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Goodspeed v. Shippen Clerk's Record v. 3 Dckt. 38829

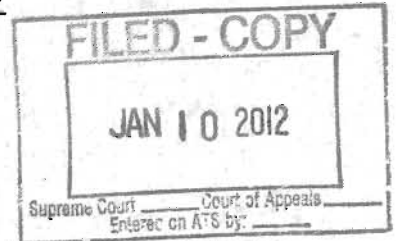
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IN THE
SUPREME COURT LAW CLERK
OF THE
LAW CLERK **STATE OF IDAHO**
VOLUME 3



WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODPSEED,)
)
Plaintiffs-Respondents,)
)
-vs-)
)
ROBERT and JORJA SHIPPEN,)
)
Defendants-Appellants,)
)

SUPREME COURT NO. 38829-2011
Jefferson County
Case No. CV-2009-15

CLERK'S RECORD ON APPEAL

Appeal from the District court of the 7th Judicial District of the State of Idaho, in and for

**THE JEFFERSON COUNTY
DISTRICT COURT
GREGORY S. ANDERSON
DISTRICT JUDGE**

ATTORNEY FOR APPELLANT

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Rigby, ID 83442**

ATTORNEY FOR RESPONDENT

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P.O. Box 51630
Idaho Falls, ID 83405-1630**

Filed this the 19 day of Sept, 2011

Christine Boulter
Clerk of the District Court

[Signature]
By: Nancy Andersen
Deputy

COPY



38829

Volume 3

IN THE SUPREME COURT OF THE STATE OF IDAHO

**WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODPSEED,)**

Plaintiffs-Respondents,)

-vs-

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2010 SEP 23 PM 2:10
JEFFERSON COUNTY, IDAHO

WESTON S. DAVIS (I.S.B. # 7449)
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
Post Office Box 51630
Idaho Falls, Idaho 83405-1630
Telephone (208) 522-3001
Fax (208) 523-7254

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

**AFFIDAVIT OF WESTON S.
DAVIS IN SUPPORT OF MOTION
TO AMEND FOR PUNITIVE
DAMAGES**

STATE OF IDAHO)
 : ss.
County of Bonneville)

WESTON S. DAVIS, being duly sworn upon oath, deposes and says as follows:

1. I am the attorney for Plaintiffs in the above entitled action.
2. Attached hereto as Exhibit "A" is a true and correct copy of the Deed of Trust on the

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subject real property that I received from the Jefferson County Recorders Office, evidencing a transfer of the subject real property from Paul Jenkins to Robert and Jorja Shippen as husband and wife.

3. Attached hereto as Exhibit "B" is a true and correct copy of the relevant deposition transcript excerpts from the deposition of Robert Shippen taken in the aforementioned case.
4. Attached hereto as Exhibit "C" is a true and correct copy of the relevant deposition transcript excerpts from the deposition of Jorja Shippen taken in the aforementioned case.
5. Attached hereto as Exhibit "D" is a true and correct copy of the relevant deposition transcript excerpts from the deposition of Nicholas Shippen taken in the aforementioned case.
6. Attached hereto as Exhibit "E" is a true and correct copy of the relevant deposition transcript excerpts from the deposition of Paul Jenkins taken in the aforementioned case.
7. Attached hereto as Exhibit "F" is a true and correct copy of the relevant deposition transcript excerpts from the deposition of Dave Chapple taken in the aforementioned case.
8. Attached hereto as Exhibit "G" is a true and correct copy of the relevant deposition transcript excerpts from the deposition of William Shawn Goodspeed taken in the aforementioned case.

DATED this 28 day of September, 2010


WESTON S. DAVIS

SUBSCRIBED and SWORN TO before me this 28 day of September 2010.

Carl Park
NOTARY PUBLIC FOR Idaho
Residing at: Shelley, Idaho
My Commission Expires: 10-21-11

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 28 day of September, 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

- Mailing
- Hand Delivery
- Fax
- E-Mail
- Overnight Mail
- Courthouse Box


WESTON S. DAVIS

L:\wspd\~ Clients\7411.1 Goodspeed\Mot.Punitive.Damages.(Affidavit - WSD).wpd

EXHIBIT "A"

EXHIBIT "A"

RECORDING REQUESTED BY
First American Title Company

342206

AND WHEN RECORDED MAIL TO:
First American Title Company
110 N. Clark Street
Rigby, ID 83442

Instrument # 342206
RIGBY, JEFFERSON, IDAHO
2005-09-01 01:50:00 No. of Pages: 8
Recorded for: FIRST AMERICAN TITLE
CHRISTINE BOULTER Fee: 18.00
Ex-Officio Recorder Deputy *ML*
Index to: DEED OF TRUST

Space Above This Line for Recorder's Use Only

File No. 130148-RI (dm)

DEED OF TRUST

THIS DEED OF TRUST, made this 08/30/2005, between Robert Shippen and Jorja Shippen, husband and wife, herein called GRANTOR(S), whose address is 518 North 3950 East, Rigby, ID 83442, and First American Title Company, herein called TRUSTEE, and Paul Jenkins and Rosemary Jenkins, herein called BENEFICIARY, whose address is 3630 East 300 North, Rigby, ID 83442.

WITNESSETH: That Grantor does hereby irrevocably GRANT, BARGAIN, SELL AND CONVEY TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in the County of Jefferson, State of Idaho, described as follows and containing not more than Forty acres in area:

Lot 7, Block 2, & Lot 11, Block 1, Woodhaven Creek Estates, Division No. 1, Jefferson County, Idaho, as shown on the plat recorded November 29, 2004, as Instrument No. 335643. Affidavit of Correction recorded February 3, 2005, as Instrument No. 337151.

TOGETHER WITH all the tenements, hereditaments and appurtenances now or hereafter thereunto belonging or in anywise appertaining, and the rents, issues, and profits thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues and profits;

For the purpose of securing:

1. Performance of each agreement of Grantor herein contained.
2. Payment of the indebtedness evidenced by a promissory note, of even date herewith, and any extension or renewal thereof, in the principal sum of forty thousand Dollars (\$40,000.00) payable to Beneficiary or order and made by Grantor, the final payment of principal and interest thereof, if not sooner paid, to be finally due and payable August 31, 2006.

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3. To secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor herein, or any or either of them while record owner of present interest, for any purpose, and any notes, drafts or other instruments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein provided. Provided, however, that the making of such further loans, advances or expenditures shall be optional with the Beneficiary, and provided further, that it is the express intention of the parties to this Deed of Trust that it shall stand as continuing security until paid for all such loans, advances or expenditures together with interest thereon.
- A. To protect the security of this Deed of Trust, Grantor agrees:
1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon, and to pay when due all claims for labor performed and materials furnished; to comply with all laws affecting said property or requiring any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.
 2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part thereof may be released to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.
 3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorneys' fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear.
 4. To pay: at least ten days before delinquency, all taxes and assessments affecting said property, when due, all encumbrances, charges and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees and expenses of this Trust. In addition to the payments due in accordance with the terms of the note hereby secured the Grantor shall at the option, and on demand of the Beneficiary, pay each month 1/12 of the estimated annual taxes, assessments, insurance premiums, maintenance and other charges upon the property, nevertheless in trust for Grantor's use and benefit and for the payment by Beneficiary of any such items when due. Grantor's failure so to pay shall constitute a default under this trust.
 5. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof, with interest from date of expenditure at the note rate.
 6. Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligation hereof, may: make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of either

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appears to be prior or superior hereto; and, in exercising any such powers, in enforcing this Deed of Trust by judicial foreclosure, pay necessary expenses, employ counsel and pay his reasonable fees.

B. It is mutually agreed that:


1. Any award of damages in connection with any condemnation for public use of or injury to said property or any part thereof is hereby assigned and shall be paid to Beneficiary who may apply or release such moneys received by him in the same manner and with the same effect as above provided for disposition of proceeds of fire or other insurance.
2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.
3. At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby, Trustee may: reconvey all or any part of said property; consent to the making of any map or plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the lien or charge hereof.
4. Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed and said Note to Trustee for cancellation and retention and upon payment of its fees, Trustee shall reconvey, without warranty, the property then held hereunder. The recitals in any reconveyance executed under this Deed of Trust of any matters or facts shall be conclusive proof of the truthfulness thereof. The Grantee in such reconveyance may be described as "the person or persons legally entitled thereto."
5. As additional security, Grantor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of these Trusts, to collect the rents, issues and profits of said property, reserving unto Grantor the right, prior to any default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and retain such rents, issues and profits as they become due and payable. Upon any such default, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in his own name sue for or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorneys' fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine. The entering upon and taking possession of said property, the collection of such rents, issues and profits and the application thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.
6. Upon default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default, Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of his election to cause to be sold the herein described property to satisfy the obligations hereof, and shall cause such notice to be recorded in the office of the recorder of each county wherein said real property or some part thereof is situated.

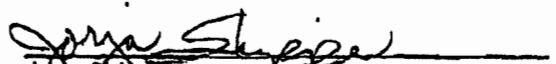
Notice of sale having been given as then required by law, and not less than the time then required by law having elapsed, Trustee, without demand on Grantor, shall sell said property at the time and place fixed by it in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee shall deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including the Beneficiary under the Deed of Trust, may purchase at such sale.

After deducting all costs, fees and expenses of Trustee and of this Trust, including cost of evidence of title and reasonable counsel fees in connection with sale, Trustee shall apply the proceeds of sale to payments of: all sums expended under the terms hereof, not then repaid, with accrued interest at the note rate; all other sums then secured hereby; and the remainder, if any, to the person or persons legally entitled thereto.

- 7. This Deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns, the term Beneficiary shall mean the owner and holder of the Note secured hereby; or, if the note has been pledged, the pledgee thereof. In this Deed, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.
- 8. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Grantor, Beneficiary or Trustee shall be party unless brought by Trustee.
- 9. In the event of dissolution or resignation of the Trustee, the Beneficiary may substitute a Trustee or Trustees to execute the trust hereby created, and when any such substitution has been filed for record in the office of the Recorder of the County in which the property herein described is situated, it shall be conclusive evidence of the appointment of such Trustee or Trustees, and such new Trustee or Trustees shall succeed to all of the powers and duties of the Trustee or Trustees named herein.

Request is hereby made that a copy of any Notice of Default and a copy of any Notice of Sale hereunder be mailed to the Grantor at his address hereinbefore set forth.


Robert Shippen


Jona Shippen

4/12

Date: August 30, 2005

Deed of Trust - continued

File No.: 130148-RI (dm)

THE PROMISSORY NOTE OR NOTES, AND ANY EVIDENCES OF FURTHER AND/OR ADDITIONAL ADVANCES MUST BE PRESENTED WITH THIS REQUEST	
_____ Idaho _____	_____ 20 _____
To: _____	Trustee: _____
You are hereby authorized and requested to execute a reconveyance hereunder and	

The undersigned hereby certifies	
Are the owner(s) and holder(s) of the debt mentioned in said Deed of Trust and that the same has never been	
Address: _____	By: _____
_____	By: _____
Telephone: _____	_____

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EXHIBIT "B"

(Deposition Transcript of Robert Shippen)

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1 Q What were those tasks that you learned?
 2 A Well, bidding.
 3 Q Okay.
 4 A Doing footings, reading plans, squaring
 5 foundations, pouring foundations, paying attention to
 6 lot lines, plot plans, engineering. There's a lot of
 7 stuff.
 8 Q Was excavation one of those?
 9 A At that period, no.
 10 Q Okay. Did you receive any education
 11 regarding excavation processes?
 12 A Just working directly with excavators on
 13 foundation projects.
 14 Q And you mentioned that you were bidding
 15 and doing labor work over those 30 years.
 16 Is that when you would have been working
 17 with those excavators or did that occur after you
 18 began running Marriott Homes, Incorporated?
 19 A No, it was previous.
 20 Q Okay. Are you – sorry, I should have
 21 asked this. Are you from this area?
 22 A Yes.
 23 Q From the Jefferson County, Rigby area?
 24 A I grew up in Menan.
 25 Q Okay. How long have you lived here in

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1 Jefferson County?
 2 A Another guess, since '72 or three or
 3 four, something like that.
 4 Q So about 30 years?
 5 A Yeah.
 6 Q Okay. Are you familiar with subwater
 7 issues here in Jefferson County?
 8 A Yes.
 9 Q When did you become aware of those?
 10 A In Jefferson County or in the whole
 11 area?
 12 Q Well, let me ask you this: What do you
 13 understand these water table or subwater issues to
 14 be, just to the best of your understanding.
 15 I'm not asking you to testify as an
 16 expert. I'm just asking you what do you understand
 17 to be the water issues in Jefferson County?
 18 MR. DUNN: I would object. That
 19 question is a little broad.
 20 Let me tell you why I'm making that
 21 objection: Subwater, ground water and surface
 22 water all have different technical meanings. I
 23 don't know how you're trying to ask him; but
 24 maybe he understands what you're meaning, but I'm
 25 just making that objection for the record.

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1 MR. DAVIS: Do you want me to walk
 2 through each one?
 3 MR. DUNN: It's not a matter of what he
 4 wants. You get to conduct the deposition. I'm
 5 just objecting that it's overly broad.
 6 MR. DAVIS: I understand that. I guess
 7 for clarity sake, I'm asking Mr. Shippen what he
 8 understands.
 9 BY MR. DAVIS:
 10 Q Do you understand them to be three
 11 separate issues, subwater, ground water and surface
 12 water?
 13 A Yes.
 14 Q Okay. What do you understand the
 15 subwater issues to be in Jefferson County?
 16 A Your subwater is affected primarily
 17 through irrigation from farmers, is what basically
 18 raises and lowers your subwater, to my understanding.
 19 Q Okay. And ground water, what do you
 20 understand about the ground water in Jefferson
 21 County?
 22 A Your ground water, to me, is the
 23 stable – is basically the aquifer. It will rise and
 24 lower depending on the height of the river and the
 25 streams and the canals.

Page 21

1 Q Okay. You understand there to be a high
 2 ground water level in Jefferson County, or do you
 3 know?
 4 A Can you clarify high?
 5 Q Sure. That's a fair question.
 6 Do you know at what point the ground
 7 water level raises to in Jefferson County?
 8 A No.
 9 Q Sorry.
 10 How deep do you have to dig to hit
 11 ground water in Jefferson County?
 12 A The wells are about 60 feet before they
 13 hit water.
 14 Q Okay. You mentioned that you know about
 15 this subwater being affected through irrigation of a
 16 farmer. What is your understanding of how that
 17 works?
 18 A The more the farmer irrigates, just the
 19 higher sublevels.
 20 I mean, you're flooding an area and the
 21 water has to drain down through the aquifer and
 22 before it can drain down, it raises.
 23 Q Sure.
 24 So did you know about this subwater the
 25 way that the farmers affect – the farmers flood

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1 irrigating, the way that affects ground water prior
 2 to the construction of the Goodspeed house?
 3 A Yes.
 4 Q Just for the record, whenever I mention
 5 the house or the property, I'm going to be talking
 6 about this, the subject property, the Goodspeed
 7 house.
 8 If you do have any call for a
 9 clarification, that's generally what I'm talking
 10 about. So if you have any questions, let me know but
 11 I'll try and be clear to that.
 12 Now, you mentioned that you live –
 13 sorry, I didn't write down your address here.
 14 Where you live, is that near Woodhaven
 15 Creek Estates?
 16 A No.
 17 Q How far away is that?
 18 A Approximately three miles.
 19 Q You mention your previous house was at
 20 37 – or excuse me, 3917 East, 489 North?
 21 A 485.
 22 Q Excuse me. 485 North.
 23 How far away is that address from
 24 Woodhaven Creek Estates?
 25 A About the same.

Page 23

1 Q So it's just in a different direction
 2 then from Woodhaven Creek Estates?
 3 A Yes.
 4 Q Were you familiar with the Woodhaven
 5 Creek Estates subdivision area prior to the
 6 construction of the home?
 7 A Yes.
 8 Q Okay. Did you ever attend any meetings
 9 for the zoning of the Woodhaven Creek subdivision?
 10 A No.
 11 Q What knowledge do you have about the
 12 original approval of the Woodhaven Creek subdivision,
 13 sorry, by planning and zoning?
 14 A None.
 15 Q Okay. Do you know anything about the
 16 approval of the Woodhaven Creek subdivision in
 17 general?
 18 A You know, I'm trying to think of the
 19 sheet that they give you. Just the covenants. The
 20 restricted covenants.
 21 Q So the covenants. Would you have also
 22 known about the plat?
 23 A Oh, yes.
 24 Q The plat map? I'm sorry. Can you
 25 answer that again?

Page 24

1 A Yes.
 2 Q The plat map?
 3 A Yes.
 4 Q Okay.
 5 Were you aware of any subwater issues in
 6 the Woodhaven Creek Estates subdivision prior to the
 7 construction of the home?
 8 A Yes.
 9 Q What was your knowledge of that?
 10 A There was a test hole dug for people to
 11 measure the depth.
 12 Q Okay. Do you remember what the findings
 13 of that test hole were?
 14 Let me ask it this way: Did you dig
 15 that test hole?
 16 A No.
 17 Q Do you know who dug that test hole?
 18 A No, I don't.
 19 Q Okay. Do you know the results of that
 20 test hole dig?
 21 A I'm not sure I understand your question.
 22 Q Did you ever see the report of the test
 23 hole?
 24 A No, I did not.
 25 Q Okay. You mentioned that you did know

Page 25

1 about the subwater issues because the test hole was
 2 dug.
 3 What is your understanding of the result
 4 of that test hole?
 5 A Can you clarify?
 6 Q Yeah. Let me try.
 7 You previously mentioned that you know a
 8 test hole was dug and that you knew about the
 9 subwater issues before you built the house.
 10 What did you know about the subwater
 11 issues before you bought the house, or excuse me,
 12 before you built the house?
 13 A I knew there were issues.
 14 I measured, personally, the height of
 15 the water in the test hole and put the basement in
 16 accordingly.
 17 Q Okay. What was the height of the water
 18 in the test hole?
 19 MR. DUNN: Objection; foundation.
 20 THE WITNESS: I don't recall what the
 21 inches was.
 22 BY MR. DAVIS:
 23 Q Okay. Let me just clarify the question
 24 because it wasn't a very good way of stating it.
 25 From the surface of the ground, you said that you

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1 personally measured the water in the test hole.
 2 A (Nods yes.)
 3 Q Do you recall how far from the -- how
 4 far down from the surface of the ground there was
 5 until you hit water?
 6 MR. DUNN: Objection; foundation.
 7 THE WITNESS: I don't.
 8 BY MR. DAVIS:
 9 Q Okay. At the time you measured the
 10 water in the test hole, what was your impression as
 11 to how deep the basement could go, how deep you could
 12 excavate the basement?
 13 A Could you please reask that?
 14 Q Sure.
 15 When you measured -- you said that you
 16 went and measured the water in the test hole, what
 17 was -- you said you don't recall how deep or how far
 18 it was until you hit subwater or ground water.
 19 What was your impression, at that time,
 20 as to how deep you needed to dig the -- you could dig
 21 the foundation of that house?
 22 A We went 16 inches. We dug the
 23 footings -- we had the footings dug to be -- so the
 24 finished floor was 16 inches above what was measured.
 25 Q And when did you go and measure this

1 A No, it doesn't.
 2 Q Okay. You also mentioned that you're
 3 aware that the subwater is affected through
 4 irrigation of the farmers.
 5 Do you know when, generally, this --
 6 when that subwater starts to rise?
 7 A Typically Labor Day weekend is probably
 8 the highest.
 9 Q Did you know this before you began
 10 construction on the home?
 11 A The date is kind of a reference. It can
 12 fluctuate.
 13 Q Sure.
 14 A So I knew that the high water season was
 15 when the subwater was the highest.
 16 Q Okay. Maybe you can explain that for
 17 me. What is high water season?
 18 A When the farmers are irrigating.
 19 Q Would that be in the months -- starting
 20 in the months of April or May?
 21 Is that the entire year of the crop or
 22 is that usually in the hotter months of the year?
 23 A Depends on the farmers and what crops
 24 they're growing.
 25 Q Okay. When you mention high water

1 test hole?
 2 A I don't know the exact date.
 3 Q Would it have been in 2005 or 2006?
 4 A I couldn't answer that. I don't know.
 5 Q Do you recall when you began
 6 construction of the home?
 7 A The year?
 8 Q The year.
 9 A I should know. I don't. I think it was
 10 2006.
 11 Q Okay. Do you recall if there was snow
 12 on the ground when you measured the --
 13 A No.
 14 Q Okay. Do you remember the season that
 15 you measured that hole?
 16 A Summer.
 17 Q Okay. If I were to represent to you
 18 that you began construction on that home the very
 19 beginning of the year 2006, would that seem
 20 consistent with what you recall?
 21 A If you have those records, yes.
 22 Q Well, I want you to testify as to what
 23 you recall, not to what I'm telling you.
 24 I'm just wondering if that spurs your
 25 memory at all.

1 season, is that typically at the end of the planting
 2 season, excuse me, at the end of the crop season?
 3 A That is hard to answer because every
 4 crop ends in a different season and a different
 5 month.
 6 Q That's a fair objection. You can tell
 7 I'm a city boy. You can probably also tell I don't
 8 take many vacations because I'm going to ask you is
 9 Labor Day, that's the beginning of September; is that
 10 right?
 11 A Yes, between the end of August and the
 12 beginning of September.
 13 Q Okay. That's typically the highest
 14 point that the subwater gets, though, is that what
 15 you're telling me?
 16 A At the Goodspeed's home, that was the
 17 highest it was there on that day.
 18 Q Okay. Do you recall when you went and
 19 dug or excuse me, when you went and measured the test
 20 hole; did you go there in the early summer or late
 21 summer of 2006?
 22 A I did not say I did it in 2006.
 23 Q Okay. I apologize.
 24 A I did it -- I probably measured it four
 25 or five times throughout the summer or more.

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1 MR. DAVIS: Sure.
 2 From what I understand, and it's
 3 probably good to clarify this now, ground water,
 4 from what Mr. -- from what Bob Shippen has
 5 explained, is down about 60 feet for wells.
 6 MR. DUNN: That's his understanding.
 7 MR. DAVIS: That's his understanding.
 8 Really, what I'm looking at is that water that
 9 you're going to first meet; and from what he's
 10 defined, he's defined that as subwater.
 11 I was going to bifurcate the question
 12 into both ground water and subwater just for
 13 clarity.
 14 MR. DUNN: So I think a hydrologist
 15 would use all the terms we're using today
 16 completely different than we're using them.
 17 But I understand that what my client's
 18 definition is, is what you're relying upon.
 19 MR. DAVIS: Right. Thanks. Now, I
 20 lost my place.
 21 BY MR. DAVIS:
 22 Q Let's see.
 23 So similarly, subwater and ground water
 24 are critical to the construction of the home, not
 25 necessarily in the integrity of the home but in other

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1 issues; is that a fair statement?
 2 A Yes.
 3 Q What are those other issues that it
 4 would affect on the home?
 5 A Well, it impedes the liveability.
 6 Q The ability?
 7 MR. DUNN: Liveability.
 8 MR. DAVIS: Oh. Liveability.
 9 BY MR. DAVIS:
 10 Q So where do you generally look to
 11 determine if there is going to be high levels of
 12 ground water or subwater as a contractor?
 13 A The only thing you can go off of is
 14 historically what has been found out.
 15 In this case, we was going off the hole
 16 that was dug.
 17 Q Okay.
 18 Those were based on your measurements;
 19 is that correct? What you were relying on were your
 20 personal measurements in the hole?
 21 A That, plus the advice of the guys that
 22 had built before me and other people in the area, the
 23 contractors.
 24 Q Okay.
 25 Did you hire an engineer or hydrologist

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1 to diagnose the ground water or subwater for this
 2 house?
 3 A No.
 4 Q Did you consult an engineer to discuss
 5 remedies for the high water -- the high ground water
 6 or subwater for this home?
 7 A No.
 8 Q If you wanted to obtain information
 9 about the home, you've mentioned that you talked to
 10 other contractors and done your own measurements, is
 11 there any other documents or places you would turn
 12 to, to have some understanding as to where the ground
 13 water would be for the home -- or for a home?
 14 Sorry.
 15 A Not that I'm aware of.
 16 Q To your knowledge, would a recorded plat
 17 map have any information about the water levels?
 18 A No.
 19 Q Would it contain any information about
 20 the health considerations of the area?
 21 A Say that again.
 22 Q Yeah. Would it have any information
 23 about health considerations for that specific area?
 24 A Not that I know of.
 25 Q Would there be information on that plat

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1 about a specific septic system that might need to be
 2 installed?
 3 A We get our information from Seventh
 4 District Health regarding every subdivision that
 5 supersedes whatever is on the plat.
 6 MR. DUNN: Just for the record, I will
 7 indicate that its changed its name from the
 8 Seventh District Health department which he would
 9 be familiar with. It's Upper Valley Health
 10 Department, or something similar to that.
 11 But it's the health department that
 12 he's referring to.
 13 It's changed its name now.
 14 THE WITNESS: Okay.
 15 MR. DAVIS: Okay.
 16 BY MR. DAVIS:
 17 Q When you build a house, what kind of
 18 permits do you need to get to build a house?
 19 A A sewer permit.
 20 Q Okay. Any other permits?
 21 A Building permit.
 22 Q Okay. Anything else?
 23 A The others are obtained by the
 24 subcontractors that do the work.
 25 Q So is it your testimony, then, that you

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1 the home for a reasonable amount.
 2 BY MR. DAVIS:
 3 Q Is it Marriott Homes, LLC's position
 4 that -- to build homes of quality construction?
 5 A We try.
 6 Q Okay. What are some precautions you
 7 take to make sure that you build a home of quality
 8 construction?
 9 MR. DUNN: Objection; overly broad.
 10 THE WITNESS: You just use the best
 11 subs that you can find.
 12 BY MR. DAVIS:
 13 Q Okay. How frequently did you visit the
 14 job site?
 15 A When actual construction is taking
 16 place, probably daily or every other day. Probably
 17 four times a week, minimum.
 18 Q So you didn't have a foreman going out
 19 to do the checking for you, you did that personally?
 20 A No, I did not. Uh-huh.
 21 Q Is that a yes?
 22 A I do not have a foreman. I checked it
 23 myself, yes.
 24 Q Did you visit or work on the residence
 25 in July -- well, of 2006?

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1 A I can't recall whether I did it in July
 2 of 2006.
 3 Q Do you know if the house was under
 4 construction in July of 2006?
 5 A Without looking at documents or papers,
 6 I couldn't answer that.
 7 Q Okay.
 8 Well, we had previously talked about a
 9 septic permit being issued in April of 2006.
 10 Do you recall about how long after you
 11 got that building permit and septic permit that it
 12 took before you began construction?
 13 A Once you take the septic permit out,
 14 then you can apply for the building permit.
 15 It depends on if the building permit is
 16 in one week, four weeks, however long it took to get
 17 it out.
 18 Then there would be a little period
 19 after that when I actually started. I don't know the
 20 time.
 21 Q Okay.
 22 Did you personally observe standing
 23 water on the property outside of the house during
 24 that time when you were supervising the construction
 25 of the home?

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1 A When I back filled that, I dug the back
 2 down deep because it was a high subwater year so I
 3 could -- so I could watch it.
 4 Q Okay. So did you personally observe
 5 standing water on the property?
 6 A Yes. In the excavated portion, yes.
 7 Q How far down did you dig?
 8 A It was probably two and a half feet,
 9 three feet maybe. I don't know.
 10 Q Where was that hole that you dug in
 11 relation to the house?
 12 A In the walkout.
 13 Q So did you dig that hole before the
 14 walkout basement door was cut out of the foundation?
 15 A There was not a door cut out of the
 16 foundation.
 17 Q Out of the foundational wall, there is
 18 no door cut out for the basement?
 19 A This is flush as I recall. It would
 20 have been poured blocked out -- if it would have been
 21 an opening, it would have been pour blocked out.
 22 Q I apologize. You wouldn't have cut it
 23 out. It wouldn't have been poured for you to cut
 24 out.
 25 A Right.

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1 Q Okay. How far was the house -- how near
 2 completion was the house at the time that you dug
 3 that hole?
 4 A I'm not sure. It was in -- I believe it
 5 was the first of July when I dug that. It might have
 6 been the end of June.
 7 Q And when you said that you -- would you
 8 agree there's a walkout basement?
 9 A Yes.
 10 Q And did you excavate that walkout
 11 basement?
 12 I'm sorry. Did Shippen Construction
 13 excavate that walkout basement?
 14 A No.
 15 Q So are you telling me, then, that you
 16 dug two and a half feet from the original ground
 17 level before you found water or where did you dig
 18 that hole?
 19 A No. Follmer excavated it and so it was
 20 down to the walkout level. Then from the walkout
 21 level, I dug it down deeper.
 22 Q From the time that you observed that
 23 water, this was back in July, then, about July of
 24 2006?
 25 A That's when I dug it, yes.

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1 Q Is that when you saw the standing water?
 2 A It didn't come in for probably mid July,
 3 end of July, mid July.
 4 I don't know a date exactly.
 5 Q So why did you dig that hole?
 6 A From talking to other people, it was the
 7 most extreme subwater anybody had seen in this area
 8 in the last 40 or 50 years.
 9 Q In your observations of the house, did
 10 the water ever come out of that hole that you dug?
 11 While the house -- during the time the house was
 12 under construction, did that water from the test hole
 13 ever go fill the test hole?
 14 A Yes.
 15 Q Okay. And did it come out of the test
 16 hole?
 17 A Yes, it raised above it.
 18 Q Okay. And how far above the test hole
 19 did that water raise?
 20 A Above the test hole, I'm not sure.
 21 Q Did it go into the basement?
 22 A Yes.
 23 Q Had the basement been sheetrocked at
 24 that time?
 25 A Yes, I believe it had.

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1 Q Okay.
 2 A I'm not positive, but I think it was.
 3 Q How high did that water level raise?
 4 Let me finish my question here.
 5 Do you recall what month that water went
 6 into the basement of the house?
 7 A It was on Sunday on Labor Day weekend.
 8 Q Of 2006?
 9 A I believe so.
 10 Q Did you continue to observe this ground
 11 water in the basement?
 12 A Yes.
 13 Q Okay. How high in that basement did
 14 that water get?
 15 A I measured it with a tape measure and it
 16 was one inch deep.
 17 Q Did it cover the entire basement floor?
 18 A Yes.
 19 Q All right. Did it ever exceed one inch
 20 --
 21 A No.
 22 Q -- to your knowledge?
 23 A No.
 24 Q No?
 25 A No.

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1 Q Okay. Did anyone contact you during
 2 those -- during that Labor Day weekend period to
 3 notify you about ground water going into the
 4 basement?
 5 A No.
 6 Q Do you know where that water came from?
 7 A Yes.
 8 Q Where did it come from?
 9 A The ground. From irrigators. Subwater.
 10 Q When did you remove that water from the
 11 basement?
 12 A It came in on a Sunday and the next day,
 13 I went out and the water was lower than the basement
 14 floor on the outside.
 15 So I watched in the basement to see how
 16 long it would stay there. And after about, I'm
 17 guessing four days, it had considerably went down to
 18 where it was just wet all over.
 19 At that time, I swept it into little
 20 areas and pumped -- and got a little teeny pump and
 21 pumped it out and then cleaned it and dried
 22 everything out.
 23 Q Okay.
 24 So the basement essentially drained
 25 itself, is that what you're saying?

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1 A Sunk back down through the cement.
 2 Q Did the concrete absorb the water, is
 3 that what you're saying?
 4 A That's how -- it came back up and then
 5 it sunk a little bit and absorbed, yes.
 6 Q And you're the expert in concrete
 7 curing.
 8 But is it your testimony, then, that the
 9 concrete absorbed an inch of water?
 10 A There could be cracks, other places
 11 where it could go down; but yes, if you put water on
 12 concrete, it will absorb it.
 13 Q How long did it take to remove the water
 14 from the basement?
 15 A Two hours. Not very long.
 16 Q Okay. While the home was under
 17 construction or listed for sale, did it ever flood
 18 again to your knowledge?
 19 A No, it did not.
 20 Q Did you have a leaching system installed
 21 at that time?
 22 A No.
 23 Q And just to have the record clear, when
 24 I say at that time, I mean, at the time, Labor Day
 25 weekend of 2006?

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1 Q Well, I'm asking -- it says in here that
 2 you have agreed to give them a standard builder's
 3 warranty. But then it says buyers agree to hold
 4 builder harmless.
 5 To me that conflicts because on the one
 6 hand, they say we're going to give you -- you're
 7 going to give us a warranty and on the other hand,
 8 potentially, I look at this and say: Well, is Bob
 9 telling us that -- well, he says right here that we
 10 agree to hold the builder harmless.
 11 MR. DUNN: Is there a question there or
 12 is that a statement?
 13 MR. DAVIS: Well, that's my question.
 14 BY MR. DAVIS:
 15 Q What is your understanding of this
 16 buyers to agree to hold builder harmless? What does
 17 that mean to you?
 18 A That means that that line that precedes
 19 it, that's the definition of that line that precedes
 20 it. Builder to allow buyers to store belongings in
 21 the garage until closing. Buyers agree to hold
 22 builder harmless.
 23 Q So you won't be liable for the loss of
 24 their stuff that's in the garage prior to closing; is
 25 that what you're saying?

1 A That's what I understand that to say.
 2 Q Okay. And the reason I ask is that
 3 Mr. Dunn had previously sent me a letter back in
 4 December saying that they had agreed to hold you
 5 harmless.
 6 So that's why I need to understand what
 7 you mean by that now so that we're not getting a
 8 different story later on.
 9 MR. DUNN: My letter has nothing to do
 10 with that paragraph.
 11 MR. DAVIS: Okay. But you quoted it
 12 verbatim so I thought I would ask.
 13 BY MR. DAVIS:
 14 Q Did you understand the Goodspeeds would
 15 be inhabiting the house as their primary residence?
 16 A Yes.
 17 Q Okay. Is there anything in this
 18 contract that you believe that notifies the
 19 Goodspeeds that the house would not be of quality
 20 construction?
 21 A No.
 22 Q Do you believe that if there were, that
 23 this contract would be confusing?
 24 MR. DUNN: Objection; that calls for a
 25 conclusion, a legal conclusion.

1 THE WITNESS: I don't understand your
 2 question.
 3 BY MR. DAVIS:
 4 Q Well, the contract apparently says that
 5 you're going to give a warranty.
 6 If there were somewhere a disclaimer in
 7 here about a warranty, don't you think that would be
 8 confusing as to what was actually meant by the
 9 contract?
 10 A Not really.
 11 Q Why not?
 12 A Probably depends on a person's
 13 perception.
 14 Q Okay. In your line of construction
 15 business, do you believe or do you expect to produce
 16 quality homes people can live in?
 17 MR. DUNN: Objection; asked and
 18 answered.
 19 THE WITNESS: Yes.
 20 BY MR. DAVIS:
 21 Q Okay. And did you believe the
 22 Goodspeeds were expecting this of you?
 23 MR. DUNN: Objection; speculation as to
 24 what the Goodspeeds may be thinking.
 25 THE WITNESS: Yes.

1 BY MR. DAVIS:
 2 Q Okay. The closing on this house, do you
 3 know who the closing check was written out to?
 4 A No, I do not.
 5 Q Do you know what account you deposited
 6 that check in?
 7 A Marriott Homes. Well, that's incorrect.
 8 I'm actually not sure where I would have deposited
 9 that.
 10 Q Okay. Do you remember what your profit
 11 margin on the house was?
 12 MR. DUNN: Objection; irrelevant. You
 13 don't -- do not have to answer that one.
 14 THE WITNESS: No.
 15 BY MR. DAVIS:
 16 Q Are you saying you don't recall?
 17 MR. DUNN: Objection.
 18 BY MR. DAVIS:
 19 Q You don't recall or are you refusing to
 20 answer?
 21 A Don't know.
 22 Q Okay.
 23 I just want to make sure that I'm
 24 understanding what's happening here.
 25 Are you saying you don't know or are you

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Exhibit No. 7
 Date: 2-27-10
R. SHIPPEN
 T&T REPORTING

Jefferson County Planning & Zoning
 243 East Fremont Avenue
 Rigby ID, 83442

Date: 5/8/2006 Permit No: JEF-06-05-07

Job Address: 3109 East 319 North
 Lot: 7 Block: 2 Sub: Woodhaven Div #1
 Township: 4N Range: 38E Sec: 14
 Pin: _____

Owner

Name: _____
 Address: _____
 City, State, Zip: _____ Phone: _____

Contractor

Name: Shippen Construction
 Address: 518 North 3950 East
 City, State, Zip: Rigby, ID 83442 Phone: _____

Designer

Name: _____
 Phone: _____

Structure: New Type: Residence

Dimension: 94 X 39 Plot Acres: 1 Main/Foundation: 2000
 Garage/Year: 888 Stories /X Wide: 1 2nd Floor: _____

Basement: Full - Unfinished (2000)

Footings: <u>Concrete</u>	Foundation: <u>Concrete</u>
Floors: <u>Wood</u>	Ext Walls: <u>Masonry, Veneer, Stucco</u>
Int Walls: <u>Drywall</u>	Ceiling: <u>Drywall</u>
Roof: <u>Comp Sh</u>	Heat: <u>Gas</u>
Insulation: <u>Walls, Ceiling, Perimeter</u>	

In Flood Plain: No Certificate: N/A

Use: R-3, U,

Zoning: Residential

Valuation: \$161,272
 Permit Cost: \$1,470.57
 10% Review: \$133.69
 Refund: \$401.06

Michael Law
 Issued By
Robert D. Higgins
 Applicant Signature

EXHIBIT “C”

(Deposition Transcript of Jorja Shippen)

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1 Q I would ask what type of work that
 2 involves but my wife tells me every night what that
 3 involves.
 4 A Okay. I want to clarify that. Not just
 5 a homemaker. I'm a homemaker.
 6 Q Is it fair to say, then, that you
 7 haven't worked in the field of construction?
 8 A Yes.
 9 Q Okay. Are you from this area?
 10 A Yes.
 11 Q Where did you grow up?
 12 A In Rigby.
 13 Q How long have you lived here?
 14 A Fifty-six years.
 15 Q So you have seen a few changes to this
 16 town I'm guessing.
 17 A Yes.
 18 Q Are you familiar with the water table or
 19 subwater issues in Jefferson County?
 20 A Yes, somewhat.
 21 Q Okay. What do you know about them?
 22 A Probably the same as everybody else.
 23 You know, they raise and they lower.
 24 Q Okay.
 25 Do you know what affects the water

Page 11

1 levels or the ground water or subwater levels here in
 2 Jefferson County?
 3 A Probably the farmers' irrigation.
 4 Q Okay. And how long have you known about
 5 these water table issues? I'm sorry, subwater and
 6 water table issues.
 7 A Since we built our first home.
 8 Q When was that?
 9 A 1977.
 10 Q Okay. Did you ever attend a meeting for
 11 the zoning of -- I'm sorry, Woodhaven Creek Estates?
 12 A No.
 13 Q Do you have any knowledge about the
 14 original approval of that subdivision?
 15 A No.
 16 Q Were you aware of subwater issues in the
 17 general vicinity of that subdivision?
 18 A Yes, just because I've grown up here.
 19 Q Were you aware of any test water -- were
 20 you aware of any ground water test holes that were
 21 dug in that subdivision for it to be approved?
 22 A No.
 23 Q Okay. Did you know that there were farm
 24 fields surrounding the subdivision?
 25 A Yes.

