OF HABITABILITY Civil No. 90-0906667CN Judge Michael R. Murphy
SPECTRUM DEVELOPMENT CORPORATION, a Utah corporation, Third-Party Plaintiff, v. NEIL'S HEATING & AIR CONDITIONING, a Utah corporation, and RANDY TIMOTHY PAINTING, INC., a Utah corporation, Third-Party Defendants.	

Defendant Spectrum Development Corporation, by and through its attorney, Dennis R. James of Morgan & Hansen, and pursuant to invitation of the Court by Minute Entry dated July 22, 1992, submits the following Memorandum of Points and Authorities addressing the applicability of Wade v. Jobe, 818 P.2d 1006 (Utah 1991) to the case at hand.

ARGUMENT

A. There is not even the slightest hint in the language of Wade v. Jobe that the Court considered the warranty of habitability to be applicable in the real property area beyond residential leases.

It would require a "quantum jump" to draw the presumption that the Utah Supreme Court, by adopting an implied warranty of habitability theory in landlord/tenant law, intended this theory of law to also be applied to the purchase of new homes from a builder/vendor. The Utah Supreme Court made it perfectly clear that they were adopting a theory applicable only to residential leases. By footnote, the Court indicated that it was not even extending the common law implied warranty of habitability to commercial leases, let alone making the even greater jump required to make the theory applicable to the purchase of new homes from a builder/vendor. Wade v. Jobe, 818 P.2d 1006, page 1010, footnote 2. There has been no suggestion that the 40 states that have adopted the warranty of habitability theory, either legislatively or judicially, in the area of landlord/tenant law, have seen fit to expand that theory into the realm of new home purchases.

B. Plaintiffs have not brought the appropriate case before this Court for consideration of expanding the implied warranty of habitability into the area of new home purchases.

Even if there was some correlation between the states that have adopted the warranty of habitability in the landlord/tenant area and the states that have adopted the warranty of habitability in the new construction area, Plaintiffs have simply not brought the appropriate case before this Court for the requested expansion of the law. While Plaintiffs espouse that, in spite of the lack of "cost-effectiveness" of their case, they are pursuing a worthy principle which transcends economic realities, our common law is still developed on a case by case approach. Even though one believes that a new legal theory is worthy of adoption in Utah, the courts must await a case with the right facts in order to consider such an expansion of the law.

In Wade v. Jobe, the Utah Supreme Court was handed a most appropriate case for the adoption of the warranty of habitability theory in the area of landlord/tenant law. In that case, we have a single mother with three young children who, within a few days of taking occupancy, had no hot water. An investigation revealed that the lack of hot water was the result of the flame of the water heater having been extinguished by accumulated sewage and water in the basement, which produced a foul odor throughout the house. The landlord, upon being notified of the problem, pumped the sewage and water from the basement onto the sidewalk, never solving the problem. An inspection by the Ogden City Inspection Division

revealed that the premises were unsafe for human occupancy due to the lack of a sewer connection and other problems. The Division found numerous code violations which were a substantial hazard to the health and safety of the occupants. The Division issued a notice that the property would be condemned if the violations were not remedied. The landlord's treatment of his tenants was offensive to human sensitivities. After the tenant moved out of the house, the landlord had the gall to bring suit to recover the unpaid rent, thereby inviting the Court to find a legal theory to protect this defenseless tenant from the egregious behavior of this overreaching landlord calloused to human sensitivities and with no regard for the health or safety of this woman and her three children.

Given those facts, the Court adopted an implied warranty of habitability theory with respect to residential leases based upon the following factors:

1. The rule of caveat emptor assumes an equal bargaining position between landlord and tenant. Wade v. Jobe, 818 P.2d 1006, p. 1010.

2. Modern tenants, like consumers of goods, however, frequently have no choice but to rely on the landlord to provide a habitable dwelling. Id.

3. Where they exist, housing shortages, standardized leases and racial and class discrimination place today's tenants, as consumers of housing, in a poor position to bargain effectively for

express warranties and covenants, requiring landlord to lease and maintain safe and sanitary housing. Id.

4. In consumer law, implied warranties are designed to protect ordinary consumers who do not have the knowledge, capacity, or opportunity to insure that goods which they are buying are in safe condition. Id.

5. The implied warranty of habitability has been adopted in other jurisdictions to protect the tenant as the party in the less advantageous bargaining position. Id.

Recognizing that these were the bases relied upon by the Court for the adoption of the theory of implied warranty of habitability in the landlord/tenant area of the law, we must first analyze whether the facts of our case warrant the Court's consideration of the expansion of that theory into the area of purchases of new homes. The answer is a resounding "no" based upon the following facts:

1. The facts are clear that the Plaintiffs were in a strong bargaining position with respect to the purchase of this home. They bargained the price down from $260,000 to $235,000 and then bargained an additional $8,475 in credits. Plaintiffs were able to demand completion of an extremely detailed punch list of items by the Seller. Plaintiffs had many houses to choose from and there was no testimony that they were under any pressure to purchase this particular home. Plaintiffs were represented by a real estate agent with ten years' experience (who, in spite of contrary

assertions by counsel for Plaintiffs in his closing argument, clearly represented the Plaintiffs, as specifically indicated in Item 10, Agency Disclosure, of the Earnest Money Sales Agreement, Exhibit 28). Plaintiffs had Brent Toolson, who had both experience and education in the contracting industry, walk through and inspect the home.