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1 Q Do you know when Marriott Homes was
 2 formed? Sorry. Do you remember when Marriott Homes,
 3 LLC was formed?
 4 A No, not the exact date.
 5 Q Okay. What's your role in Marriott
 6 Homes, LLC?
 7 A Secretary.
 8 Q What are your duties?
 9 A I'm pretty much a silent partner.
 10 Support, silent partner.
 11 Q Do you ever consult with Bob Shippen
 12 regarding business transactions?
 13 A No.
 14 Q Do you do any consulting with Robert
 15 Shippen with regard to the affairs of Marriott Homes?
 16 A No, not really.
 17 Q Okay. I asked -- well, let me ask you
 18 this first: Does the Marriott Homes, LLC have
 19 regular meetings?
 20 A Occasionally.
 21 Q Okay. What do those meetings entail?
 22 A Just kind of discussing where we're at.
 23 Q Do you know if any minutes were taken
 24 during those meetings?
 25 A Not that I know of.

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1 Q Are you aware of any formal entity
 2 documents that are not in the possession of Bill
 3 Dupree?
 4 A No.
 5 Q Other than maybe titles to property or
 6 the like?
 7 A No, I don't.
 8 Q Okay. Do you have any account
 9 involvement with the accounting for Marriott Homes?
 10 A No.
 11 Q Do you know who Maria Rodriguez is?
 12 A No.
 13 Q Okay.
 14 A I've never heard of her.
 15 MR. DAVIS: Off the record.
 16 (Off-the-record discussion.)
 17 MR. DAVIS: Go back on the record.
 18 Actually, let's stay off the record.
 19 (Off-the-record discussion.)
 20 MR. DAVIS: Let's go back on the
 21 record.
 22 BY MR. DAVIS:
 23 Q Jorja, could you please turn to Exhibit
 24 Number 3.
 25 A (Witness complies). What does it say on

Page 22

1 the land that this house was under, never belonged to
 2 Marriott Homes, Incorporated or Shippen Construction,
 3 Incorporated – Marriott Homes, LLC or Shippen
 4 Construction, Incorporated?
 5 A Okay. Repeat the first of that.
 6 Q I'm sorry.
 7 A That's okay.
 8 Q I keep trying to separate this LLC
 9 Incorporated.
 10 Would you agree that the real property
 11 sold to the Goodspeeds was never in the name of
 12 Marriott Homes, LLC or Shippen Construction,
 13 Incorporated?
 14 A Yes.
 15 Q Okay. That name was held in your name
 16 and in Robert Shippen's name only, correct?
 17 A Uh-huh.
 18 Q Is that a yes?
 19 A Yes. Sorry.
 20 Q Did you ever speak with Robert Shippen
 21 about hiring an engineer to design this home?
 22 A No.
 23 Q Again, when I say property and home, I'm
 24 referencing the subject property of this litigation.
 25 Do you understand that's what I'm asking?

Page 23

1 A Uh-huh.
 2 Q Is that a yes?
 3 A Yes.
 4 Q How frequently did you personally visit
 5 the job site while the home was under construction?
 6 A The whole time? Maybe four or five
 7 times.
 8 Q Okay. And then while it was listed for
 9 sale, did you go and visit it more?
 10 A I cleaned it.
 11 Q Was that a periodic cleaning or was that
 12 a cleaning in anticipation of closing?
 13 A You know, kind of clean as it went
 14 along, you know, kind of have to go clean up. And
 15 then cleaned it as it was listed.
 16 Q Okay.
 17 As that home was listed, how many times
 18 did you personally visit that property?
 19 A I never did. After it was listed?
 20 Q While it was listed?
 21 A Oh, while it was listed? I don't think
 22 I ever went out.
 23 Q I thought you just told me that you
 24 cleaned it every –
 25 A I cleaned it prior to – no, I cleaned

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1 it -- as the home was being constructed, I would go
 2 out and clean it as it was being constructed to clean
 3 up after contractors. Then I cleaned it prior to it
 4 being listed.
 5 Q So after the property was listed, is it
 6 your testimony that you never went back over to the
 7 house?
 8 A I went over one more time.
 9 Q I'm sorry. Okay. When was that?
 10 A It was – I believe maybe the day – it
 11 was the day Mr. Goodspeed was there and he was
 12 leaving to go back and pick up his, I believe his
 13 wife to move in.
 14 Q Was this prior to closing?
 15 A Yes, it was.
 16 Q Did you ever visit the residence between
 17 the months of July and October of 2006?
 18 A Can you tell me when it was – it was
 19 being built in 2006? I have to get the dates
 20 straight. No.
 21 Q Okay. Did you ever personally observe
 22 standing water outside of the house?
 23 A No.
 24 Q Did you ever personally observe standing
 25 water on the inside of the house?

Page 25

1 A No.
 2 Q Did Robert Shippen ever tell you that he
 3 had witnessed water in the house?
 4 A Yeah, he had concerns.
 5 Q Okay. What did he tell you?
 6 A Just like today.
 7 You know, he went out there and there
 8 was just, you know, I don't know – I don't even know
 9 how deep. I didn't really listen, but that there was
 10 water in there.
 11 Q Just like he told me today or he went
 12 out there today?
 13 A Just like he explained it today, yeah.
 14 Q Okay. Did anyone contact you,
 15 personally, regarding ground water in the basement?
 16 A No.
 17 Q Did you have – well, do you know how
 18 long that water was in the basement until it was
 19 removed?
 20 A No. I never went out. Sorry.
 21 Q One final question. I'm sure you've
 22 already answered this.
 23 You mentioned that occasionally you
 24 would go and help clean up the property. Did you
 25 ever go and help clean up any flooding?

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1 home. And then parenthesis, it says, walk out
 2 basement area. This is on page three.
 3 What did you understand that language to
 4 mean?
 5 A What do I understand it to mean?
 6 Q Yes.
 7 A I understand -- I would just call it a
 8 sub pump.
 9 Q Okay.
 10 Do you know why that sub pump was -- why
 11 that sub pump was installed?
 12 A Yes.
 13 Q Why is that?
 14 A Because Bob had a conversation, they
 15 felt like there could be a possibility of subwater.
 16 Q Who is they?
 17 A Bob and Mr. Goodspeed. I know Bob had a
 18 conversation with him about it.
 19 Q Okay.
 20 Do you have any personal knowledge as to
 21 why that sub pump was installed?
 22 A Because of the existing water that had
 23 shown up, the possibility of that.
 24 Q Did you understand that the Goodspeeds
 25 would be occupying this residence as their primary

1 A Number 11?
 2 MR. DUNN: Just keep going.
 3 BY MR. DAVIS:
 4 Q Do you recognize this document?
 5 A No.
 6 Q Did you ever check the MLS listing while
 7 the house was listed for sale?
 8 A No.
 9 Q Did you have any discussions with Dave
 10 Chapple regarding what was to be included in the MLS
 11 listing?
 12 A No.
 13 Q Do you have any idea who wrote this --
 14 the representations in this MLS listing?
 15 A No.
 16 Q Okay. And I can't remember if I asked
 17 you already if -- how many times you checked the MLS
 18 listing for this house?
 19 A I never did.
 20 Q Okay.
 21 You mentioned that you had heard from
 22 Bob that the house had flooded.
 23 Did you ever think to put the public on
 24 notice by amending an MLS listing to make the
 25 disclosure of the flood?

1 residence?
 2 A Yes.
 3 Q Is there anything in this contract, and
 4 by this contract, I mean, Exhibit 10, that would lead
 5 you to believe that this house was not warranted to
 6 be of quality construction?
 7 A No.
 8 Q Do you believe there is anything in this
 9 agreement that precludes -- well, let me rephrase
 10 that.
 11 Is there anything in this document, to
 12 your knowledge, that notifies the Goodspeeds that
 13 this house would not be habitable?
 14 A Can you repeat that one more time?
 15 Q Yeah.
 16 Is there anything in this contract, that
 17 you're aware of, that would notify the Goodspeeds
 18 that the house would not be habitable?
 19 A No, not that I know of.
 20 Q Do you know who the closing check was
 21 made out to?
 22 A I don't.
 23 Q Lets turn to Exhibit Number 11.
 24 A (Witness complies).
 25 Q It's the MLS listing one.

1 A No.
 2 Q Do you know how long the house was on
 3 the market?
 4 A I don't.
 5 Q Are you aware whether the house flooded
 6 again in 2007 or 2008?
 7 A Not to my knowledge.
 8 MR. DAVIS: If I could have a minute
 9 with my clients, please. See if we need to
 10 discuss anything else.
 11 (Brief recess.)
 12 MR. DAVIS: Can we go back on.
 13 We don't have anything further.
 14 However, we would restate our position on
 15 suspending the deposition as mentioned previously
 16 and for those same things mentioned in the
 17 deposition of Robert Shippen.
 18 Notably in this case, however, we have
 19 not requested in the deposition itself,
 20 confirmation that Ms. Shippen would, in fact,
 21 provide additional documents that she had
 22 previously promised and therefore, we suspend the
 23 deposition only with respect to those documents
 24 not produced in response to the subpoena.
 25 MR. DUNN: I would reiterate the same

EXHIBIT “D”

(Deposition Transcript of Nicholas Shippen)

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1 A. Yes.
 2 Q. If you're working on the property and
 3 you dig down -- or, excuse me, if you're pouring a
 4 foundation and you see subwater on the property, is
 5 it normal to continue construction?
 6 A. Probably not normal to continue.
 7 Q. Okay. What kind of steps would you
 8 generally make in the event you saw subwater?
 9 A. Well, I would call the builder and let
 10 them make the call.
 11 Q. Okay. Were you involved in any cleanup
 12 of subwater in the basement of the house?
 13 A. No.
 14 Q. Okay. Did Robert Shippen ever talk to
 15 you about flooding in the house?
 16 A. Yes.
 17 Q. I'm sorry, that was a dangling modifier.
 18 Did Robert Shippen ever talk to you
 19 about flooding at the house?
 20 MR. DUNN: Flooding or subwater?
 21 Q. (BY MR. DAVIS:) Flooding in the
 22 basement in the house?
 23 A. Not flooding.
 24 Q. He talked to you about subwater then?
 25 A. Yes.

Page 23

1 Q. What did he tell you?
 2 A. He had mentioned that there had been
 3 some in the basement. I don't know what extent. If
 4 I remember right, it seems like he said around the
 5 low spot around the drain around the stairway or
 6 something.
 7 Q. And when was this that the --
 8 A. I don't know.
 9 Q. -- that he saw water in the basement?
 10 A. When?
 11 Q. Yeah. Did he tell you when he had seen
 12 that water?
 13 A. I don't remember the exact dates on
 14 that.
 15 Q. Was it before the house was sold?
 16 A. I believe so.
 17 Q. Okay. When did he tell you about this
 18 subwater in the basement?
 19 A. When? I don't know the exact date.
 20 Q. Okay. Was it prior to the sale of the
 21 home?
 22 A. Yes.
 23 Q. Did he tell you whether or not he was
 24 going to disclose this subwater in the basement to
 25 potential buyers of the home?

Page 24

1 A. He didn't -- we never discussed that.
 2 MR. DAVIS: All right. If you give me
 3 just a second with my clients, we will talk a few
 4 things over and see if I need to ask you anything
 5 else.
 6 THE WITNESS: Okay.
 7 (A brief recess was had.)
 8 MR. DAVIS: Go back on the record.
 9 Q. (BY MR. DAVIS:) I just have a final
 10 question for you about your payments on jobs that
 11 you completed.
 12 How were you paid? Were you paid by the
 13 job, or were you paid bi-weekly, bi-monthly? How
 14 were you paid?
 15 A. I was an hourly, just every two weeks.
 16 Q. And were you salaried, or was that --
 17 A. I don't remember.
 18 Q. Go ahead. Okay. You can go ahead and
 19 answer.
 20 A. I don't remember if I was at that time
 21 or not. Shortly after. I don't remember what date
 22 that was we did that house.
 23 Q. Okay. Do you remember when you became a
 24 salaried employee?
 25 A. Probably eight months or so after I

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1 moved here. Probably fall of '05.
 2 MR. DAVIS: Okay. I don't think I have
 3 any further questions.
 4 MR. DUNN: No questions.
 5 THE COURT REPORTER: Did you want to
 6 read and sign your deposition transcript or waive
 7 signature?
 8 THE WITNESS: What's that?
 9 THE COURT REPORTER: Did you want to
 10 read and sign your deposition transcript or waive
 11 signature?
 12 THE WITNESS: I don't know.
 13 MR. DUNN: Most people waive, but that's
 14 your right to read it and see if there's any errors
 15 made by the reporter or if you said something that
 16 you really didn't mean.
 17 THE WITNESS: I'll read it.
 18 (Whereupon, the deposition concluded at
 19 5:00 p.m.)
 20 *****
 21
 22
 23
 24
 25

EXHIBIT "E"

(Deposition Transcript of Paul Jenkins)

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1 part that you've circled doesn't make it to the
 2 property? What did you mean by that?
 3 A. I mean, my headgate is right here and
 4 one of them is over here.
 5 Q. Okay. Would you put an X where the
 6 headgate is?
 7 A. It's right here, and the other one's
 8 probably --
 9 Q. Just circle the next gate so we can --
 10 A. Probably right in here. This -- this
 11 canal -- ditch here went to the Jefferson Elementary
 12 property, and this canal here went down to the
 13 others, and this come across.
 14 Q. The circled headgate went up to
 15 Jefferson Elementary, and then the uncircled one
 16 just came across?
 17 A. Came across. Well, actually, it served
 18 a little more than just the Jefferson Elementary,
 19 but it served part of the -- all the upper fields
 20 and the lower fields on the bottom side.
 21 Q. Okay. Did you ever have, prior to the
 22 division of this subdivision, did you ever have
 23 subwater issues occur on this property?
 24 A. No.
 25 Q. Okay.

1 sorry, I just don't think I can state it anymore
 2 clear than that. Do you --
 3 A. There's -- there's been sub, you know,
 4 in lots of houses. My parents' house down the road
 5 has sub. It's had it every year. Sometimes
 6 nothing, sometimes a lot. Not a lot, but a couple
 7 inches. Yeah. There's sub in basement houses.
 8 Q. I'm just going to mention this property.
 9 Are you familiar with the property in this
 10 litigation which particular lot we're talking about
 11 in the subdivision?
 12 A. Yes.
 13 Q. I'm just going to call it the property
 14 unless you have any objections to it.
 15 A. That's fine.
 16 Q. Before we were talking about subdivision
 17 itself, now we're going to narrow it down and talk
 18 about the specific parcel.
 19 When you told Robert Shippen about the
 20 subwater issues on this property, because I believe
 21 that you mentioned before you tell everyone about
 22 the subwater issues, do you recall what Robert
 23 Shippen told you in response to your statement about
 24 the sub issues?
 25 MR. DUNN: Objection, foundation.

1 A. But I don't go deep, I just stay, you
 2 know, from the ground water.
 3 Q. Sure. Did you ever disclose the
 4 subwater issues that you're aware of in Jefferson
 5 County to Robert Shippen?
 6 A. Anybody buys property up there, I tell
 7 them that there is sub.
 8 Q. Okay. So you would have told Robert
 9 Shippen that there's sub issues with that land?
 10 A. When they come to get a building --
 11 they're building things, I make sure they know
 12 there's sub. That's why all the houses go up.
 13 Q. I'm sorry, is that what you said that's
 14 why all the houses --
 15 A. That's why they build them up a little
 16 higher than just on ground level.
 17 Q. In the Woodhaven Creek Estates?
 18 A. Uh-huh.
 19 Q. Is that a yes?
 20 A. Yes, uh-huh.
 21 Q. Were you aware of other houses in
 22 Jefferson County flooded in the past as a result of
 23 sub issues?
 24 MR. DUNN: Objection, foundation.
 25 Q. (BY MR. DAVIS:) Say within -- Well, I'm

1 Spreading general, it could have been ten years,
 2 five years, three years.
 3 Q. (BY MR. DAVIS:) Okay. I just don't
 4 think it is.
 5 You sold the property in 2005, does that
 6 sound right, to Robert Shippen?
 7 A. I don't know when -- that's probably
 8 pretty close to it --
 9 Q. Okay.
 10 A. -- 2005. I don't know when it was sold.
 11 But it was sold, yes.
 12 Q. At or around that time when you sold it
 13 to him, you did disclose the subwater issue to him.
 14 Do you recall what he told you?
 15 MR. DUNN: Objection. There's no
 16 indication that he ever talked to him at a specific
 17 date. I really want a specific date if he's going
 18 to make some statement, or at least a general day.
 19 Month, year.
 20 THE WITNESS: When he -- he bought five
 21 lots, and he bought the five lots, and I don't know
 22 when it was, I told him there was sub there.
 23 Q. (BY MR. DAVIS:) Would that have been
 24 about the time that he signed the deed of trust that
 25 lot?

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1 A. It would be about then, yes.
 2 Q. Okay. Within a week or --
 3 MR. DUNN: For the record, I still want
 4 my foundation objection preserved.
 5 Q. (BY MR. DAVIS:) Within the week or
 6 within the month?
 7 A. As soon as he bought the lot, I told him
 8 there's sub there.
 9 Q. Before or after he bought the lot?
 10 A. When he bought the lot. So it would
 11 be -- so it would be after, probably.
 12 Q. Do you know how long after he purchased
 13 the lot you would have told him about the
 14 subwater?
 15 A. That day.
 16 Q. So it would have been the day of the
 17 sale?
 18 A. As soon as the next time I -- yeah.
 19 Next time I saw him he would be told there's sub.
 20 Of course, everybody knows there's sub there.
 21 Q. Okay. Well, my direct question, then,
 22 is: Do you recall what he told you when you told
 23 him there were sub issues?
 24 A. Yeah, he knew.
 25 Q. So he admitted that he knew about the

1 copy of the deed of trust?
 2 A. It is.
 3 Q. It looks like this document is six pages
 4 long, and the document was recorded on September 1st
 5 of 2005.
 6 Does that seem correct to you?
 7 A. Yes.
 8 Q. Is that about the time you would have
 9 made that representation to Robert Shippen?
 10 A. Yes.
 11 Q. I'm sorry, is that about the time you
 12 would have made the representation about the
 13 subwater issues to Robert Shippen?
 14 A. Yes.
 15 Q. Okay. Did you have any role in the
 16 construction of this property?
 17 A. No.
 18 Q. Okay. Did you have any role in the
 19 listing or sale of this property?
 20 A. No.
 21 Q. All right. Did you do an initial
 22 walk-through on this property as a Realtor?
 23 A. You mean as bare ground?
 24 Q. No. I'm sorry. When the home was
 25 completed and listed for sale, did you do a

1 sub issues?
 2 A. Yeah.
 3 MR. DAVIS: Go off the record for just a
 4 second. Oh, no, we don't need to, we already have
 5 it in here.
 6 MR. DUNN: Exhibit 2, I think.
 7 MR. DAVIS: What's that?
 8 MR. DUNN: I thought you were looking at
 9 the plat.
 10 Q. (BY MR. DAVIS:) Do you recognize --
 11 I've turned here to -- sorry, back on the record.
 12 You're a top of things.
 13 I'm indicating to you here Exhibit
 14 Number 8, which has been used in other depositions,
 15 do you recognize this document?
 16 A. Yes.
 17 Q. Okay. I actually, in fairness to you, I
 18 should mention to you there are actually two
 19 documents in Exhibit Number 8. One is a deed of
 20 trust and one is the deed of reconveyance. I'm
 21 turning to page 2 of Exhibit 8 which is the deed of
 22 trust.
 23 This document -- I'll give you a chance
 24 to inspect that, and after you've looked at it,
 25 would you let me know is this a true and correct

1 walk-through with other Realtors?
 2 A. No. I went through the top. I opened
 3 the door and I saw the inside, but I did not go the
 4 walk-through, no. I have not been in the
 5 basement.
 6 Q. Okay. You've never been in the
 7 basement.
 8 A. No.
 9 Q. Okay. Have you ever -- Did you ever
 10 notice any subwater around the foundation of this
 11 house?
 12 A. I never noticed any water. I did notice
 13 dampness.
 14 Q. I'm sorry?
 15 A. Dampness.
 16 Q. Okay.
 17 A. I did not notice no water.
 18 Q. And when did you see this dampness?
 19 A. It would be in August.
 20 Q. Do you recall the year?
 21 A. When he was building it. I don't know
 22 what year that was.
 23 Q. Okay. Does 2006 sound about correct?
 24 A. I don't know.
 25 Q. Okay. Can you describe the dampness to

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EXHIBIT "F"

(Deposition Transcript of Dave Chapple)

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1 A. I do the paperwork and submit it to the
 2 office for approval.
 3 Q. So the broker then, would it be fair to
 4 say that the broker basically copies what you say
 5 verbatim on the MLS listing?
 6 A. They review it.
 7 Q. Okay.
 8 A. To backtrack, the MLS office is actively
 9 involved in the monitoring of that while it's not
 10 solely the broker who makes that ultimate decision.
 11 There's lots of compliance and pictures. I mean,
 12 there's lots of things that have to be done, so it's
 13 not strictly the broker. It would be the
 14 Realtor/broker in the MLS office.
 15 Q. What kind of control does the MLS
 16 listing have regarding public input as far as
 17 comments that are placed on the MLS listing itself
 18 to the general public?
 19 A. I cannot honestly answer that. I don't
 20 know what they actively do there. I've seen them
 21 respond in different ways to several different
 22 things.
 23 Q. Did the MLS agency or the broker in this
 24 case update or any way modify the MLS listing beyond
 25 what you told them to put in that MLS listing?

1 in the last couple of depositions.
 2 Is there a difference in your mind
 3 between subwater and ground water?
 4 A. Absolutely.
 5 Q. Okay. What's the difference, in your
 6 mind?
 7 A. Ground water is in the canal, and
 8 subwater is underneath the ground, by definition.
 9 Q. And where do you get those
 10 definitions?
 11 A. Well, in the farming world that's -- I
 12 mean, that's pretty much why all these things
 13 exist.
 14 Q. That's what farmers call it, then, is
 15 what you're saying, ground water is in the canal?
 16 A. That's who people who manage the canals
 17 would call it. It's ground water. Ground water and
 18 surface water is how they categorize it.
 19 Q. I'm saying ground water and subwater.
 20 A. Ground water. No, ground water is -- to
 21 the best of my knowledge, is categorized as a well.
 22 To me they're different, subwater and ground
 23 water.
 24 Q. So when you say ground water is in a
 25 well, I just want to be clear --

1 A. Modify the MLS listing?
 2 Q. Modify or alter that listing.
 3 A. Not to my knowledge.
 4 Q. Let me backtrack here. Are you from
 5 Jefferson County?
 6 A. No.
 7 Q. Okay. Where are you from?
 8 A. Bingham County.
 9 Q. Okay. How long -- You mentioned earlier
 10 that you do live here in Rigby; is that correct?
 11 A. Uh-huh.
 12 Q. How long have you lived here?
 13 A. Five years.
 14 Q. So about the time you became listed as a
 15 real estate agent; is that correct?
 16 A. Correct.
 17 Q. Okay. Are you familiar with water table
 18 or subwater issues in Jefferson County?
 19 A. In regards to now or then?
 20 Q. Yeah. Just now.
 21 A. Well, yeah, now.
 22 Q. When did you become familiar with those
 23 issues?
 24 Let me stop just a second. I want to
 25 make sure that I'm clear here. We've had to do this

1 A. It's what you pump out from a deep lift
 2 well.
 3 Q. So for you subwater is any other water
 4 that's underground, is that what you're saying?
 5 A. Absolutely.
 6 Q. Let me ask: When did you become aware
 7 of the subwater issues in Jefferson County?
 8 A. Why?
 9 Q. When?
 10 A. When? Probably a year-and-a-half ago to
 11 two years ago.
 12 Q. And what do you understand the subwater
 13 issues in Jefferson County to be?
 14 A. The subwater issues?
 15 Q. Yes.
 16 A. I understand it to be -- I understand it
 17 fluctuates to great degrees every single year.
 18 Q. Okay.
 19 A. Specifically in flood irrigated areas.
 20 Q. Okay. Is that what you understand the
 21 fluctuation to be is based on the type of
 22 irrigation?
 23 A. Well, it's tied to everything. It's
 24 moisture in general. It's rainfall. It's snow
 25 pack. I mean, it's not going to be just tied to

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1 you'll ask, but there's numerous pages. For
 2 example, on page 2 there's some writing that doesn't
 3 exist on Exhibit 10.
 4 MR. DAVIS: Okay.
 5 MR. DUNN: Each page appears to have
 6 different writings on it is my objection, and you
 7 said it's the same document, and I don't believe it
 8 is the same.
 9 It may be the same document with
 10 alterations, I guess, is a better objection.
 11 Q. (BY MR. DAVIS:) Okay. Why don't you do
 12 this: Will you take a second and review through
 13 those and see what, if any, discrepancies there are
 14 so we can talk about those. Exhibit 10 is the same.
 15 A. Is that the –
 16 MR. DUNN: It would be easier if I –
 17 THE WITNESS: I don't want to pull it
 18 out of the binder.
 19 MR. DUNN: Here is Exhibit 10. The
 20 record will reflect I've handed a copy of Exhibit 10
 21 to the deponent.
 22 THE WITNESS: Page 1 on Exhibit 10 is
 23 missing. Should I just go through it like this?
 24 MR. DUNN: Whatever his question is.
 25 THE WITNESS: Do you want me to state

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1 everything that I see that's different?
 2 Q. (BY MR. DAVIS:) Uh-huh. Yes, please.
 3 A. Page 1 on Exhibit 10, Robert Shippen's
 4 initials are missing. They appear to be the exact
 5 same handwriting.
 6 Q. Page 2 on Exhibit 14, renotece?
 7 A. Well, there's language apparently –
 8 there's handwriting at the bottom of that page.
 9 Q. Correct. It is not on Exhibit 10. All
 10 right.
 11 MR. DUNN: Did you care about the fax
 12 things at the top of the page, or are you trying to
 13 ask him –
 14 Q. (BY MR. DAVIS:) I'm not asking about
 15 the – I mean, if you think it makes a difference,
 16 Dave, let me know. But you may recognize on the
 17 document number ten it appears on the top part of
 18 the document of every page there's fax numbers back
 19 and forth.
 20 A. On page 7 it's added in Exhibit 14 for
 21 Marriott Homes, and not in Exhibit – Exhibit 10.
 22 At the end of Bob Shippen's name, yeah.
 23 On page 8 of Exhibit 14, again, is added for
 24 Marriott Homes at the end of Robert Shippen's name.
 25 The top of page 9 on the property

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1 disclosure form is added for Marriott Homes behind
 2 Robert Shippen's name, as well as the signer line
 3 behind Robert Shippen's name.
 4 That's all I see.
 5 Q. Okay. I'm certainly not trying to
 6 mislead you. They're the same. I'm just saying on
 7 my inspection those are the differences that I've
 8 noticed as well.
 9 The question I have is: Who added the
 10 for Marriott Homes language after Mr. Shippen's
 11 signature?
 12 A. I'm unaware. Standard procedure is that
 13 the listing agreement or actually the documents need
 14 to reflect the MLS listing name, which would be
 15 Marriott Homes. My assumption is that somebody in
 16 the office wrote for Marriott Homes basically for
 17 in-house to tie it together with the MLS listing,
 18 excuse me.
 19 Q. So is it your understanding, then,
 20 that – to the best of your knowledge was Exhibit
 21 Number 14 ever conveyed to the Goodspeeds?
 22 A. Would you repeat the question.
 23 Q. Sure. Was Exhibit Number 14 there, to
 24 the best of your knowledge, was that ever sent to
 25 the Goodspeeds?

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1 A. To the best of my knowledge I don't
 2 know. I would say this was not.
 3 Q. So Exhibit Number 10, then, is the
 4 correct purchase and sale agreement that would have
 5 been circulated between the parties; is that
 6 correct?
 7 A. Correct.
 8 Q. Do you recognize that handwriting for
 9 Marriott Homes --
 10 A. Do not.
 11 Q. – in Exhibit 14?
 12 So we were talking previously about the
 13 MLS listing. Who drafted the language in the MLS
 14 listing?
 15 A. I did.
 16 Q. And where did you obtain the information
 17 for the MLS listing?
 18 A. The information regarding the
 19 characteristics of the home?
 20 Q. Anything.
 21 A. From the builder.
 22 Q. Okay.
 23 MR. DUNN: Are we looking at a document,
 24 or are we just asking generally?
 25 Q. (BY MR. DAVIS:) I'm just asking

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1 generally.
 2 Would you have obtained any of the MLS
 3 information from anyone other than the builder?
 4 A. No. Well, the assessor's office for tax
 5 purposes, legal descriptions, things like that.
 6 Q. Okay. If you'll turn to page 11 -- or,
 7 excuse me, Exhibit 11, flip over one more, actually,
 8 that one there. Okay.
 9 Do you recognize this document?
 10 A. Yes.
 11 Q. Okay. And is this a true and correct
 12 copy of the MLS listing for this -- for the
 13 property?
 14 A. Uh-huh.
 15 Q. Is that a yes?
 16 A. Yes, sorry.
 17 Q. Okay. If you'll look under -- I have a
 18 copy of it in here.
 19 MR. GOODSPEED: Do you need this?
 20 MR. DAVIS: No.
 21 Q. (BY MR. DAVIS:) If you'll look under
 22 public info, see about two -- two stars halfway
 23 through the document, then it says: There has
 24 been --
 25 A. Uh-huh.

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1 Q. -- it says: There has been concern
 2 about subwater in Jefferson County; however, this
 3 home has not had sub issues and to give the buyer
 4 peace of mind builder will install a leaching system
 5 around the home and provide a one-year warranty on
 6 construction.
 7 Where did you obtain that information?
 8 A. Where did I obtain the information?
 9 Q. Yes. It says in here: This home has
 10 not had sub issues.
 11 A. Conversations with the builder.
 12 Q. Okay. As well as this builder will
 13 install a leaching system for peace of mind, would
 14 that have also come from the builder?
 15 A. Through discussions that we both had.
 16 Q. And by "the builder," would those have
 17 been conversations with Robert Shippen?
 18 A. Yes.
 19 Q. Okay. There is --
 20 MR. DUNN: Objection as to Robert
 21 Shippen. I don't understand him to be the
 22 builder.
 23 THE WITNESS: Marriott Homes.
 24 Q. (BY MR. DAVIS:) Okay. Well, which
 25 individual were you speaking with? An entity can't

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1 talk for itself.
 2 A. Robert Shippen representing Marriott
 3 Homes.
 4 Q. Okay. And then under the public info.
 5 there's a part that says private info. It says
 6 essentially the same thing.
 7 A. The reason private info. repeats what it
 8 does is because if you were to go to Snake River
 9 MLS, which is the public website, private
 10 information it's not included, it's only privy to
 11 Realtors --
 12 Q. Okay.
 13 A. -- through Realtor access.
 14 Q. But, again, anything written in the
 15 private information, that would have been written by
 16 you upon information you obtained from Robert
 17 Shippen; is that correct?
 18 A. Correct.
 19 Q. Okay. It says here the list date was
 20 August of 2006.
 21 Is that the time that this would have
 22 been listed, or does that represent an amended
 23 time?
 24 A. The time it would have been listed is
 25 you amend listings all the time. When the listing

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1 was originally put in there was no talk about a
 2 leach system or anything else. You change it as you
 3 market the home progressively between adjustments
 4 and price, what's included, what's excluded, so on
 5 and so forth.
 6 Q. Okay.
 7 A. So it's not a true representation of
 8 what was consistently there through the whole
 9 listing period.
 10 Q. Okay. Is there a system that tracks
 11 those changes?
 12 A. The MLS system will tell you what
 13 changes were made and when.
 14 Q. Is that generally referred to as
 15 NAVICA?
 16 A. Yes.
 17 Q. Am I saying that right?
 18 A. NAVICA.
 19 Q. Okay. Based upon the information that
 20 was given to you, did you have any reason to believe
 21 that any of this information was untrue?
 22 A. Repeat the question.
 23 Q. Sure. During the time this house was
 24 for sale, did you have any reason to believe that
 25 any of the information shown here in Exhibit 11 was

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1 untrue?
 2 A. No.
 3 Q. Okay. Did Robert Shippen ever contact
 4 you and tell you that the house had flooded?
 5 A. No.
 6 MR. DAVIS: Okay.
 7 (Deposition Exhibit 20 was marked for
 8 identification.)
 9 Q. (BY MR. DAVIS:) This is Exhibit
 10 Number 20. Handing you what's been marked as
 11 Exhibit Number 20, would you compare that document
 12 to Exhibit Number 11.
 13 And I should say, the first two pages
 14 appear to be the same, but the following pages are
 15 not the same.
 16 A. The first two pages are the same?
 17 Q. No. Well, that's my question. Will you
 18 look through the first two pages and see if you
 19 believe there's any difference between these two
 20 exhibits.
 21 Based on your inspection of those first
 22 two pages, did they appear to be identical?
 23 A. Right.
 24 Q. What I handed you as Exhibit Number 20
 25 is what I received from WinStar Realty pursuant to

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1 my subpoena, with the exception of the final page,
 2 which was a page that I received from the buyer's
 3 Realtor, Randy Storer.
 4 A. The final page you received from the
 5 buyer's Realtor, Randy Storer?
 6 Q. Randy Storer. And I'll talk to you
 7 about that in just a second.
 8 So I think what you're telling me is if
 9 any changes were made to the listing agreement they
 10 would show up in the NAVICA display or -- I don't
 11 know what you would call that -- computer history;
 12 is that correct?
 13 A. Uh-huh.
 14 Q. I'm sorry, is that a yes?
 15 A. Yes.
 16 Q. Okay. Again, just trying to get it for
 17 the court reporter. So is there -- Well, let me ask
 18 you about page 3, do you recognize this page, page 3
 19 of Exhibit 20? You're on it right there.
 20 A. Do I recognize this page?
 21 Q. Yes.
 22 A. Yes.
 23 Q. Okay. What is this page? What are they
 24 for?
 25 A. It's an MLS change form.

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1 Q. Okay. And what does that mean?
 2 A. It means if you make a change you fill
 3 out this form.
 4 Q. Okay. And what was the request for the
 5 change here?
 6 A. To extend the expiration date of the
 7 listing.
 8 Q. Okay. Was that the only requested
 9 change that you're aware of on this MLS listing?
 10 A. Yes.
 11 Q. Okay. If you turn to page 4 of
 12 Exhibit 20, this appears to be from me -- or to me,
 13 this NAVICA history printout, and I don't know,
 14 because I just got it from WinStar Realty.
 15 Do you recognize this document?
 16 A. Do I recognize it? No. This is what
 17 one of the forms would look like. I've never seen
 18 this before.
 19 Q. Okay. Would you take a second and look
 20 through this. It says, I should say, in the top
 21 left-hand corner, it's got the numbers 141140 which
 22 appears to correspond with the MLS listing --
 23 A. Correct.
 24 Q. -- on page 1 together with the address
 25 as well.

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1 A. Uh-huh.
 2 Q. Does this represent a true and accurate
 3 history of all the changes that were made on this
 4 property?
 5 MR. DUNN: Objection to the form of the
 6 question.
 7 Q. (BY MR. DAVIS:) Do you want me to
 8 clarify it?
 9 A. Are you talking to me, or are you
 10 talking --
 11 MR. DAVIS: No. I was talking to Rob
 12 Dunn.
 13 I don't understand your objection on
 14 this.
 15 MR. DUNN: I object to just the form of
 16 your question.
 17 MR. DAVIS: Okay.
 18 MR. DUNN: He's already indicated he's
 19 never seen this document.
 20 MR. DAVIS: Okay. And I've asked him to
 21 notify me if there's any changes that he made on the
 22 MLS listing that aren't reflected in this
 23 document.
 24 MR. DUNN: I object to the form of the
 25 question.

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1 THE WITNESS: I would say that there's
 2 something missing because it says that this is a new
 3 listing. It is a four eighteen oh seven.
 4 Q. (BY MR. DAVIS:) Okay.
 5 A. Why it would be different, I'm unaware,
 6 but the original listing was entered in September of
 7 '06, I believe. Which one is that? Which is the
 8 agreement?
 9 MR. DUNN: Eleven.
 10 THE WITNESS: The home was originally
 11 listed in August of 2006. This says it was
 12 originally listed in April of '07. Why there's a
 13 discrepancy, I could not tell you. You would have
 14 to consult with -- I don't know why it wouldn't
 15 reflect the listing date being seven months later.
 16 As far as this form goes, yes, I did
 17 make a change to -- miscellaneous change to extend
 18 the expiration date, but that's it relative to this
 19 form.
 20 Q. (BY MR. DAVIS:) Okay. It appears, and
 21 the reason I attach the last sheet here, it appears,
 22 if you look on the -- I guess you'd call it the
 23 right-hand column on page 4, there seem to be some
 24 arrows that point down and some that point up.
 25 A. What's this? A toggle? Yeah, I would

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1 guess.
 2 Q. And then the following space shows those
 3 all pointed down. I see one saying the construction
 4 status was changed from under construction to newly
 5 complete.
 6 And another that seems to indicate
 7 there's a change of great floor space, but it
 8 appears in all respects that it seems identical.
 9 A. Yes.
 10 Q. If you look at the front page, then, of
 11 Exhibit 20, the first and the second page, I guess,
 12 is there anything in this listing that was pulled
 13 out, added or modified during the listing of this
 14 property other than the status of the house being
 15 changed from to new construction -- newly
 16 complete?
 17 MR. DUNN: I believe he's answered that.
 18 He believes there's missing documents, so I don't
 19 know that he can answer that question. My objection
 20 is improper foundation.
 21 THE WITNESS: Do you still want me to
 22 answer the question?
 23 Q. (BY MR. DAVIS:) Yes.
 24 A. Can you ask the question again?
 25 Q. Yeah. If you look at Exhibit Number 20

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1 and Exhibit Number 11, just -- let's just say the
 2 first two pages of Exhibit Number 20 and 11, I guess
 3 you represented that they're identical documents.
 4 Am I correct?
 5 A. 11, and this is 20.
 6 Q. Right. And the first two pages of 20.
 7 A. Yeah.
 8 Q. Let's look at Exhibit Number 11 there.
 9 Is there anything in Exhibit Number 11 that you
 10 either pulled out or added at any course during the
 11 listing of this house?
 12 A. Pulled out or added --
 13 Q. Right.
 14 A. -- during the course of the listing?
 15 I added it was complete, obviously, by
 16 these documents.
 17 Q. And by "these," you're indicating --
 18 A. Exhibit 20.
 19 Q. -- Exhibit 20. Okay.
 20 Anything else in that MLS listing,
 21 Exhibit Number 11, that you changed during the
 22 course of the listing of this property?
 23 A. As a standard practice, as the home
 24 progresses based on marketing plans that I suggest
 25 to the seller home, I change things to market the

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1 home progressively as it goes on, be it price,
 2 inclusions, things like that, as I've already
 3 answered.
 4 There would have been other changes,
 5 yes. Specifically, I don't recall. It's been
 6 several years. That's why these things are so
 7 valuable. To me I can't accurately answer that
 8 specifically what it was because there's documents
 9 missing.
 10 I don't know that the MLS has an
 11 document that states the original listing was the
 12 18th of April because it was not.
 13 Q. Okay. Did you ever pull out the
 14 language in the MLS listing about the subwater?
 15 A. Did I ever pull it out?
 16 Q. Yes. Do you recall when you would have
 17 added it?
 18 A. I do not recall.
 19 Q. Okay. But you would have added that?
 20 A. It would have been spring of -- if it
 21 were added, it would have been -- you know, I
 22 honestly don't know.
 23 Q. By that you don't know if it was --
 24 A. I don't recall.
 25 Q. -- part of the original listing or if it

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1 was added?
 2 A. I do not recall. I think -- I believe
 3 it was added.
 4 Q. Do you recall if it was ever removed?
 5 A. No, it was never removed.
 6 Q. Would it be fair to say if Robert
 7 Shippen ever requested that that language be
 8 removed, that there would be an MLS change form in
 9 the records of WinStar Realty?
 10 A. Are you asking me a question, or is it a
 11 statement?
 12 Q. Yes.
 13 MR. DUNN: I'll object. Mr. Shippen
 14 indicated he's never seen the MLS.
 15 Q. (BY MR. DAVIS:) Would it be fair to say
 16 that if he -- if there were ever a change to the MLS
 17 listing that Robert Shippen would have filled out an
 18 MLS change form?
 19 A. Would it be fair to say?
 20 Q. Yeah. I mean, did he do it?
 21 A. He fill out an MLS change form?
 22 Q. Yes.
 23 A. No. I would fill out the MLS change
 24 form and he would sign it.
 25 Q. Okay.

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1 A. Based on his direction.
 2 Q. Is this the only MLS change form that
 3 you're aware of signed by Robert Shippen?
 4 A. It's the only one in his file. I think
 5 there are others, they're not here.
 6 Q. Okay. Where would those documents be?
 7 A. I do not know. They should be in the
 8 file. They would have been specific to price, in my
 9 opinion, but I do not recall.
 10 Q. Are you positive there were other change
 11 forms?
 12 A. I'm not positive there were other change
 13 forms, no.
 14 Q. If you find those, to the extent you
 15 find other MLS change forms, will you produce
 16 those?
 17 A. Yes.
 18 Q. Okay. Do you recall the -- I may have
 19 already asked you this, and if I did I apologize.
 20 Do you recall the circumstances
 21 regarding a leaching system, any discussions you had
 22 with Robert Shippen regarding the installation of a
 23 leaching system around the property?
 24 A. Do I recall a conversation?
 25 Q. Did you have a conversation with him

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1 about that?
 2 A. Yes.
 3 Q. Do you recall what was said?
 4 A. Yes.
 5 Q. Okay. What was that?
 6 A. I came to him, we had weekly marketing
 7 meetings. He asked me what people's questions were,
 8 in the midst of those questions and based on weekly
 9 Realtor meetings within WinStar Realty, we had with
 10 other Realtors listed in Rigby, sub was a concern at
 11 the time.
 12 And so I talked to Bob, and he came up
 13 with the resolution that he would put in a leaching
 14 system as it states in the MLS form to be basically
 15 a marketing tool, to take care of any preliminary
 16 concerns about that.
 17 Q. And so he -- so he consented to this
 18 language about the installation of a leaching
 19 system?
 20 A. Correct.
 21 Q. Okay. Did he tell you that there had
 22 never been subwater or sub issues with this house?
 23 A. We never had a conversation specifically
 24 about whether the home had sub or not.
 25 Q. Okay. Well, the reason I ask is the

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1 listing says this house has not had sub issues, and
 2 so I'm just wondering how you would have known to
 3 write that in there?
 4 A. Because it didn't have sub issues. Sub
 5 issues would be a recurring problem. It would be
 6 sub problems, not subwater. The sub table changes
 7 weekly in the summertime in Jefferson County. There
 8 were no sub issues.
 9 Q. So if it had flooded once, you wouldn't
 10 classify that as a sub issue?
 11 A. Absolutely not.
 12 Q. Don't you think that's misleading?
 13 A. How so?
 14 MR. DUNN: Objection, speculative.
 15 Answer it if you'd like.
 16 THE WITNESS: I don't think I would
 17 concur. I don't think it's -- I think it is
 18 misleading, and I'd rather not. I think it's
 19 interpretation.
 20 Q. (BY MR. DAVIS:) So it's up to the
 21 buyer, then, to know the difference between whether
 22 a house is flooded or whether it's has sub issues?
 23 A. Flooded or sub issues?
 24 Q. That's my question.
 25 A. What's the difference? That's the

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1 problem.
 2 Q. That's my question, though. Are you
 3 leaving that up to the buyers, then, to make that
 4 determination?
 5 MR. DUNN: Objection. What is in the
 6 buyer's mind is speculative.
 7 THE WITNESS: I have nothing to do with
 8 what the buyer's think or do or act or their
 9 conversations with their Realtors. How they
 10 represented them, I couldn't tell you, because I
 11 have no idea what they like or what they are
 12 specifically looking for.
 13 Q. (BY MR. DAVIS:) Do you believe that the
 14 newly constructed home is exempt from flooding
 15 disclosures?
 16 A. I believe that flooding disclosures are
 17 required for homes that need to have them. That's
 18 not up to me.
 19 Q. Okay.
 20 A. At that time it was not a form in the
 21 Realtor MLS, I do not believe.
 22 Q. So you don't know whether flooding of
 23 houses was a required disclosure at the time this
 24 house was sold?
 25 A. Right. I'm sure if a home is flooded,

1 Having sub once is not a sub issue. That's the
 2 second time I've answered the question.
 3 Q. Well, I mean, I guess I just must be
 4 stupid, because I guess I look at it and I think,
 5 if -- if there's ever been a flooding in the
 6 basement floor from ground subwater, tells me a
 7 house has sub issues.
 8 A. Tells you.
 9 MR. DUNN: Objection, there's no
 10 question pending.
 11 THE WITNESS: You're misleading me.
 12 MR. DUNN: Well, just answer whatever he
 13 asks, and I'll make the objections.
 14 Wait. You're crossing each other once
 15 again for the reporter, so slow down both of you,
 16 please.
 17 Q. (BY MR. DAVIS:) What disclosures do you
 18 think need to be made what disclosures are required
 19 for new construction?
 20 A. The one that's in the file.
 21 Q. Which is what?
 22 A. Exhibit 19.
 23 Q. Page 1 of Exhibit 19?
 24 A. Correct.
 25 Q. Are those the only requirements for --

1 then there probably is a form. You're asking me
 2 about subwater and flooding, which in my mind are
 3 two different things.
 4 Q. I'm asking you about flooding now.
 5 A. Flooding, I have no idea about
 6 flooding.
 7 Q. Okay. So you don't know, then, if
 8 flooding is a required disclosure?
 9 A. I have no idea. To me it's irrelevant.
 10 To the best of my knowledge there was no flood in
 11 southeast Idaho in '07.
 12 Q. I'm talking about a flood in the house.
 13 A. Nothing to tell.
 14 Q. Water on the basement floor, you don't
 15 call that flooding?
 16 A. No.
 17 Q. Not even if it comes from subwater?
 18 A. No.
 19 Q. So what would you calling that? Water
 20 on the basement floor?
 21 A. I'd say you have a sub problem.
 22 Q. Okay. But you just told me if it
 23 doesn't happen once, then it wasn't an issue?
 24 A. You have a recurring problem, because I
 25 already answered the question. You have sub issues.

1 disclosure requirements for new construction?
 2 A. Yes. To the best of my knowledge it
 3 is.
 4 Q. If a house is flooded, do you believe as
 5 a Realtor you're under the obligation to disclose
 6 whether that house is flooded?
 7 A. Can you ask that question again, please?
 8 Q. Sure. If the house floods and the
 9 Realtor knows about it, even if it's new
 10 construction, should the Realtor list whether the
 11 house is flooded or not?
 12 A. Yeah. If the home flooded.
 13 Q. Okay.
 14 A. Might I add something to that?
 15 Q. Well, let me -- let me just ask the
 16 questions. I might be able to shorten this up a
 17 little bit.
 18 A. I'd like to add to that. The only
 19 information I can put in the listing agreement is
 20 the information that is given to me. I'm not a
 21 specialist on the home, I'm not an inspector, nor am
 22 I required to be.
 23 Q. I understand, and I think you've stated
 24 that before.
 25 A. I don't think you should add that to

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1 it, that they can access the MLS?
 2 A. They pay a monthly fee, yes.
 3 Q. And that would usually be through the
 4 broker; is that correct?
 5 A. Yes.
 6 Q. And then the Realtors under the broker
 7 could have access to this special company service?
 8 A. Yes.
 9 Q. In your experience as a Realtor, are the
 10 MLS listings considered any type of warranty on a
 11 particular residence?
 12 A. No.
 13 Q. Now, there's a difference between,
 14 obviously, a buyer's Realtor and a seller's Realtor.
 15 In this specific case, you were the buyer's
 16 Realtor - I mean, the seller's Realtor, excuse me.
 17 A. Yes.
 18 Q. And the buyers had a separate Realtor
 19 that represented their interests; is that correct?
 20 A. I -- I do not know what his
 21 representation entailed.
 22 Q. What I'm getting at is Exhibit 10, and
 23 there were various - someone has to accept a
 24 proposal or make a proposal?
 25 A. Yes. He was acting as an agent for the

1 MR. DUNN: That's all the questions I
 2 have.
 3 MR. DAVIS: I just have a few follow-up
 4 questions from Mr. Dunn's questions.
 5
 6 FURTHER EXAMINATION
 7 BY MR. DAVIS:
 8 Q. You mentioned that the public has access
 9 to the public info. but not the private info.
 10 Is there an ethical restriction on
 11 Realtors to show the private information to the
 12 potential buyers?
 13 A. That's up to the Realtor. They're not
 14 required to, no, on the private information.
 15 Q. Okay. I guess my more direct question
 16 is whether they're prohibited from showing the
 17 private information.
 18 A. No.
 19 Q. Okay. They wouldn't expect to be
 20 penalized for showing that information?
 21 A. No. My understanding is that the
 22 Realtor representing Goodspeeds could have shown
 23 them anything they wanted to see.
 24 Q. Prior to the purchase of the property?
 25 A. At any time.

1 buyers.
 2 Q. And when you say "he," who would that
 3 be?
 4 A. Randy Storer.
 5 Q. And you know that because you're looking
 6 at a document under Exhibit 10; is that correct?
 7 A. Correct.
 8 Q. And Randy Storer represented the buyers
 9 in this case?
 10 A. Correct.
 11 Q. And he actually filled out information
 12 on page 9, I believe, it was you were looking at,
 13 that you believe came from him; is that correct?
 14 A. Correct.
 15 Q. And so anything he may have written on
 16 there would be whatever he wrote?
 17 A. Correct.
 18 Q. How many pages, if you know, on
 19 Exhibit 10 were prepared - well, just go through
 20 the pages and tell me which pages were prepared
 21 through WinStar or yourself, and which pages were
 22 prepared through Mr. Storer and/or his agency?
 23 A. Pages 8, 10 - 8 and 10 of the ten pages
 24 were prepared by WinStar Realty. 1 through 7 and 9
 25 were prepared by Randy Storer.

1 Q. And to your knowledge there's no ethical
 2 violations in doing that?
 3 A. I do not - I do not know. I don't know
 4 of any restrictions to that.
 5 Q. And then he had mentioned or requested
 6 the involvement of the MLS listing - or, excuse me,
 7 the MLS company, is that a company that owns MLS,
 8 was it Snake River MLS, or who owns this MLS listing
 9 agency?
 10 A. It's administered by the Idaho Falls -
 11 like the Realtor association who administers the
 12 MLS, Idaho Falls Realtor Association.
 13 Q. Do you currently monitor - excuse me,
 14 when you were listing this house, did you currently
 15 monitor - not currently.
 16 As you listed this house, were you
 17 consistently monitoring the MLS listings for this
 18 house?
 19 A. To this house?
 20 Q. Yes.
 21 A. Specifically in regards to what?
 22 Q. Just were you looking at it, the MLS
 23 listings, while this house was listed for sale?
 24 A. If I had a specific need, yes. Did I
 25 just thumb through them? No.

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DAYS ON MARKET: 308
 STYLE: 1 Story
 TOTAL BEDROOMS: 3
 TOTAL BATHS: 2
 TOTAL HALF BATHS: 0
 APX YEAR BUILT: 2006
 APX TOTAL SQFT: 4288
 GARAGE # STALLS/TYPE: 3 Stalls,
 Attached

UNIT #:
 COUNTY: Jefferson
 SUB AREA: OTHER
 SUBDIVISION: WOODHAVEN CREEK
 ELEMENTARY SCHOOL: Jefferson 251EL
 MIDDLE SCHOOL: MIDWAY 251JH
 HIGH SCHOOL: RIGBY 251HS
 ZONING-GENERAL: RES-SINGLE FAMILY
 ZONING-SPECIFIC: JC-RESIDENTIAL

LEGAL DESCRIPTION: LOT 7 BLK 2 WOODHAVEN CREEK ESTATES
 LOT SIZE (APX SQFT): APX ACREAGE: 1 FRONTAGE: DEPTH: FLOOD PLAIN: N

TOPO:
 LOCATION:
 PRCL #:
 HO EXEMPT: N

	SqFt:	#Bdrms:	#FB:	#HB:	#Fam:	#Lvg:	#Kit:	#FrmDng:	#Den/Ofc:	#Lndry:	#Frplc:
Upper:	0	0	0	0	0	0	0	0	0	0	0
Main:	2144	3	2	0	1	0	1	1	0	1	1
Lower:	0	0	0	0	0	0	0	0	0	0	0
Bsmnt:	2144	0	0	0	0	0	0	0	0	0	0

ABV GRADE SQFT: 2144 BLW GRADE SQFT: 2144 % BASEMENT FIN: 0
 #WNDWPNS: FRM TYPE: AVG ELEC: TAX YR: 2006 ASSOCIATION FEE INCLUDES: CBEXMPT: N
 TAXES: TBD ASSOC FEE \$:

CONSTRUCTION/STATUS: Frame, New-Complete
 EXTERIOR-PRIMARY: Stone, Stucco
 EXTERIOR-SECONDARY:
 HEAT SOURCE/TYPE: Gas, Forced Air
 AIR CONDITIONING: None
 FOUNDATION:
 ROOF: Composition
 WATER: Well-Private
 SEWER: Private Septic
 IRRIGATION: None
 PROVIDER/OTHER INFO: Rocky Mountain Power, 220 Volt
 Plug-In(s), Breaker(s)
 BASEMENT: Unfinished, Walk-Out
 OTHER ROOMS:
 LAUNDRY: Main Level
 APPLIANCES INCLUDED: Range/Oven-Electric, Water
 Heater-Gas, Microwave, Garbage Disposal, Dishwasher
 FIREPLACE:
 INTERIOR FEATURES:
 EXTERIOR FEATURES:
 PATIO/DECK:
 FENCE TYPE/INFO:
 LANDSCAPING:
 VIEW:
 DRIVEWAY TYPE:

INCLUSIONS: RANGE, MICROWAVE, DISHWASHER
 EXCLUSIONS: TOOLS, PERSONAL PROPERTY

PUBLIC INFO: GREAT FLOOR PLAN WITH LOTS OF SPACE! LOCATED IN WOODHAVEN CREEK ESTATES ON JUST OVER AN ACRE AND WITHIN WALKING DISTANCE TO TWO SCHOOLS. THIS HOME WILL FEATURE A WALKOUT BASEMENT, WRAP AROUND DECKING, A LARGE 3-CAR GARAGE. KNOTTY-ALDER OR MAPLE CABINETS (YOUR CHOICE), TILED ENTRY WAYS AND KITCHEN AND SO MUCH MORE. THE LIVING ROOM IN THE BASEMENT WILL BE FINISHED GIVING THE HOME NEARLY 2600 FINISHED SQUARE FOOTAGE, AND HALF OF THE BASEMENT LEFT TO FINISH FOR ADDITIONAL BEDROOMS AND ONE MORE BATH. HOME WILL HAVE A TOTAL OF NEARLY 4290 SQ FT. DEFINITELY A GREAT BUY IN RIGBY. **THERE HAS BEEN CONCERN ABOUT SUB WATER IN JEFFERSON COUNTY, HOWEVER THIS HOME HAS NOT HAD SUB ISSUES AND TO GIVE BUYER PIECE OF MIND BUILDER WILL INSTALL A LEACHING SYSTEM AROUND HOME AND PROVIDE 1 YEAR WARRANTY ON CONSTRUCTION**

PRIVATE INFO: There has been some concern about sub water in Jefferson County. This particular home has never had sub issues but to give the buyer peace of mind the builder is going to install a leaching system with a drainage field from the east side to the west side of the home to prevent the possibility of there every being any sub issues.

DIRECTIONS: HEADING WEST ON HWY 48 TRN RT ON 3700 E TRN RT INTO WOODHAVEN CREEK ESTATES HOME IS ON LEFT LOOK FOR SIGN

OWNER NAME: Marriott OCCUPANT/CONTACT PRIMARY PHONE:
 OCC/CNTCT NM: ALT PHN1: ALT PHN2:
 CNTRTYPE: ERS BA COMP: 3 NAGTOFFR: 3 DUAL/VAR: No AGTBONUS: MIN COMM:
 KEYBXTYPE: INFRARED KEYBXTIME: KEYLOCATN: LOCKBOX FXR UPPR: No
 BUILDER: SIGN: Yes AGENT OWNED: No BUYER EXCLUSIONS: No
 SHOWING INSTRUCTIONS: Lockbox Vacant POSSESSION:
 TERMS: Cash, Conventional, FHA, IHFA PENDING DATE:
 LIST DATE: 8/10/2006 EXPIRE DATE: 7/30/2007 DISPLAY ON INTERNET: Yes

Exhibit No. 11
 Date: 2-27-10
 R. Sh. TPPN
 T&T REPORTING

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CO-LIST OFFICE:

Listing Office: Win Star Realty (#:3046)
Office Phone: (208) 529-8888

CO-LIST AGENT:

Listing Agent: Dave Chapple (#:8240)
Agent Phone: (208) 351-9951
Agent Email: chapple21@hotmail.com

Information Herein Deemed Reliable but Not Guaranteed



DAYS ON MARKET: 308
STYLE: 1 Story
TOTAL BEDROOMS: 3
TOTAL BATHS: 2
TOTAL HALF BATHS: 0
APX YEAR BUILT: 2006
APX TOTAL SQFT: 4288
GARAGE # STALLS/TYPE: 3 Stalls, Attached

UNIT #:
COUNTY: Jefferson
SUB AREA: OTHER
SUBDIVISION: WOODHAVEN CREEK
ELEMENTARY SCHOOL: Jefferson 251EL
MIDDLE SCHOOL: MIDWAY 251JH
HIGH SCHOOL: RIGBY 251HS
ZONING-GENERAL: RES-SINGLE FAMILY
ZONING-SPECIFIC: JC-RESIDENTIAL

LEGAL DESCRIPTION: LOT 7 BLK 2 WOODHAVEN CREEK ESTATES
LOT SIZE (APX SQFT): **APX ACREAGE:** 1 **FRONTAGE:** **DEPTH:** **FLOOD PLAIN:** N

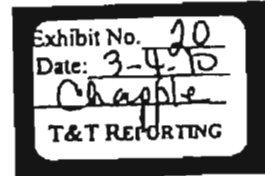
TOPO:
LOCATION:
PRCL #: **TAXES:** TBD **TAX YR:** 2006 **CBEXMPT:** N
HO EXEMPT: N **ASSOC FEE \$:** **ASSOCIATION FEE INCLUDES:**

	SqFt:	#Bdrms:	#FB:	#HB:	#Fam:	#Lvg:	#Kit:	#FrmlDng:	#Den/Ofc:	#Lndry:	#Frplc:
Upper:	0	0	0	0	0	0	0	0	0	0	0
Main:	2144	3	2	0	1	0	1	1	0	1	1
Lower:	0	0	0	0	0	0	0	0	0	0	0
Bsmnt:	2144	0	0	0	0	0	0	0	0	0	0

ABV GRADE SQFT: 2144 **BLW GRADE SQFT:** 2144 **% BASEMENT FIN:** 0
#WINDWPNS: **FRM TYPE:** **AVG ELEC:** **AVG GAS:** **AVG HEAT:**

CONSTRUCTION/STATUS: Frame, New-Complete
EXTERIOR-PRIMARY: Stone, Stucco
EXTERIOR-SECONDARY:
HEAT SOURCE/TYPE: Gas, Forced Air
AIR CONDITIONING: None
FOUNDATION:
ROOF: Composition
WATER: Well-Private
SEWER: Private Septic
IRRIGATION: None
PROVIDER/OTHER INFO: Rocky Mountain Power. 220 Volt Plug-In(s), Breaker(s)
BASEMENT: Unfinished, Walk-Out
OTHER ROOMS:

LAUNDRY: Main Level
APPLIANCES INCLUDED: Range/Oven-Electric, Water Heater-Gas, Microwave, Garbage Disposal, Dishwasher
FIREPLACE:
INTERIOR FEATURES:
EXTERIOR FEATURES:
PATIO/DECK:
FENCE TYPE/INFO:
LANDSCAPING:
VIEW:
DRIVEWAY TYPE:



INCLUSIONS: RANGE, MICROWAVE, DISHWASHER
EXCLUSIONS: TOOLS, PERSONAL PROPERTY

PUBLIC INFO: GREAT FLOOR PLAN WITH LOTS OF SPACE! LOCATED IN WOODHAVEN CREEK ESTATES ON JUST OVER AN ACRE AND WITHIN WALKING DISTANCE TO TWO SCHOOLS. THIS HOME WILL FEATURE A WALKOUT BASEMENT, WRAP AROUND DECKING, A LARGE 3-CAR GARAGE. KNOTTY-ALDER OR MAPLE CABINETS (YOUR CHOICE). TILED ENTRY WAYS AND KITCHEN AND SO MUCH MORE. THE LIVING ROOM IN THE BASEMENT WILL BE FINISHED GIVING THE HOME NEARLY 2600 FINISHED SQUARE FOOTAGE, AND HALF OF THE BASEMENT LEFT TO FINISH FOR ADDITIONAL BEDROOMS AND ONE MORE BATH. HOME WILL HAVE A TOTAL OF NEARLY 4290 SQ FT. DEFINITELY A GREAT BUY IN RIGBY **THERE HAS BEEN CONCERN ABOUT SUB WATER IN JEFFERSON COUNTY, HOWEVER THIS HOME HAS NOT HAD SUB ISSUES AND TO GIVE BUYER PIECE OF MIND BUILDER WILL INSTALL A LEACHING SYSTEM AROUND HOME AND PROVIDE 1 YEAR WARRANTY ON CONSTRUCTION**

PRIVATE INFO: There has been some concern about sub water in Jefferson County. This particular home has never had sub issues but to give the buyer peace of mind the builder is going to install a leaching system with a drainage field from the east side to the west side of the home to prevent the possibility of there every being any sub issues.

DIRECTIONS: HEADING WEST ON HWY 48 TRN RT ON 3700 E TRN RT INTO WOODHAVEN CREEK ESTATES HOME IS ON LEFT LOOK FOR SIGN

OWNER NAME: Marriott **OCCUPANT/CONTACT PRIMARY PHONE:**
OCC/CNTCT NM: **ALT PHN1:** **ALT PHN2:**
CNTRTYPE: ERS **BA COMP:** 3 **NAGTOFFR:** 3 **DUALVAR:** No **AGTBONUS:** **MIN COMM:**
KEYBXTYPE: INFRARED **KEYBXTIME:** **KEYLOCATN:** LOCKBOX **FXR UPPR:** No
BUILDER: **SIGN:** Yes **AGENT OWNED:** No **BUYER EXCLUSIONS:** No
SHOWING INSTRUCTIONS: Lockbox Vacant **POSSESSION:**
TERMS: Cash, Conventional, FHA, IHFA **PENDING DATE:**
LIST DATE: 8/10/2006 **EXPIRE DATE:** 7/30/2007 **DISPLAY ON INTERNET:** Yes

504

CO-LIST OFFICE:

Listing Office: Win Star Realty (#3046)
Office Phone: (208) 529-8888

CO-LIST AGENT:

Listing Agent: Dave Chapple (#8240)
Agent Phone: (208) 351-9951
Agent Email: chapple21@hotmail.com

Information Herein Deemed Reliable but Not Guaranteed



SNAKE RIVER REGIONAL MLS CHANGE FORM

To be placed in listing file and/or submitted to SNRRMLS Board Office if required

Date: 1/2/07

Listing Office & Number WINSTON

MLS Number: 141140

Listing Agent & Number Dave Chappell 8240

Address 319 N 3709 E Rigby ID 83442

Status Change By Listing Agent / Office Staff

- U- Under Contract with contingencies
 - Sale of Property
 - Inspections
 - Other _____

P - Pending

W- Withdrawn

C- Closed/Sold Date: _____ Price _____

date	initials
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Terms _____
How sold (see Navica pick list)

Selling Office and Agent _____ / _____
office agent

Changes Board Level

Transfer Office Agent

From: _____ To: _____

Delete

Reason: _____

Broker Approval (signature required): _____

Changes Requiring Seller and Broker Signature

I/We the undersigned owner(s) and the undersigned Realtors® do hereby agree to amend the listing contract between them dated _____, relating to the real estate located at 319 N 3709 E Rigby ID 83442

Price Change From \$ _____ To \$ _____

Expiration Date - Change to 2/20/2007

If such listing agreement has already expired by its terms, this amendment shall be construed in the same manner as if a new listing agreement had been signed with exactly the same terms except for the new expiration date provided herein.

Cancel listing

Seller Signature: Robert Shipp Date 1/2/07

Seller Signature: _____ Date _____

Broker Signature: Jim Windmiller Date 1/2/07

EXHIBIT "G"

(Deposition Transcript of Shawn Goodspeed)

DEPOSITION OF WILLIAM SHAWN GOODSPEED
 BE IT REMEMBERED that the deposition of
 William Shawn Goodspeed was taken by the attorney for
 the defendants at the office of Dunn Law Offices,
 located at 477 Pleasant Country Lane, Rigby, Idaho,
 before Sandra D. Terrill, Court Reporter and Notary
 Public, in and for the State of Idaho, on Friday, July
 30, 2010, commencing at the hour of 10:00 a.m., in the
 above-entitled matter.

APPEARANCES

For the Defendants:

DUNN LAW OFFICES
 BY: ROBIN D. DUNN
 477 Pleasant Country Lane
 Post Office Box 277
 Rigby, Idaho 83442-0276
 (208) 745-9202

For the Plaintiffs:

NELSON HALL PARRY TUCKER, P.A.
 BY: WESTON S. DAVIS
 490 Memorial Drive
 Post Office Box 51630
 Idaho Falls, Idaho 83405-1630
 (208) 522-3001

Also Present:

Robert Shippen
 Jorja Shippen
 Shellee Beth Goodspeed

1 (The deposition proceeded at 9:57 a.m.
 2 as follows:)
 3 William Shawn Goodspeed,
 4 produced as a witness at the instance of the
 5 defendants, having been first duly sworn, was
 6 examined and testified as follows:

EXAMINATION

7
8
9 BY MR. DUNN:

10 Q. Would you state your name for the
11 record.

12 A. William Shawn Goodspeed.

13 Q. And what did you do, if anything, to
14 prepare for today's deposition?

15 A. I've reviewed some of the attachments
16 and proceedings back and forth, the paperwork
17 provided by my attorney.

18 Q. Do you believe that you're
19 knowledgeable on the events and/or documents in
20 this particular case?

21 A. Yes.

22 Q. When did you approach the Shippens
23 about purchase of the real property in Jefferson
24 County, which is the subject of this lawsuit?

25 A. It would have been late May, early

EXAMINATION

WILLIAM SHAWN GOODSPEED

BY MR. DUNN..... 4
 BY MR. DAVIS..... 29

Page

NO EXHIBITS

1 June of 2007.

2 Q. And I take it you and your wife and
3 children were moving here from Tennessee; is that
4 correct?

5 A. Correct.

6 Q. And approximately how many homes did
7 you look at before deciding upon this particular
8 home?

9 A. It felt like 50, but it could have
10 been less. It was a long, tiresome process.

11 Q. And who assisted you in this process?

12 A. My wife and Randy Storer.

13 Q. And Randy Storer, as mentioned
14 previously, is a Realtor?

15 A. He's our real estate agent, yes,
16 Realtor.

17 Q. And what company was he associated
18 with?

19 A. I'd have to look. To be honest with
20 you, I don't, from memory, recall.

21 Q. But in the documents it would show
22 what company he was associated with?

23 A. It would, and that would be correct.

24 Q. And did he give you opinions and
25 advice as you went through this process of

1 what we were -- not what we had agreed to buy.
 2 Q. Is there anything else that you are
 3 requesting for yourself individually?
 4 A. Yes.
 5 Q. And what would that be?
 6 A. Attorney's fees as well as
 7 consideration of the upgrades that have been done
 8 to the house.
 9 Q. Now, you performed some upgrades to
 10 the house through either yourself or
 11 subcontractors; is that correct?
 12 A. Correct.
 13 Q. And that was subsequent to the
 14 purchase of the home?
 15 A. Meaning after, yes, it was after the
 16 home.
 17 Q. And did Bobby or Jorja or any of the
 18 defendants perform any of those upgrades?
 19 A. No.
 20 Q. Were those upgrades considered in any
 21 contractual form with any of the defendants?
 22 A. No.
 23 Q. Those upgrades were of your free and
 24 voluntary choice; is that correct?
 25 A. Yes.

1 A. I'm not. I have no claim for anything
 2 but nonmonetary damages -- I'm not sure I
 3 understand the question, but I have -- I don't
 4 think so.
 5 THE WITNESS: Am I understanding his
 6 question?
 7 MR. DUNN: You can consult with him if
 8 you'd like. That's fine with me.
 9 MR. DAVIS: I guess I would object just to
 10 the classification -- a legal conclusion between
 11 monetary and nonmonetary damages.
 12 I think what he's asking you is other
 13 than what you've put in the complaint, do you want
 14 money for anything else?
 15 THE WITNESS: No.
 16 MR. DAVIS: Is that a fair question?
 17 MR. DUNN: That's a fair question.
 18 Q. BY MR. DUNN: The reason we do
 19 depositions is to try to prepare for ultimate
 20 trial. So what I'm asking you is related to
 21 preparation. I've got some notes here, so just if
 22 you'll bear with me a second.
 23 Do you know if your Realtor reviewed
 24 any forms from the district department?
 25 A. I don't think so, but I don't know.

1 Q. And those upgrades that you indicate
 2 were done with you and the consent of your wife?
 3 A. Yes.
 4 Q. Did you review any sewer and septic
 5 plans with the health department prior to the
 6 purchase of this home?
 7 A. No.
 8 Q. Did you review the MLS agreement with
 9 anyone prior to the purchase of this home?
 10 A. Yes.
 11 Q. And what person did you review the MLS
 12 agreement with prior to the purchase of this home?
 13 A. My wife and my Realtor.
 14 Q. And how did you obtain access to the
 15 MLS listing?
 16 A. My wife had been working with the
 17 Realtor from Knoxville. They had been sending
 18 documents, advertisements for homes, back and forth
 19 trying to narrow down the search before we got
 20 here. So I'm assuming that because she had those
 21 before we left Knoxville, she would have gotten
 22 those from our Realtor.
 23 Q. Are you claiming any noneconomic,
 24 meaning nonmonetary, damages in this particular
 25 case?

1 Q. The experts that your wife talked
 2 about in this particular case, were they retained
 3 by you and her jointly?
 4 A. Yes.
 5 Q. And have they caused to be produced
 6 any written documents that you have seen or your
 7 attorney has seen?
 8 A. Yes. There's a survey report.
 9 Q. Let's go to the amended complaint, if
 10 your attorney has one. I do not intend to use it
 11 as an exhibit, but I'd like to go through it and
 12 ask you some questions.
 13 MR. DAVIS: I have to ask, is that the one
 14 that I faxed over to you yesterday?
 15 MR. DUNN: No. This is the old one.
 16 MR. DAVIS: Okay.
 17 MR. DUNN: I might ask some questions on
 18 that one, but I doubt it at this point.
 19 MR. DAVIS: Do you have the date there on
 20 the complaint?
 21 MR. DUNN: October 8th of 2009.
 22 Q. BY MR. DUNN: In Count 1 on page 2
 23 you've indicated breach of express warranty. How
 24 did the defendants breach an express warranty?
 25 A. I'm not seeing -- I must be on the

1 wrong page. Oh, I got it, yeah, at the bottom.
 2 MR. DAVIS: Again, I'll just object to a
 3 line of questioning that calls for a legal
 4 conclusion.
 5 You can answer if you know.
 6 Q. BY MR. DUNN: Let me restate that.
 7 On what facts do you base your opinion
 8 that the defendants breached an express warranty?
 9 A. I think that they failed to disclose a
 10 known defect.
 11 Q. Count 2, breach of implied warranty.
 12 What facts do you believe support that the
 13 defendants breached an implied warranty?
 14 A. I think that when you purchase a new
 15 home and there's a warranty, I think that that
 16 implies that there's -- that the home is going to
 17 be habitable and safe, and I think that the
 18 condition of water -- standing water in the
 19 basement is not in line with a safe, habitable
 20 home -- new home.
 21 Q. What facts do you allege that the
 22 defendants breached the implied covenant of good
 23 faith and fair dealing?
 24 A. Please repeat the question.
 25 Q. What facts do you allege support the

1 Q. What facts suggest that Marriott
 2 Homes, LLC, and/or Shippen Construction, Inc., did
 3 not build this home?
 4 A. I didn't -- that was a confusing
 5 question. Please try to break it down for me.
 6 Q. What facts do you know of lead you to
 7 believe that Shippen Construction or Marriott Homes
 8 did not construct and build this home?
 9 A. The construction and building of the
 10 home is confusing to me. The only thing I have to
 11 go off is the closing paperwork and the
 12 representations made. So I don't -- I don't
 13 understand what facts you're asking for.
 14 Q. Well, you've alleged that Robert and
 15 Jorja Shippen were the actual builders and that you
 16 want to do what's called pierce the veil of their
 17 entities, that they were doing it on a personal
 18 level and not a corporate or LLC level. What facts
 19 support that allegation?
 20 A. The fact that through all
 21 representation -- all representation through the
 22 sales process, be it the signing of the closing
 23 paperwork or conversations about the property, at
 24 no time was Marriott brought up until afterwards.
 25 So I don't know -- I still am confused by your

1 allegation that the defendants breached the implied
 2 covenant of good faith and fair dealing?
 3 A. That on several occasions -- many
 4 occasions there's standing water in the basement of
 5 the home.
 6 Q. Was this prior to or subsequent to the
 7 purchase of the real estate?
 8 A. After purchase of the real estate, I
 9 learned that it was both prior to and after. But
 10 at the time of purchase I relied upon the MLS
 11 listing and the representations that there had been
 12 no water in the basement when, in fact, now I know
 13 that there had been.
 14 Q. On Count 7, which is page 8, what
 15 facts suggest that my clients, the defendants, have
 16 been unjustly enriched?
 17 A. Had they disclosed the fact that that
 18 basement had flooded before my purchase of the
 19 home, that home would not have the same value. In
 20 fact, I would have never even stopped to look at
 21 that home. So I think if they were to have
 22 disclosed that the basement had flooded and given
 23 the reasons for that flooding, that the value of
 24 the home would have been substantially different
 25 from what was -- what the purchase price was.

1 question. You're asking me for facts, and I'm not
 2 sure what facts would satisfy your question.
 3 Q. Well, you wrote the complaint so I'm
 4 just assuming that you had facts to support what
 5 you've written. Do you know of any facts?
 6 A. We're going to have to start over
 7 again. You've lost my train of thought. Please
 8 start back from your last question.
 9 Q. Paragraphs 69 to 73 indicate that you
 10 believe Robert and Jorja Shippen worked
 11 fraudulently through other entities. What facts do
 12 you have that support those allegations?
 13 A. Defendant Robert and/or Jorja Shippen
 14 maintain such a unity of interest in defendant
 15 Shippen -- the fact that they're sole owners and
 16 proprietors of Marriott Homes and that they're
 17 making -- I believe that they're making the claim
 18 that the home was built by Marriott Homes.
 19 MR. DAVIS: I would state for the record
 20 that I still have the same continuing objection
 21 throughout this line of questioning in that they
 22 call for legal conclusions.
 23 Additionally, there are other
 24 documents that have been requested that have not
 25 been produced by the defendants and so I would just

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rdunn@dunnlawoffices.com

2010 OCT 12 AM 9:30
DISTRICT COURT
JEFFERSON COUNTY, IDAHO

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODSPEED,)
husband and wife,)

Plaintiffs,)

vs.)

SHIPPEN CONSTRUCTION, INC., an)
Idaho corporation, ROBERT)
JORJA SHIPPEN, husband and wife,)
ROBERT and JORJA SHIPPEN, d/b/a)
SHIPPEN CONSTRUCTION, ROBERT)
SHIPPEN, AN INDIVIDUAL, and)
MARRIOT HOMES, LLC)

Defendants.)

Case No. CV 09-015

DEFENDANTS' RESPONSE
TO PLAINTIFFS' REQUEST TO
AMEND COMPLAINT AND
INCLUDE PUNITIVE DAMAGES

COMES NOW, defendants, by and through the undersigned attorney of record, and responds to that document entitled "Motion for Leave to Amend Complaint to Add Punitive Damages" as follows:

MOTION TO AMEND COMPLAINT

This is the FOURTH time the plaintiffs have attempted to amend their complaint.

DEFENDANTS' RESPONSE TO AMEND COMPLAINT TO ADD PUNITIVE DAMAGES

Page 1

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First, the plaintiffs filed an initial complaint. Second, the plaintiffs filed their first amended complaint to obtain new parties to the action. Third, the plaintiffs amended their causes of action of which a request for Intentional/Negligent Infliction of Emotional Distress was denied by the court (Judge St Clair, Sitting District Judge). Now, the plaintiffs have filed their request for a FOURTH amendment by requesting leave of the court to file punitive damages.

Each time the defendants must respond in answers and briefing. Each time additional costs and expenses are incurred. As such, it behooves the court to try to get the plaintiffs to focus on one amendment of its complaint and discontinue the needless expense of litigation costs. Why does each proposed amendment need to be filed separately and not heard by the court in one setting to allow the parties to focus on the realities of the case?

The defendants OBJECT to the proposed amendment for punitive damages. The defendants file this response and request attorney fees pursuant to the discovery rules, Rule 26; frivolous filings, Rule 11; Codes Sections 12-120, 12-121, 12-123; IRCP, Rule 54 and other pertinent rules, statutes and/or law developed by the court.

12-123. Sanctions for frivolous conduct in a civil case

(1) As used in this section:

(a) "Conduct" means filing a civil action, asserting a claim, defense, or other position in connection with a civil action, or taking any other action in connection with a civil action.

(b) "Frivolous conduct" means conduct of a party to a civil action or of his counsel of record that satisfies either of the following:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action;

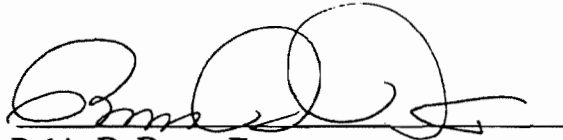
(ii) It is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

ID ST Sec. 12-123, Sanctions for frivolous conduct in a civil case

----- Excerpt from page 6369.