2. Instead of a situation in which buyers are left without warranty due to the common law merger doctrine upon closing and execution of the warranty deed, the Plaintiffs specifically negotiated a one-year builder's warranty on the entire home. By the very terms of Section O of the Earnest Money Sales Agreement, this and any other express warranties survived the execution and delivery of final closing documents.

The entire basis for the Utah Supreme Court's adoption of the implied warranty of habitability in the landlord/tenant area is missing with respect to the case at hand. There was no evidence of a disparity of bargaining position unless it was disparity in favor of Plaintiffs who were taking advantage of an anxious seller. There was no evidence of housing shortages forcing Plaintiffs to either take this home or go without shelter. There was no evidence that any warranty proposed by Plaintiffs in their offer had been rejected or crossed out by Seller. There was no evidence that Plaintiffs were forced to use a standardized Earnest Money Sales Agreement in making their offer or that they were prevented, or even pressured, from completing it and the Addendum in accordance

with their own desires and in accordance with the advice of their real estate agent. There is simply no evidence that Plaintiffs were in a poor position to bargain effectively for express warranties and covenants. The detailed punch list requirements, the required $8,475 in credits, and the specific inclusion of the one-year builder's warranty are all facts running counter to the Utah Supreme Court's basis for their decision in Wade v. Jobe.

C. Plaintiffs' inclusion of an express one-year builder's warranty excluded the possibility of them benefitting, in addition, from an implied warranty covering the same subject matter.

The Utah Court of Appeals in Ted R. Brown and Assoc. v. Carnes Corp., 753 P.2d 964, 970 (Utah App. 1988) citing the earlier Utah Supreme Court ruling in Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980) stated that "an express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature." The Court of Appeals, citing 3 Corbin on Contracts § 564 (1960), further solidified this position by stating, "[w]here the parties have made an express contract, the court should not find a different one by 'implication' concerning the same subject matter if the evidence does not justify [such] an interference . . ." Ted R. Brown and Assoc. v. Carnes Corp. at 970.

Plaintiffs included an express one-year builders' warranty in their offer, which was accepted by the Seller. They now are asking this Court to expand their warranty rights far beyond what they proposed and bargained for in their contract. The granting of such

a request would violate the very rule of law of this State set forth by the Supreme Court in Algom Corp. v. Jimco Ltd. This is not an appropriate case to even consider expanding the implied warranty of habitability theory into the realm of sales of newly constructed homes.

D. The tests adopted by the Utah Supreme Court in Wade v. Jobe were not breached by the Defendants.

The Utah Supreme Court in Wade v. Jobe stated, "As a general rule, the warranty of habitability requires that the landlord maintain 'bare living requirements'. . . and that the premises are fit for human occupation." Id. 1010-11. Plaintiffs, in the case at hand, were never forced to seek alternative shelter. They did eat out for a meal or two when they were without water because of the frozen pipes, but nothing more. There is no evidence that the home failed to meet the bare living requirements or that it was not fit for human occupation. It is noteworthy that the need for paint was specifically excluded by the Court as a requirement.

The Court indicated that substantial compliance with building and housing code standards would generally serve as evidence of the fulfillment of the landlord's duty to provide habitable premises. Id. 1011. The evidence in the case at hand is that the construction met all code requirements and passed all inspections. There was not even a citation issued in connection with Salt Lake City's investigation of the frozen pipes. The Court did indicate that there could be a breach of the warranty even though there was no code violation if the claimed defect had an impact on the health or

safety of the tenant. Id. There is simply no evidence in the case at hand that the health or safety of the Plaintiffs was ever in question as a result of the alleged defects for which they seek reimbursement.

Most importantly, the Court set forth the requirement that the landlord must have a reasonable time to repair material defects before a breach can be established. Id. 1010. This requirement alone, which, in all fairness would necessarily be a requirement if the warranty of habitability were expanded to the purchase of new homes, would bar Plaintiffs' recovery. Plaintiffs never provided the Defendants or the Third-Party Defendants any notice, demand, or opportunity to cure the alleged defects.

E. The facts of this case do not warrant the Court's interference with the sanctity of the parties' contract.

Even with full deference to the Utah Supreme Court's adoption of the warranty of habitability in the landlord/tenant area in Wade v. Jobe, the courts of this State are duty bound to uphold the sanctity of the parties' contract. The Utah Supreme Court reiterated the fundamental right of the parties to contract freely on terms which establish and allocate risks between them in Resource Management Co. v. Weston Ranch, 706 P.2d 1028 (Utah 1985) by stating:

> With a few exceptions, it is still axiomatic in contract law that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain. Parties should be permitted to enter into contracts that actually may be unreasonable or which may lead to

> hardship on one side. Although courts will not be parties to enforcing flagrantly unjust agreements, it is not for the courts to assume the paternalistic role of declaring that one who has freely bound himself need not perform because the bargain is not favorable.

Id. at 1040 (citations omitted).