WHEREFORE, defendants request that the motion to amend complaint be denied and that attorney fees be awarded to said defendants.

DATED this 12th day of October, 2010.

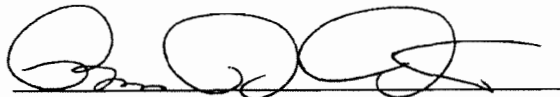


Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of October, 2010, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
 Postage-prepaid mail
 Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

Courtesy Copy To: Honorable Gregory Anderson
Bonneville County Courthouse
605 N. Capital
Idaho Falls, ID 83402

DEFENDANTS' RESPONSE TO AMEND COMPLAINT TO ADD PUNITIVE DAMAGES

Page 3

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2010 OCT 12 PM 4:29
DISTRICT COURT
JEFFERSON COUNTY, IDAHO

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODSPEED,)
husband and wife,)
)
) Plaintiffs,)
)
vs.)
)
)
SHIPPEN CONSTRUCTION, INC., et.)
al.)
)
)
) Defendants.)
_____)

Case No. CV 09-015

MEMORANDUM ON
PUNITIVE DAMAGES:
DEFENDANTS' OBJECTION

COMES NOW, defendants in the above-entitled matter, and file this Memorandum
Re: Punitive Damages in opposition to the request of the plaintiffs' leave to add punitive
damages to the proposed amended complaint of the plaintiffs, as follows:

INTRODUCTION

1. The plaintiffs filed their complaint in this matter and their primary cause(s) of action

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dealt with alleged breach of contract claims on the purchase of a new home in Jefferson County. The plaintiffs then filed two additional amended complaints. This would be the "fourth" attempt to alter the complaint, (including the original complaint).

2. As the complaint now stands, as amended, there are three (3) primary sets of defendants as follows:
 - A. Robert and Jorja Shippen, husband and wife, as owners of the original ground (real property);
 - B. Marriot Homes, LLC which is the general contractor who built the home on the real property owned by the husband and wife.
 - C. Shippen Construction, Inc. which is a sub-contractor of Marriot Homes, LLC and performs excavation and foundation work on homes. (Plaintiffs have also included Robert Shippen d/b/a Shippen Construction).
3. The last attempt to amend the complaint included a request for Intentional/Negligent infliction of Emotional Distress which was denied by acting Judge, Richard T. St.Clair.
4. Now, the plaintiffs have requested of this court, "Leave to Amend to Add Punitive Damages" to the complaint. As stated, the complaint is primarily grounded in contract.

PUNITIVE DAMAGES

§ 6-1604. Limitation on punitive damages

(1) In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.

(2) In all civil actions in which punitive damages are permitted, no claim for

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damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.

ID ST Sec. 6-1604, Limitation on punitive damages
----- Excerpt from page 3895.

It has long been held that punitive damages are not favored in Idaho and should be awarded only within narrow limits. Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980). Our Supreme Court recently reiterated "that the policy behind punitive damages is deterrence rather than punishment." Cheney v. Palos Verdes Investment Corp., 104 Idaho at 905, 665 P.2d at 669. The court thus continues to follow the policy stated in Yacht Club Sales and Service, Inc. v. First National Bank of North Idaho, 101 Idaho 852, 623 P.2d 464 (1980), where it said:

"We prefer to accentuate those cases which define the purpose of exemplary damages as a deterrent to the defendant and others from engaging in similar conduct in the future. We concede that any exemplary damages assessed against a defendant will appear to him to be punishment. However, we feel that the courts in these civil cases should be motivated primarily by a purpose of deterrence and not by a purpose of punishment.... Punishment, per se, should be left to the criminal law."

Id. at 864, 623 P.2d at 476 (quoting Jolley v. Puregro, 94 Idaho 702, 708-09, 496 P.2d 939, 945-46 (1972)). *Therefore, the district court should rarely, if ever, award punitive damages absent a likelihood of future bad conduct.* Linscott v. Rainier National Life Ins. Co., supra. The likelihood of future bad conduct is a question of fact. Where there is substantial and competent--even though conflicting--evidence of extreme bad conduct and of a need for deterrence of similar future conduct, we will uphold an award of punitive damages. Cheney v. Palos Verdes Investment Corp., 104 Idaho at 905, 665 P.2d at 669.

Davis v. Gage, 682 P.2d 1282, 106 Idaho 735, (Idaho App. 1984)
----- Excerpt from page 682 P.2d 1285.

In the instant case, the plaintiffs have stated in their depositions that the defendants did not intend any harm to the plaintiffs nor did the plaintiffs want any money not requested, at the time of the deposition, in their complaint. This was basically the plaintiffs request for emotional distress claims. Now, the plaintiffs shoot for a different

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angle in an attempt to add punitive damages to the complaint.

Normally, in contract cases, intent is not an element of a breach of contract claim and the “oppressive, fraudulent, malicious or outrageous conduct” does not come about. It is hard to imagine, in a contract case, the punitive damage aspect since both parties participated in the contract. In a tort action, it would also seem plausible that the alleged wrongful conduct would rise to the level of the forgoing standard by “clear and convincing evidence”. The allegations in the case at bar of water damage do not rise to the level of clear and convincing evidence and the allegations of the affidavits “just don’t have it” in the words of the undersigned. It just does not flow that punitive damages should be set forth for the allegation of sub-surface or irrigation water damages. The defendants just do not display the evil or wrongful conduct associated with punitive damages.

Defendants take exception to the request for punitive damages based upon the allegations of the complaint. As such, attorney fees are requested by the defendants and have been alleged under multiple theories in defendants’ response to plaintiffs’ motion.

It appears that the plaintiffs could have set forth their numerous motions to amend or alter their original complaint in one pleading. It is believed that this attempt to piece meal the motions is not the most efficient use of the judicial time involved; and, obviously increases the costs of litigation on the attorney fee subject of the case. These various Motions of the plaintiffs certainly increase the cost of litigation for both parties that will ultimately be borne by the prevailing party. This point is brought to this court, at an early stage, as the projection for a trial in this matter is highly likely and the costs to be extreme on the attorney billing amount.

Punitive damages are described in case law, in Idaho, in several cases and point out the following:

An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was "an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences." The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that be termed "malice, oppression, fraud or gross negligence"; "malice, oppression, wantonness"; or simply "deliberate or willful."

Vendelin v. Costco Wholesale Corp., 95 P.3d 34, 140 Idaho 416, (Idaho 2004)
----- Excerpt from page 95 P.3d 42.

Whether punitive damages may be awarded depends on "whether the plaintiff is able to establish the requisite intersection of two factors: a bad act and a bad state of mind." Myers v. Workmen's Auto Ins. Co., 140 Idaho 495, 503, 95 P.3d 977, 985 (2004) (internal quotations omitted). Therefore, a "reasonable likelihood" must exist that the defendant performed a bad act with a bad state of mind.

"It is within the discretion of a trial court to deny a motion to amend the pleadings. We review discretionary matters under an abuse of discretion standard." Eastern Idaho Economic Development Council v. Lockwood Packaging Corp., 139 Idaho 492, 498 80 P.3d 1093, 1099 (2003).

Hall v. Farmers Alliance Mut. Ins. Co., 179 P.3d 276, 145 Idaho 313, (Idaho 2008)
----- Excerpt from page 179 P.3d 282.

I.C. § 6-1601(9) describes "punitive damages" as serving "the public policies of punishing a defendant for outrageous conduct and ... deterring future like conduct."

Schaefer v. Ready, 3 P.3d 56, 134 Idaho 378, (Idaho App. 2000)
----- Excerpt from page 3 P.3d 60.

In the instant case, the alleged breach of contract for water damages and the various underlying torts do not raise to the level of the "malicious or bad state of mind" standard. Attached and (some excerpts were previously filed on other issues) filed with the court are deposition/discovery excerpts in support of defendants' position.

DATED this 12th day of October, 2010.




Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of October, 2010, a true and correct copy of the foregoing was delivered to the following person(s) by:

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls ID, 83405
523-7254

Courtesy Copy:
Hon. Gregory Anderson
District Judge

DUNN LAW OFFICES, PLLC
 Robin D. Dunn, Esq., ISB #2903
 Amelia A. Sheets, Esq., ISB #5899
 P.O. Box 277
 477 Pleasant Country Lane
 Rigby, ID 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)

2010 OCT 12 PM 4:29
 DISTRICT COURT
 JEFFERSON COUNTY, IDAHO

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and)
 SHELEE BETH GOODSPEED,)
 husband and wife,)

Plaintiffs,)

vs.)

SHIPPEN CONSTRUCTION, INC.,)
 et. al.)

Defendants.)

Case No. CV 09-015

AFFIDAVIT OF ROBIN D.
 DUNN

PUNITIVE DAMAGES

STATE OF IDAHO)
)ss
 County of Jefferson)

ROBIN D. DUNN, being first duly sworn upon oath, states as follows:

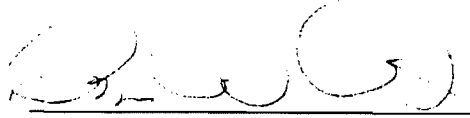
1. That he is the attorney for the named defendants in the above-captioned matter.
2. That various discovery requests were obtained in depositions that the undersigned attended. Attached as Exhibit A is a portion of the Deposition of Shellee Goodspeed; Exhibit B-William Shawn Goodspeed; Exhibit C-Defendants which is/are incorporated herein by reference.
3. Further your affiant sayeth naught.

AFFIDAVIT OF ROBIN D. DUNN-PUNITIVE DAMAGES

Page 1

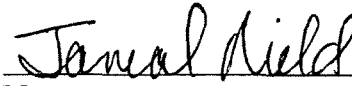
520

DATED this 12th day of October, 2010



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

SUBSCRIBED AND SWORN to before me this 12th day of October, 2010.

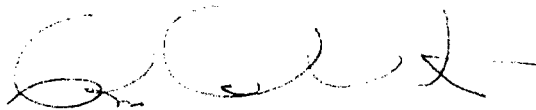


Notary Public for Idaho
Residing at: Lewisville
Commission: 113114

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of October, 2010, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

Courtesy Copy To: Honorable Gregory Anderson
Bonneville County Courthouse
605 N. Capital
Idaho Falls, ID 83402

EXHIBIT A

500
300

DEPOSITION OF SHELEE BETH GOODSPEED - 07/30/2010

SHEET 7 PAGE 25

1 purpose of this litigation?
2 A. I think there's maybe something
3 missing. There should be a clean bill of health
4 before this date.
5 MR. DAVIS: Just flip through them page by
6 page and make sure they all carried through on the
7 fax machine. Go back to page 1.
8 Q. BY MR. DUNN: Page 1 is your cover
9 letter so you should be beginning with page 2.
10 MR. DAVIS: Go to the next page.
11 Q. BY MR. DUNN: So would those be the
12 pages you're relying upon for purposes of this
13 litigation?
14 A. Oh, I'm sorry. Here it is. Yes.
15 Q. In those documents it indicated you
16 might have some thyroid issues. Do you have any
17 thyroid issues?
18 A. Yes.
19 Q. And do you take any medications for
20 those thyroid issues?
21 A. Yes.
22 Q. And who is your treating physician?
23 A. I go to Community Care.
24 Q. And who at the -- just in general,
25 whoever shows up at Community Care?

PAGE 26

1 A. Uh-huh.
2 Q. Do you know of anything that the
3 defendants have done to intentionally cause you any
4 health issues?
5 ~~A. They haven't hurt me intentionally.~~
6 ~~It's the whole nondisclosure of my home and what to~~
7 ~~do with the home that has caused me issues.~~
8 Q. So there's been no intentional acts by
9 any of the defendants towards you that you know of?
10 ~~A. No.~~
11 Q. Have there been any negligent act
12 towards you by the defendants which you believe
13 have caused health issues?
14 A. Yes. Neglected to tell me about
15 flooding of the home.
16 Q. And that would be related to the
17 contract of purchase and sale of this agreement,
18 correct?
19 A. There was no disclosure in that
20 purchase and sale agreement.
21 Q. But my question is it would be related
22 to this transaction?
23 A. The sale of the home, yes.
24 Q. Which was contractual in nature,
25 correct?

PAGE 27

1 A. Yes.
2 Q. And you haven't socialized with them?
3 A. No.
4 Q. You haven't done any extracurricular
5 activities with any of the defendants?
6 A. No.
7 Q. So all of your dealings would be
8 related to the purchase of this particular home
9 along with the documents associated therewith?
10 A. Would you state that one more time.
11 Q. So all of your dealings with the
12 defendants would be related to the contracts and
13 the associated documents relative to this home
14 sale?
15 A. Yes. I've ran into them a few times
16 at church, but, yes.
17 Q. You've also listed some experts in
18 this particular matter. Do you know who those
19 experts are?
20 A. Yes.
21 Q. And who are they?
22 A. Well, I know what they do. Yeah.
23 Q. Do you know their name?
24 A. My memory is not great on this whole
25 thing. I'm blocking the whole thing out. No, I

PAGE 28

1 don't remember their name offhand.
2 Q. Okay. So what type of things do these
3 experts do that you've hired?
4 A. A land surveyor.
5 Q. Okay.
6 A. And the other one would be a home
7 appraiser.
8 Q. Okay. So do you have any other
9 experts that you know of who would testify in this
10 matter?
11 A. No.
12 Q. Now, what is the purpose of a land
13 surveyor in conjunction with this lawsuit, if you
14 know?
15 MR. DAVIS: Again, I'll just object, as it
16 would call for a legal conclusion. You can answer
17 if you know.
18 THE WITNESS: They were getting the
19 elevation of how deep the home was dug.
20 Q. BY MR. DUNN: And the purpose of an
21 appraiser for this home is related to this
22 litigation in what respect?
23 A. The value of our home.
24 Q. Do you know of any other experts at
25 this point that you have retained to assist you in

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EXHIBIT B

DEPOSITION OF WILLIAM SHAWN GOODSPEED - 07/30/2010

SHEET 3 PAGE 9

PAGE 11

1 here she was not part of.
2 Q. On Exhibit *-10, page 3, line 82 --
3 A. Page 3?
4 Q. Yes. Line 82. Was a drainage/leach
5 system installed by the defendants around the home
6 that you eventually purchased?
7 A. It was not installed around the home.
8 There was a sump pump installed in one location.
9 ~~Q. Was the drainage/leach system~~
10 ~~installed, I guess is a better question?~~
11 A. Yes.
12 Q. And was it installed to your
13 satisfaction?
14 A. Yes. Because in my mind it was only a
15 precautionary measure against sump -- to me it
16 wasn't -- yes. I didn't have a big concern about
17 it.
18 Q. But going to the next page under No. 9
19 it says inspection. You as the buyer chose to have
20 an inspection. Could you explain to me what
21 inspections, if any, occurred prior to your
22 purchase?
23 A. Yes. We had a home inspector come
24 through and do a documented home inspection.
25 Q. And do you know who paid for that home

1 Q. And could you provide those documents
2 to me with the assistance of your attorney?
3 A. I thought that they already had. But,
4 yes, if you don't have them.
5 MR. DAVIS: We've provided them.
6 Q. BY MR. DUNN: They might be. And if
7 they're provided, then I'll go back through them.
8 In the professional inspection was
9 there any indication of water damage or problems
10 that could arise in the future?
11 A. No. There was no mention of any water
12 problems.
13 Q. And this inspector that you chose to
14 have this inspection, was he licensed and certified
15 as to inspection of homes?
16 A. Yes.
17 Q. When you met with the defendants, were
18 you aware who constructed the home in question?
19 A. It was my understanding that it had
20 been constructed by Bob Shippen.
21 Q. So you didn't know about Marriott
22 Homes, LLC, or Shippen Construction, Inc.?
23 A. I didn't. I didn't go to the extent
24 to consider it.
25 Q. Did the Realtor make any inquiry or

PAGE 10

PAGE 12

1 inspection?
2 A. I did.
3 Q. And who was that person that performed
4 that inspection?
5 A. Without looking up his name, I
6 wouldn't recall.
7 Q. And that's not the same inspection
8 that is under Exhibit *-15; is that correct?
9 A. No. This is a walk-through inspection
10 that I did.
11 Q. And what was the difference, in your
12 mind, of the professional inspection that was
13 performed and this walk-through inspection?
14 A. This walk-through inspection was only
15 things that needed completion, the touchup, you
16 know, minor things that -- a punch list, his
17 creation of a punch list.
18 Q. And was this punch list completed to
19 your satisfaction as the items are contained in
20 Exhibit *-15?
21 A. To my knowledge, yes.
22 Q. This professional inspection that you
23 had performed, do you have any documents associated
24 with that?
25 A. Yes.

1 make known unto you of these other entities?
2 A. No.
3 Q. When you purchased the home, you were
4 aware that Robert and Jorja Shippen owned the real
5 property?
6 A. Yes.
7 Q. The deed would reflect that they
8 transferred that to you, correct --
9 A. Yes.
10 Q. -- you and your wife?
11 What, if any, problems did you
12 encounter after the purchase of the home?
13 A. Water in the basement.
14 Q. Were there any other problems that you
15 encountered that are contained in your lawsuit?
16 A. Any other problems that are contained
17 in my lawsuit? I'm not sure. There's the physical
18 problems my wife's had. I'm not -- if that's what
19 you're referring to, yes. I'm not sure what else
20 you would be referring to.
21 Q. And did you have a chance to sign the
22 complaint and review it?
23 A. Yes.
24 Q. And sign the amended complaint and
25 review it?

DEPOSITION OF WILLIAM SHAWN GOODSPEED - 07/30/2010

SHEET 5 PAGE 17

1 conversation like normal people do when they're in
2 the same room.

3 Q. Was there ever any occasion that you
4 recall prior to the purchase of the home where
5 Bobby or Jorja Shippen or any of the defendants
6 treated you improperly?

7 A. No.

8 Q. Would it be fair to say that Exhibits
9 *-1 through *-23, which have been produced thus
10 far, constitute the majority of the documents and
11 transactions associated with this case?

12 A. As far as I know, yes.

13 Q. Now, this was a contractual
14 relationship, this purchase of this home; was that
15 not correct?

16 A. Yes.

17 Q. And you're claiming that in some
18 respect there have been a breach of that contract;
19 is that a fair statement -- or series of contracts?

20 A. Yes.

21 Q. And what monetary damages, if any, are
22 you asking for?

23 A. I would like to have the purchase
24 price of my home reinstated and have the Shippens
25 take back the property because it's not -- was not

PAGE 19

1 Q. And those upgrades that you indicate
2 were done with you and the consent of your wife?

3 A. Yes.

4 Q. Did you review any sewer and septic
5 plans with the health department prior to the
6 purchase of this home?

7 A. No.

8 Q. Did you review the MLS agreement with
9 anyone prior to the purchase of this home?

10 A. Yes.

11 Q. And what person did you review the MLS
12 agreement with prior to the purchase of this home?

13 A. My wife and my Realtor.

14 Q. And how did you obtain access to the
15 MLS listing?

16 A. My wife had been working with the
17 Realtor from Knoxville. They had been sending
18 documents, advertisements for homes, back and forth
19 trying to narrow down the search before we got
20 here. So I'm assuming that because she had those
21 before we left Knoxville, she would have gotten
22 those from our Realtor.

23 Q. Are you claiming any noneconomic,
24 meaning nonmonetary, damages in this particular
25 case?

PAGE 18

1 what we were -- not what we had agreed to buy.

2 Q. Is there anything else that you are
3 requesting for yourself individually?

4 A. Yes.

5 Q. And what would that be?

6 A. Attorney's fees as well as
7 consideration of the upgrades that have been done
8 to the house.

9 Q. Now, you performed some upgrades to
10 the house through either yourself or
11 subcontractors; is that correct?

12 A. Correct.

13 Q. And that was subsequent to the
14 purchase of the home?

15 A. Meaning after, yes, it was after the
16 home.

17 Q. And did Bobby or Jorja or any of the
18 defendants perform any of those upgrades?

19 A. No.

20 Q. Were those upgrades considered in any
21 contractual form with any of the defendants?

22 A. No.

23 Q. Those upgrades were of your free and
24 voluntary choice; is that correct?

25 A. Yes.

PAGE 20

1 A. I'm not. I have no claim for anything
2 but nonmonetary damages -- I'm not sure I
3 understand the question, but I have -- I don't
4 think so.

5 THE WITNESS: Am I understanding his
6 question?

7 MR. DUNN: You can consult with him if
8 you'd like. That's fine with me.

9 MR. DAVIS: I guess I would object just to
10 the classification -- a legal conclusion between
11 monetary and nonmonetary damages.

12 ~~I think what he's asking you is other~~
13 ~~than what you've put in the complaint, do you want~~
14 ~~money for anything else?~~

15 ~~THE WITNESS: No.~~

16 MR. DAVIS: Is that a fair question?

17 MR. DUNN: That's a fair question.

18 Q. BY MR. DUNN: The reason we do
19 depositions is to try to prepare for ultimate
20 trial. So what I'm asking you is related to
21 preparation. I've got some notes here, so just if
22 you'll bear with me a second.

23 Do you know if your Realtor reviewed
24 any forms from the district department?

25 A. I don't think so, but I don't know.

EXHIBIT C

1 to this purchase and sale agreement?
 2 A Yes.
 3 Q Under that agreement on page three, it
 4 says up at the top, section four, builder to provide
 5 a standard builder's warranty for a minimum of one
 6 year.
 7 Do you see that language?
 8 A Yes, I do.
 9 Q What was your understanding of this
 10 warranty?
 11 A That the warranty will cover the house
 12 for one year.
 13 Q What was your understanding as to what
 14 that covered?
 15 A Probably the workmanship.
 16 Q Anything else?
 17 A No.
 18 Q Did you ever have discussions with the
 19 Goodspeeds regarding the coverage of this warranty?
 20 A No.
 21 Q Do you believe the house is habitable if
 22 it floods every year?
 23 A Yes.
 24 Q Under section four, it says, builder to
 25 complete a drainage or leaching system around the

1 residence?
 2 A Yes.
 3 Q Is there anything in this contract, and
 4 by this contract, I mean, Exhibit 10, that would lead
 5 you to believe that this house was not warranted to
 6 be of quality construction?
 7 A No.
 8 Q Do you believe there is anything in this
 9 agreement that precludes - well, let me rephrase
 10 that.
 11 Is there anything in this document, to
 12 your knowledge, that notifies the Goodspeeds that
 13 this house would not be habitable?
 14 A Can you repeat that one more time?
 15 Q Yeah.
 16 Is there anything in this contract, that
 17 you're aware of, that would notify the Goodspeeds
 18 that the house would not be habitable?
 19 A No, not that I know of.
 20 Q Do you know who the closing check was
 21 made out to?
 22 A I don't.
 23 Q Lets turn to Exhibit Number 11.
 24 A (Witness complies).
 25 Q It's the MLS listing one.

1 home. And then parenthesis, it says, walk out
 2 basement area. This is on page three.
 3 What did you understand that language to
 4 mean?
 5 A What do I understand it to mean?
 6 Q Yes.
 7 A I understand - I would just call it a
 8 sub pump.
 9 Q Okay.
 10 Do you know why that sub pump was - why
 11 that sub pump was installed?
 12 A Yes.
 13 Q Why is that?
 14 A Because Bob had a conversation, they
 15 felt like there could be a possibility of subwater.
 16 Q Who is they?
 17 A Bob and Mr. Goodspeed. I know Bob had a
 18 conversation with him about it.
 19 Q Okay.
 20 Do you have any personal knowledge as to
 21 why that sub pump was installed?
 22 A Because of the existing water that had
 23 shown up, the possibility of that.
 24 Q Did you understand that the Goodspeeds
 25 would be occupying this residence as their primary

1 A Number 11?
 2 MR. DUNN: Just keep going.
 3 BY MR. DAVIS:
 4 Q Do you recognize this document?
 5 A No.
 6 Q Did you ever check the MLS listing while
 7 the house was listed for sale?
 8 A No.
 9 Q Did you have any discussions with Dave
 10 Chapple regarding what was to be included in the MLS
 11 listing?
 12 A No.
 13 Q Do you have any idea who wrote this -
 14 the representations in this MLS listing?
 15 A No.
 16 Q Okay. And I can't remember if I asked
 17 you already if - how many times you checked the MLS
 18 listing for this house?
 19 A I never did.
 20 Q Okay.
 21 You mentioned that you had heard from
 22 Bob that the house had flooded.
 23 Did you ever think to put the public on
 24 notice by amending an MLS listing to make the
 25 disclosure of the flood?

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DEPOSITION OF JORJA SHIPPEN - 02-24-10

SHEET 9 PAGE 33

PAGE 35

1 A No.
 2 Q Do you know how long the house was on
 3 the market?
 4 A I don't.
 5 Q Are you aware whether the house flooded
 6 again in 2007 or 2008?
 7 A Not to my knowledge.
 8 MR. DAVIS: If I could have a minute
 9 with my clients, please. See if we need to
 10 discuss anything else.
 11 (Brief recess.)
 12 MR. DAVIS: Can we go back on.
 13 We don't have anything further.
 14 However, we would restate our position on
 15 suspending the deposition as mentioned previously
 16 and for those same things mentioned in the
 17 deposition of Robert Shippen.
 18 Notably in this case, however, we have
 19 not requested in the deposition itself,
 20 confirmation that Ms. Shippen would, in fact,
 21 provide additional documents that she had
 22 previously promised and therefore, we suspend the
 23 deposition only with respect to those documents
 24 not produced in response to the subpoena.
 25 MR. DUNN: I would reiterate the same

1 and I just stopped by.
 2 Q Did you go out and clean at
 3 Mr. Goodspeed's request?
 4 A Yes.
 5 MR. DUNN: That's all I have.
 6 MR. DAVIS: I don't have anything
 7 further.
 8 (Deposition concluded at 4:15 p.m.
 9 wherein reading and signing of the transcript
 10 were waived.)
 11
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35

PAGE 34

PAGE 36

1 objections in Robert Shippen's deposition. No
 2 questions.
 3 MR. DAVIS: Okay.
 4 (Off-the-record discussion.)
 5 MR. DUNN: I think we need to go back
 6 on the record. I need to ask one question.
 7 EXAMINATION
 8 BY MR. DUNN:
 9 Q Jorja, you indicated that you -- on your
 10 testimony, when you remembered that you had gone out
 11 there one more time to the house at the request of
 12 Mr. Goodspeed.
 13 Could you please explain?
 14 A Well, it was like I said, it was the day
 15 before he left to go get his wife. I was out there.
 16 Bob was doing some extra repairs or whatever, some
 17 little things that needed to be done.
 18 When I was out there, he had asked me if
 19 I would reclean the house, just make sure it was
 20 really clean for his wife.
 21 So I guess -- I don't know if you could
 22 call it recleaning. It wasn't dirty, but, you know,
 23 just a little bit of dust and stuff.
 24 Q You did go out one more time then?
 25 A Yeah. Bob was just out there working

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
 COUNTY OF BONNEVILLE)

I, Karla Steed, RPR, RMR, CSR, and Notary Public
 in and for the State of Idaho, do hereby certify:
 That prior to being examined, JORJA SHIPPEN, the
 witness named in the foregoing deposition, was by me
 duly sworn to testify to the truth, the whole truth,
 and nothing but the truth;
 That said deposition was taken down by me in
 shorthand at the time and place therein named and
 thereafter reduced to typewriting under my direction,
 and that the foregoing transcript contains a full,
 true and verbatim record of said deposition.
 I further certify that I have no interest in the
 event of the action.
 WITNESS my hand and seal this _____ day of
 _____, 2010.

Karla Steed
 Idaho CSR No. 755
 Notary Public in and for
 the State of Idaho

My Commission Expires: 8-21-12

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DEPOSITION OF ROBERT SHIPPEN - 02-24-10

SHEET 42 PAGE 165

PAGE 167

1 corner, it says list date, August 10th, 2006. Do you
 2 see that?
 3 A Yes.
 4 Q Do you recall about when you would have
 5 contacted your real estate agent to list the property
 6 on the MLS system?
 7 A No.
 8 Q Okay. Who was your real estate agent?
 9 A Dave Chapple.
 10 Q Okay. Under the private info, it says
 11 there has been some concern about subwater in
 12 Jefferson County. This particular home has never had
 13 sub issues but to give the buyer peace of mind, the
 14 builder is going to install a leaching system with a
 15 drainage field from the east side to the west side of
 16 the home to prevent the possibility of there ever
 17 being any sub issues.
 18 Did you request that the real estate
 19 agent list any of that information?
 20 A No.
 21 Q Okay.
 22 When you learned of this flooding,
 23 apparently on Labor Day weekend of 2006, did you ever
 24 ask Dave Chapple to amend the MLS listing to notify
 25 the buyers that the house had, in fact, flooded.

1 A Ask that question again once more. Let
 2 me make sure I understood it.
 3 Q Sure.
 4 Do you know whether the disclosure about
 5 the house flooding was ever made to the Goodspeeds?
 6 MR. DUNN: Known? Made known? You
 7 just said -
 8 MR. DAVIS: Did I skip a word?
 9 MR. DUNN: Yes.
 10 MR. DAVIS: I'm sorry.
 11 BY MR. DAVIS:
 12 Q Made known to the Goodspeeds.
 13 A You've got me confused.
 14 Q I'll start back over again.
 15 Do you know whether the disclosure about
 16 the flooding was made to the Goodspeeds, was made
 17 known to the Goodspeeds?
 18 A It was only made known - I only made it
 19 to Shawn.
 20 Q Okay. So are you telling me you
 21 personally told him that the house had flooded?
 22 A Yes.
 23 Q And when was that?
 24 A It's when they were looking at it.
 25 Q Okay. Okay.

PAGE 166

PAGE 168

1 Excuse me, notified potential buyers that the house
 2 had, in fact, flooded.
 3 A As I recollect, I told Dave Chapple to
 4 make sure it was disclosed that there was an inch of
 5 subwater in it.
 6 Q But you never checked to make sure that
 7 happened?
 8 A No, I never checked this here.
 9 Q Okay. You never checked to make sure
 10 that Dave Chapple made the amendment to the MLS
 11 listing?
 12 A No, I just talked to him.
 13 Q Okay. How long was the house on the
 14 market before it was sold?
 15 A I don't know.
 16 Q Okay. Do you have a guess?
 17 I mean, do you know if it was on there
 18 for a few months or was it on there for a year or do
 19 you even recall?
 20 A I don't. I have no idea.
 21 Q Okay. But in the time it was listed for
 22 sale, do you know whether or not the disclosure about
 23 the house flooding was ever made to the Goodspeeds?
 24 A Yes.
 25 Q It was?

1 The purchase and sale agreement is dated
 2 June 17th of 2007, I believe. Would it have been
 3 about that time that you made that disclosure or do
 4 you recall?
 5 A I just know I was putting the leaching
 6 system in when they were looking at the house.
 7 And I talked to Shawn at that time and
 8 told him we've got an inch of water. That's why I
 9 was putting that in.
 10 Q And to your recollection, what did he
 11 say back to you?
 12 A You know, I don't remember the exact
 13 words.
 14 If my memory serves me, he says, I'm
 15 just moving here from Tennessee and they have water
 16 issues there, or something to that matter. That's
 17 what I remember. I don't know if that's correct or
 18 not.
 19 Q Isn't it true you told the Goodspeeds on
 20 one occasion that you don't know why the disclosure
 21 of the flood wasn't made to them?
 22 A I'm sorry. Ask me that again.
 23 Q Isn't it true that you told the
 24 Goodspeeds on one occasion that you don't know why
 25 the disclosure of the flood didn't get through to

2010 OCT 13 PM 4:24
JEFFERSON COUNTY, IDAHO

WESTON S. DAVIS, ESQ (ISB No. 7449)
NELSON HALL PARRY TUCKER, P.A.
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Telephone (208) 522-3001
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

**EXPERT WITNESS
DISCLOSURES**

COMES NOW, Plaintiffs, William and Shellee Goodspeed, and hereby submit their
Expert Witness Disclosures pursuant to the Scheduling Order, dated February 26, 2010, as
modified by the Order Continuing Trial Setting to January 11, 2011, dated July 16, 2010, in the
above referenced case. Plaintiffs intend to call the following expert witnesses:

25

Robert Jon Meikle

Mountain River Engineering, Inc.
1020 E. Lincoln Rd.
Idaho Falls, ID 83401
208.524.6175

Mr. Meikle will testify regarding the topography of the surrounding land and the depth of excavation on the subject real property. His report has been produced to Defendants.

Mark Lieble

Mark Lieble Appraisal Services, Inc.
172 N. Woodruff Ave
Idaho Falls, ID 83406
208.525.6060

Mr. Lieble will testify regarding the current fair market value of the subject real property (with and without the house). His report was just obtained by Plaintiffs on October 12, 2010 (yesterday) and will be produced to Defendants in the next couple of days.

Ray Keating

Eastern Idaho Public Health District
380 Community Lane
Rigby, ID 83442-1266
208.745.7297 (Rigby) 208.523.5382 (Idaho Falls - Wednesdays)

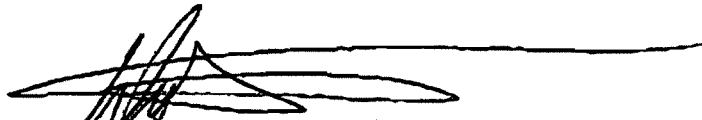
Will testify regarding the subwater levels in Jefferson County for purposes of establishing the maximum depth of excavation for a septic system on the subject real property. His report regarding the septic inspection on the subject real property has already been produced to Defendants.

Jeff Stoddard

Stoddard Enterprises, Inc.
2229 Dickson Cir E
Idaho Falls, ID 83402-3866
208.535-9981

Will testify regarding the condition of the subject real property and his observations of whether any flooding was apparent at the time of inspection. His home inspection report has previously been produced to the Defendants.

DATED this 13 day of October, 2010.


WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

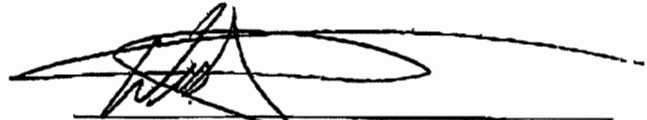
I hereby certify that I served a true copy of the foregoing document upon the following this 13 day of October 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
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Idaho Falls, ID 83402

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WESTON S. DAVIS, ESQ.

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2010 OCT 14 PM 6:29
DISTRICT COURT
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

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SHIPPEN, dba SHIPPEN CONSTRUCTION,
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MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

**REPLY TO RESPONSE TO
MOTION TO AMEND FOR
PUNITIVE DAMAGES**

COMES NOW Plaintiffs, William Shawn Goodspeed and Shellee Beth Goodspeed, by and through counsel of record, and hereby reply to Defendant's response to Plaintiff's motion for leave to amend for punitive damages as follows:

I. DEFENDANTS INCORRECTLY CHARACTERIZE THE NUMBER OF AMENDMENTS.

This is Plaintiff's third motion to amend, not the fourth. That said, Plaintiffs' motions to

amend have not been overly burdensome or frivolous; in some instances, the amendments have actually helped the Defendants.

First Motion to Amend. Plaintiff's first motion to amend was brought by Plaintiffs upon the insistence of the *Defendants* by way of their Motion to Dismiss alleging that Plaintiffs had named the wrong parties to the litigation and that Marriott Homes, LLC was in fact the liable party. This amendment was made based upon Defendants' insistence that further evidence not yet produced would show Marriott Homes, LLC was the liable party instead of the Shippens. Plaintiffs were also able to identify Shippen Construction's name on a number of operative documents in the construction of the subject real property. Therefore, this Court allowed an amendment to pursue the contractors.

Second Motion to Amend. After conducting additional discovery and in an effort to clarify to this Court and opposing counsel which issues applied to which Defendants, Plaintiffs filed a second motion to amend. Plaintiffs believed that Defendants would appreciate this motion as it served to clarify the issues for trial. Plaintiffs also sought to amend the complaint to add a claim for emotional distress. Judge St. Clair allowed an amendment to the complaint as to the issues clarifying the claims and parties, but did not allow the claim for emotional distress as it related to fraud on the basis that the statute of limitations had run.

This is now the Third Motion to Amend. Plaintiffs had not completed discovery prior to their first motion to amend—again, the first motion was made on Defendants' insistence and their pending motion to dismiss. It is also noteworthy that even at the time of the Second Motion to Amend, this Court was also considering Plaintiff's third motion to compel missing information from Defendants and that Defendants still have not fully responded to outstanding discovery. Only after discovery has begun winding down, were Plaintiffs able to more fully analyze a claim for punitive

damages.

The Idaho Rules of Civil Procedure allow for an amendment to the pleadings with the understanding that in the process of litigation and discovery, cases become more clear and allow the attorneys to refine their claims or add claims not included in the original complaint. See I.R.C.P. 15; *Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986). The rule does not require a perfect complaint at the outset of the litigation.

Notably, a claim for punitive damages may only be brought by leave of the court through an amendment of the pleadings.

Considering the amount in controversy, exclusive of punitive damages, exceeds \$300,000.00, and involves several claims for relief, a complaint is bound to be amended on more than one occasion.

Even the time frame for requesting the amendment is reasonable. The Supreme Court of Idaho recognized that a request for an amendment of the pleadings made five and a half years after the filing of the original complaint was not too long to consider allowing an amendment. *Suits v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 22 - 23, 713 P.2d 1374, 1381 - 1382 (1985).

Therefore, a request for a third amendment is not an unreasonable request, especially considering discovery still has not yet been completed and the deadline for discovery has not passed.

II. AN AMENDMENT FOR PUNITIVE DAMAGES IS BASED UPON THE CLAIM FOR FRAUDULENT CONDUCT, NOT FOR BREACH OF CONTRACT.

In an effort to sway the focus of Plaintiff's request for punitive damages, Defendants assert that punitive damages cannot be awarded for breach of contract. Plaintiffs do not dispute this point. However, Plaintiffs have alleged three counts of fraud. Not only may punitive damages be awarded for deceptive business practices, but they are expressly permitted for cases involving fraud. See

Umphrey v. Sprinkel, 106 Idaho, 700, 710, 682 P.2d 1247, 1257 (1983).

Again, an amendment for punitive damages must be granted upon a showing of a *reasonable likelihood* of proving facts at trial sufficient to support an award of punitive damages. I.C. § 6-1604(2). This likelihood is met by showing evidence that (1) Defendants committed a bad act and that (2) Defendants had a bad state of mind.

Defendants only contest that they did not act with a bad state of mind and that the Plaintiff's allegedly knew the Defendants did not act with a bad state of mind. A bad state of mind can be proven by showing fraud, deliberateness, or gross negligence. *Umphrey*, 106 Idaho at 710. Plaintiffs have shown in their memorandum to their motion that Robert Shippen (1) knew of sub-water issues in Jefferson County for the better part of thirty years, (2) knew about sub-water issues in the subdivision before he began construction on the subject real property, (3) saw sub-water outside of the house prior to listing the property, (4) supplied the MLS listing information stating the property never having sub-water issues, (5) knew about sub-water flooding inside the residence ten months in advance of the sale and told Jorja Shippen and his son about it, and (6) knew how to change the MLS listing at least seven months in advance of the sale, but did not do so as it related to sub-water.