The Court went on to discuss unconscionability as an exception to these general principles. However, we are not dealing in the case at hand with an unconscionable contract. Plaintiffs chose to use the standardized Earnest Money Sales Agreement as the vehicle to present their offer. Plaintiffs drafted the Addendum. Plaintiffs filled in the blank spaces of the Earnest Money Sales Agreement. Plaintiffs proposed the terms of sale. Plaintiffs required the one-year builder's warranty.

There is no evidence of fraud or concealment of known defects. There is no evidence of a failure to disclose dangerous conditions. There is no gross disparity of bargaining positions requiring a reapportioning of responsibility in spite of the contract terms.

F. Plaintiffs, with the exception of the one-year builders' warranty and the warranties set forth in Section C of the Earnest Money Sales Agreement (Ex. 28), expressly accepted the property "as is."

Plaintiffs, by the terms of their own document, accepted the property in "as is" condition. The law of this state with respect to that provision is set forth in Tibbets v. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967), in which the court upheld a lower court ruling that an "as is" provision in a real estate contract was effective to disclaim any potential implied warranties. There, as here, the "as is" provision is controlling because the Plaintiffs

have failed to prove by clear and convincing evidence that such was not the understanding of the parties at the time the contract was entered into. Id. at 161-62. A party cannot sign a contract and thereafter assert ignorance or failure to read the contract as a defense to its enforcement. John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205, appeal after remand 795 P.2d 678. Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028.

Plaintiffs argue that not all of the preprinted terms of the Earnest Money Sales Agreement apply to the case at hand. On this ground they seek the Court's help in relieving them of their agreement to accept the property in "as is" condition subject to Seller's warranties as outlined in Section 6 of the Earnest Money Sales Agreement. It is interesting to note that it was in Section 6 that Plaintiffs added the requirement of a one-year builder's warranty. It seems obvious that Plaintiffs' real estate agent, knowing of the "as is" provision, saw the need to include an express one-year builder's warranty on the entire home.

Plaintiffs' counsel, in his closing argument, specifically referenced Section C on page 1 of the Earnest Money Sales Agreement, calling the Court's attention to the reference to air conditioning and asking whether the Seller wants to be bound to such a warranty in light of the fact that the home, as originally constructed, had no air conditioner. This matter was, of course, resolved at closing by Exhibit 79 in which the Plaintiffs specifi-

cally agreed to undertake the installation of the air conditioner and to release Sellers in connection therewith. Parties to a contract may, by mutual consent, modify any or all of a contract and the terms of the modification prevail over inconsistent terms in the original contract. Ted R. Brown and Assoc. v. Carnes Corp., 753 P.2d 964, 968 (Utah App. 1988).

More importantly, the fact that a term or a phrase or even a section of a contract is inapplicable does not render unenforceable another section of the contract that is clear, unambiguous, and applicable. Common sense and good faith are the leading characteristics of all constructions of contracts. Contracts must receive a reasonable construction according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language. A reasonable construction will be preferred to one which is unreasonable, and that interpretation should be adopted which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct of the parties. 17A Am. Jur. 2d Contracts, §§ 340, 342, 344.

It is fundamental that doubtful language in a contract should be interpreted most strongly against the party who has selected that language, especially where he seeks to use such language to defeat the contract or its operation, unless the use of such language is prescribed by law. Also, in case of doubt or ambiguity, a contract will be construed most strongly against the party

who drew or prepared it, or supplied a form for the agreement, or whose attorney drew or prepared it. Id. § 348 (emphasis added).

Although the rule is well settled that written or typed provisions, when there is an inconsistency, are given greater effect than the printed parts, there is no suggestion by that rule that printed parts are not enforceable. Id. § 395. Printed parts are controlling absent such inconsistency with written or typed parts.

SUMMARY

Plaintiffs have not presented to this Court a case which cries out for the expansion of the implied warranty of habitability theory to new construction home sales at the expense of the sanctity of the contractual rights of the parties. This is not a "sewage in the basement" case. This is not a case in which the "big bad builder" forced unconscionable contractual terms on the "poor innocent purchaser" or refused to give express warranties with respect to the construction of the home. This is not a case in which the "big bad builder" chose to ignore the repeated demands of the "poor innocent purchaser." Plaintiffs' first written demand was this lawsuit, commenced several years after the fact, with no opportunity for the contractor or any subcontractor to remedy or cure.

This is not the case that screams for the Court to step into the legislative arena, no matter how strong the desire may be to see this theory of liability adopted in the State of Utah.

HAROLD A. HINTZE (A-1499)
GARDINER & HINTZE
525 East 100 South, Suite 200
Salt Lake City, UT 84102
Telephone: (801) 355-7900

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

FARRELL G. and VICKI A. FORSBERG, Plaintiffs, vs. BURNINGHAM & KIMBALL, a Utah general partnership, et al., Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 9009066667
SPECTRUM DEVELOPMENT CORPORATION, a Utah corporation, Third-Party Plaintiff, vs. NEIL'S HEATING & AIR CONDITIONING, a Utah corporation, et al., Third-Party Defendants.	

Plaintiffs, by and through their attorneys and pursuant to Utah Rule of Civil Procedure 52(a) and the directions of this Court at a hearing held on July 31, 1992, hereby respectfully submit their proposed **FINDINGS OF FACT AND CONCLUSIONS OF LAW** as to those issues addressed by the Court.

GENERAL

1. Plaintiffs are residents of Salt Lake County, State of Utah. The contract herein sued upon arose and was to be performed within said county and state.

2. The Defendant CHRISTENSEN & KIMBALL, is a Utah general partnership with its principal place of business in Salt Lake County, State of Utah. Defendant VICTOR M. KIMBALL is a resident of and is doing business within Salt Lake County, State of Utah. The Defendant SPECTRUM DEVELOPMENT CORPORATION is a Utah corporation with its principal place of business in Salt Lake County, State of Utah.

3. Pursuant to an open court Stipulation entered into the record at the commencement of trial, the Defendants are jointly and severally liable for the damages found herein.

4. On or about November 17, 1987, the Forsbergs, as buyers, and Defendant, CHRISTENSEN & KIMBALL, as sellers, entered into a Earnest Money Sales Agreement whereby the Forsbergs bought from the Defendants a home located at 2364 South Scenic Drive, Salt Lake City, Utah. Said home is more particularly described as Yard 105, Benchmark Subdivision. (Plaintiffs' Exhibit 28.)

5. Said Earnest Money Sales Agreement contained, inter alia, the following express warranty and representation:

> "Seller to give a one-year builder's warranty on entire home."
> (Exhibit 28, p. 6.)

6. During the spring of 1988, after the Forsbergs moved into the subject home, it was discovered that the ground floor of the

home leaked and permitted substantial amounts of water to enter and flood said floor.

7. During the spring of 1988, the paint on the railings and deck of the home flaked off and required substantial repair, including sanding, sealing and repainting.

8. During the night of February 3, 1989, the water pipes within the home froze and burst causing severe water damage to the home and necessitating substantial repair.

9. The interior of the home experienced substantial difficulty in maintaining adequate heat and air conditioning, ultimately requiring an additional furnace and air conditioning unit to be added to the home.

YARD MISREPRESENTATION

10. As part of the Defendants' efforts to sell the home, the Defendants' realtor prepared a document entitled "FACT SHEET" purporting to state relevant information about the home and yard size. According to said FACT SHEET, the yard size was "98' x 102'" and described as a "flat backyard with room for a pool." (Plaintiffs' Exhibit 27.)

11. The Defendants also misrepresented the size of the yard by planting poplar trees as a site barrier between the subject home site and the GMAC building located to the west of the property. Said trees were beyond the actual property lines. (Plaintiffs' Exhibits 34, 35, 75-D.)

12. The Forsbergs reasonably relied upon the representations of the Defendants relative to the size of the property. There was

no notice whatsoever at the closing as to the size of the property of the location of easements restricting the utility of the yard.

13. The property, as represented by the Defendants, would contain 9,996 sq. ft. The actual size of the property is approximately 4,628 sq. ft. The fair market value of the property, as indicated by the Defendants own testimony, is the sum of $3.85 per sq. ft. and the Plaintiffs thereby incurred damages as a direct and proximate result of the Defendants' negligent misrepresentation in the sum of $21,767.90.

1988 BASEMENT FLOODING

(Express Warranty)

14. The Court finds that the home was not built in a workman-like manner sufficient to keep it water tight and as a result thereof, the home experienced flooding during the spring of 1988. Such defect is covered by the one-year builders warranty provided by the Defendants.

15. There was no credible evidence that there was any soils testing prior to construction of the home, even though there is no evidence of the source of the water nor evidence of any building code violations.

16. Plaintiffs are entitled to those damages which are reasonably required to repair and to put the home in the condition as it should have been at the time of possession. Those damages are reflected in Exhibits 71-73 and Exhibit 64, plus a total of $450 attributable to time spent by Dr. Forsberg for a total of

$10,591.21. Said sums were necessarily incurred and are reasonable.

DEFECTIVE PAINTING OF DECKS AND RAILS

(Express Warranty)

17. The Court finds that the railing and decks were not painted in a workman-like manner. Said defect is covered by the one-year builders warranty provided by the Defendants.

18. The cost to repair said defect is reflected in Plaintiffs' Exhibit 44 and is the sum of $3,049.00 which the Court finds reasonable and necessary.

(FEBRUARY 3, 1989 - FROZEN PIPE-FLOOD)

(Express Warranty)

19. The Court finds that the house was not built in a workman-like manner as to its framing and insulation thereby causing or permitting the water pipes within the home to freeze and burst during a severe cold experienced during the night of February 3, 1989. The Court finds, however, that said occurrence was beyond the express one-year warranty provided by the Defendants.

20. The Court does find, however, that the Plaintiffs incurred damages as a result of said incident in the sum of $5,169.92 as indicated in Exhibits P-46; P-57-62; P-66-70 all of which were necessarily incurred and are reasonable.

COLLATERAL SOURCE

21. The Court finds that the Plaintiffs made a claim upon their home-owners insurance for the damages sustained as a result of the ruptured water pipes and resultant repairs and received from

said insurance the sum of $6,036.42 (which claim included additional items withdrawn as claims asserted herein.) As a result of receipt of said insurance proceeds, the Plaintiffs incurred no compensable damages as a result of the ruptured water pipes.