Plaintiffs established they would not have purchased the residence had they known the truth about the residence and that they relied on Mr. Shippen's statement that the house had not flooded and would not flood. The Shippens admit they knew the Goodspeeds were going to occupy the home as their primary residence and that they never notified the Goodspeeds that the house was anything but quality construction. The Goodspeeds have also demonstrated they were not from the area and could therefore reasonably rely on the Shippens' representations regarding the house.

Punitive damages are appropriate where the seller knows of a major defect impeding the livability of the residence and not only withholds that knowledge from the buyer during the

contracting period in the hope of closing the sale, but communicates the exact opposite of the truth to the buyer. There is a bad act and a bad state of mind.

Defendants further claim in their motion that Plaintiff, Shellee Goodspeed stated that the Shippens did not hurt her intentionally, but fail to recognize the context of the statement or the gravamen of Ms. Goodspeed's statement:

Q. Do you know of anything that the defendants have done to intentionally cause you *any health issues*?

A. They haven't hurt me intentionally. *It's the whole nondisclosure of my home and what to do with the home that has caused me issues.*

(Emphasis Added.)

Defendant counsel then mischaracterizes the context of Ms. Goodspeed's answer:

Q. So there's been no intentional acts by any of the defendants toward you that you know of?

A. No.

In recognition of this mischaracterization of testimony, Plaintiff's counsel inquired:

Q. Then Mr. Dunn asked you if the Shippens intentionally caused you this emotional distress. *Do you believe that the Shippens knew about the flooding prior to selling the home?*

A. Yes.

Mr. Davis: Okay, that's all I have.

Mr. Dunn: No questions.

Affidavit of Weston S. Davis in Support of Reply to Defendant's Response to Third Motion to Compel; Response to Motion to Amend Complaint, Ex "B". It is clear from these statements that Ms. Goodspeed believes that the conduct of failing to disclose the condition of the home was intentional. The Shippens failed to disclose the defect even though they knew differently and had an opportunity to do so—a bad act and a bad state of mind.

III. PUNITIVE DAMAGES ARE APPROPRIATE AGAINST THE NAMED DEFENDANTS.

Defendants Robert and Jorja Shippen, either individually or through their subsidiary companies, are in the business of building homes—the largest asset most people will ever purchase in their entire lives. To wilfully withhold and conceal by misrepresenting a known defect that impedes the livability of the home which is not manifest upon visual inspection of the property is outrageous and calculated. Letting such conduct go unpunished creates a risk that future purchasers of the Defendants' properties may be taken advantage of as well. The best way to prevent such future problems is by way of exemplary damages.

As is cited by Defendants in their response brief:

Where there is substantial and competent—even though conflicting—evidence of extreme bad conduct and a need for deterrence of similar future conduct, [the Supreme Court of Idaho] will uphold an award of punitive damages. *Davis v. Gage*, 106 Idaho 735, 682 P.2d 1282, 1285 (Idaho App. 1984) citing *Cheney v. Palos Verdes Investment Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983).

Allowing exemplary damages will prevent future bad conduct and allow purchasers to feel confident in their purchases.

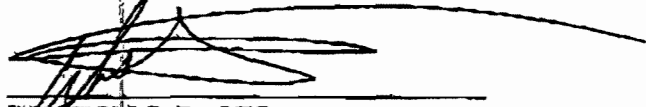
IV. AN AMENDMENT DOES NOT PREJUDICE DEFENDANTS AT THIS STAGE OF LITIGATION.

The deadline for discovery has not yet passed. Even if it had, Plaintiffs have not alleged a cause of action outside of the scope of the discovery already conducted. Again, the claim that invokes Plaintiff's request for punitive damages is the fraud claim, which Defendants have had an opportunity to fully discover. Plaintiffs have not notified the court that additional discovery is necessary if this claim were allowed. Therefore, no prejudice is caused to Defendants in allowing this amendment.

CONCLUSION

In light of the foregoing, Plaintiffs respectfully request that this Court grant leave for Plaintiffs to amend their complaint to include a claim for punitive damages.

DATED this 14 day of October, 2010.


WESTON S. DAVIS

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 14 day of October, 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

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WESTON S. DAVIS

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2010 OCT 18 PM 3:01
DISTRICT COURT
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
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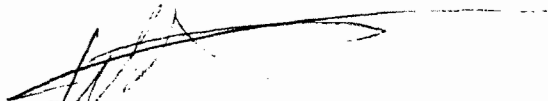
Case No.: CV-09-015

NOTICE OF SERVICE

I HEREBY CERTIFY that on this 14 day of October 2010, I served upon Defendants,
and their attorney of record Robin D. Dunn, Esq., SUPPLEMENTAL ANSWERS TO
DEFENDANTS' SECOND SET OF DISCOVERY REQUESTS by having a true and correct
copy of same mailed by U. S. Mail, postage prepaid, to:

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

Dated this 14 day of October 2010.

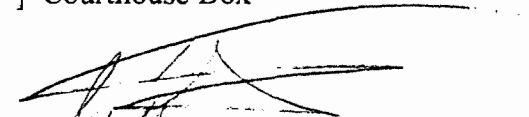

WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

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WESTON S. DAVIS, ESQ.

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Goodspeed v Eppien

Date 10/18/10
Defendant Name _____

Title of Action Motions
Case Number CV 09-15

Refer. #

	Counsel waives no recorder.
	Davis - 3 claims of Fraud (Independent)
	Reviews case w/ Judge 3rd motion to amend still expecting discovery
2:25	Dunn - denies allegations - believes the teaching system was all discussed before contract does not rise to the level of punitive
2:39	Davis - Defends position -
2:42	Judge - asks if they addressed elements of fraud was
2:44	Davis goes through elements
2:45	Judge questions based on #3 (when statements were made - did defendants know ...) Misrepresentation is defined by 9 elements Duty of disclosure v fraud
2:53	Davis Given 2 weeks to address concern in Brief
2:54	Davis recaps position
2:57	Dunn responds Judge gives his guidelines - for determining the issue 'Duty to Disclose' is his concern May Brief it up w/in 7 days - simultaneous

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2010 OCT 25 PM 3:48
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
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ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

**SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO
AMEND COMPLAINT TO ADD
CLAIM FOR PUNITIVE
DAMAGES**

COME NOW Plaintiffs, William Shawn Goodspeed and Shellee Beth Goodspeed, by and through counsel of record, and hereby supplement their memorandum in support of motion for punitive damages per this court's October 18th, 2010 request as follows:

**STANDARD ON MOTION TO AMEND FOR
PUNITIVE DAMAGES RELATING TO FRAUD**

It is well established that punitive damages are allowed where the defendants commit fraud. *Umphrey v. Sprinkel*, 106 Idaho 700, 710, 682 P.2d 1247, 1257 (1983). Establishing fraud by clear and convincing evidence, while important for trial, is not the standard for a pre-trial motion. See

Large v. Cafferty Realty, Inc., 123 Idaho 676, 680, 851 P.2d 972, 976 (1993). A motion to amend for punitive damages is allowed where Plaintiffs meet the threshold burden of establishing a reasonable likelihood that Defendants committed fraud. In an action for fraud or misrepresentation, the following elements must be established:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon, and (9) his consequent and proximate injury.

Aspiazu v. Mortimer, 139 Idaho 548, 550, 82 P.3d 830, 832 (2003) citations omitted.

I. IN CONSIDERING THE ELEMENTS OF FRAUD, A FAILURE TO DISCLOSE IS A MISREPRESENTATION.

In considering the nine elements of fraud, this Court raised the question at hearing whether a failure to disclose is the same as a misrepresentation. In short, yes.

A nondisclosure of material facts amounts to a fraudulent misrepresentation. Tusch Enterprises v. Coffin, 113 Idaho 37, 42, 740 P.2d 1022, 1027 (1987). "A duty to speak arises in situations where the parties do not deal on equal terms or where information to be conveyed is not already in possession of the other party." *G&M Farms v. Funk Irrigation, Co.*, 119 Idaho 514, 521 (1991); *See also Sorensen v. Adams*, 98 Idaho 708, 571 P.2d 769 (1977) *overruled on other grounds* ("Silence in circumstances where a prospective purchaser might be led to harmful conclusion is a form of 'representation'").

"Actual intent to deceive need not be shown when a seller knows of facts that would have apprised a person of ordinary prudence of the truth." *Tusch*, 113 Idaho at 43.

Two cases illustrate these principals clearly for the Court:

A. *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966)

Bethlahmy involved a failure to disclose in the purchase and sale of real property.

In that case, prior to the home's construction, the seller (Bechtel) enclosed an open irrigation canal running across the real property. *Id.* at 57. This was accomplished by means of burying conduit laid in a trench which was dug along the course of the existing canal. *Id.* The joints of the now underground concrete conduit canal were not sealed. *Id.* The house was then constructed over the conduit canal in such a manner that the conduit ran under the garage's concrete floor. *Id.* As the

house was constructed, the builder mopped the exterior basement walls with tar and hydrosealed the snap tie holes. *Id.* at 58. No additional measures were taken to waterproof the basement. *Id.*

Prior to the completion of the house, some buyers (Bethlahmy) inquired about the purchase of the house. The seller told the buyers that the houses he built were the finest and of first quality construction, assuring them the home would be ready for occupancy on May 15th of that year. *Id.* at 57. After visiting the property on two separate occasions, the buyers purchased the home and moved in on May 17th, even though the house was not entirely finished at the time. *Id.* The buyers worked through punch lists with the sellers as construction was completed and any defects discovered were remedied. *Id.*

The seller, who knew about the conduit canal, did not disclose the conduit canal. *Id.* at 58.

Then, in July, about two months after the purchaser's moved in and after the irrigation season had commenced, water began seeping into the basement rooms and floors. *Id.* The builder made several attempts to reroute the water, but none of these efforts were successful. *Id.*

The buyers sued the seller for fraud based upon the seller's failure to disclose the defective condition of the home. The Supreme Court of Idaho recognized that a "[f]ailure to disclose such defects would support a finding of fraud." *Id.* at 59. The opinion goes on to cite several cases nationwide where sellers were held liable for a failure to disclose major defects in the real property involved (for example, the failure to disclose a concealed cesspool, a defect in a furnace boiler, termites, disease, a leaky house, a defect in floor, and a house built on filled ground). *Id.* at 60.

The Court then adopted the Kentucky standard regarding fraudulent concealment:

It cannot be controverted that actionable fraud or misrepresentation by a vendor may be by concealment or a failure to disclose a hidden condition or material fact, where under the circumstances there was an obligation to disclose it during the transaction. If deception is accomplished, the form of deceit is immaterial. And the legal question is not affected by the absence of an intent to deceive. . . .

Id. at 60, citing *Kaze v. Compton*, 383 S.W.2d 204, 207 (1955). *Emphasis added.*

The Court then recognized that in the sale of real property, a seller has superior knowledge regarding the condition of the real property and therefore has a duty to disclose defects to the buyer. *Id.* at 62. It held that in the sale of real property, a confidential relationship arises and the buyers are able to rely on the representations or lack thereof by sellers. *Id.* The Court further reasoned:

The purchase of a home is not an everyday transaction for the average family, and in

many instances is the most important transaction of a lifetime. To apply the rule of caveat emptor to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling house, is manifestly a denial of justice.

Id. at 67.

Because the seller in *Bethlahmy* was aware of the unsealed conduit canal and failed to disclose its existence and further stated that the house was of the finest construction, the Court held that a finding of fraud was appropriate regardless of the seller's intent. *Id.* at 61 - 64.

B. Tusch Enterprises v. Coffin, 113 Idaho 37, 740 P.2d 1022 (1987)

Tusch also involved a failure to disclose in the purchase and sale of real property.

In that case, a seller (Coffin) who had extensive experience in the road construction decided to build three duplexes along with his wife. *Id.* at 38. The seller hired a contractor and told the contractor that the building site was cut out of the mountain and assured the contractor that no fill dirt was used on the site (fill dirt settles and can cause foundations to settle and crack). *Id.* at 39. The contractor told the seller that the ground looked soft and the two of them agreed that the ground for the third duplex did not look like original ground. *Id.* The seller asked the contractor to do what the contractor had to do to take care of it. *Id.*

After the duplexes were completed, a buyer in partnership with her relatives (Tusch Enterprises) approached the seller about purchasing the duplexes as investment properties. *Id.* at 39 - 40. In the negotiations prior to purchasing the property, the seller informed the buyer that he worked for a construction company, had access to the site preparation equipment, and that he had personally participated in the site preparation. *Id.* at 40. The seller also stated that the duplexes were of "good quality construction." *Id.* The buyer relied on these representations. *Id.* The seller failed to notify the buyer of the foundational conditions. *Id.*

Prior to purchasing the property, the buyer had the property inspected and found no major defects. *Id.* About a month after purchasing the properties, however, the walls in the third duplex began cracking around the windows and the doors would not shut properly. *Id.* Further investigation found that the foundation was cracking because a portion of the property was built on fill dirt that had begun to settle. *Id.*

The Idaho Supreme Court again recognized the *Bethlahmy* standard that non-disclosures amount to misrepresentations in transactions regarding real property where the seller has superior

knowledge regarding the property. *Id.* at 42. The Court reaffirmed the *Kaze* holding that “fraud or misrepresentation by a vendor may be by concealment or failure to disclose a hidden condition or material fact. . .”. *Id.* at 43.

The Court stated that after the seller’s conversation with the contractor, the seller knew or should have known that the third duplex was at least partially built on fill dirt. *Id.* Considering the seller’s experience in the construction industry, albeit unrelated to the building of houses, the Court found that the seller would have known the implications of the fill dirt. *Id.* The seller did not notify the buyer of the condition and instead stated that the duplexes were of quality construction. *Id.* The Court also held that the buyer had a right to rely on the representations and non-disclosure by the seller where the seller was of superior knowledge. *Id.*

C. *Application to Goodspeed v. Shippen, et. al.*

In this case, not only did the Shippens not disclose the fact of the sub-water and flooding to the Goodspeeds prior to the sale, they pointed the Goodspeeds in the opposite direction from the truth. Prior to the Shippens listing the property, a contractor, Dan Fohrenck, approached Robert Shippen about the sub-water collecting the back yard. Robert Shippen said he knew about it. A month later, Robert Shippen listed the property supplying his realtor with the following information:

PUBLIC INFO: . . . ** THERE HAS BEEN CONCERN ABOUT SUB WATER IN JEFFERSON COUNTY, HOWEVER THIS HOME HAS NOT HAD SUB ISSUES AND TO GIVE THE BUYER PEACE OF MIND BUILDER WILL INSTALL A LEACHING SYSTEM AROUND HOME AND PROVIDE 1 YEAR WARRANTY ON CONSTRUCTION**

PRIVATE INFO: There has been some concerns about sub water in Jefferson County. This particular home has never had sub issues but to give the buyer peace of mind the builder is going to install a leaching system with a drainage field from the east side to the west side of the home to prevent the possibility of there every [sic] being any sub issues.

Emboldened emphasis added, caps in original.

Then, a month after listing the property, the house flooded from sub-water, a fact Robert personally witnessed and told Jorja about. Robert Shippen, like the contractor in *Tusch*, has extensive background in the construction business, as he has been in the concrete foundation business since approximately 1977. He has also been aware of sub-water issues in county and in Woodhaven Creek Estates shortly before he constructed the house and for approximately thirty years

prior thereto. Despite this superior knowledge, the Shippens did not disclose the sub-water issue or flooding to the Goodspeeds prior to the sale of the subject real property. Mr. Shippen knew how to change the MLS listing in advance of selling the home but failed to do so during the ten months transpiring between the flood and the sale of the residence. The Goodspeeds who were not from the area relied on the Shippen's superior knowledge regarding the property to their detriment. This failure to disclose constituted fraud.

This Court also inquired whether the Shippens had a duty to retract the MLS listing after the house flooded. Yes they did. A failure to do so, is equivalent to silence or non-disclosure of a material fact. This constitutes fraud. What is even more egregious than the non-disclosure of the sub-water and the flood was that the MLS listing published to the general public on a continuing basis contained information which was not true.

Defendants bank their defense on whether the Shippens intended to deceive or harm to Goodspeeds. However, intent is immaterial if the seller has concealed or failed to disclose a material fact. Regardless, of whether intent is necessary or not, when the question of intent was clarified for Shellee Goodspeed, she testified that she believes the Shippens knew about the flooding prior to selling the residence.

II. THE FAILURE TO DISCLOSE JUSTIFIED THE GOODSPEEDS' RELIANCE ON THE MLS LISTING.

Defendants argued that, regardless of the MLS listing, where Plaintiffs were able to view the house and had a home inspector inspect the house Plaintiffs cannot claim (1) that the MLS statement was material to the contract or (2) that Plaintiffs had a right to rely on the representation. Again, in light of the forgoing and following authority, these arguments are incorrect.

A. The MLS Statement Was Material.

The MLS statement in this case was material to the transaction. A representation is "material" if:

- (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; *or*
- (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

Watts v. Krebbs, 131 Idaho 616, 620, 962 P.2d 387, 391 (1998) *citing Restatement (Second) of Torts*

§ 538(2) (1977). *Emphasis added*. Only one of the two test need be satisfied, but here, both are.

Regarding the first test, in *Watts*, the Court held that in a purchase and sale of real property a reasonable person would find the absence of standing timber of substantial worth to be material, even when the timber itself was not even discussed in the transaction. *Id.* Again, a non-disclosure of a material fact amounts to a fraudulent misrepresentation. *Tusch*, 113 Idaho at 42. This principal again was illustrated by both *Tusch* and *Bethlahmy*.

The Supreme Court has also held that, even in spite of an existing merger clause, a buyer may reasonably rely on an MLS listing for purposes of establishing fraud. *Large*, 123 Idaho at 681.

In this case, where individuals are seeking to inhabit a home as a primary residence, a reasonable person would attach importance to whether a house has sub-water issues or not. Before selling the property, Mr. Shippen never disclosed the flooding.

Regarding the second test, Robert Shippen had reason to know that the recipients of the MLS information would have regarded the flooding and sub-water levels as important because (1) he raised the issue that the subject real property had not had sub-issues and (2) he wanted to give the buyer "peace of mind" by installing a sump pump to prevent the possibility of there ever being sub issues. These assurances would not be necessary if he did not have reason to know that potential purchasers would rely on them.

The Shippens' representations and/or lack thereof were material.

B. The Goodspeed's Reliance Was Reasonable.

Furthermore, a buyer has a right to rely on the seller's failure to disclose harmful conditions. The Idaho Supreme Court recognized this in both *Bethlahmy* and *Tusch*, even where both sets of buyers inspected the properties.

To further illustrate the point, in *Sorenson v. Adams*, a farmer agreed to sell farmland to interested buyers. 98 Idaho 708, 571 P.2d 769 (1977) The farmer provided to the buyers a paper from the United States Department of Agriculture, Agricultural Stabilization and Conservation Service, stating that the land to be sold contained 1,238 acres of farmland. *Id.* at 710. After purchasing the property, the buyers subsequently discovered that the actual farmland only contained 1,076 acres. *Id.* Even though a legal description was provided to the buyers and the buyers were able to inspect the property before they purchased it, the Court held that the non-disclosure of this material fact could constitute fraud:

In short, the general rule is that "a vendor may be liable in tort for misrepresentations [. . . regarding real property], notwithstanding such misrepresentations were made without actual knowledge of their falsity. The reason, of course, is that the parties to a real estate transaction do not deal on equal terms. *An owner is presumed to know [. . . about his property]. If he does not know the correct information, he must find it 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.'*

Id. at 715. Citations omitted. *Emphasis added.* The Supreme Court held that because the property owner had reason to know that the acreage of the farmland was less than that represented by the U.S.D.A. paper he provided to the purchasers, a claim for fraud could be supported. *Id.* It further held this silence was a form of a representation or statement and that:

False statements found . . . to have been made and relied on cannot be avoided by the [sellers] by the contention that the [buyers] could have, by independent investigation, ascertained the truth. The [sellers] having stated what was untrue cannot now complain because [the buyers] believed what they were told. *Lack of caution on the part of the [buyers] because they so believed and the contention that the [buyers] could have made an independent investigation and determined the true facts, is no defense to the action.*

Id. *Emphasis added.*

Such a holding is consistent with the *Watts* decision wherein the Supreme Court of Idaho affirmed that a purchaser of real property had a right to rely on the vendor's failure to disclose that a portion of the land being sold had been harvested for timber prior to the sell. *Watts v. Krebs*, 131 Idaho 616, 621, 962 P.2d 387, 392 (1998). Again a finding of fraud was sustained even where the purchaser could have discovered the fact of the harvesting prior to purchasing the property. *Id.*

In this case, while the Goodspeeds did have the home inspected, they did not call for a special inspection to have the probability of sub-water inspected because they believed the statements in the MLS listing that the house had never had sub issues and that a sump pump would take care of any rain or snow melt as orally represented by Robert Shippen. There was also no notice to the Goodspeeds that the house would not be of quality construction.

Even if the Shippens were to argue that the mere discussion of sub-water in the MLS listing should have put the Goodspeeds on notice that there might be sub issues, they would be failing to recognize the actual language of the MLS listing denying such conditions and are further failing to recognize the Idaho Supreme Court's holding that a seller cannot make a representation he or she

does not know to be true. See *Sorenson, supra* at 715. The sub-pump was never tested with sub-water, as it was installed in July of 2007, before the sub-water season.

The MLS listing was material to the Goodspeed's purchase of the residence, and they reasonably relied on the MLS listing, even though they inspected the property prior to purchasing it.

CONCLUSION

In light of the foregoing, Plaintiffs meet the threshold burden of establishing a reasonable likelihood of showing fraud, and therefore respectfully request that this Court grant leave for Plaintiffs to amend their complaint to include a claim for punitive damages.

DATED this 25 day of October, 2010.



WESTON S. DAVIS

CERTIFICATE OF SERVICE

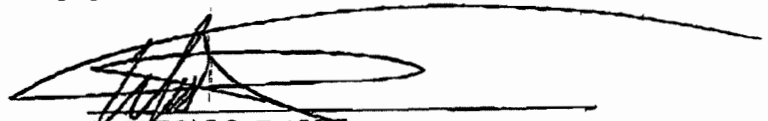
I hereby certify that I served a true copy of the foregoing document upon the following this 25 day of October, 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
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Hon. Gregory Anderson
Bonneville County Courthouse
605 N. Capital Ave.
Idaho Falls, ID 83402

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- E-Mail
- Overnight Mail
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WESTON S. DAVIS

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2009 OCT 25 PM 4:49
DISTRICT COURT
JEFFERSON COUNTY, IDAHO

rdunn@dunnlawoffices.com

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODSPEED,)
husband and wife,)
)
Plaintiffs,)

vs.)

SHIPPEN CONSTRUCTION, INC., an)
Idaho corporation, ROBERT and)
JORJA SHIPPEN, husband and wife,)
ROBERT and JORJA SHIPPEN, d/b/a)
SHIPPEN CONSTRUCTION, ROBERT)
SHIPPEN, AN INDIVIDUAL, and)
MARRIOT HOMES, LLC)
)
Defendants.)

Case No. CV 09-015

DEFENDANTS' MEMORANDUM
IN RESPONSE TO PLAINTIFFS'
MOTION TO AMEND
COMPLAINT TO INCLUDE
PUNITIVE DAMAGES

1. The above-entitled court requested additional briefing on the issue of a tort, to-wit: fraud or misrepresentation and whether the same required an overt act as opposed to an act of omission.

It should be noted that the instant case involves a contract for a real estate purchase. The plaintiffs have attempted to add various torts in addition to their causes of action for breach of contract. It is well settled in Idaho that the following law pertains:

In *Carroll v. United Steelworkers of America*, 107 Idaho 717, 692 P.2d 361 (1984), the Idaho Supreme Court stated that it is well settled that:

an alleged failure to perform a contractual obligation is not actionable in tort.... "To found an action in tort, there must be a breach of duty apart from non-performance of a contract." [Quoting *Taylor v. Herbold*, 94 Idaho 133, 483 P.2d 664 (1971)].... Mere nonfeasance, even if it amounts to a willful neglect to perform the contract, is insufficient to establish a duty in tort.

Carroll, 107 Idaho at 719, 692 P.2d at 363 (footnote omitted, emphasis in original). See also *Steiner Corp. v. American Dist. Tel.*, 106 Idaho 787, 683 P.2d 435 (1984); *Browns Tie & Lumber Co. v. Chicago Title Co.*, 115 Idaho 56, 764 P.2d 423 (1988).

Hudson v. Cobbs, 797 P.2d 1322, 118 Idaho 474, (Idaho 1990)
----- Excerpt from page 797 P.2d 1326.

IRCP, Rule 9 describes the fraud that must be pleaded in a complaint as follows:

(b) **Fraud, Mistake, Condition of the Mind, Violation of Civil or Constitutional Rights.** In all averments of fraud or mistake, or violation of civil or constitutional rights, the circumstances constituting fraud or mistake, or violation of civil or constitutional rights shall be stated with particularity.

IRCP Rule 9, Pleading special matters
----- Excerpt from page 26.

The elements of fraud/intentional misrepresentation are as follows:

The elements of a cause of action for fraud, also referred to as intentional misrepresentation, are well established in Idaho. A plaintiff must prove: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the supposed truth of the representation; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Mitchell v. Siqueiros*, 99 Idaho 396, 401, 582 P.2d 1074, 1079 (1978).

Dunnick v. Elder, 882 P.2d 475, 126 Idaho 308, (Idaho App. 1994)
----- Excerpt from page 882 P.2d 480.

In the instant case, it is very certain, from the case cites above, that an affirmative act is required. Without some type of representation, the hearer cannot

rely upon anything. An omission could never meet the elements set forth above since there could be no falsity, no reliance, no knowledge or otherwise.

Fraud is never presumed, and all essential elements must be established by the party alleging the fraud by clear and convincing evidence. *Chester B. Brown Co. v. Goff*, 89 Idaho 170, 403 P.2d 855 (1965).

Jarman v. Hale, 842 P.2d 288, 122 Idaho 952, (Idaho App. 1992)
----- Excerpt from page 842 P.2d 295.

To prove fraud, . . . must establish every one of the following elements:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge about its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearers ignorance of its falsity; (7) his reliance on the [representation]; (8) his rights to rely thereon; (9) his consequent and proximate injury.

Witt v. Jones, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986). The absence of any one of the elements is fatal to recovery. *Id.* "The party alleging fraud must support the existence of each of the elements of the cause of action for fraud by pleading with particularity the factual circumstances constituting fraud." *Estes v. Barry*, 132 Idaho 82, 86, 967 P.2d 284, 288 (1998); See also I.R.C.P. 9(b).

Jenkins v. Boise Cascade Corp., 108 P.3d 380, 141 Idaho 233, (Idaho 2005)
----- Excerpt from page 108 P.3d 386.

The plaintiffs simply cannot set forth enough evidence to meet the standard to include the allegations of punitive damages in the amended complaint. The case law is clear; the plaintiffs are lacking in sustainable evidence; and, the plaintiffs cannot meet the burden of statute to allege punitive damages.

2. The court wanted to know of the fraud aspect to rule whether punitive damages could be added to an amended complaint.

Since there could be no fraud without an affirmative act, the complaint should not be amended to add the potential of punitive damages. Certainly, the standard for punitive damages could not possibly be obtained by the plaintiffs given that the standard requires the following:

(1) In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.

ID ST Sec. 6-1604, Limitation on punitive damages
----- Excerpt from page 3895.

Furthermore, the plaintiffs conducted their own independent inspection through their own hired expert. Reliance upon their hired expert would preclude any justification of reliance upon any other entity/person.

CONCLUSION

Punitive damages are not a proper matter to be added to the amended complaint for the reason that the standard could not be met by the plaintiffs; the action is primarily grounded in contract; and, the fraud element requires an affirmative act that is not present in this case.

The plaintiff performed an inspection of the subject real property by their own independent expert. The plaintiffs should have relied upon their own inspector and could not have possibly relied upon any statements or, as is the case, non-statements in the case at bar.

The addition of the allegations for pleading punitive damages is not present.

Dated this 25th day of October, 2010.




Robin D. Dunn
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of October, 2010, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
 Postage-prepaid mail
 Facsimile Transmission


Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

Courtesy Copy To: Honorable Gregory Anderson
Bonnevill County Courthouse
605 N. Capital
Idaho Falls, ID 83402

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

Date 11/11/10
Time 3:40 pm

Deputy Clerk mmuthurik

WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODSPEED, husband)
and wife,)

Plaintiffs,)

vs.)

SHIPPEN CONSTRUCTION, INC., an)
Idaho corporation, ROBERT and JORJA)
SHIPPEN, husband and wife, ROBERT and)
JORJA SHIPPEN, dba SHIPPEN)
CONSTRUCTION, ROBERT SHIPPEN, an)
individual, and MARRIOTT HOMES, LLC,)

Defendants.)

Case No. CV-09-15

**ORDER RE: MOTION FOR LEAVE TO
AMEND COMPLAINT TO ADD
CLAIM FOR PUNITIVE DAMAGES**

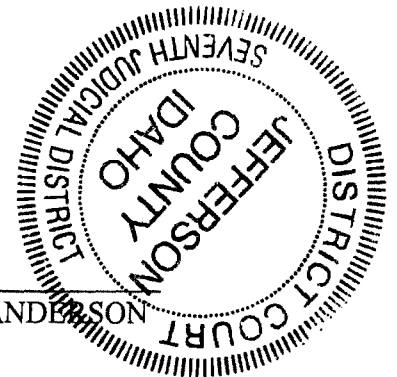
This cause having come before this Court pursuant to Goodspeeds' September 29, 2010,
Motion for Leave to Amend Complaint to add Claim for Punitive Damages, and this Court being
fully advised in the premises, and good cause appearing,

NOW, THEREFORE:

Goodspeeds Motion for Leave to Amend Complaint to add a Claim for Punitive Damages
is granted.

DATED this 15th day of November 2010.

G S A
GREGORY S. ANDERSON
District Judge



CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of November 2010, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Weston S. Davis
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Robin D. Dunn
Amelia A. Sheets
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477 Pleasant Country Lane
Rigby, ID 83442

CHRISTINE BOULTER
Clerk of the District Court
Jefferson County, Idaho

By ms
Deputy Clerk

ORDER RE: MOTION FOR LEAVE TO AMEND COMPLAINT TO ADD CLAIM FOR
PUNITIVE DAMAGES - 2

559

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

FILED 11/1/10
Time 3:40 pm
Deputy Clerk msruthwick

WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODSPEED, husband)
and wife,)

Plaintiffs,)

vs.)

SHIPPEN CONSTRUCTION, INC., an)
Idaho corporation, ROBERT and JORJA)
SHIPPEN, husband and wife, ROBERT and)
JORJA SHIPPEN, dba SHIPPEN)
CONSTRUCTION, ROBERT SHIPPEN, an)
individual, and MARRIOTT HOMES, LLC,)

Defendants.)

Case No. CV-09-15

**MEMORANDUM DECISION RE:
MOTION FOR LEAVE TO AMEND
COMPLAINT TO ADD CLAIM FOR
PUNITIVE DAMAGES**

I. FACTUAL AND PROCEDURAL BACKGROUND

Having lived in Jefferson County for over thirty years, Robert and Jorja Shippen (Shippens) have become familiar with difficulties caused by high sub-water levels during certain parts of the year in Jefferson County.¹

On or about August 20, 2005, Mr. and Mrs. Shippen purchased a lot in Woodhaven Creek Estates in Jefferson County at 37089 East 319 North, Rigby, Idaho. At that time, Mr. and Mrs. Shippen were aware of sub-water issues in the general vicinity of that subdivision.

On May 8, 2006, Mr. Shippen obtained a building permit and began constructing a home on the lot. During June or July 2006, Mr. Shippen dug a test hole in the walk out area of the basement to watch the sub-water levels.

¹ Marriott Homes, LLC and Shippen Construction, Inc. are entities owned by Robert and Jorja Shippen. For convenience, the Court will refer these people and entities collectively as "Shippens."

In late July, 2006, construction worker Daniel Fohrenck noticed standing water by the basement patio of the home. Mr. Fohrenck told Mr. Shippen about the problem. Mr. Shippen replied that he already knew about the problem and was planning to install a leaching system to prevent the sub-water from being an issue for the homeowner.

On August 10, 2006, while the home was still under construction, Mr. Shippen contacted Dave Chapple of Winstar Realty to list the home for sale on the open market. Mr. Chapple created an MLS listing based on a conversation with Mr. Shippen. The MLS listing stated in part:

PUBLIC INFO: . . . ** THERE HAS BEEN CONCERN ABOUT SUB WATER IN JEFFERSON COUNTY, HOWEVER THIS HOME HAS NOT HAD SUB ISSUES AND TO GIVE THE BUYER PEACE OF MID BUILDER WILL INSTALL A LEACHING SYSTEM AROUND THE HOME AND PROVIDE 1 YEAR WARRANTY ON CONSTRUCTION**

PRIVATE INFO: There has been some concerns about sub water in Jefferson County. This particular home has never had sub issues but to give the buyer peace of mind the builder is going to install a leaching system with a drainage field from the east side to the west side of the home to prevent the possibility of there every being any sub issues.

Sometime during the first weekend in September 2006, Mr. Shippen observed one to two inches of sub-water in and around the basement of the home. After observing the flooding, Mr. Shippen told his son and Mrs. Shippen that the house had flooded. Shippens never contacted Mr. Chapple to notify him that the house has flooded.

On January 2, 2007, Mr. Shippen filled out a change form to extend the expiration date of the MLS listing for the house. But, he did not change the language in the listing.

In late may or early June 2006, Shawn and Shellee Goodspeed (Goodspeeds), then residents of Tennessee, began looking for properties to purchase in Eastern Idaho. They obtained a copy of the MLS listing for the house Shippens were selling. When

Goodspeeds came to Idaho to look at the house prior to purchasing it, Mr. Shippen told them the leaching system was merely a precautionary measure in the event of a fast snow melt or rain running toward the house. Prior to purchasing the house, Goodspeeds never received notice of the flooding that had occurred in the basement.

On July 2, 2007, Goodspeeds purchased the house by warranty deed from "Robert Shippen and Jorja Shippen, dba Shippen Construction." Thereafter, Goodspeeds learned from a neighbor that the basement of the house had flooded in August 2006.

Despite the installment of a leaching system, the basement of the house flooded in August and September 2007.

On January 6, 2009, Goodspeeds filed suit against Shippens. Goodspeeds' Second Amended Complaint, filed on September 23, 2009, alleges breach of express warranty, breach of the implied covenant of good faith and fair dealing, breach of implied warranty, unjust enrichment, fraudulent concealment of known defect, fraudulent misrepresentation of known fact, and fraud in the inducement.

On September 29, 2010, Goodspeeds filed a Motion for Leave to Amend Complaint to Add Claim for Punitive Damages.

On October 12, 2010, Shippens filed a Response to Plaintiffs Request to Amend Complaint and Include Punitive Damages and a Memorandum on Punitive damages: Defendants Objection.

On October 14, 2010, Goodspeeds filed a Reply to Response to Motion to Amend for Punitive Damages.

II. STANDARD OF ADJUDICATION

Idaho Code § 6-1604(2) provides, “The court shall allow the motion to amend the pleadings [to add a claim for punitive damages] if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.”

The decision to grant or refuse permission to amend a complaint to add a claim for punitive damages is left to the sound discretion of the trial court. *See Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 233 P.3d 1221 (2010); *Cuddy Mountain Concrete, Inc. v. Citadel Construction, Inc.*, 121 Idaho 220, 824 P.2d 151, (1992); *Garnett v. Transamerica Ins. Services*, 118 Idaho 769, 800 P.2d 656 (1990). A trial court does not abuse its discretion in allowing an amendment for punitive damages as long as the record contains substantial evidence supporting the court’s decision. *Garnett*, 121 Idaho at 781, 800 P.2d at 668. *Id.*

II. DISCUSSION

Goodspeeds argue they are entitled to amend their complaint to include a claim for punitive damages because there is a reasonable likelihood that they will be able to prove that Shippens committed fraud.

Shippens argue punitive damages are inappropriate because the “defendants just do not display the evil or wrongful conduct associated with punitive damages.”

The Idaho Supreme Court has stated,

To recover punitive damages, “the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.” Idaho Code § 6-1604(1). “Punitive damages are not favored in the law and should be awarded in only the most unusual and compelling circumstances.” *Seiniger Law Office, P.A. v. North Pacific Ins. Co.*, 145 Idaho 241, 249, 178 P.3d 606, 614 (2008). A claim for punitive damages cannot be asserted in the claimant’s pleading without the approval of the trial court. The claimant must make a pretrial motion, and, after a

hearing, the trial court must conclude that the claimant has established a reasonable likelihood of proving facts sufficient to support an award of punitive damages. I.C. § 6-1604(2).

Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP, 148 Idaho 479, 224 P.3d 1068, 1088 (2009).

“It is well established in this state that punitive damages may be awarded when the defendant has committed fraud.” *Umphrey v. Sprinkel*, 106 Idaho 700, 710, 682 P.2d 1247, 1257 (1983).

To establish actionable fraud . . . a plaintiff must prove the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

G & M Farms v. Funk Irr. Co., 119 Idaho 514, 518, 808, P.2d 851, 855 (1991).

Goodspeeds must establish a reasonable likelihood of proving all the elements of fraud.

At a hearing held on October 18, 2010, this Court took this matter under advisement to determine whether Shippens actions could have been fraudulent if the allegedly false statements in the MLS listing were not known to be false at the time Shippens created the listing.

Regarding that issue, the Idaho Supreme Court has stated,

Fraud may be established by silence where the defendant had a duty to speak. *Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980); *see also Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987) (failure to disclose may amount to a misrepresentation); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (failure to disclose may amount to a misrepresentation); *Jones v. Majestas*, 108 Idaho 69, 696 P.2d 920 (Ct.App.1985) (fraud may be established by silence where information to be conveyed is not already in possession of other party). A duty to speak arises in situations where the parties do not deal on equal terms or where information to be conveyed is not already in possession of the other party. *Jones v. Maestas*, 108 Idaho 69, 696 P.2d 920 (Ct.App.1985); *see also Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769

(1977) (silence in circumstances where a prospective purchaser might be led to harmful conclusion is a form of "representation").

G & M Farms, 119 Idaho at 521, 808 P.2d at 858.

This Court concludes there is a reasonably likelihood Goodspeeds can prove the following elements of fraud:

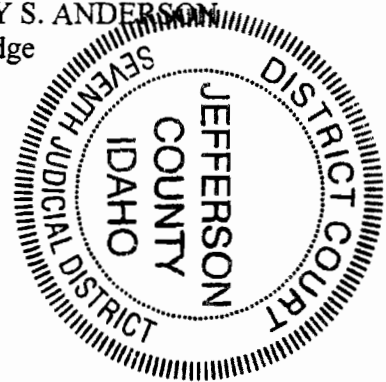
- (1) Shippens made the following representation in the MLS listing: "This particular home has never had sub issues;"
- (2) Shippens' representation was either false at the time the listing was made or became false when the house flooded in September 2006.
- (3) Shippens' representation was material,
- (4) Shippens either knew of the falsity of the representation when creating the MLS listing or had a duty to change the MLS listing after learning of the flooding that occurred in September 2006,
- (5) Shippens intended for purchasers such as Goodspeeds to act on the representation,
- (6) Goodspeeds were ignorant of the falsity of the representation,
- (7) Goodspeeds relied on the representation as being truthful,
- (8) Goodspeeds had the right to rely on the representation as being truthful, and
- (9) Goodspeeds have suffered injury proximately caused by Defendant's misrepresentation.