MITIGATION

22. The Plaintiffs are not barred from recovery by a failure to mitigate their damages by requesting that the Defendants, or Defendants' subcontractors return to the premises to do the necessary repair work. The Court finds that such a request would have been a meaningless act and the evidence indicates that such requests to Defendants brought no response.

ESCROW

$1,000

23. The $1,000 to be held in escrow pursuant to the closing documents (but erroneously not held by the title company) was intended as "security", in effect, for the completion of the "punch list" items shown on Exhibit P-84. No line item amounts are provided as to each entry and Plaintiffs did not proffer evidence as to each uncompleted item, or the value thereof. Accordingly, the Court finds "no cause of action" as to the escrow claim.

ADEQUATE HEATING AND AIR CONDITIONING

(Express Warranty)

24. Pursuant to the closing documents, the Defendants were responsible for providing the home with an adequate heating system. In that regard, the Defendants failed to install or select properly, in a workman-like fashion an adequate heating system. On

that issue, the Court discredits the testimony of Steve Sundloff and Bill Thompson and credits the testimony of Mr. Norton.

25. On this issue, the court finds that the Plaintiffs have failed in their burden of proof.

26. With respect to the air conditioning, the Court finds that, in accordance with the closing documents, said obligation remained with the Plaintiffs as evidenced by Exhibits P-79 & P-74, and the Defendants are not liable on that issue under any theory.

CONCLUSIONS OF LAW

1. The Court has subject matter and personal jurisdiction in this case.

2. Pursuant to Stipulation, the Defendants are jointly and severally liable for the damages sustained by the Plaintiffs and for the Judgment to be issued pursuant to these Findings and Conclusions.

YARD MISREPRESENTATION

3. Utah has adopted the Restatement of Tort 2d §552 regarding negligent misrepresentation and Restatement of Torts 2d §538a. A vendor is liable in tort for misrepresentations as to the area of land conveyed, notwithstanding such misrepresentations were made without actual knowledge of their falsity. The reason is that parties to a real estate transaction do not deal on equal terms. An owner is presumed to know the boundaries of his own land and the quantity of his acreage. If he does not know the correct information, he must find out or refrain from making representations to unsuspecting strangers. Even honesty in making

a mistake is no defense as it is incumbent upon the vendor to know the facts. (Dugan v. Jones, 615 P.2d 1239, 1249 (Utah 1980))

4. The parol evidence rule does not bar evidence of negligent misrepresentation. (Formento v. Encanto Business Park, 744 P.2d 22 (Arizona 1987))

5. The integration clause of the Earnest Money Agreement is not applicable in an action based upon negligent misrepresentation.

6. Plaintiff is entitled to judgment against the Defendants based upon the theory of negligent misrepresentation in the amount of $21,769.90.

ONE-YEAR BUILDERS

(Express Warranty)

7. The flooding which occurred in the spring of 1988 was a breach of the one-year builders warranty provided by the Defendants.

8. As a result of said breach, the Plaintiffs are entitled to a judgment against the Defendants in the sum of $10,591.21.

9. The peeling paint on the exterior rails and decks which occurred in the spring of 1988 was a breach of the one-year builders warranty provided by the Defendants.

10. As a result of said breach, the Plaintiffs are entitled to a judgment against the Defendants in the sum of $3,059.00.

11. The ruptured water pipes which occurred on February 4, 1989 was an incident beyond the one-year warranty and, therefore, is not actionable under the express warranty by the Plaintiffs.

IMPLIED WARRANTY OF HABITABILITY

12. The Court finds and adopts the principal that in Utah there exists an implied warranty of habitability in favor of buyers of new homes. A purchase of a home is the most significant single purchase in most individuals' lives and no adequate tort claim otherwise exists which would protect said buyers from latent defects existing within the home.

13. Said warranty is limited to "latent" defects.

14. Said warranty is further limited to the concept of "habitability" and is not applicable to the concept of "merchantability" or "adequate workmanship."

15. Because the warranty of habitability is a creature of public policy, it generally cannot be waived, such waivers themselves being against public policy. In order for a warranty to exist their must be a conspicuous reference to the warranty within the contract, consciously understood and agreed to by the parties.

16. In this particular case, the "one-year builders warranty" created an express warranty which waived any claim of implied warranty.

IMPLIED WARRANTY

17. As to the flooding within the home in the Spring of 1988, the Court finds that said flooding was the result of the Defendants' failure to build the home in a workman-like manner, causing a latent defect in the home.

18. The flooding of the home did not, however, render the home "uninhabitable."

19. As to the frozen and ruptured water pipes in February, 1989, the Court finds that said damage occurred as a result of the Defendants' failure to build the home in a workman-like manner, causing a latent defect in the home.

20. The broken water pipes did not, however, render the home "uninhabitable."

21. The paint flaking and peeling off the exterior rails and deck was the result of the Defendants' failure to build the home in a workman-like manner, causing a latent defect in the home.

22. The peeling paint did not, however, render the home "uninhabitable."

DATED this _____ day of October, 1992.

BY THE COURT:

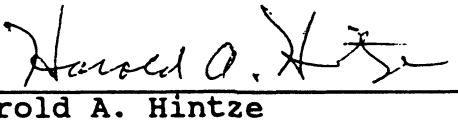
_____
Honorable Michael R. Murphy
District Court Judge

CERTIFICATE OF COMPLIANCE
WITH CJA 4-504(2)

Plaintiffs certify that a copy of the Plaintiffs' Proposed Findings of Fact and Conclusions of Law was mailed to counsel for the Defendants listed below more than five (5) days prior to submission to the Court in accordance with CJA 4-504(2).

Dennis R. James, Esq.
Attorneys for Defendant Spectrum
Development Corporation
Morgan & Hansen
136 South Main, #800
Salt Lake City, Utah 84101

Duane Smith, Esq.
Attorneys for Defendants
Christensen & Kimball, and
Victor M. Kimball
Dart, Adamson & Kasting
310 South Main, #1330
Salt Lake City, Utah 84101



Harold A. Hintze
Attorney for Plaintiffs

Dennis R. James, No. 1642
MORGAN & HANSEN
Attorney for Defendant Spectrum Development
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, UT 84101
Telephone: (801) 531-7888

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

FARRELL G. and VICKI A. FORSBERG, Plaintiffs, vs. BURNINGHAM & KIMBALL, a Utah general partnership, et al., Defendants.	DEFENDANT SPECTRUM DEVELOPMENT'S OBJECTIONS TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 9009066667 Judge Michael R. Murphy
SPECTRUM DEVELOPMENT CORPORATION, a Utah corporation, Third-party Plaintiff, vs. NEIL'S HEATING & AIR CONDITIONING, a Utah corporation, et al., Third-party Defendants.	

Defendant Spectrum Development, by and through its attorney Dennis R. James of Morgan & Hansen, hereby objects to

Plaintiffs' Proposed Findings of Fact and Conclusions of Law as set forth below:

1. With respect to Paragraph 5 of Plaintiffs' Proposed Findings of Fact, Plaintiffs' set forth what amounts to a conclusion of law that was never found by the Court and is completely contrary to any legal authority. There was no finding of fact or conclusion of law by the Court that the statement in the Earnest Money Sales Agreement, Section 6, "Seller to give a one-year builder's warranty on entire home," constituted an express warranty or representation. On its face, this statement simply indicates that at some point in time in the future, presumably at closing, seller would give to buyer some format of a one year builder's warranty. The language is not otherwise operative. In Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983) at p. 604 (emphasis added), the Utah Supreme Court defined an express warranty as follows:

> "A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself and it amounts to a promise to answer in damages for any injury proximately caused if the fact warranted proves untrue."

With respect to the statement "Seller to give a one-year builder's warranty on entire home", there is simply no statement or

assurance of the existence of a fact. It is a prospective statement without any specifics as to what might be warranted or what standard might be applied. What Plaintiffs now want the Court to do is to rewrite the agreement so that seller expressly warrants the entire home to be constructed in a workmanlike manner.

Plaintiffs only possible cause of action with respect to the statement "Seller to give a one-year builder's warranty on an entire home" would be a breach of contract claim for failing to provide the warranty Plaintiffs expected would be provided at closing. There was simply no allegation of such a breach and no evidence presented with respect thereto.

In Garriffa v. Taylor, 675 P.2d 1284 (Wyo. 1984), the Wyoming Supreme Court clearly set forth the law that for an express warranty to arise, there must be more than a general statement that seller is to provide a warranty. At Page 1286 of its opinion, the Court stated as follows:

> "In order for an express warranty to exist, there must be some positive and unequivocal statement concerning the thing sold which is relied upon by the buyer and which is understood to be an assertion concerning the item sold and not an opinion."

The only express warranty provided by the Earnest Money Sales Agreement is found in the pre-printed provisions on Page 1 of the Agreement under Section C, Seller Warranties. In that section,

seller warrants, inter alia that, "the plumbing, heating, air conditioning and ventilating systems, electrical system and appliances shall be sound or in satisfactory working condition at closing." That is the extent of the express warranties with respect to the construction of the home. Otherwise, pursuant to Section B of the Earnest Money Sales Agreement, Plaintiffs accepted the property in "as is" condition.

In order for Plaintiffs to recover under an express warranty theory, they would have to present to the Court express warranty language to the effect that seller was warranting against any flooding of the home or was warranting against paint flaking off the railings and decks on the exterior of the home or was warranting against the pipes freezing and breaking in severe cold. There is simply no evidence that such warranties were ever made a part of the agreement between the parties.

At the hearing of July 31, 1992, wherein the Court set forth its skeletal decision with respect to this matter, there was absolutely no indication by the Court that any judgment was being granted under an express warranty theory. Recovery under such a theory was not even argued in Plaintiffs' closing argument. The Court on Page 9 of the Transcript of the hearing (a copy of which is attached hereto as Exhibit "A") (hereinafter referred to as the "Transcript"), in rendering its opinion that the defects found to

exist did not render the home uninhabitable, stated that with respect to such items, the parties can bargain for express warranties (Transcript, Page 7, lines 5 and 6). Even though the evidence indicated the superior bargaining position of buyers with respect to the purchase of the home, there was never any demand for an express warranty regarding flooding, exterior paint or bursting of pipes in severe cold spells.