IV. CONCLUSION

Goodspeeds Motion for Leave to Amend Complaint to add a Claim for Punitive Damages should be granted.

DATED this 15th day of November 2010.

G S A
GREGORY S. ANDERSON
District Judge



5/6/6

CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of November 2010, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Weston S. Davis
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CHRISTINE BOULTER
Clerk of the District Court
Jefferson County, Idaho

By ms
Deputy Clerk

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2010 NOV -4 PM 1:31
DISTRICT COURT IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

THIRD AMENDED COMPLAINT

COMES NOW Plaintiffs, as and for a claim for relief, plead and allege as follows:

1. That Plaintiffs, WILLIAM SHAWN and SHELLEE BETH GOODSPEED, are bona fide residents of the State of Idaho who reside in Jefferson County.
2. That Defendants, ROBERT and JORJA SHIPPEN, are a bona fide residents of the State of Idaho who reside in Jefferson County.
3. That Defendant, MARRIOTT HOMES, LLC, is an Idaho limited liability company

in good standing with the State of Idaho.

4. That Defendant, SHIPPEN CONSTRUCTION, INC., is an Idaho corporation in good standing with the State of Idaho.

5. That the subject property of this litigation, namely, 3709 East 319 North, Rigby, Idaho, is located in Jefferson County.

6. That both jurisdiction and venue are proper in this action.

7. That pursuant to Idaho Code § 6-2503, Plaintiff's served written notice of the ensuing claim on the construction professional, Shippen Construction, Inc., and Robert Shippen, by mailing a copy to Robert Shippen by certified mail on the Idaho corporation's registered agent. Attached hereto as Exhibit "A" is a copy of such attempt to comply with the Notice and Opportunity to Repair Act, together with a acknowledgment of receipt.

8. Plaintiffs received a letter from Dunn Law Offices, PLLC on November 19, 2008, which volunteers to accept service of a complaint against Defendants, lists defenses Defendants will raise if a complaint is filed (none of which notify Plaintiffs that they have allegedly attempted to sue the wrong entity), and fails to assert any willingness to repair or remedy the construction defect. Plaintiffs therefore have brought this action against Defendants in compliance with the Act.

9. That, upon information and belief, Marriott Homes, LLC is a closely held limited liability company wherein Robert and Jorja Shippen are the only members or constitute a majority of the members in the company. Additionally, Robert Shippen is the registered agent for Marriott Homes, LLC, and Marriot Homes, LLC shares the same physical address as Shippen Construction, Inc. Therefore, Marriott Homes, LCC was also on notice of the ensuing claim prior to its filing.

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COUNT ONE: BREACH OF EXPRESS WARRANTY
(Defendants: Robert Shippen; Robert and Jorja Shippen; Robert and Jorja Shippen d/b/a Shippen Construction; Marriott Homes, LLC; and Shippen Construction, Inc.)

10. Plaintiffs hereby incorporate and re-allege paragraphs 1 - 9 and further plead and allege as follows:

11. On June 17, 2007, Plaintiffs and Defendants (Robert Shippen; and/or Robert and Jorja Shippen, husband and wife; and/or Robert and Jorja Shippen d/b/a Shippen Construction; and/or Marriott Homes, LLC; and/or Shippen Construction, Inc.) entered a real estate contract for the purchase and sale of a residence and real property commonly referred to as 319 N. 3709 E., Rigby, ID 83442 (hereinafter "the Property"). This purchase and sale agreement was amended on June 18, 2007 and then again on July 2, 2007.

12. The Purchase and Sale Contract expressly extended a standard builder's warranty on the Property for a minimum of one year, without further definition of that warranty.

13. Additionally, on August 8, 2006, Defendants, through its/their authorized agents, listed the Property for sale on the Multiple Listing Service (hereinafter "MLS") in Idaho.

14. That MLS listing specifically stated twice that the Property had never had sub water flooding issues.

15. That MLS listing also stated twice that the Builder would install a leaching system to give the buyer peace of mind against flooding.

16. The MLS listing served as an express warranty, warranting that the Property had never flooded and would not flood.

17. After the Plaintiffs' July 2, 2007 purchase of the Property, they learned from a neighbor that the Property's basement had flooded in August of 2006, contrary to the

representation in the MLS listing.

18. Despite the installment of a leaching system, the Property flooded again in August and September of 2007 (within the one year warranty period) and continues to flood frequently from sub-water today.

19. The express warranties were therefore breached to the extent the Defendants misrepresented that the house had not flooded and would not flood.

20. These express warranties were further breached when the house flooded in August and September of 2007 and thereafter, subsequent to the time of the sale.

21. As a result of this flooding, Plaintiffs have suffered damages in an amount in excess of \$10,000, which shall be proven at trial.

**COUNT TWO: BREACH OF THE IMPLIED COVENANT
OF GOOD FAITH AND FAIR DEALING**

**(Defendants: Robert Shippen; Robert and Jorja Shippen; Robert and Jorja Shippen
d/b/a Shippen Construction; Marriott Homes, LLC; and Shippen Construction, Inc.)**

22. Plaintiffs hereby incorporate and re-allege paragraphs 1 - 21 and further plead and allege as follows:

23. Implied in every contract is a covenant of good faith and fair dealing.

24. Defendants (Robert Shippen; and/or Robert and Jorja Shippen, husband and wife; and/or Robert and Jorja Shippen d/b/a Shippen Construction; and/or Marriott Homes, LLC; and/or Shippen Construction, Inc.) represented to Plaintiffs that the Property Plaintiffs were about to purchase had not flooded, when in fact it had flooded.

25. Defendants further represented that a leaching system was installed to prevent snow run off and to give peace of mind against sub-water flooding.

26. Defendants breached its/their implied covenant of good faith and fair dealing by

misrepresenting the condition of and flooding history of the Property.

27. As a result of this breach, Plaintiffs have suffered damages in an amount in excess of \$10,000, which shall be proven at trial.

COUNT THREE: BREACH OF IMPLIED WARRANTY
(Defendants: Robert Shippen; Robert and Jorja Shippen; Robert and Jorja Shippen d/b/a Shippen Construction; Marriott Homes, LLC; and Shippen Construction, Inc.)

28. Plaintiffs hereby incorporate and re-allege paragraphs 1 - 27 and further plead and allege as follows:

29. Implied in every newly constructed residence lies an implied warranty of habitability extended by the builder. Defendants (Robert Shippen; and/or Robert and Jorja Shippen, husband and wife; and/or Robert and Jorja Shippen d/b/a Shippen Construction; and/or Marriott Homes, LLC; and/or Shippen Construction, Inc.) therefore extended a implied warranty of habitability to Plaintiffs.

30. That implied warranty was breached when the residence flooded in August and September of 2007 and each time it has flooded thereafter.

31. Such continual flooding results in the uninhabitability of the entire residence.

32. As a result of this flooding, Plaintiffs have suffered damages in an amount in excess of \$10,000, which shall be proven at trial.

COUNT FOUR: ALTER EGO / VEIL PIERCING
(Defendants: Robert Shippen; Robert and Jorja Shippen; Robert and Jorja Shippen d/b/a Shippen Construction; Marriott Homes, LLC; and Shippen Construction, Inc.)

33. Plaintiffs hereby incorporate and re-allege paragraphs 1 - 32 and 44 - 69 and further plead and allege as follows:

34. That Defendants Robert and/or Jorja Shippen maintain such a unity of interest in

defendants Shippen Construction, Inc. and in Marriott Homes, LLC that the individuality of such entities has ceased.

35. That the fiction of a separate existence between said Robert and/or Jorja Shippen and said defendant entities would result in an inequitable result, sanction a fraud, and/or promote injustice to the extent Robert and/or Jorja Shippen intend to rely on corporate or limited liability status solely as a shield against liability of the breaches and fraud heretofore mentioned.

36. Based on information and belief, the value of the Defendant entities has been filtered or siphoned to Robert and/or Jorja Shippen for personal use, rendering the viability of any judgment as enforceable only against Robert and/or Jorja Shippen.

37. That the damages and claims for liability sought forth against Marriott Homes, LLC and/or Shippen Construction, Inc., should be imposed upon Robert and/or Jorja Shippen under the theory of alter ego or corporate veil piercing.

COUNT FIVE: UNJUST ENRICHMENT
(Defendants: Robert Shippen; Robert and Jorja Shippen;
Robert and Jorja Shippen d/b/a Shippen Construction)

38. Plaintiffs hereby incorporate and re-allege paragraphs 1 - 37 and 44 -69 and further plead and allege as follows:

39. Defendants (Robert and Jorja Shippen, husband or wife; and/or Robert and Jorja Shippen d/b/a Shippen Construction; and/or Robert Shippen) were unjustly enriched by obtaining the agreed upon purchase price of the residence of \$272,000, in exchange for a house that representedly had no history of flooding and upon guarantees that the house would not flood.

40. Plaintiffs detrimentally relied on Defendants' representations regarding the Property.

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41. Because Defendants misrepresented the status of the house, Defendants obtained a higher purchase price for the house than they would have received had Defendants made the flooding disclosure. This resulted in unjust enrichment to the Defendants.

42. But for Defendants' misrepresentation, Plaintiffs would not have even purchased the Property.

43. That as a proximate result of Defendants' misrepresentations, Defendants were unjustly enriched in excess of \$10,000.00, in an amount to be proven at trial.

**COUNT SIX: FRAUDULENT
CONCEALMENT OF KNOWN DEFECT
(Defendants: Robert Shippen; Robert and Jorja Shippen;
Robert and Jorja Shippen d/b/a Shippen Construction)**

44. Plaintiffs hereby incorporate and re-allege paragraphs 1- 43 and further plead and allege as follows:

45. Defendants (Robert and Jorja Shippen, husband or wife; and/or Robert and Jorja Shippen d/b/a Shippen Construction; and/or Robert Shippen) knowingly concealed the following facts from Plaintiffs:

- a) Defendants concealed the fact that the property had flooded prior to the sale by representing that it had not flooded.
- b) Defendants knowingly installed a sump pump under the false stated premise that it was intended for winter snow run off.
- c) Defendants fraudulently concealed the nature of the flooding by stating that flooding in 2007 was the result of a one time canal rupture.

46. The condition of the Property and these statements were material to the purchase of the Property and continued habitation of the Property.

47. At the time these statements were made, Defendants knew the statements were false and Plaintiffs did not.

48. Defendants intended for the Plaintiffs to rely on these statements.

49. Plaintiffs did in fact rely on these statements.

50. Plaintiffs' reliance was reasonable.

51. As a proximate result of Defendants' misrepresentations, Plaintiffs suffered damages in excess of \$10,000.00, in an amount to be proven at trial.

**COUNT SEVEN: FRAUDULENT
MISREPRESENTATION OF KNOWN FACT
(Defendants: Robert Shippen; Robert and Jorja Shippen;
Robert and Jorja Shippen d/b/a Shippen Construction)**

52. Plaintiffs hereby incorporates and re-allege paragraphs 1- 51 and further plead and allege as follows:

53. Defendants (Robert and Jorja Shippen, husband or wife; and/or Robert and Jorja Shippen d/b/a Shippen Construction; and/or Robert Shippen) knowingly misrepresented the following facts to Plaintiffs:

- a) Defendants misrepresented in their MLS listing that the Property had never flooded prior to the sale, when in fact it had.
- b) Defendants misrepresented that a sump pump was installed for winter snow runoff, when it was actually installed to remove sub- water.
- c) Defendants misrepresented that subsequent flooding in August of 2007 was the result of a nearby canal rupture.

54. These statements were material to the purchase of the Property.

55. At the time these statements were made, Defendants knew the statements were

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false and Plaintiffs did not.

56. Defendants intended for the Plaintiffs to rely on these statements.

57. Plaintiffs did in fact rely on these statements.

58. Plaintiffs' reliance was reasonable.

59. As a proximate result of Defendants' misrepresentations, Plaintiffs suffered damages in excess of \$10,000.00, in an amount to be proven at trial.

**COUNT EIGHT: FRAUD IN THE INDUCEMENT
(Defendants: Robert Shippen; Robert and Jorja Shippen;
Robert and Jorja Shippen d/b/a Shippen Construction)**

60. Plaintiffs hereby incorporate and re-allege paragraphs 1 - 59 and further plead and allege as follows:

61. Defendants (Robert and Jorja Shippen, husband or wife; and/or Robert and Jorja Shippen d/b/a Shippen Construction; and/or Robert Shippen) knowingly misrepresented the following facts from Plaintiffs:

- a) Defendants misrepresented in their MLS listing that the Property had never flooded prior to the sale, when in fact it had.
- b) Defendants misrepresented that a sump pump/leaching system was installed for winter snow runoff, when it was actually installed to remove sub- water.

62. The condition of the Property and these statements were material to the purchase of the Property.

63. At the time these statements were made, Defendants knew the statements were false and Plaintiffs did not.

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64. Defendants intended for the Plaintiffs to rely on these statements to induce Plaintiffs to purchase the property.

65. Plaintiffs did in fact rely on these statements.

66. Plaintiffs' reliance was reasonable.

67. As a proximate result of Defendants' misrepresentations, Plaintiffs suffered damages in excess of \$10,000.00, in an amount to be proven at trial.

COUNT NINE: PUNITIVE DAMAGES
(Defendants: Robert Shippen; Robert and Jorja Shippen;
Robert and Jorja Shippen d/b/a Shippen Construction)

68. Plaintiffs hereby incorporate and re-allege paragraphs 1 - 67 and further plead and allege as follows:

69. The acts of the defendants constitute liability for fraud and further constitute intentional, deliberate, reckless, outrageous, and/or grossly negligent conduct.

70. As a result of Defendant's conduct, Plaintiffs have been damaged in an amount to be proven at trial.

71. Plaintiffs are entitled to an award of punitive (exemplary) damages against Defendants to deter Defendants from future fraudulent, intentional, deliberate, reckless, outrageous, and/or grossly negligent conduct as outlined above.

72. Punitive damages should be awarded against Defendants in excess of \$10,000.00, in an amount to be decided by the jury.

ATTORNEY'S FEES

Plaintiffs have been required to retain an attorney to prosecute this action and are entitled to costs and attorney fees pursuant to Idaho Code §12-120 and §12-121 and I.R.C.P. 54. Further,

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Plaintiffs are entitled to attorneys fees pursuant to the parties' purchase and sale agreement of the Property. In the event this matter is taken by default, Plaintiffs are entitled to a reasonable attorney fee of \$2,500.00, and such additional amount in the event this matter is contested.

WHEREFORE, Plaintiff prays for judgment as follows:

A. That the contract for the sale of the Property be rescinded, with all title and obligations on the Property being reinstated to Defendants, relieving Plaintiffs of any future obligations on the Property;

B. That Plaintiffs be awarded damages equal to the purchase price of the Property;

C. That Plaintiffs additionally be awarded money damages in an amount to reflect their improvements on the property in an amount in excess of \$10,000 to be proven at trial;

D. That Plaintiffs additionally be awarded money damages in an amount to reflect Plaintiff's efforts to mitigate the damage to the Property as a result of the flooding;

E. That Plaintiffs be awarded punitive damages in excess of \$10,000 for Defendants' conduct;


F. That, in the event the contract is not rescinded, Plaintiffs receive damages in excess of \$10,000.00 in an amount to be proven at trial;

G. That in the event the contract is not rescinded, Defendants be ordered to repair and restore the Property to the extent reasonably possible to ensure continuing and uninterrupted habitability thereof;

H. For attorneys fees in the amount of \$2,500.00 in the event this matter is taken by Default, and such additional amounts that may be incurred in the event this matter is contested; and

I. For such other relief as the Court deems just and proper.

DATED this 3 day of November, 2010.


WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 3 day of November 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

- Mailing
- Hand Delivery
- Fax **208.745.8160**
- E-Mail
- Overnight Mail
- Courthouse Box

Hon. Gregory Anderson
Bonneville County Courthouse
605 N. Capital Ave.
Idaho Falls, ID 83402

- Mailing
- Hand Delivery
- Fax
- E-Mail
- Overnight Mail
- Courthouse Box


WESTON S. DAVIS, ESQ.

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FILED - 9 PM 3:22
DISTRICT COURT IDAHO

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

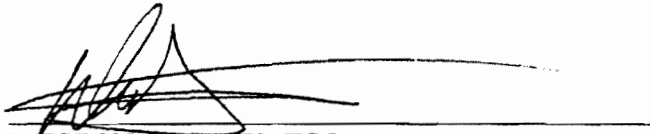
**MOTION TO EXCLUDE EXPERT
WITNESSES**

COME NOW Plaintiffs, Shawn and Shellee Goodspeed, by and through their attorney of record, and hereby moves the Court for an order excluding Defendants' expert witnesses from testifying at trial for their failure to produce that information requested in the process of discovery. This motion is based upon the pleadings, record, Order Setting Trial and Pre-Trial Conference, Idaho Rules of Civil Procedure 26 and 37, and the Plaintiffs' memorandum in support.

Plaintiffs give notice of their intent to present oral argument on this motion.

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DATED this 4 day of November, 2010.


WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

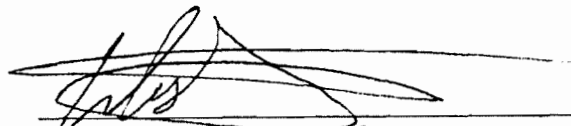
I hereby certify that I served a true copy of the foregoing document upon the following this 5 day of November 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

- Mailing
- Hand Delivery
- Fax **208.745.8160**
- E-Mail
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Hon. Gregory Anderson
Bonneville County Courthouse
605 N. Capital Ave.
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WESTON S. DAVIS

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

**MEMORANDUM IN SUPPORT OF
MOTION TO EXCLUDE EXPERT
WITNESSES**

COME NOW Plaintiffs, Shawn and Shellee Goodspeed, by and through their attorney of record, and support their Motion to Exclude Expert Witnesses as follows:

FACTS / PROCEDURAL HISTORY

The Court entered its "Order Setting Trial and Pre-Trial Conference" in this matter on February 26, 2010. In the order, this court ordered that all discovery was to be completed seventy (70) days prior to trial (July 20, 2010). The deadlines for compliance of this scheduling order were subsequently modified by this court on August 3, 2010, when this Court issued its "Amended Order

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Setting Trial and Pre-Trial Conference.” The discovery deadline thus fell on November 2, 2010. The scheduling order reserves the right to impose sanctions on those who violate the order.

Prior to either order, on May 12, 2009, one and a half years ago, Plaintiffs made the following discovery requests on Defendants:

INTERROGATORY NO. 4: Please identify any and all experts whom you have engaged and who are expected to testify at the trial of this cause, and for each such expert, please provide educational background, field of specialization, *a detailed summary of the opinions to which the expert will testify, and all facts, data, events and other knowledge utilized by the expert upon which his/her testimony is based.*

REQUEST FOR PRODUCTION NO. 9: If you have retained an expert witness, *produce a copy of the expert's report, underlying data, raw data, tests, answers to questions submitted to the expert by yourself or others, and any other information upon which the expert relies in drawing his or her conclusion. Also produce a copy of the resume' for any expert(s).*

(Emphasis added).

As the case was pending, Defendants made some mention of expert witnesses, but never responded to the language emphasized above. In the meantime, the parties were discussing a settlement. When settlement negotiations fell through, Plaintiffs requested a supplement regarding Defendant's expert witnesses on January 12, 2010. *Affidavit of Weston S. Davis, Exhibit "A"*.

On, July 13, 2010, one week prior to the first discovery deadline, Plaintiffs filed a Motion to Continue Trial on the basis that Plaintiffs had not received all documentation from Defendants as it related to Plaintiffs' discovery requests. *See Motion to Continue Trial*. Defendants stipulated to the continuance. *See Stipulation to Continue Trial*.

On August 4, 2010, Defendants filed their expert disclosures, stating the names of their experts and an overly general summary regarding their testimony. *See Defendant's Exhibit List and Expert Disclosures*. For example, Defendants name one expert as follows: “4. Roger Warner, Hydrologist: Idaho Falls, Idaho. He would testify to all hydrology issues on the subject real property

relative to the pleadings herein.” No mention was made with regard to a detailed summary of the opinions to which the experts would testify, the facts or knowledge they relied on, their conclusions, or any reports as requested under Interrogatory No. 4 and Request for Production No. 9.

On August 6, 2010, two days later, Plaintiffs sent a letter to Defendants stating they were in receipt of disclosure of expert witnesses but did not, to date, have the experts conclusions, reports, or other information. *See Exhibit "A" to Third Motion to Compel.* Plaintiffs then requested a supplemental response to their discovery requests. *Id.*

On August 13, 2010, having received no word from Defendants, Plaintiffs filed a Motion to Compel said information. *See Third Motion to Compel.*

On August 30, 2010, after still not receiving the information requested regarding the experts, The Honorable Richard T. St. Clair heard Plaintiff's motion to compel. At hearing, Plaintiffs expressed concern that if they did not receive this expert information in advance of the discovery deadline, they would not be able to intelligently depose the Defendant's experts. Judge St. Clair compelled this missing expert information at the hearing, which was further confirmed by the *Order on Plaintiff's Motion to Compel* dated September 15, 2010.

While the Defendants supplemented their discovery answers regarding experts on September 20, 2010, still no mention was made with regard to a detailed summary of the opinions to which the experts would testify, the facts or knowledge they relied on, their conclusions, or any reports. *Affidavit of Weston S. Davis, Exhibit "B".*

Then, on October 19, 2010, still two weeks before the discovery deadline, Plaintiffs requested again the reports, conclusions, and other missing information regarding Defendants' experts. *Affidavit of Weston S. Davis, Exhibit "C".*

The reports or conclusions from Defendants' experts to date still have not been produced and

MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE EXPERT WITNESSES - 3

the discovery deadline has passed.¹

ARGUMENT

Plaintiffs have failed to comply with the Court's order regarding discovery to complete all discovery seventy (70) days prior to trial. Based on the current date of the trial, Plaintiffs' complete disclosures should have been made on November 2, 2010, and arguably before then so that Plaintiffs could have sufficient time to prepare for and depose Defendants' experts.

A party may discover the following information regarding an expert in discovery by way of interrogatory or request for production pursuant to I.R.C.P. 26(b)(4)(A)(i):

A complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(Emphasis added). In this case, Plaintiffs specifically requested the emphasized information nearly a year and a half ago and made numerous attempts since to recover the missing information, including receiving an order compelling the information. The discovery deadline has now passed, and the missing information still has not been produced.

Rule 26(e)(4), Idaho Rules of Civil Procedure specifically contemplates exclusion of a witness where a party fails to timely supplement its discovery responses: "If a party fails to

¹ In contrast, on October 13, 2010, *Plaintiffs* filed their Expert Witness Disclosures confirming that information requested by Defendants and further confirming that Defendants were already in possession of three of the four expert's reports, some of which were produced to Defendants numerous months in advance of this formal disclosure. Plaintiffs disclosed the report of their fourth expert to Defendants on October 14, 2010, a day and a half after the Plaintiff's received the report. Notably, the fourth report would have been produced the day of or the day after it was received if Plaintiffs were not in the process of drafting a reply brief on their motion for punitive damages. Thus, the Plaintiffs acted with due diligence in producing the reports of all of their experts.

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seasonably supplement the responses as required in this Rule 26(e), the trial court may exclude the testimony of witnesses or the admission of evidence not disclosed by a required supplementation of the responses of the party.” Excluding Defendant’s expert witnesses would therefore be an appropriate sanction by way of Rule 26(e) and the pre-trial order.

Defendants cannot now assert, as they did at hearing on Plaintiff’s Third Motion to Compel, that they have sufficiently disclosed enough information about their experts so that any additional information from the experts could be elicited by way of deposition. First, the rules of procedure allow for a recovery of this detailed expert information by interrogatory. *See* I.R.C.P. 26(b)(4). Second, Plaintiffs’ counsel cannot prepare intelligently for or conduct an expert’s deposition with no point of reference. Plaintiffs would not be sufficiently apprised of the experts’ opinions, facts, or conclusions.

The Supreme Court of Idaho has addressed this concern:

Whether to exclude undisclosed expert testimony pursuant to I.R.C.P. 26(e)(4) is committed to the sound discretion of the trial court. *Viehweg v. Thompson*, 103 Idaho 265, 271, 647 P.2d 311, 317 (Ct.App.1982) (citing *Matter of Webber's Estate*, 97 Idaho 703, 707-08, 551 P.2d 1339, 1343-44 (1976)). The test for determining whether a district court abused its discretion is: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *Sun Valley Shopping Center Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Idaho Rule of Civil Procedure 26(e) states in relevant part that:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to ... (B) the identity of each person expected to be called as an expert witness at trial, ***the subject matter on which the person is expected to testify, and the substance of the person's testimony.***

The rule goes on to state that:

(4) If a party fails to seasonably supplement the responses as required in this Rule 26(e), the trial court may exclude the testimony of witnesses ... not disclosed by a required supplementation of the responses of the party.

This Court stated in *Radmer v. Ford Motor Co.* that I.R.C.P. 26(e) “unambiguously imposes a continuing duty to supplement responses to discovery with respect to the substance and subject matter of an expert's testimony where the initial responses have been rejected, modified, expanded upon, or otherwise altered in some manner.” 120 Idaho 86, 89, 813 P.2d 897, 900 (1991) (citations omitted). The Court went on to note that:

In cases [involving expert testimony], a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation.... Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Id. (quoting Fed. Rule Civ. P. 26 advisory committee's note). Finally, we recognized that:

It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved.... *Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony.*

Schmechel v. Dille, 148 Idaho 176, 219 P.3d 1192, 1196 - 1197 (2009) (Emphasis added). In that case, the Plaintiffs attempted to have their expert address specific information that had not been disclosed to Defendants until the time of trial. *Id.* at 1197 - 1198. As a result, the trial court correctly excluded the expert witness. *Id.* at 1199.

In this case, Plaintiffs specifically requested the following information from Defendants over a year and a half ago, which to date, Defendants still have not disclosed:

INTERROGATORY NO. 4: Please identify any and all experts whom you have

engaged and who are expected to testify at the trial of this cause, and for each such expert, please provide educational background, field of specialization, *a detailed summary of the opinions to which the expert will testify, and all facts, data, events and other knowledge utilized by the expert upon which his/her testimony is based.*

REQUEST FOR PRODUCTION NO. 9: If you have retained an expert witness, *produce a copy of the expert's report, underlying data, raw data, tests, answers to questions submitted to the expert by yourself or others, and any other information upon which the expert relies in drawing his or her conclusion. Also produce a copy of the resume' for any expert(s).*

(Emphasis added).

Plaintiffs showed Defendants their intent to rely on obtaining such information prior to depositions by sending I.R.C.P. 37(a) letters attempting to meet and confer with the Defendants regarding their answers to written discovery. This Court recognized Defendants' duty to disclose the information requested by its order on Plaintiffs' third motion to compel.

To date, despite this Court's order and Plaintiff's numerous attempts to obtain the requested information before the discovery deadline, Plaintiffs still do not have a detailed summary of the expert's opinions; the facts, data, events, or other knowledge utilized by the expert upon which his/her testimony is based; a copy of the expert's report, underlying data, raw data, and tests; answers to questions submitted to the expert; and other information upon which the expert relies in drawing his or her conclusions.

In short, Plaintiffs will be cross-examining Defendants' experts blind at trial.

Again, Plaintiffs attempted to avoid this situation by filing a motion to compel, obtaining an order to compel, and even thereafter sending another followup letter demanding supplementation to the aforementioned requests. Defendants have had sufficient time to contemplate these requests and still have not complied.

Allowing the Defendants to produce expert testimony now at trial, when they have failed to

disclose the requested information during discovery, rewards the Defendants for their failure to comply with I.R.C.P. 26(e).

Defendants have failed to properly disclose their experts as required by the Court's Order Setting Trial and as per I.R.C.P. 26. As such, Plaintiffs will be prejudiced if Defendants' experts are allowed to testify at trial. Consequently, Defendants' experts should be excluded from testifying at trial.

REQUEST FOR ATTORNEYS' FEES

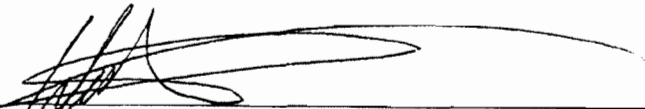
Trial courts have considerable authority to govern the discovery process. I.R.C.P. 26 and 37. Inherent in the Court's authority is the power to sanction parties for failure to comply with discovery orders. I.R.C.P. 37(e). Rule 37(e) states that "In addition to the sanctions above under this rule for violation of discovery procedures, any court may in its discretion impose sanctions or conditions, or assess attorney's fees, costs or expenses against a party or the party's attorney for failure to obey an order of the court made pursuant to these rules." (Emphasis added).

Here, there is no justification for Defendants' failure to supplement the specific information from Defendants' experts. Plaintiffs have incurred attorneys' fees in preparing this motion, and anticipate incurring additional attorneys' fees in attending the hearing on this motion. Accordingly, in addition to having the Defendant's expert witnesses excluded, Plaintiffs requests attorney fees incurred in preparing, filing, and arguing the instant motion.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request the Court enter an order excluding Defendants' expert witnesses. Plaintiffs also request an award of attorneys' fees incurred in the preparation and argument of the instant motion.

DATED this 4 day of November, 2010.


WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 4 day of November 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

- Mailing
- Hand Delivery
- Fax **208.745.8160**
- E-Mail
- Overnight Mail
- Courthouse Box

Hon. Gregory Anderson
Bonneville County Courthouse
605 N. Capital Ave.
Idaho Falls, ID 83402

- Mailing
- Hand Delivery
- Fax
- E-Mail
- Overnight Mail
- Courthouse Box


WESTON S. DAVIS, ESQ.

L:\awsdl~ Clients\7411.1 Goodspeed\Exclude Expert (Memo).wpd

529

WESTON S. DAVIS (I.S.B. # 7449)
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
Post Office Box 51630
Idaho Falls, Idaho 83405-1630
Telephone (208) 522-3001
Fax (208) 523-7254

NOV 8, 2010 No
11:32 AM

RECEIVED DISTRICT COURT OF IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

**AFFIDAVIT OF WESTON S.
DAVIS IN SUPPORT OF MOTION
TO EXCLUDE EXPERT
WITNESSES**

STATE OF IDAHO)
): ss.
County of Bonneville)

WESTON S. DAVIS, being duly sworn upon oath, deposes and says as follows:

1. I am the attorney for Plaintiffs in the above entitled action.
2. Attached hereto as Exhibit "A" is a true and correct copy of a letter sent on January 12, 2010 to Defendants requesting a supplementation of expert witnesses. *See paragraph 1(e).*

59

3. Attached hereto as Exhibit "B" is a true and correct copy of Defendant's supplemental discovery answers produced on September 20, 2010.

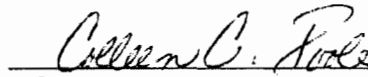
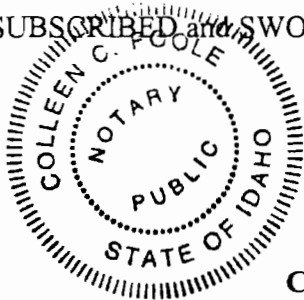
4. Attached hereto as Exhibit "C" is a true and correct copy of a letter sent on October 19, 2010 to Defendants requesting the reports, conclusions, and other missing information regarding Defendant's experts. *See paragraph 1.*

DATED this 4 day of November, 2010



WESTON S. DAVIS

SUBSCRIBED and SWORN TO before me this 4 day of November 2010.



NOTARY PUBLIC FOR IDAHO

Residing at: Menan, Idaho

My Commission Expires: 12/31/12

CERTIFICATE OF SERVICE

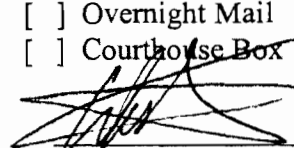
I hereby certify that I served a true copy of the foregoing document upon the following this 5 day of November 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

- Mailing
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- Fax **208.745.8160**
- E-Mail
- Overnight Mail
- Courthouse Box

Hon. Gregory Anderson
Bonneville County Courthouse
605 N. Capital Ave.
Idaho Falls, ID 83402

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- Overnight Mail
- Courthouse Box



WESTON S. DAVIS, ESQ.

L:\wsd\~ Clients\7411.1 Goodspeed\Exclude Expert (Affidavit - WSD).wpd

10/11



NELSON HALL PARRY TUCKER, P.A.

Attorneys & Counselors

490 Memorial Drive
PO Box 51630
Idaho Falls, ID 83405-1630
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Douglas R. Nelson
Blake G. Hall
Scott R. Hall
Steven R. Parry
Brian T. Tucker
Wiley R. Dennert
Sam L. Angell
Weston S. Davis
W. Joe Anderson
(1923-2002)

Sent Via Facsimile Transmission 208.745.8160

January 12, 2010

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

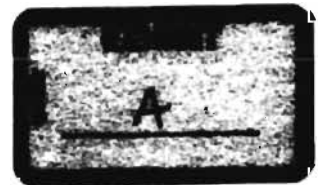
RE: *Goodspeed v. Shippen*

Dear Mr. Dunn:

I received your phone message and correspondence wherein you confirmed that Mr. Shippen believes he can litigate the case for less than he would expend through a settlement offer. Therefore, my clients will proceed to trial. This raises several issues:

1. I will need you to supplement your discovery responses to the extent more information and documents are available to you. You have objected to producing certain corporate records as being irrelevant or not in your possession. I will address each deficiency individually:
 - a. Requests for Production Nos. 2 and 3: We requested all documents in your possession relating in any way to the Subject Real Property or that you intend to introduce at trial or in support of any other motion. You have responded that your client is not in possession of any documents or that they are not aware of any documents at this time. I believe the Shippens will have a difficult time prevailing at trial without any documentation supporting their position. Please supplement this request.
 - b. Request for Production No. 5: We requested tax information for the past four (4) years. The Judge has held that for now, there appear to be grounds upon which to allege Shippen Construction is liable. As a result, information regarding the

592



internal workings of that company are relevant. Please, therefore, produce the taxes.

- c. Request for Production No. 6: We requested copies of corporate documents. You responded that the documents were in the possession of Mr. Dupree. Mr. Dupree will not likely produce any such documents due to his duty to maintain the confidentiality of his clients. Therefore, the burden will fall on Mr. Shippen to produce the requested documents.
- d. Requests for Production Nos. 5, 7 and 8: The solvency of the Defendants is very much relevant to the allegations of the complaint and therefore we request that you supplement the same.
- e. Request for Production No. 9: To the extent you have retained an expert witness, please supplement this request.
- f. Request for Production No. 14: Again, I find it difficult to believe there are no records in Mr. Shippen's possession or obtainable access relating to his subcontractors and the Subject Real Property. He does not have copies of any subcontractor bids, change orders, payments made to sub contractors for their work, etc.? Please have Mr. Shippen produce everything in his possession that is in anyway related to the subcontractors and the Subject Real Property.

If I have not obtained these requested documents from you in the next two weeks, I will file a Motion to Compel.

- 2. My assistant, Jodi Thurber, will be coordinating the time for depositions with your office in the near future. I presently anticipate three days for my depositions. We will consent to the depositions taking place at your office.
- 3. Also, please find enclosed a Note of Issue and Request for Trial Setting.

If you have any questions or concerns, please contact me.

Yours very truly,



Weston S. Davis, Esq.

cc: Client

L:\wsd\~ Clients\7411.1 Goodspeed\Dunn.Ltr11.wpd

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB # 2903
Amelia A. Sheets, Esq., ISB #5899
P.O. Box 277
477 Pleasant Country Lane
Rigby, Idaho 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON
MAGISTRATE'S DIVISION

WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODSPEED,)
husband and wife,)

Plaintiffs,)

vs.)

SHIPPEN CONSTRUCTION, INC., an)
Idaho corporation, ROBERT and)
JORJA SHIPPEN, husband and wife,)
ROBERT and JORJA SHIPPEN, d/b/a)
SHIPPEN CONSTRUCTION, ROBERT)
SHIPPEN, AN INDIVIDUAL, and)
MARRIOT HOMES, LLC)

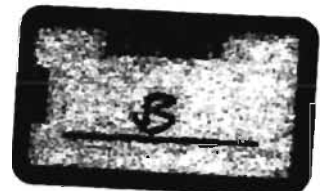
Defendants.)

Case No. CV 09-015

DEFENDANTS' ANSWER TO
INTERROGATORIES:
SUPPLEMENTAL

COMES NOW, the defendants, MARRIOT HOMES, LLC, SHIPPEN
CONSTRUCTION, INC., and ROBERT and JORJA SHIPPEN, by and through their
attorney of record, Robin D. Dunn, and supplement answer on plaintiffs' Interrogatories as
follows:

INTERROGATORY NO. 4: Please identify any and all experts whom you have
engaged and who are expected to testify at the trial of this cause, and for each such expert,



please provide educational background, field of specialization,, a detailed summary of the opinions to which the expert will testify, and all facts, data, events and other knowledge utilized by the expert upon which his/her testimony is based.

ANSWER TO INTERROGATORY NO. 4: The court order the supplementation or

1. Roger Warner, hydrologist.

Mr. Warner would testify to his degree and experience, including training in the field of hydrology. He worked numerous years for the Idaho Department of Water Resources. Most recently he purchased his own business on engineering and water issues, including hydrology. Thus, he would testify to his background, education, training, field of expertise and general qualifications.

Mr. Warner would then testify to the general area of ground in question, his familiarity with the area. The approximate amount of structures in this area and how he is familiar with this area of Jefferson County.

and that is...

It is expected he would explain the different terms used in the field of hydrology and of surface and sub-surface water. He would describe what factors may control water levels and how the water table interacts with the years and the seasons.

such as.

He would testify to the sub-surface water levels in data collected by the IDWR and attempt to garner water levels in this particular area of Jefferson County for approximately 2005-2010.

which is

He would testify to the purpose of pumping of water and the seasons generally involved in the pumping of water for sump pumps of both ground and sub-surface water. He would opine and opinion on the viability of the system installed in the subject real property.

meaning ..

He would explain the different types of water that could invade a foundation and the

and in the case ..

5/15

potential causes therefore.

This interrogatory may need to be supplemented based on any other information that is provided to or becomes known to this expert.

2. Ray Keating: District Health Department

Mr. Keating would testify to his background and how he became involved in the health department along with his qualifications. He would testify to his job duties.

He would testify to matters in the pleadings as it relates to any plans, permitting of sewer and septic. He would testify to any knowledge of water depth and how the sewer system interacts with the water.

He would testify to the pleadings on file herein and how any such pleadings may relate to his office. In particular, what entity the permitting was titled within and the known knowledge that Robert Shippen is known through his office and oftentimes signatures are for the various entities represented as agent of such entities.

3. Naysha Foster/James Lynch: Building Department/Planning and Zoning

These individuals would testify to any plans on file herein and of their job duties, descriptions and how the job was acquired by each. They would testify to their prior affidavits and the knowledge of Robert Shippen and the various entities he represents and signs documents for as an agent. ?

They would testify as to the common knowledge of Shippen Construction, Inc. as an excavation company and not a contractor or owner of real property to their knowledge.