The Court, on Page 10 of the Transcript, found that Plaintiffs waived any claim of workmanship warranty, (Transcript, Page 10, lines 10-12). The waiver is found in Section B of the General Provisions of the Earnest Money Sales Agreement, Page 1, which provides as follows:

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

The suggestion by Plaintiffs that they were awarded damages under an express warranty theory is exactly opposite to the Court's findings, conclusions and holding in this case. The Court

specifically indicated on Page 20 of the Transcript that the only reason the Court made the findings with respect to workmanship were in the event the Court was reversed by the Court of Appeals saying that the implied warranty of habitability was much more extensive than this Court determined it to be (Transcript, Page 20, lines 7-10).

There was simply no express assurance as to condition, performance or physical quality and there was no express assurance against defective work. Paragraph 5 of Plaintiffs' Proposed Findings of Fact should be stricken.

2. With respect to Paragraph 6 of Plaintiffs' Proposed Findings of Fact, the "Spring of 1988" is a misstatement of the time that the Forsbergs moved into the subject home. Testimony was that it was around Memorial Day which would put the move-in time at the end of May, and beginning of June, 1988. Defendant Spectrum Development also objects to the phraseology, "the home leaked and permitted substantial amounts of water to enter and to flood said floor." A more accurate statement in light of testimony would be as follows:

> 6. In May or June, 1988, water was discovered flowing onto and across the basement floor of the subject home.

3. With respect to Paragraph 7 of Plaintiffs' Proposed Findings of Fact, Plaintiffs' testimony with respect to the flaking

paint was that there was some flaking in the spring or summer of 1988. The only testimony regarding the repair required at that time was by Randy Timothy who indicated that it would have cost him approximately $200 in order to repair the flaking paint had a request been made that it be repaired in a timely manner. Therefore, a more accurate factual statement would be as follows with respect to Paragraph 7:

> 7. During the Spring of 1988, Plaintiffs noticed some flaking of the paint on the railings and deck of the home.

4. With respect to Paragraph 8 of Plaintiffs' Proposed Findings of Fact, the phrase "causing severe water damage to the home" is an over-statement well beyond the testimony. There was not severe water damage to the home, but instead water damage in two bathroom areas of the home. A more accurate statement with respect to Paragraph 8 would be as follows:

> 8. During the night of February 3, 1989, certain water pipes within the home froze and burst causing water damage to two bathroom areas of the home necessitating $5,169.92 worth of repair work.

5. With respect to Paragraph 9 of Plaintiffs' Proposed Findings of Facts, there is no indication in the Transcript even hinting at such a finding and Defendant objects to its inclusion as being unnecessary and a misstatement of actual findings. The Court stated on Page 6 of the Transcript, ". . . I cannot find by a

preponderance of the evidence that there was a failure to install or select properly in a workmanlike fashion an adequate heating plant." (Transcript, Page 6, lines 13-15). This is the finding of fact that should be set forth.

6. With respect to Paragraph 14 of Plaintiffs' Proposed Findings of Fact, Defendant Spectrum Development reiterates it objections as set forth in Paragraphs 1 and 2 above. Testimony placed the discovery of the flooding in May or June of 1988 and there was absolutely no finding by the Court that a failure to keep the home water tight was covered by an express warranty. The Court's ruling was the opposite as set forth on Page 10 of the Transcript, where the Court ruled as follows, "There was, however, in this particular case, a waiver in the Earnest Money Sales Agreement as to any claim of workmanship warranty." (Transcript, Page 10, lines 10-12.)

7. With respect to Paragraph 16, this paragraph is unnecessary to the main body of the Findings of Fact and Conclusions of Law in that it was a supplementary finding only for the purpose of preventing a retrial if the case is sent back down by the Appeals Court due to adoption by them of a broader scope of the implied warranty of habitability. The statement "Plaintiffs are entitled to those damages which are reasonably required to repair and put the home in the condition as it should have been at

the time of possession" is completely contrary to the Court's decision which was not to award damages in light of the fact that such flooding did not render the home uninhabitable.

8. With respect to Paragraph 17 of Plaintiffs' Proposed Findings of Fact, the Court never found that the painting deficiency was covered by an express warranty. The Court's ruling was the opposite. See Paragraph 6 above and Transcript, Page 10, lines 10-12.

9. With respect to Paragraph 18 of Plaintiffs' Proposed Findings of Fact, there was absolutely no finding by the Court that the cost to repair the defective painting was $3,049. The only testimony on the matter was that of Randy Timothy indicating that he could have repaired the flaking paint for approximately $200. There was no testimony from the individual who, three years thereafter, did the painting for $3,049. There was no testimony that such costs were reasonable or necessary or that they in any way related to or were a result of the initial flaking problem.

10. With respect to Paragraph 19 of Plaintiffs' Proposed Findings of Fact, the Court simply found that a lack of workmanlike construction caused the pipes to burst and, but for the insurance, the Plaintiffs would have suffered damages as reflected in Exhibits P-46 - P-52, 57 - 62 and 66 - 70, totaling $5,169.92, all of which were reasonable in amount. (Transcript, Page 5, lines 19-23).

There was no finding of the Court with respect to an express warranty since there was no express warranty given against pipes freezing and bursting during severe cold periods. See Paragraphs 1 and 6 above and Page 10 of the Transcript.

11. With respect to Paragraph 22 of Plaintiffs' Proposed Findings of Fact, Plaintiffs' have here attempted to broaden the mitigation findings beyond the scope of the Court's ruling. The Court found specifically that there was no failure on the part of Plaintiffs to mitigate with respect to the flooding or with respect to the pipes freezing and breaking. See Transcript, Page 5, lines 9-14 and Page 6, lines 2, 3. The Court did not address the issue of mitigation nor find it necessary to do so with respect to the painting. The only testimony on point with respect to the painting was that Plaintiffs never asked Randy Timothy to come back and repair the flaking paint and that Randy Timothy was willing to come back and repair the flaking paint had he been asked. Randy Timothy was in the Plaintiffs' home after they moved in doing other work for them, but they never asked him to repair the flaking paint on the decks and handrails.

12. With respect to Paragraph 24 of Plaintiffs' Proposed Findings of Fact, there was no finding by the Court that Defendants failed to install or select properly in a workmanlike fashion an adequate heating system. The Court found just the opposite. The

Court indicated that there was no evidence of any code violation. The Court discredited the testimony of Sundloff and Thompson and credited the testimony of Norton. Norton's testimony was that the heating system installed by Neal's Heating and Air Conditioning was more than adequate to meet the purpose intended. The Court found that the Plaintiffs failed to meet their burden of proof in showing that Defendants failed to install or select properly in a workmanlike fashion an adequate heating plant. Transcript, Page 6, lines 4-20.

13. With respect to Paragraphs 7, 8, 9 and 10 of Plaintiffs' Proposed Conclusions of Law (Page 8), there was no finding by the Court of any express warranty against flooding or against peeling paint or against frozen water pipes. Defendant reiterates the arguments set forth in Paragraph 1 above.

14. With respect to Paragraph 16 of Plaintiffs' Proposed Conclusions of Law (Page 9), the Court did not rule that implied warranties were waived by express warranties. Rather, the Court found a particular waiver in the Earnest Money Agreement as to any claim of workmanship warranty. The waiver is set forth in Section B of the General Provisions of the Earnest Money Sales Agreement which provides in part as follows:

> "Buyer accepts the property in 'as is' condition . . . "

The Court simply found that Plaintiffs were subject to the "as is" provision of Section B which is an express waiver of any workmanship warranties.

15. With respect to Paragraphs 21 and 22 of Plaintiffs' Proposed Conclusions of Law (Page 10), there was absolutely no finding that the flaking paint was a latent defect in the home. The paint problems were addressed in the exhaustive punch list created by Plaintiff Farrell Forsberg in anticipation of the closing. The only finding of the Court was set forth on Page 7 of the Transcript where the Court stated, "With respect to the painting, I find that it was not done in a workmanlike fashion. The failings, however, do not render the edifice uninhabitable." Transcript, Page 7, lines 2-5.

In order to more accurately set forth the Findings of Fact and Conclusions of Law, Defendant is submitting concurrently herewith its Proposed Findings of Fact and Conclusions of Law.

DATED this 24 day of September, 1992.

MORGAN & HANSEN

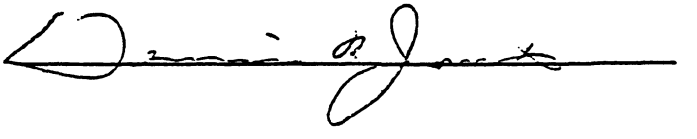
Dennis R. James
Attorney for Defendant Spectrum Development

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of September, 1992, I caused a true and correct copy of DEFENDANT SPECTRUM DEVELOPMENT'S OBJECTION TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW to be mailed, first class, postage prepaid to the following:

Duane R. Smith
DART, ADAMSON & KASTING
310 South Main, Suite 1330
Salt Lake City, UT 84101

Harold A. Hintze
GARDINER & HINTZE
525 East 100 South, Suite 200
Salt Lake City, UT 84102



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

FARRELL G. and VICKI A. FORSBERG,	:	MINUTE ENTRY
	:	CIVIL NO. 900906667
Plaintiffs,	:	
vs.	:	
BURNINGHAM & KIMBALL, a Utah general partnership, et al.,	:	
Defendants.	:	
	:	
SPECTRUM DEVELOPMENT CORPORATION, a Utah corporation,	:	
Third Party Plaintiff,	:	
vs.	:	
NEIL'S HEATING & AIR CONDITIONING, a Utah corporation, et al.,	:	
Third Party Defendants.	:	

Defendants' objections concerning plaintiffs' recovery under the builder's warranty provision is sustained.

Dated this 24 day of November, 1992.

/S/
MICHAEL R. MURPHY
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 24 day of November, 1992:

Duane R. Smith, Esq.
310 S. Main, Suite 1330
Salt Lake City, Utah 84101

Harold A. Hintze, Esq.
525 East 100 South, Suite 200
Salt Lake City, Utah 84102

Dennis R. James, Esq.
136 S. Main, 8th Floor
Salt Lake City, Utah 84101

M Sack