They would testify as to the pleadings and any such pleadings involving plans on file, viz. building permits, certificates of occupancy and other permits as are pertinent.

They would answer any questions, within their knowledge, of water issues in the subject subdivision and the particular house in question. *meaning. What questi.*

11/12


4. Bill Dupree, Esq.: He would testify as to how he became an attorney, of his current status as and attorney and credentials. He would testify to the formation of the various entities named as defendants and the formation and purpose of each entity. He would dispute that the purpose was to hide or evade any problems but were planning tools in conjunction with accountants.

2. Lyle Simmons, CPA: Rexburg, Idaho. He would testify to his credentials, his education and current active status. He would testify to any accounting matters relevant to the pleadings herein and as to any specific entities of the named defendants and the intended accounting practices of each entity. ?

He would testify to the separate and distinct nature of each named defendant that is within his knowledge.

(Note: the 2005 Federal Income tax return of Robert and Jorja Shippen have been sent by separate cover and private letter to comply with the order dated September 17, 2010.)

DATED this 20th day of September, 2010.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am a duly licensed attorney for the State of Idaho, resident of and with my office at Rigby, Idaho; that I served a copy of the foregoing by mailing, with postage prepaid thereon, a true and correct copy thereof to the following person(s) this 20th day of September, 2010.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

490 Memorial Drive
PO Box 51630
Idaho Falls, ID 83405-1630
Phone: (208) 522-3001
Fax: (208) 523-7254
e-mail: nhpt@nhptlaw.net
www.nhptlaw.com

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Steven R. Parry
Brian T. Tucker
Wiley R. Dennert
Sam L. Angell
Weston S. Davis
Nathan R. Starnes
W. Joe Anderson
(1923-2002)

SENT VIA FACSIMILE TRANSMISSION 208.745.8160

October 19, 2010

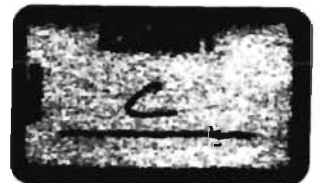
Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

RE: *Goodspeed v. Shippen*

Dear Mr. Dunn:

In light of clarification of our conversation as of yesterday, I still need the following documents from you:

1. Expert Reports: I have not received any expert reports addressing their conclusions or reasoning behind your expert's anticipated testimony. As a result, I am not presently able to analyze their reports and depose them in a prepared or intelligent manner. Please produce these reports to me as soon as possible. You are already in possession of the reports and conclusions of all of my experts.
2. Additional Exhibits: If you have any documents you intend to produce as exhibits that you have not yet produced, please do so.
3. Insurance Information: I requested insurance information for any insurance that would have covered the subject real property when it was listed for sale. You previously produced insurance information for Shippen Construction, Inc., but notified me that said insurance did not apply to the subject real property and that each residence was individually insured during the time of construction. Please produce the insurance documents and information as it pertains to the subject real property.

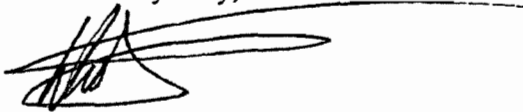


4. Closing Documents: Judge St. Clair ordered that Mr. Shippen produce the closing documents from the title company on the subject real property as they relate to Robert and Jorja Shippen. While I have the majority of the closing documents, I do not have the closing documents as it relates to any payments made to lien holders or others prior to disbursements made to the Shippens.

Additionally, I wonder if, in anticipation of trial, what exhibits we may stipulate to admitting at trial. Please notify me whether you are willing to engage in discussions regarding the stipulation of certain exhibits to the end of saving time and expense at trial.

Finally, I am enclosing the verification sheet to my clients' Supplemental Answers to Defendants' Second Set of Discovery Requests that I faxed to you last week.

Yours very truly,



Weston S. Davis, Esq.

L:\wsd\~ Clients\7411.1 Goodspeed\Dunn.Ltr26.wpd

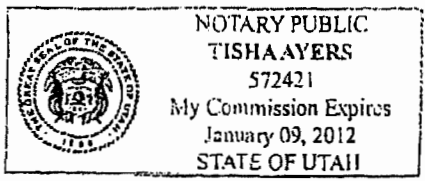
STATE OF ~~IDAHO~~ ^{Utah})
County of ~~Bonneville~~ ^{Grand}) : ss.

VERIFICATION

WILLIAM SHAWN GOODSPEED, being first duly sworn upon oath, deposes and says:
That he is the Plaintiff in the above-entitled action; that he has read the foregoing, knows
the contents thereof, and verily believes the information contained therein to be true.

William Shawn Goodspeed
WILLIAM SHAWN GOODSPEED

SUBSCRIBED AND SWORN to before me this 18th day of ~~September~~ ^{October}, 2010.



Tisha Ayers
Notary Public for ~~Idaho~~ ^{Utah}
Residing at: ~~moab, utah~~
My commission expires: 1-9-2012

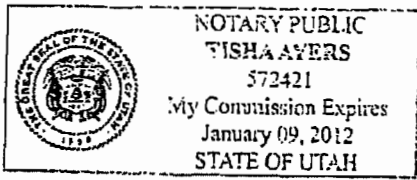
STATE OF ~~IDAHO~~ ^{Utah})
County of ~~Bonneville~~ ^{Grand}) : ss.

VERIFICATION

SHELLEE BETH GOODSPEED, being first duly sworn upon oath, deposes and says:
That he is the Plaintiff in the above-entitled action; that he has read the foregoing, knows
the contents thereof, and verily believes the information contained therein to be true.

Shellee Beth Goodspeed
SHELLEE BETH GOODSPEED

SUBSCRIBED AND SWORN to before me this 18th day of ~~September~~ ^{October}, 2010.



Tisha Ayers
Notary Public for ~~Idaho~~ ^{Utah}
Residing at: ~~moab, utah~~
My commission expires: 1-9-2012

621

FAX HEADER: NELSON_PARRY

TRANSMITTED/STORED : OCT. 19. 2010 1:19PM
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E-2) BUSY
E-4) NO FACSIMILE CONNECTION

NHPT NELSON HALL PARRY TUCKER, P.A.
Attorneys & Counselors

490 Memorial Drive
PO Box 51830
Idaho Falls, ID 83405-1830
Phone: (208) 622-3001
Fax: (208) 623-7254
e-mail: nhpt@nhptlaw.net
www.nhptlaw.com

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Wiley R. Dennert
Sam L. Angell
Weston S. Davis
Nathan R. Starnes
W. Joe Anderson
(1923-2002)

SENT VIA FACSIMILE TRANSMISSION 208.745.8160

October 19, 2010

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

RE: *Goodspeed v. Shippen*

Dear Mr. Dunn:

In light of clarification of our conversation as of yesterday, I still need the following documents from you:

1. **Expert Reports:** I have not received any expert reports addressing their conclusions or reasoning behind your expert's anticipated testimony. As a result, I am not presently able to analyze their reports and depose them in a prepared or intelligent manner. Please produce these reports to me as soon as possible. You are already in possession of the reports and conclusions of all of my experts.
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62

WESTON S. DAVIS, ESQ (ISB No. 7449)
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
Post Office Box 51630
Idaho Falls, Idaho 83405-1630
Telephone (208) 522-3001
Fax (208) 523-7254

NOV-8 PM 3:22
JEFFERSON COUNTY IDAHO

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

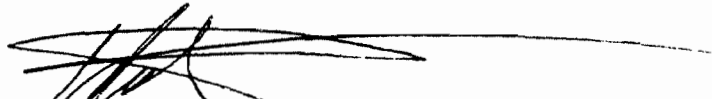
Defendants.

Case No.: CV-09-015

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 29th day of November, 2010, at 1:30 p.m., of said day,
or as soon thereafter as counsel can be heard in the above court, in the District Courtroom, at the
Courthouse, in Rigby, Jefferson County, Idaho, Plaintiffs, will call up for hearing their MOTION TO
EXCLUDE EXPERT WITNESSES.

DATED this 5 day of November, 2010.



WESTON S. DAVIS, ESQ.

505

CERTIFICATE OF SERVICE

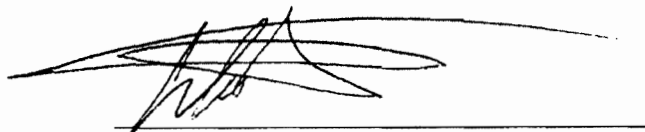
I hereby certify that I served a true copy of the foregoing document upon the following this 5 day of November 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

- Mailing
- Hand Delivery
- Fax **208.745.8160**
- E-Mail
- Overnight Mail
- Courthouse Box

Hon. Gregory Anderson
Bonneville County Courthouse
605 N. Capital Ave.
Idaho Falls, ID 83402

- Mailing
- Hand Delivery
- Fax
- E-Mail
- Overnight Mail
- Courthouse Box



WESTON S. DAVIS, ESQ.

L:\wsd\~ Clients\7411.1 Goodspeed\Exclude Expert (NOH).wpd

626

DUNN LAW OFFICES, PLLC
 Robin D. Dunn, Esq., ISB # 2903
 Amelia A. Sheets, Esq., ISB #5899
 P.O. Box 277
 477 Pleasant Country Lane
 Rigby, Idaho 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)

2009-09-15 PM 1:55
 JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and)
 SHELLEE BETH GOODSPEED,)
 husband and wife,)
)
 Plaintiffs,)

Case No. CV 09-015

DEFENDANTS' ANSWER
 TO THIRD AMENDED COMPLAINT

vs.)

SHIPPEN CONSTRUCTION, INC., an)
 Idaho corporation, and ROBERT and)
 JORJA SHIPPEN, husband and wife,)
)
 Defendants.)

COMES NOW, defendants, by and through the undersigned attorney of record, and answer that THIRD AMENDED COMPLAINT on file herein as follows:

I

The Complaint on file herein fails to state an adequate cause for which relief may be granted and should be dismissed pursuant to the Idaho Rules of Civil Procedure, Rule (12)(b)(6).

II

Robert and Jorja Shippen, husband and wife, (also Robert and Jorja Shippen d/b/a

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Shippen Construction) are not involved in this third amended complaint; and, the complaint should be dismissed, with prejudice, and an appropriate award of fees and costs in their favor.

Likewise, Shippen Construction Inc., is a sub-contractor and not involved in the actions involved in the third amended complaint; and should be awarded fees and costs in its favor.

Moreover, Robert Shippen, an individual, is not a proper party to this action and should be dismissed from this third amended complaint with an award of fees and costs in his favor.

III

The defendants herein do not waive any defenses by answering this Complaint and more particular, the following: jurisdiction both – subject and personal; failure to join indispensable parties and/or the defense of statute of limitation and/or laches.

IV

Shippen Construction, Inc. and/or Robert and Jorja Shippen d/b/a Shippen Construction are not proper parties to this action and should be dismissed from this action.

V

The defendants reserve the right, after appropriate discovery, to assert counterclaims and/or alternate pleading based upon discovery.

VI

The defendants herein deny each and every allegation of the Complaint on file unless specifically admitted hereafter.

VII

The defendants answer and each and every paragraph of the Complaint on file herein

according to the numerical reference set forth by plaintiffs as follows:

1. Admit;
2. Admit;
3. Admit;
4. Admit;
5. Neither admits nor deny as the subject property should not be a matter of litigation.
6. Jurisdiction over real property is subject to Idaho law in District Court and venue is appropriate where the defendants reside. It is believed that these two (2) concepts are properly pleaded in the above action, but the defendants deny based upon the fact that the same are legal conclusions.
7. Mr. Shippen has received a written notice, but deny that the notice is appropriate as no cause of action should exist against Robert and Jorja Shippen and that the Shippen Construction claim is without merit. None of these parties was the general contractor.
8. The defendants admit that they have accepted service, but deny the remainder of said allegation.
9. Admit that Marriott Homes, LLC is a limited liability company with members of Robert and Jorja Shippen. The balance of the paragraph is denied. Marriot Homes, LLC did not receive notice either by actual notification or by constructive notice.
10. Defendants reincorporate and re-allege answers previously set forth in paragraphs 1 through 9.
11. A contract for real estate sale was entered into, but the allegations do not set forth

the proper particulars of the defendants without review of said contract. As such, the defendants admit that a real estate venture was entered into between some of the parties and believe the residence and property are not properly before the court.

12. Deny that a builder's warranty applies to all aspects of a building and is specific in nature.

13. As to the exact date contained in this paragraph, the defendants are unsure, but admit the balance of said paragraph.

14. Deny.

15. The exact nature of the leaching system was discussed, but the particulars are uncertain as to these answering parties.

16. Deny.

17. The defendants are without knowledge and, therefore, deny the same.

18. The defendants are without knowledge and, therefore, deny the same.

19. Deny.

20. Deny.

21. Deny.

22. Defendants re-allege paragraphs answered 1 through 21 as though full set forth hereafter.

23. Deny.

24. Deny.

25. Deny.

26. Deny.

27. Deny.

28. Defendants re-allege paragraphs answered 1 through 27 and incorporate the same herein.

29. Deny.

30. Deny.

31. Deny.

32. Deny.

33. Defendants re-allege paragraphs answered 1 through 32 and incorporate the same herein.

34. Deny.

35. Deny.

36. Deny.

37. Deny.

38. Defendants re-allege paragraphs answered 1 through 37 and incorporate the same herein.

39. Deny.

40. Deny.

41. Deny.

42. Deny.

43. Deny.

44. Defendants re-allege paragraphs answered 1 through 43 and incorporate the same herein.

45. Deny in its entirety.

46. Deny.

47-51. Deny.

52. Defendants re-allege paragraphs answered 1 through 51 and incorporate the same herein.

53-59. Deny

60. Defendants re-allege paragraphs answered 1 through 59 and incorporate the same herein.

61-67. Deny.

68. Defendants re-allege paragraphs answered 1 through 67 and incorporate the same herein.

69-72. Deny.

ATTORNEY FEES

Defendants have been made aware that an attorney represents plaintiffs, but deny the plaintiffs should have set forth this Complaint and the various amendments to the complaint and have unduly burdened the defendants and have caused expense and cost to the defendants through attorney fees, costs, time and expenses. Therefore, these defendants deny that the plaintiffs should be awarded anything including fees and costs. The defendants should be awarded their/its fees and costs.

FIRST AFFIRMATIVE DEFENSE

The written sales agreement specifically requires and requests the plaintiffs to inspect and cause inspections to be made upon the real property in question. As such, the plaintiffs are without a cause of action for which relief may be granted and did, in fact, conduct their own inspection of the real property through their own hired expert.

SECOND AFFIRMATIVE DEFENSE

The defendants have given no specific warranties for sub-water control, and, as such are acts of God and not within the control of the builder.

THIRD AFFIRMATIVE DEFENSE

The plaintiffs are estopped from asserting their claims herein and the defendants rely upon detrimental reliance, estoppel and other similar defenses.

FOURTH AFFIRMATIVE DEFENSE

The defendants reserves the right to set forth additional defenses based upon adequate Discovery and/or evidence produced at hearings and at trial.

JURY TRIAL

The defendants request a trial by jury.

ATTORNEY FEES

The defendants herein request attorney fees as are recoverable by contract, statute, rule and/or case law developed in the State of Idaho.

WHEREFORE, defendants having fully answered the Third Amended Complaint on file herein request and pray for relief as follows:

1. That the Complaint on file herein be dismissed with prejudice;
2. That the defendants, each and every one of them, be awarded attorney fees, reasonable costs of court and other such expenses as are necessarily recoverable in defending this action;
3. For all relief that is just in the premises.

DATED this 9th day of November, 2010.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of November, 2010 a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
 Postage-prepaid mail
 Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405
208.523-7254

02

DUNN LAW OFFICES, PLLC
 Robin D. Dunn, Esq., ISB # 2903
 Amelia A. Sheets, Esq., ISB #5899
 P.O. Box 277
 477 Pleasant Country Lane
 Rigby, Idaho 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)

2010 NOV 22 PM 4:50
 JEFFERSON COUNTY, IDAHO

rdunn@dunnlawoffices.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and)
 SHELEE BETH GOODSPEED,)
 husband and wife,)
)
 Plaintiffs,)
)
 vs.)
)
 SHIPPEN CONSTRUCTION, INC.,)
 et. al.)
)
 Defendants.)
 _____)

Case No. CV 09-015

DEFENDANTS' RESPONSE
 AND OBJECTION TO
 PLAINTIFF'S MOTION TO
 EXCLUDE EXPERT
 WITNESSES

COME NOW, defendants, by and through counsel and responds and objects to that document of the plaintiff's entitled "Motion to Exclude Witnesses", for the reason that defendants have responded appropriately to discovery; that the Motion is brought without foundation; that the plaintiff's could have deposed experts witnesses disclosed to the plaintiffs; and, defendants are still willing to attend and extend any timelines that suit plaintiff's desire to depose any expert or any other person that the plaintiff's would like to depose.

The request for attorney fees by the plaintiffs is not appropriate and this

response indicates that fees should be granted to the defendants and are so requested pursuant to rule, statute and respective case law in Idaho.

This response and objection is supported by the affidavit of Robin D. Dunn, attorney for plaintiffs; the pleadings on file herein; and, oral argument to be presented at hearing.

Dated this 22nd day of November, 2010.

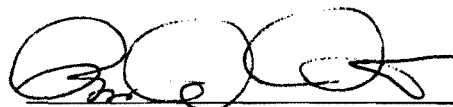


Robin D. Dunn
Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of August, 2010, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

Courtesy Copy To: Honorable Gregory Anderson/Dane Watkins
Bonneville County Courthouse
605 N. Capital
Idaho Falls, ID 83402

2010 NOV 22 PM 4:50
JEFFERSON COUNTY, IDAHO

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rdunn@dunnlawoffices.com

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODSPEED,)
husband and wife,)

Plaintiffs,)

vs.)

SHIPPEN CONSTRUCTION, INC.,)
et. al.)

Defendants.)

Case No. CV 09-015

AFFIDAVIT OF ROBIN D.
DUNN RULE RE: DISCOVERY
ON EXPERTS

STATE OF IDAHO)
)ss
County of Jefferson)

ROBIN D. DUNN, being first duly sworn upon oath, states as follows:

1. That he is the attorney for the named defendants in the above-captioned matter is over the age of 18 and competent to file this affidavit. Your affiant attended depositions in this cause, filed discovery and discovery answers and is familiar with the information set forth hereafter.
2. That early in the case, to-wit: May 12, 2009 (Notice of Service in Court File)

AFFIDAVIT OF ROBIN D. DUNN ON DISCOVERY RE: EXPERTS

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- plaintiffs filed initial discovery requesting standard information and information on potential experts. This discovery included 21 interrogatories; 21 requests for admissions and 17 requests for production of documents.
3. On July 15, 2009, the defendants indicated a hydrologist would be obtained but had not been hired at that point. (Notice of Service in Court file). The defendants always indicated that an expert in the field of water issues would be retained. This matter has been known to counsel for the plaintiffs for over 1.5 years.
 4. A supplemental response by defendants was sent on documents on the date of January 22, 2010.
 5. The plaintiffs conducted depositions on the following: a) plaintiffs, Robert and Jorja Shippen in capacities as husband and wife and in capacities of members/shareholders/directors of the co-defendants. These depositions occurred on February 24, 2010. b) Dave Chapple, realtor, was deposed on March 4, 2010. c) Paul Jenkins, developer, was deposed on March 4, 2010. d) Nicholas Shippen, employee, was deposed on March 4, 2010. e) Justin Fullmer, foundation/excavation sub-contractor, was deposed on February 25, 2010.
 6. These foregoing depositions indicated that there were water issues and should have given further notice to the plaintiffs that a hydrologist would be retained- which was stated in the depositions. Additionally, 22 Exhibits were disclosed in the depositions for trial use.
 7. Orally, on no less than four (4) occasions, since the original filing of this complaint, the defendants' counsel has informed the plaintiffs' counsel that a

hydrologist was or had been retained. After these verbal notices, plaintiffs' counsel indicated he may take the deposition of the hydrologist.

8. Attorney for the formation of companies named as co-defendants, Billy G. DuPree, Jr. was subpoenaed for documents on February 17, 2010. He complied with files on the various formation, minutes and other matters of the co-defendants.
9. The defendants' accountant was likewise subpoenaed for production of documents tax returns which were answered.
10. The defendants have stipulated on one prior occasion to the extension of discovery to assist both parties. (Date of 7/12/10 on Stipulation in court file). Plaintiffs indicated that they may depose the hydrologist. No mention was made of the governmental "experts" such as Ray Keating of the Health Department, Naysha Foster of Planning and Zoning or of James Lynch the building inspector. These experts do not generate reports; the defendants disclosed their potential testimony; and, the plaintiffs were free to depose these persons.
11. Also, the documents of Winstar Realty were subpoenaed on January 13, 2010. (Dave Chapple, Employee.)
12. The plaintiffs' have filed an original complaint and three (3) subsequent amended complaints which the defendants were required to answer. Each answer further gave responses that would lead to further knowledge for the benefit of the plaintiffs and, certainly, would further lead to the water issues.
13. On June 9, 2010, the defendants further filed supplemental responses containing 362 pages. Exhibit A is the cover letter to verify the same.

14. The defendants obtained the documents from the government “experts” and sent the same to the plaintiffs. (See Motion for Protective Order, page 2-dated February 12, 2010.)
15. Defendants answered subsequent Requests for Admissions numbered 22-38 on June 24, 2010. (See Notice of Filing in Court File). See Exhibit B cover letter to indicate compliance and further attempts to work with and comply with unknown questions or informal discovery requests of the plaintiffs.
16. First American Title Company was sent a subpoena for documents by the plaintiffs. This subpoena was honored. (Subpoena of June 18, 2010).
17. The Order on disclosure of expert testimony was heard by retired judge, Richard T. St.Clair and signed by administrative judge, Jon Shinderling. That order dated September 15, 2010 required “Defendants are compelled to disclose that information known regarding the scope of the intended expert testimony and produce those reports as they are generated.” Defendants have complied as the response is before the court and is attached with the affidavit of plaintiff’s counsel on plaintiff’s motion to exclude experts. (See also, Notice of Service dated September 20, 2010 filed by defendants’ counsel in the court records.)
18. At the time of the response on experts, the plaintiffs counsel indicated that the deposition of Roger Warner may be taken. To date, no notice of deposition has been given to defendants on any of the named governmental custodian “experts” or of Roger Warner.
19. No written report has been generated by Roger Warner as of the date of this affidavit. The defendants still do not object to the plaintiffs taking the deposition



of Roger Warner. The plaintiffs, for whatever reason, have chosen not to take his deposition.

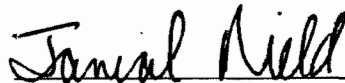
20. The plaintiffs have named Ray Keating, one of the defendants "experts" in their discovery responses dated October 13, 2010. Yet, the plaintiffs are objecting to the experts of the defendants.
21. The expert disclosure list of the plaintiffs was subsequent to the disclosures of the defendants. The defendants actually disclosed their experts prior to that of the plaintiffs. See plaintiff's expert disclosure list in the court file dated October 13, 2010 with the defendants' supplemental disclosures occurring in September of 2010 as stated above.)
22. The defendants have done everything possible to accommodate the discovery requests and informal discovery requests of the plaintiffs. Much of the foregoing information for the court is to show the extensive discovery and compliance therewith by the defendants.

DATED this 22nd day of November, 2010



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

SUBSCRIBED AND SWORN to before me this 22nd day of August, 2010.



Notary Public for Idaho
Residing at: Lewisville
Commission: 1/31/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of August, 2010, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
 Postage-prepaid mail
 Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

Courtesy Copy To: Honorable Gregory Anderson/Dane Watkins
Bonneville County Courthouse
605 N. Capital
Idaho Falls, ID 83402

EXHIBIT A

DUNN LAW OFFICES, PLLC

ROBIN D. DUNN
AMELLA A. SHEETS

Telephone: (208) 745-9202

P.O. Box 277
477 Pleasant Country Lane
Rigby, Idaho 83442-0277
email: rdunn@dunnlawoffices.com

Facsimile: (208) 745-8160

June 9, 2010

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405-1630

Re: Goodspeed v. Shippen

Dear Mr. Davis:

I have attached further discovery documents consisting of 362 pages. I have attached the responses of my client in handwritten notes on your letter for appropriate response. I could dictate a letter going through each and every item, but have reviewed the file and believe those items are present along with the handwritten notes attached to your letter. I further believe we have complied with all of your outstanding discovery requests.

If, however, there is some additional information that we have somehow missed, please inform. However, I do believe that everything is current as of the dated indicated. I have given a total of page numbers in the event that discovery issues were relevant to protect my client and self as to the documents provided.

This informal response should be construed as updating formal discovery requests, requests in depositions and/or other informal requests you have made for discovery via written letter. Thus, I think all is in order.

Given the voluminous nature of the discovery thus far, if I have overlooked something, please advise.

The reason I have not gotten back to you on my requests for deposition dates of your client, is the time constraints and the heavy caseload that is in our office at the present time. I certainly would appreciate additional dates as I was planning on getting discovery by way of deposition from your client this week. However, I could not work that into my schedule.

Weston S. Davis, Esq.
June 9, 2010
Page 2

Thus, the next time your client is available and in town, please let me know so that I could schedule his deposition and give you plenty of advance notice.

Sincerely,

A handwritten signature in black ink, appearing to read "Robin D. Dunn", with a stylized flourish at the end.

Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

RDD/jn
enclosures
cc: client

2010

EXHIBIT B

DUNN LAW OFFICES, PLLC

ROBIN D. DUNN
AMELIA A. SHEETS

Telephone: (208)745-9202

P.O. Box 277
477 Pleasant Country Lane
Rigby, Idaho 83442-0277
email: rdunn@dunnlawoffices.com

Facsimile: (208) 745-8160

June 24, 2010

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405-1630

Re: Goodspeed v. Shippen/Reply letter to your June 18, 2010

Dear Mr. Davis:

I have received your letter dated June 18, 2010 and respond to your various inquiries and/or bullet points as follows:

1. Robert and Jorja Shippen had a tax return for the year 2005. I assume that tax return was not contained in the original discovery. Both Marriott Homes, LLC and Shippen Construction, Inc., questions regarding returns for 2005 were answered in Requests for Admission.
2. Previously, I sent you a LLC partnership tax return for Marriott Homes, LLC in the year 2007. Attached to the discovery responses on Requests for Admission is another copy.
3. My client will obtain a list of all assets, titles, etc., through the Jefferson County Assessor. This lists all ownership assets as are in compliance with the laws of the State of Idaho through the tax assessor.
4. You add an additional question on Request for Production No. 8. The only debt existed, known to my client(s), is a crane which had a debt against it. He is attempting to obtain that through the banking institution.
5. We are obtaining from the court records in the Jefferson County Assessor's Office any property owned by Marriott Homes, LLC or Shippen Construction, Inc. I am quite sure Marriott Homes, LLC does not own any equipment or real property. At the time of registration of contractors in the State of Idaho, Mr. Shippen was informed that he only needed one (1) license for both Marriott Homes, LLC and Shippen Construction, Inc. He obtained that licensing. That is answered in Requests for Admission.

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Furthermore, in the current year, the State of Idaho has now requested that he has two (2) separate licenses for each entity. Those funds have been paid, but a license has not been received from the State of Idaho via mailing. Those are answered in Requests for Admission.

6. Regarding various checks that you would like to view which detail the QuickBooks actions, do not exist. My client does not receive a return of checks from the banking institution. Whether those checks are available through the bank is unknown to my client. If you want to further investigate this matter through the banking institution, we will provide any releases necessary for you to purchase said copies. In any event, my client does not have return and cancelled checks. That is why he enters them on the QuickBooks for his expenses and otherwise. You are certainly free to obtain a request from my client to handle these particular issues if you decide to pay for the bank services.

7. There is no construction insurance policy for Marriott Homes, LLC. Each project is individually insured as to the real property and not through the general contractor, Marriott Homes, LLC. That information has already been supplied to you in previous documents.

8. Your last question in your letter really seems unusual. My clients have had a Home Equity Loan against their real property for numerous years. They have no construction loans and simply pay on a line of credit on their personal house. When monies come back through payment of individual sales, the line of credit is paid down or off. I think that was made clear in the deposition of Mr. Shippen. Thus, there is no underlying paperwork to provide to you and I really do not know what you mean by "a second mortgage on his property". There is no such animal as he merely has a line of credit against his own personal residence.

Enclosed you will find the Notice of Deposition Duces Tecum. Many of the records that I believe you will intend to use are in the deposition exhibits. I certainly will rely upon those exhibits. However, if you have any additional exhibits you intend to use at any hearings or trial of this matter, please bring them to the deposition. Also, I would like to find out all payments made on the lot and real property that is the subject of this litigation. I would assume your clients have some sort of checks, drafts, money orders or other evidences of payment. The final request is their tax returns for the years in question. If those three (3) items can be complied with at the deposition, it would be helpful. Prior to the depositions, if there are any problems in bringing any of these documents, please inform as I would like to inquire into certain specifics. Thus, I could more fully prepare for a complete deposition. Given your thoroughness, I doubt you would let your clients be negligent on these requests and providing the documents necessary.

Weston S. Davis, Esq.
June 24, 2010
Page 3

Enclosed are our Answers to Requests for Admissions 22-38 and Supplemental Interrogatory. In the meantime, my client is obtaining additional information per your additional Interrogatories and Requests for Production of Documents. Although I believe much of the information provided or seemed to be provided is irrelevant to trial, I am endeavoring to provide you with all materials that you think has some relevancy to the trial at hand. However, my approach is much different than yours in this particular matter. I believe that the issue of liability is still a major hurdle for anyone attempting to litigate water issues in Jefferson County.

In any event, I will continue to do and take best efforts to comply with the various discovery requests regardless of my opinion of value or relevancy in the upcoming litigation.

Sincerely,



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

RDD/jn
enclosures
cc: client

Date 11/29/10
Defendant Name _____

Title of Action Goodspeed v. Shippen
Case Number CV-2009-15

Judge Anderson

Refer. #

1:52 Weston Davis - Appeared on behalf
plaintiff

Robin Dunn - for defendants

motion to exclude expert witnesses

Davis presents argument supporting motion -
he does not understand what defendant's
~~experts~~ experts will testify about. He ~~also~~ also
moved the court to grant attorney fees for
this matter.

Dunn presents argument

Davis Responds

The Court denied the motion

Dunn will prepare the order

WESTON S. DAVIS, ESQ (ISB No. 7449)
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
Post Office Box 51630
Idaho Falls, Idaho 83405-1630
Telephone (208) 522-3001
Fax (208) 523-7254

NOV. 29, 2010 NA
NOV 29 11:21
DISTRICT COURT OF IDAHO

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

**REPLY TO DEFENDANT'S
RESPONSE AND OBJECTION TO
MOTION TO EXCLUDE EXPERT
WITNESSES**

COME NOW Plaintiffs, Shawn and Shellee Goodspeed, by and through their attorney of record, and hereby reply to Defendants' response and objection to the motion to exclude expert witnesses as follows:

Defendants have failed to address the issue presented to the Court on Plaintiff's motion: Plaintiffs cannot depose Defendants' experts without information regarding the experts' conclusions, opinions, facts or data upon which the experts will rely, and any exhibits upon which the experts will

rely. In short, as mentioned in the *Schmechel* case, Plaintiffs cannot expect to intelligently question an *expert* if they do not have an idea of the opinions or conclusions of the expert. It would reason from this opinion that courts cannot expect attorneys to analyze a scientific opinion of an expert on the spot based upon the attorneys' independent understanding of that science. Expert opinions will usually need another trained expert to analyze flaws in the analysis.

Therefore, under defendants' approach, multiple depositions would be required—one to define the opinions of an expert and another to analyze the opinion of an expert once those conclusions have been established and evaluated by the adverse party.

Furthermore, the Rules of Civil Procedure allow Plaintiffs to extract information from an expert or other witness by interrogatory rather than by deposition if a party so chooses. I.R.C.P. 26(b)(4): "Discovery of facts known and opinions held by experts expected to testify [. . .] may be obtained by *interrogatory* and/or deposition." A deposition of an expert is not mandated by the rule to extract information. Thus, if interrogatories requesting specific information regarding the expert's testimony are not timely supplemented pursuant to I.R.C.P. 26(e)(1), the expert may be excluded under I.R.C.P. 26(e)(4).

This is not to say that Plaintiffs intended to use this rule as a sword. Quite the contrary. Plaintiffs frequently showed a willingness to depose the Defendant's experts once it could be prepared to do so. However, Plaintiffs could not prepare without some basis in understanding as it relates to the expert's opinions or conclusions. For this reason this court ordered on September 15, 2010 this information be produced. Defendant's produced Exhibit "C". See *Affidavit of Weston S. Davis*.

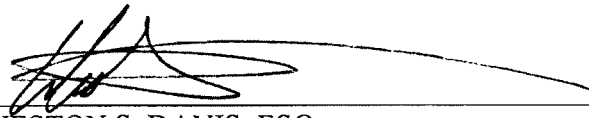
Upon reviewing Exhibit "C", it appears Defendants themselves are not aware of their own

experts opinions, conclusions, or facts upon which their experts will rely. They admit they have no expert reports and they do not provide any additional information about the conclusions or opinions of their experts. Instead, it appears Defendants only intend to consult their experts immediately prior to the time of trial. If Defendants do not know what their experts will say, they cannot expect the Plaintiffs come prepared to depose their experts.

If the Defendants are, in fact, aware of the specific conclusions and opinions of the experts, it would have been prudent to disclose that information some time ago. However, this Court is in possession of the entirety of the information Plaintiff's have about Defendants' experts opinions or conclusions. *See Exhibit "C" to Affidavit of Weston S. Davis.* In Exhibit "C", produced shortly before the discovery deadline and of which Plaintiffs' promptly requested be supplemented, there are no conclusions. There are no opinions. There are no facts or reasoning set forth as to why an expert believes one thing over another or what the expert even believes. Simply put, Defendants have stated that their experts will talk about the issues found in the complaint.

These "experts" therefore should not be permitted to testify at trial where they have not set forth their analysis for Plaintiffs to fairly evaluate their opinions in advance of trial.

DATED this 24 day of November, 2010.


WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE


I hereby certify that I served a true copy of the foregoing document upon the following this 24 day of November 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

- Mailing
- Hand Delivery
- Fax **208.745.8160**
- E-Mail
- Overnight Mail
- Courthouse Box

Hon. Gregory Anderson
Bonneville County Courthouse
605 N. Capital Ave.
Idaho Falls, ID 83402

- Mailing
- Hand Delivery
- Fax
- E-Mail
- Overnight Mail
- Courthouse Box



WESTON S. DAVIS, ESQ.

L:\wsd\~ Clients\7411.1 Goodspeed\Exclude Expert (Reply).wpd

WESTON S. DAVIS, ESQ (ISB No. 7449)
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
Post Office Box 51630
Idaho Falls, Idaho 83405-1630
Telephone (208) 522-3001
Fax (208) 523-7254

2010 DEC -2 PM 12:51
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

**NOTICE OF DEPOSITION DUCES
TECUM OF ROGER WARNER**

PLEASE TAKE NOTICE that Plaintiffs, by and through their attorneys of record, Nelson Hall Parry Tucker, P.A., will take the deposition on oral examination of ROGER WARNER, before a Certified Court Reporter in and for the State of Idaho on December 14, 2010, at 9:30 a.m., at the law offices of Nelson Hall Parry Tucker, P.A., 490 Memorial Drive, Idaho Falls, Idaho, at which time and place you are invited to appear and cross-examine.

The deponent shall produce and permit inspection and copying, at the time of the deposition

633

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB # 2903
Amelia A. Sheets, Esq., ISB #5899
P.O. Box 277
477 Pleasant Country Lane
Rigby, Idaho 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

~~2010 DEC 22 PM 1:50
DISTRICT COURT
JEFFERSON COUNTY, IDAHO~~

Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON**

**WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODSPEED,)
husband and wife,)
))
Plaintiffs,)**

Case No. CV 09-015

**ORDER ON MOTION TO EXCLUDE
WITNESSES**

vs.

**SHIPPEN CONSTRUCTION, INC., an)
Idaho corporation, and ROBERT and)
JORJA SHIPPEN, husband and wife,)
ROBERT and JORJA SHIPPEN dba)
SHIPPEN CONSTRUCTION,)
ROBERT SHIPPEN, an individual, and)
MARRIOTT HOMES, LLC)
))
Defendants.)**

*FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Honorable Gregory S. Anderson
Date December 20, 2010
Time 11:15 am
Deputy Clerk JM*

**THIS MATTER came on for hearing on the plaintiffs' Motion to Exclude Expert
Witnesses of the defendants on the 29th day of November, 2010; the plaintiffs were
represented by Weston S. Davis, Esq.; the defendant, Robert Shippen, was present with his
attorney of record, Robin D. Dunn, Esq.; and the parties having presented briefing and oral
argument and the Court being fully advised in the premises:**

DOES HEREBY DENY plaintiffs' Motion to Exclude Expert Witnesses.

ORIGINAL
684

IT IS FURTHER ORDERED, that the plaintiffs may take the deposition of any expert witnesses listed by the defendant by agreement of the parties.

It is anticipated that the depositions would occur within a short period of time as trial is set for this matter in January, 2011.

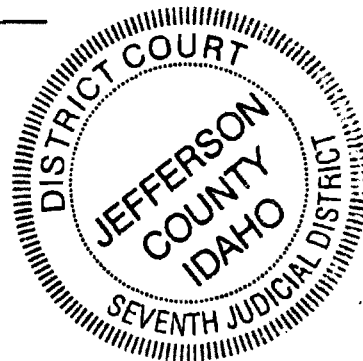
DATED: 12/14/10

Gregory S. Anderson

Gregory S. Anderson
District Judge

Approved as to form:
Weston S. Davis

Weston S. Davis, Esq.



NOTICE OF ENTRY

I HEREBY CERTIFY that on the 20th day of December, 2010 a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission

Clerk of the Court

Lynn M. ...

Deputy Clerk

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

Robin D. Dunn, Esq.
P.O. Box 277
Rigby, Idaho 83442

085

AFFIDAVIT OF SERVICE ON AN INDIVIDUAL

Jefferson
Case No. 09-15

STATE OF IDAHO)

)ss.

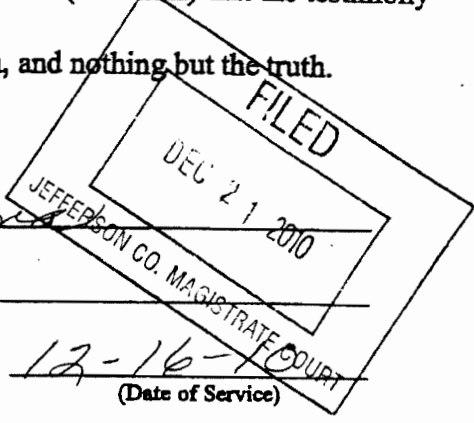
County of Bonneville)

I, *Sharon Nixon*, do solemnly swear (or affirm) that the testimony
(Process Server)

I shall give in the matter at issue shall be the truth, the whole truth, and nothing but the truth.

1. I am over the age of 18 years and am not a party to this action.

2. I served a copy of the *Trial subpoena*
(Name of Document(s) Served)



in this action on *Xcel Construction* on *12-16-10*
(Party Served) (Date of Service)

by delivery to *Daniel Fohrenck*
(Name of Person Who Received Process)

at *10525 S 1st E Lak Falls Idh*
(Address of Service)

(Check only one of the following):

personally.

_____ said address being the usual dwelling or place of abode of said party. The person who received such process then was over the age of 18 and then resided at such address.

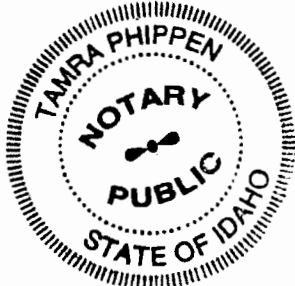
_____ who is agent authorized by law or by appointment to receive service of process for said party.

3. Fee charged for this service: \$ *50.00*.

DATED: *12-17-10* *Sharon Nixon*
(Signature)

SUBSCRIBED AND SWORN to before me this *17th* day of *Dec.* *10*.

(SEAL)



Tamra Phippen
Notary Public for the State of Idaho
Residing at: *Lak Falls Idh*
Commission Expires: *4-29-2011*

250

AFFIDAVIT OF SERVICE ON AN INDIVIDUAL

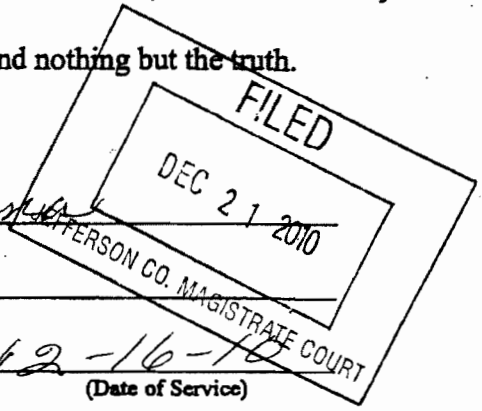
STATE OF IDAHO)
)ss.
County of Bonneville)

Jefferson
Case No. 09-15

I, Sharon Nixon, do solemnly swear (or affirm) that the testimony
(Process Server)
I shall give in the matter at issue shall be the truth, the whole truth, and nothing but the truth.

1. I am over the age of 18 years and am not a party to this action.

2. I served a copy of the Trail subpoena
(Name of Document(s) Served)



in this action on Housemasters on 12-16-10
(Party Served) (Date of Service)

by delivery to Jeff Stoddard
(Name of Person Who Received Process)

at 2229 Hickson Circle Idaho Falls
(Address of Service) *Idh*

(Check only one of the following):

personally.

_____ said address being the usual dwelling or place of abode of said party. The person who received such process then was over the age of 18 and then resided at such address.

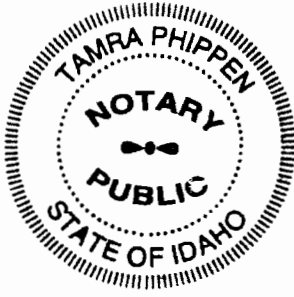
_____ who is agent authorized by law or by appointment to receive service of process for said party.

3. Fee charged for this service: \$ 40.00.

DATED: 12-17-10 Sharon Nixon
(Signature)

SUBSCRIBED AND SWORN to before me this 17th day of Dec., 10.

(SEAL)



Tamra Phippen
Notary Public for the State of Idaho
Residing at: Idaho Falls Id
Commission Expires: 4-29-2011

AFFIDAVIT OF SERVICE ON AN INDIVIDUAL

Jefferson
Case No. 09-15

STATE OF IDAHO)
)ss.
County of Bonneville)

I, *Sharon Ripon*, do solemnly swear (or affirm) that the testimony
(Process Server)
I shall give in the matter at issue shall be the truth, the whole truth, and nothing but the truth.

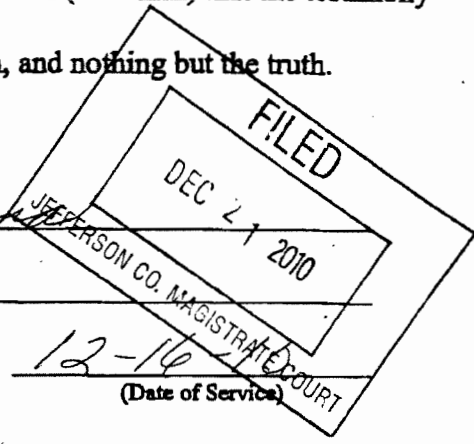
1. I am over the age of 18 years and am not a party to this action.

2. I served a copy of the *Trial Subpoena*
(Name of Document(s) Served)

in this action on *Justin Fullmer* on *12-16*
(Party Served) (Date of Service)

by delivery to *Justin Fullmer*
(Name of Person Who Received Process)

at *3225 E 1650 N Meridian Idh.*
(Address of Service)



(Check only one of the following):

personally.

_____ said address being the usual dwelling or place of abode of said party. The person who received such process then was over the age of 18 and then resided at such address.

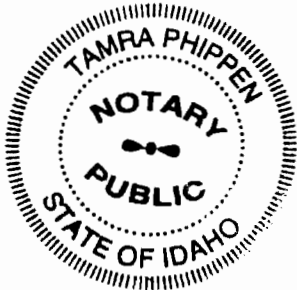
_____ who is agent authorized by law or by appointment to receive service of process for said party.

3. Fee charged for this service: \$ *50.00*.

DATED: *12-17-10* *Sharon Ripon*
(Signature)

SUBSCRIBED AND SWORN to before me this *17th* day of *Dec.*, *10*.

(SEAL)



Tamra Phippen
Notary Public for the State of Idaho
Residing at: *Idaho Falls, Idh.*
Commission Expires: *4-29-2011*

628

WESTON S. DAVIS, ESQ (ISB No. 7449)
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
Post Office Box 51630
Idaho Falls, Idaho 83405-1630
Telephone (208) 522-3001
Fax (208) 523-7254

2010 DEC 21 PM 1:22

JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

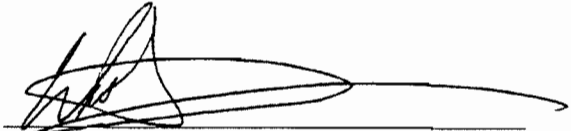
**NOTICE OF VIDEO TRIAL
DEPOSITION OF DAVE CHAPPLE**

PLEASE TAKE NOTICE that Plaintiffs, by and through their attorney of record, Nelson Hall Parry Tucker, P.A., will take the video deposition on oral examination of DAVE CHAPPLE, before a Certified Court Reporter in and for the State of Idaho on Thursday, December 23rd, 2010, at 9:00 a.m., at the office of T&T Reporting, 525 Park Ave #1E, Idaho Falls, 83402 for purposes of testifying at trial by way of video recording in the above-entitled action, at which time and place you are invited to appear and cross-examine.

NOTICE OF VIDEO TRIAL DEPOSITION OF DAVE CHAPPLE - 1

639

DATED this 20 day of December, 2010.


WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 20 day of December 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

- Mailing
- Hand Delivery
- Fax 208.745.8160
- E-Mail
- Overnight Mail
- Courthouse Box

T & T Reporting
525 Park Avenue
P.O. Box 51020
Idaho Falls, ID 83405-1020

- Mailing
- Hand Delivery
- Fax 208.529.5496
- E-Mail
- Overnight Mail
- Courthouse Box

DAVE CHAPPLE
364 N. 4300 E.
Rigby, ID 83442

- Mailing
- Hand Delivery
- Fax
- E-Mail
- Overnight Mail
- Courthouse Box


WESTON S. DAVIS

L:\wsd\~ Clients\7411.1 Goodspeed\Not of Depo DT - Video (Chapple).wpd

570

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB # 2903
Amelia A. Sheets, Esq., ISB #5899
P.O. Box 277
477 Pleasant Country Lane
Rigby, Idaho 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

2010 DEC 28 PM 3:57
DISTRICT COURT
JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and)
SHELLEE BETH GOODSPEED,)
husband and wife,)

Plaintiffs,)

vs.)

SHIPPEN CONSTRUCTION, INC.,)
et. al.)

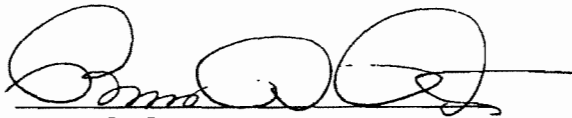
Defendants.)

Case No. CV 09-015

DEFENDANTS'
PROPOSED TRIAL
EXHIBITS

COME NOW, the named defendants and attach the proposed exhibit list of
the defendants for trial. Defendants may use any and all exhibits listed by the
plaintiffs as circumstances may allow.

Dated this 28th day of December, 2010.



Robin D. Dunn
Attorney for Defendants

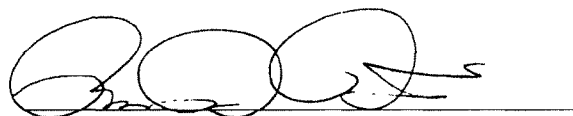
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2010, a true and correct copy of the foregoing was delivered to the following persons(s) by:

Hand Delivery (Weston Davis Received on 12/28/10 at the office of Robin Dunn, Esq.)

Postage-prepaid mail

Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

Courtesy Copy To: Hon. Gregory Anderson/Hon. Dane Watkins
Bonneville County Courthouse
605 N. Capital
Idaho Falls, ID 83402
(via U.S. Mail)

DEFENDANTS' EXHIBITS

EXHIBIT	ADMITTED	OBJECTED	REASON FOR OBJECTION
A	_____	_____	
B	_____	_____	
C	_____	_____	
D	_____	_____	
E	_____	_____	

- A- NAIP aerial photo: Roger Warner, Deposition Exhibit 24
- B- 1970-2008 Hydrology for well: Roger Warner, Deposition Exhibit 25
- C- 2005-2009 Hydrology report: Roger Warner, Deposition Exhibit 26
- D- Unit Hydrograph: Roger Warner, Deposition Exhibit 27
- E- Unit Hydrograph: Roger Warner, Deposition Exhibit 28

F _____

F- Rebuttal Photographs of Roger Warner for surrounding real estate.

J-3

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB # 2903
Amelia A. Sheets, Esq., ISB #5899
P.O. Box 277
477 Pleasant Country Lane
Rigby, Idaho 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

2010 DEC 28 PM 3: 57
DISTRICT COURT
JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and) SHELLEE BETH GOODSPEED,) husband and wife,)) Plaintiffs,)) vs.)) SHIPPEN CONSTRUCTION, INC.,) et. al.)) Defendants.) _____)	Case No. CV 09-015 DEFENDANTS' POSITION ON PLAINTIFFS' PROPOSED EXHIBITS
---	---

COME NOW, the named defendants and attach the proposed exhibit list of the plaintiffs with those exhibits which may be stipulated to for admission at trial.

PROVIDED, HOWEVER, the stipulation for admission is conditional upon some individual testifying with knowledge of the exhibit that the defendants may cross-examine the testifying witness upon the exhibit.

PROVIDED, FURTHER, that the stipulation is not effective until the testimony phase of the trial. The defendants are not stipulating that the exhibits may be used in opening argument.

Objections to exhibits are noted on the attached exhibit list.

Dated this 28th day of December, 2010.



Robin D. Dunn
Attorney for Defendants


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2010, a true and correct copy of the foregoing was delivered to the following persons(s) by:

Hand Delivery (Weston Davis Received on 12/28/10 at the office of Robin Dunn, Esq.)

Postage-prepaid mail

Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

Courtesy Copy To: Hon. Gregory Anderson/Hon. Dane Watkins
Bonneville County Courthouse
605 N. Capital
Idaho Falls, ID 83402
(via U.S. Mail)

EXHIBIT	Exhibit #	STIPULATED (Y/N)	Reason for Objection
MLS LISTING		Yes #11	
Snake River MLS Change Form dated 1/2/07		Yes #20:3	
P&S Agreement and Addendums		Yes #10	
Warranty Deed (Inst #359999) (Shippen to Goodspeed)		Yes #12	
Pictures of SRP taken by Shawn & Shellee of 2008 and 2009 subwater		NO	irrelevant
Pictures of Flood Prep for 2010		NO	irrelevant
DVD recording of 2009 sub-water		NO	"
09/26/08 WSD Letter to Robert Shippen		NO	not proper party
10/29/08 WSD Letter to Robert Shippen		NO	" " "
11/19/08 Letter from Robin Dunn		NO	attorney conclusion
02/15/10 WSD Letter to Robin Dunn		NO	legal conclusion; improper party
Home Improvement Receipts		NO	irrelevant
2009 Tax bill receipt on Property		NO	not accurate for value
Medical Records Shellee Goodspeed		NO	court ruled no medical expenses
Medical Billings & Prescription Receipts for Shellee Goodspeed		NO	" " " " "
Xcel Construction Invoice (7/23/06)		NO	do not know foundation
Deed of Trust on SRP (Inst # 342206) (Jenkins to Shippen)		NO	irrelevant
Deed of Reconveyance (Inst #358688) (Shippen to Jenkins)		NO	"
Member Service Agreement 04/24/06 (Public Record) (Inst #348023)		YES	with testifying witness
District 7 Septic Permit (Public Record) 04/26/06		YES	" " "
Shippen Home Equity Line of Credit Agreement 06/14/05		NO	irrelevant to causes of action
Building Permit & Policies (Public Record) 05/8/06		YES	with testifying witness
Wilson Associates Design of Residence (Public Record) 12/1/02 approved 05/08/06		YES	" " "
Jefferson County 05/23/06 Letter to Shippen Construction (Public Record)		YES	" " "
Building Inspection Tickets (Public Record)		YES	" " "
Bureau of Occupational Licenses printout identifying Robert Shippen as registered K'or 02/17/10 (Public Record)		NO	irrelevant

DEC. 18. 2010 3:26PM

SON PARRY

NO. 607

P. 2

646

Marriott Homes LLC Custom Detail Transaction Reports (10/05 - 03/07 & 1/1/06 - 12/24/07)	NO	NO probative value
Invoices after 12/06 from Carpet Concepts, L & F Electric, Halco Heating, Fulmer Excavating	NO	" " "
Home Depot Receipt 09/07/06 paid by card # -0129	NO	" " "
Lowes Receipts 10/31/06 and 11/02/06 paid by card # -0129	NO	" " "
Shippen Construction Accounting (01/06 - 12/07) and Handwritten Deposit Split Slip	NO	" " "
RE-26 Property Disclosure Form signed by Goodspeeds	YES	w/ testifying witness
FATCO Check (Bank Scan & Check Stub) 07/03/07	NO	NO probative value
FATCO Final Statement signed by the Shippens	NO	" " "
Shippen Taxes 2005 - 2009	NO	" " "
Marriott Taxes 2006 - 2009	NO	" " "
Shippen Inc. Taxes 2006 - 2008	NO	" " "
Commercial General Liability Coverage Part (Farm Bureau, "WC")	NO	insurance agreements ^{admitted} not admitted
06/18/10 WSD letter returned by Robin Dunn with handwriting	NO	communications of attorneys ^{Not} relevant
Shippen Property Asset List produced in Discovery Regarding Vehicles and Tax Assessment Notices for property and property parcels.	NO	NO probative value
Money Market X'fer Documents (12/12/06)	NO	do not know what document
Subdivision On-Site Form & Test Hole Drawing (08/31/04)	YES	w/ testifying witness
Woodhaven Creek Estates Plat Map (Inst #335643)	YES	
District 7 Health Letter from Ray Keating (09/01/05)	YES	w/ Ray Keating testimony
Robert Meikle Survey Report	NO	
Robert Meikle Survey Bill	NO	
Mark Leible Appraisal	NO	
Mark Leible Appraisal Bill	NO	
Jeff Stoddard House Master Home Inspection Report	YES	w/ witness testimony

DEC 18 2010 3:26PM
 NO. 607
 P. 3

17

DUNN LAW OFFICES, PLLC
 Robin D. Dunn, Esq., ISB # 2903
 Amelia A. Sheets, Esq., ISB #5899
 P.O. Box 277
 477 Pleasant Country Lane
 Rigby, Idaho 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)

2010 DEC 28 PM 3:57
 DISTRICT COURT
 JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and)
 SHELEE BETH GOODSPEED,)
 husband and wife,)
)
 Plaintiffs,)

Case No. CV 09-015

DEFENDANTS' PROPOSED
 JURY INSTRUCTIONS

vs.)

SHIPPEN CONSTRUCTION, INC., an)
 Idaho corporation, and ROBERT and)
 JORJA SHIPPEN, husband and wife,)
)
 Defendants.)

COMES NOW, Defendants and request the stock civil instructions set by the
 Idaho State Judiciary as follows:

- IDJI 1.00 Introductory
- 1.01 Deliberations
- 1.05 Statement of Claims Not Evidence
- 1.11 Communicating With Court
- 1.15.2 Completion of Verdict Form on Special Interrogatories
- 1.41.2 Charging Instructions - Plaintiff
- 1.41.3 Charging Instruction – Defendants

[Handwritten signature]

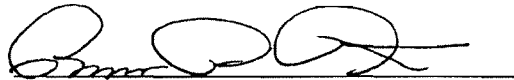
1.43.1 Instruction on Special Verdict

9.00 Cautionary Instruction on Damages

The defendants have not submitted a verdict form with special interrogatories as the same needs to be prepared as the trial progresses and various rulings of the court are considered. The defendants reserve the right to submit a special verdict form at the close of the evidence.

The Defendants submit proposed jury instructions numbered 1 through 18.

DATED this 28th day of December, 2010.




Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of December, 2010 a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
 Postage-prepaid mail
 Facsimile Transmission 208 523-7254


Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

IDJI 1.02 – Corporate parties

INSTRUCTION NO. _____

The corporation involved in this case is entitled to the same fair and unprejudiced treatment that an individual would be under like circumstances. You should decide this case with the same impartiality that you would use in deciding a case between individuals.

IDJI 1.02 – Corporate parties

INSTRUCTION NO. 2

The limited liability company involved in this case is entitled to the same fair and unprejudiced treatment that an individual would be under like circumstances. You should decide this case with the same impartiality that you would use in deciding a case between individuals.

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IDJI 1.20.1 – Burden of proof – preponderance of evidence

INSTRUCTION NO. 3

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

IDJI 1.20.2 – Burden of proof – clear and convincing evidence

INSTRUCTION NO. 4

When I say a party has the burden of proof on a proposition by clear and convincing evidence, I mean you must be persuaded that it is highly probable that such proposition is true. This is a higher burden than the general burden that the proposition is more probably true than not true.

IDJI 1.22 – Deposition testimony

INSTRUCTION NO. 5

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing [and upon video tape]. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

Comment:

The last sentence has been added to IDJI 124 to anticipate inquiry from the jury.

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IDJI 6.01.1 – Elements of contract - introductory

INSTRUCTION NO.

A contract is an agreement between two or more parties to do or not do something that is supported by consideration.

There are four elements to complete a contract. Every contract must have these four elements. The four elements are:

- 1. Competent parties;**
- 2. A lawful purpose;**
- 3. Valid consideration; and**
- 4. Mutual agreement by all parties to all essential terms.**

It is not disputed that the following elements are present in the contract alleged in this case: [State the elements of the contract that are not in dispute, such as “The parties are competent to enter into a contract, and the alleged contract was for a lawful purpose.”].

Comment:

The committee recommends that this instruction be used only where the jury actually needs a "lecture on contracts" The detailed instruction should usually be unnecessary, as only specific issues in dispute need be covered.

IDJI 6.11 – Material breach

INSTRUCTION NO. 7

A “material breach of contract,” as that term is used in these instructions, means a breach that defeats a fundamental purpose of the contract.

Comments:

Ervin Const. v. Van Orden, 125 Id. 695, 699 (1993)

IDJI 4.60 – Fraud - issues

INSTRUCTION NO. 8

In a fraud allegation, the plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

- 1. That the defendant stated a fact to the plaintiff;**
- 2. The statement was false;**
- 3. The statement was material;**
- 4. The defendant either knew the statement was false or was unaware of whether the statement was true at the time the statement was made.**
- 5. The plaintiff did not know that the statement was false;**
- 6. The defendant intended for the plaintiff to rely upon the statement and act upon it in a manner reasonably contemplated;**
- 7. The plaintiff did rely upon the truth of the statement;**
- 8. The plaintiff's reliance was reasonable under all the circumstances;**
- 9. The plaintiff suffered damages proximately caused by reliance on the false statement.**
- 10. The nature and extent of the damages to the plaintiff, and the amount thereof.**

INSTRUCTION NO. 9

The plaintiff has the burden of proof on each of the following propositions:

Count One: Breach of Express Warranty

Breach of express warranty requires that the plaintiff prove each of the following elements by a preponderance of the evidence:

1. An affirmation of fact or promise made by the seller,
2. That the affirmation or promise is material and within the knowledge of the seller,
3. That the affirmation of fact or promise forms a basis of the contract,
4. Reliance by the buyer on the affirmation of fact or promise by the buyer,
5. That the affirmation of fact or promise caused economic damages,
6. That no exclusions or warranty exceptions exist in the written agreement of the parties; and
7. Resulting damages that are ascertainable with certainty.

Count Two: Breach of the Implied Covenant of Good Faith and Fair

Dealing

Breach of implied covenant of good faith and fair dealing requires that the plaintiff prove each of the following elements by a preponderance of the evidence:

1. An action by seller,
2. That impaired rights of the buyer,
3. That such terms were agreed to by both parties,
4. That are only contained in the negotiated contract, and
5. Caused economic and clearly defined damages to the buyer.

Count Three: Breach of Implied Warranty

Breach of implied warranty requires that the plaintiff prove each of the following elements by a preponderance of the evidence:

1. An implied fact or implied promise that the dwelling is habitable and in workable order from the builder,
2. That the implied fact or implied promise is material and within the knowledge of the builder,
3. That the implied fact or implied promise forms a basis of the written contract,
4. Reliance by the buyer on the implied habitability of the structure,,
5. That implied facts or implied promises made the entire structure no habitable, and caused economic damages,
6. That no exclusions or warranty exceptions exist in the written agreement of the parties; and
7. Resulting damages that are ascertainable with certainty.

Count Four: Alter Ego/Veil Piercing

Alter ego or veil piercing requires that the plaintiff prove each of the following elements by a preponderance of the evidence:

1. The existence of a corporate entity in the lawsuit,
2. A unity of interest and ownership of the individual is such that the corporation and the individual act as one, and
3. To allow the separation of the corporation and the individual would sanction a fraud or would promote an injustice.
4. Economic damages can be proven by the plaintiff which is actual and ascertainable.

Count Five: Unjust Enrichment

Unjust enrichment is an alternative pleading to an actual written contract. The plaintiff cannot recover on both a written contract and the theory of unjust enrichment. Unjust enrichment requires that the plaintiff prove each of the following elements by a preponderance of the evidence:

1. That a written contract does not exist,
2. That the defendants received an unjust benefit as a result of the sale the house to the plaintiffs,
3. That the plaintiffs prove ascertainable and concrete value and amount that the defendants benefitted,
4. Actual damages shown by the plaintiffs, and

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5. It would be unjust for the defendants to retain the amount that the defendants benefitted.

Count Six: Fraudulent Concealment of Known Defect

Fraudulent concealment of a known defect requires that the plaintiff prove each of the following elements by clear and convincing evidence:

1. The defendants concealed a past or existing material fact,
2. Which concealment is made with the speaker's knowledge of its falsity or ignorance of its truth;
3. The defendant's intention that it should be acted on by the person to whom it is made;
4. The defendant's ignorance of its falsity on the part of the person to whom it is made,
5. Reliance on the representation made by the defendants;
6. The plaintiff has a reason or right to rely upon the concealment; and
7. Damage is proven with certainty as a result of the concealment.

Count Seven: Fraudulent Misrepresentation of Known Fact

Fraudulent misrepresentation of a known fact requires that the plaintiff prove each of the following elements by clear and convincing evidence:

1. The defendants misrepresented a past or existing material fact,

2. Which misrepresentation is made with the speaker's knowledge of its falsity or ignorance of its truth;
3. The defendant's intention that it should be acted on by the person to whom it is made;
4. The defendant's ignorance of its falsity on the part of the person to whom it is made,
5. Reliance on the misrepresentation made by the defendants;
6. The plaintiff has a reason or right to rely upon the misrepresentation; and
7. Damage is proven with certainty as a result of the misrepresentation.

Count Eight: Fraud in the Inducement

Fraud in the inducement requires that the plaintiff prove each of the following elements by clear and convincing evidence:

1. A representation by the defendants to induce the plaintiff;
2. The representation of the inducement is false;
3. The representation to induce is material;
4. The defendant had knowledge of its falsity or ignorance of its truth;
5. The defendant intended that the representation to induce should be acted on by the plaintiff and in the manner reasonably contemplated;

6. The plaintiff's ignorance of its falsity;
7. The plaintiff relied on the representation as the truth;
8. The plaintiff had the right to rely thereon; and
9. The plaintiff proves proximate injury and ascertainable and certain damages.

Count Nine: Punitive Damages

In any action seeking recovery of punitive damages, the plaintiff must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the defendants against whom the claim for punitive damages is asserted.

In this case, the defendant has asserted affirmative defenses. On these affirmative defenses, the defendant has the burden of proof on each of the following propositions:

IMPROPER PARTIES

1. The plaintiffs have improperly named Robert and Jorja Shippen as husband and wife and as a party defendant.
2. The plaintiffs have improperly named Shippen Construction, Inc. as a party defendant.
3. The plaintiffs have improperly named Robert Shippen as an individual and as a party defendant.

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4. The plaintiffs have improperly named Robert and Jorja Shippen d/b/a Shippen Construction as a party defendant.

INSPECTION OF PROPERTY

1. The plaintiffs, pursuant to the sales agreement, had the right to hire an independent inspector to review the property and structures. The plaintiffs hired their own independent inspector and relied upon such inspection which would bar any recovery by the plaintiffs.
2. The plaintiffs are estopped from asserting any claims because of the private inspection by their own hired expert. Estoppel is to stop, bar, impede, prevent or to preclude.

NO WARRANTIES EXIST FOR GROUND-WATER

Control of the elements of the earth, such as ground-water, are not covered by any warranty and are subject to acts of nature. The defendants maintain that the leaching system was adequate, if used properly, to protect against any water encroachment.

If you find from your consideration of all the evidence that the plaintiff has proved each of the propositions required of the plaintiff for each count of their case in chief, and further find that the defendant has failed to prove each of the propositions required for the affirmative defense, your verdict should be for the plaintiff.

You must also decide if each named defendant has any responsibility on each count of the plaintiff's case in chief.



If you find that the plaintiff has failed to prove each of the propositions required for each count of their case in chief, or find that the defendant has proved any of the propositions required for the affirmative defenses, your verdict should be for the defendant after considering each count of the plaintiff's case in chief.

IDJI 9.00 – Cautionary instruction on damages

INSTRUCTION NO. 10

**By giving you instructions on the subject of damages, I do not
express any opinion as to whether the plaintiff is entitled to damages.**

IDJI 9.03 – Damages for breach of contract – general format

INSTRUCTION NO. 11

If the jury decides the plaintiff is entitled to recover from the defendant, the jury must determine the amount of money that will reasonable and fairly compensate the plaintiff for any of the following elements of damages proved by the evidence to have resulted from the defendant's breach of express warranty:

When I use the term "value" or the phrase "fair market value" or "actual cash value" in these instructions as to any item of property, I mean the amount of money that a willing buyer would pay and a willing seller would accept for the item in question in an open marketplace, in the item's condition as it existed immediately prior to the occurrence in question.

Whether any of these elements of damage has been proved is for you to determine.

IDJI 9.03 – Damages for breach of contract – general format

INSTRUCTION NO. 12

If the jury decides the plaintiff is entitled to recover from the defendant, the jury must determine the amount of money that will reasonable and fairly compensate the plaintiff for any of the following elements of damages proved by the evidence to have resulted from the defendant's breach of good faith and fair dealing:

When I use the term "value" or the phrase "fair market value" or "actual cash value" in these instructions as to any item of property, I mean the amount of money that a willing buyer would pay and a willing seller would accept for the item in question in an open marketplace, in the item's condition as it existed immediately prior to the occurrence in question.

Whether any of these elements of damage has been proved is for you to determine.

IDJI 9.03 – Damages for breach of contract – general format

INSTRUCTION NO. 13

If the jury decides the plaintiff is entitled to recover from the defendant, the jury must determine the amount of money that will reasonable and fairly compensate the plaintiff for any of the following elements of damages proved by the evidence to have resulted from the defendant’s breach of implied warranty:

When I use the term “value” or the phrase “fair market value” or “actual cash value” in these instructions as to any item of property, I mean the amount of money that a willing buyer would pay and a willing seller would accept for the item in question in an open marketplace, in the item’s condition as it existed immediately prior to the occurrence in question.

Whether any of these elements of damage has been proved is for you to determine.

INSTRUCTION NO. 14

Alter ego or veil piercing is a legal term wherein a party tries to impute liability to a person by connecting the corporation or limited liability company to the individual.

The corporation or limited liability company is a separate entity. In veil piercing, a party is attempting to impute liability of a corporation or limited liability company to the individual(s) who own the corporation or limited liability company.

In order to pierce the corporation or limited liability company a party must prove that a unity of interest and ownership of the individual is such that the corporation and the individual act as one.

Blacks Law Dictionary-revised

INSTRUCTION NO. 15

Unjust enrichment is defined as is a general principle that one person should not be permitted to unjustly enrich himself at expense of another but should be required to make restitution for benefits received where it is just and equitable that such restitution be made where such action involves no violation or frustration of law.

Unjust enrichment cannot occur if there is a remedy under a contract or other law.

INSTRUCTION NO. 16

If the plaintiffs prove the allegations of fraud by clear and convincing evidence, the measure of damages is as follows:

Any funds that the plaintiffs have expended and are related with reasonable certainty to the fraud. These damages are referred to as an out-of-pocket measure. Thus, any out-of-pocket proceeds may be awarded if fraud is proven by the plaintiffs.

Nelson v. Armstrong, 99 Idaho 422, 582 P.2d 1100 (1978), Walston v. Monumental Life Ins. Co., 923 P.2d 456, 129 Idaho 211, (Idaho 1996)
----- Excerpt from page 923 P.2d 462.

INSTRUCTION NO. 17

Punitive damages are not a matter of right, but may be awarded in the jury's sound discretion, which is to be exercised without passion or prejudice. The law provides no mathematical formula by which such damages are to be calculated, other than any award of punitive damages must bear a reasonable relation to the actual harm done, to the cause thereof, to the conduct of the defendant, and to the primary objective of deterrence.

Comments:

See Robinson v. State Farm Insurance, 137 Idaho 173, 45 P.3d 829 (2002).

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IDJI 9.2 Revised

INSTRUCTION NO. 18

If plaintiff proves by clear and convincing evidence that the defendant's acts which proximately caused injury to the plaintiff were an extreme deviation from reasonable standards of conduct and that these acts were malicious fraudulent, oppressive, or outrageous you may, in addition to any compensatory damages to which you find the plaintiff entitled, award to plaintiff an amount which will punish the defendant and deter the defendant and others from engaging in similar conduct in the future.

becomes part of the basis of the bargain. > IDAHO CODE § 28-2-313(1)(a) (2001). In order to create an express warranty, the seller need not use formal words such as "warrant" or "guarantee," nor need the seller have a specific intention to make a warranty. > IDAHO CODE § 28-2-313(2) (2001). An express warranty is not created by a seller's mere affirmation of the value of the goods or statement purporting to be merely the seller's opinion or commendation of the goods. *Id.*; > *Jensen v. Seigel Mobile Homes Group*, 105 Idaho 189, 668 P.2d 65 (1983). *Whether a statement by the seller was an express warranty is a question of fact.* 67A AM. JUR.2d Sales § 729 (1985).

76 P.3d 977, 139 Idaho 233, *Keller v. Inland Metals All Weather Conditioning, Inc.*, (Idaho 2003)

----- Excerpt from pages 76 P.3d 980-76 P.3d 981.

Count Two: Implied Covenant of Good Faith and Fair Dealing

Proposition: Did any statements by the seller impair the sales agreement?

It is a covenant in contract, not in tort, and its breach is a breach of contract, not a tort. > *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991); > *Burton v. Atomic Workers Federal Credit Union*, 119 Idaho 17, 23, 803 P.2d 518, 524 (1990); > *Metcalf*, 116 Idaho at 626, 778 P.2d at 748. > (FN3) *The implied covenant of good faith is violated only when a party "violates, nullifies or significantly impairs any benefit of the ... contract."* > *Idaho First National Bank v. Bliss Valley Foods*, 121 Idaho at 289, 824 P.2d at 864
923 P.2d 486, 129 Idaho 241, *Jones v. Micron Technology, Inc.*, (Idaho App. 1996)
----- Excerpt from page 923 P.2d 492

An action by one party that violates, qualifies or significantly impairs any benefit or right of the other party under an employment contract[146 Idaho 136], whether express or implied, violates the covenant. > *Jenkins*, 141 Idaho at 243, 108 P.3d at 390. In the present case, Cantwell received the benefits and rights granted to him under his contract. Since the City did not impair any rights or benefits provided to Cantwell under the contract, Cantwell has no claim for breach of the covenant of good faith and fair dealing. *The covenant does not provide additional rights unavailable under the negotiated contract.*

The court noted that "[t]he implied covenant of good faith and fair dealing arises only regarding terms agreed to by the parties." > *Taylor v. Browning*, 129 Idaho 483, 491, 927 P.2d 873, 881 (1996) (citing > *Idaho First Natl. Bank*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991)). Furthermore:

No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties. The covenant requires "that the parties perform in good faith the obligations imposed by their agreement," and a violation of the covenant occurs only when "either party ... violates, nullifies or significantly impairs any benefit of the ... contract...."

203 P.3d 694, 146 Idaho 764, Bushi v. Sage Health Care, PLLC, (Idaho 2009)
----- Excerpt from page 203 P.3d 698.

191 P.3d 205, 146 Idaho 127, Cantwell v. City of Boise, (Idaho 2008)
----- Excerpt from pages 191 P.3d 213-191 P.3d 214.

Count Three: Implied Warranty

Proposition: An implied warranty only exists at the time of delivery.

> [6]> [7]> [8] > Idaho Code section 28-2-314 provides minimum standards for merchantability. "Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and ... (c) are fit for the ordinary purposes for which such goods are used." > I.C. § 28-2-314. It is expected that goods be "generally acceptable quality under the description used in the contract." > Dickerson v. Mountain View Equip. Co., 109 Idaho 711, 714, 710 P.2d 621, 624 (Ct.App.1985). The test for determining the breach of an implied warranty of merchantability, "is to examine whether the goods were unmerchantable at the time of delivery." > Id. at 716, 710 P.2d at 626.

79 P.3d 154, 139 Idaho 333, Powers v. American Honda Motor Co., Inc., (Idaho 2003)
----- Excerpt from page 79 P.3d 157.

Count Four: Veil Piercing

Proposition: Is the individuality of the corporation and the individual one and the same.

"To warrant casting aside the legal fiction of distinct corporate existence ... it must ... be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person has ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice." > Hayhurst v. Boyd, 50 Idaho 752, 761, 300 P. 895, 897 (1931) (citations omitted).

114 P.3d 974, 141 Idaho 604, Maroun v. Wyreless Systems, Inc., (Idaho 2005)
----- Excerpt from page 114 P.3d 983.

Count Five: Unjust Enrichment

Unjust enrichment cannot occur if there is a written contract as it is an equitable remedy. Were the defendants unjustly enriched and, if so, by how much?

In Blaser v. Cameron, the Court of Appeals indicated that a party seeking recovery under an unjust enrichment theory must present evidence not only of the value of the services it rendered, but also "the amount of the benefit which, if retained by the [defendant], would result in their unjust enrichment." > 121 Idaho 1012, 1017, 829 P.2d 1361, 1366

(Ct.App.1991). The Court of Appeals affirmed the district court's finding that the plaintiff failed to establish a claim for unjust enrichment because it did not present evidence of the amount by which the defendant was unjustly enriched. Id.

103 P.3d 440, 140 Idaho 827, Barry v. Pacific West Const., Inc., (Idaho 2004)
----- Excerpt from page 103 P.3d 447.

Count Six: Fraudulent Concealment

Count Seven: Fraudulent Misrepresentation

Count Eight: Fraud in the Inducement

Proposition: These three counts are almost identical in the fraud elements and the plaintiffs could not recover under all three allegations. Fraud is a standard of clear and convincing evidence as opposed to the preponderance of the evidence standard.

(b) Fraud, Mistake, Condition of the Mind, Violation of Civil or Constitutional Rights. In all averments of fraud or mistake, or violation of civil or constitutional rights, the circumstances constituting fraud or mistake, or violation of civil or constitutional rights shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

IRCP Rule 9, Pleading special matters
----- Excerpt from page 26.

Also, it is axiomatic that [120 Idaho 843] fraud must be proven by clear and convincing evidence. > Gneiting v. Clement, 96 Idaho 348, 528 P.2d 1283 (1974); > Zuhlke v. Anderson Buick, Inc., 94 Idaho 634, 496 P.2d 95 (1972).

> [7] The elements of actionable fraud or misrepresentation generally consist of an untrue representation or statement of past or existing material fact, which representation is made with the speaker's knowledge of its falsity or ignorance of its truth; his intention that it should be acted on by the person to whom it is made; ignorance of its falsity on the part of the person to whom it is made and reliance on the representation; his right to rely upon it; and the damage occasioned thereby. > Weitzel v. Jukich, 73 Idaho 301, 251 P.2d 542 (1952); > Faw v. Greenwood, 101 Idaho 387, 613 P.2d 1338 (1980); > Mitchell v. Siqueiros, 99 Idaho 396, 582 P.2d 1074 (1978).

820 P.2d 707, 120 Idaho 837, Mitchell v. Barendregt, (Idaho App. 1991)
----- Excerpt from pages 820 P.2d 712-820 P.2d 713.

The elements of actionable fraud or misrepresentation are as follows.

> [5] There must be evidence of:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and

in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.... > Faw v. Greenwood, 101 Idaho 387, 389, 613 P.2d 1338, 1340 (1980).

82 P.3d 830, 139 Idaho 548, Aspiazu v. Mortimer, (Idaho 2003)
----- Excerpt from page 82 P.3d 832.

Count Nine: Punitive Damages

Proposition: Punitive damages are not favored in the law and the standard, as set forth below, requires outrageous conduct. In a contract situation, outrageous conduct is next to impossible to prove and this count would "scream" for a directed verdict.

(1) In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.

ID ST Sec. 6-1604, Limitation on punitive damages
----- Excerpt from page 3895.

The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that state be termed "malice, oppression, fraud or gross negligence."

> Cheney v. Palos Verdes Investment Corp., 104 Idaho 897, 905, 665 P.2d 661, 669 (1983) (citations omitted).

39 P.3d 577, 136 Idaho 637, Rockefeller v. Grabow, (Idaho 2001)
----- Excerpt from page 39 P.3d 587

DEFENDANT ISSUES AND DEFENSE MATTERS

1. Equitable Estoppel

Equitable estoppel is based on the concept that it would be inequitable to allow a person to induce reliance by taking a certain position and, thereafter, take an inconsistent position when it becomes advantageous to do so. > Gafford v. State, 127 Idaho 472, 903 P.2d 61 (1995)
997 P.2d 615, 134 Idaho 154, Regjovich v. First Western Investments, Inc., (Idaho 2000)
----- Excerpt from page 997 P.2d 619.

2. Motions in Limine

A motion in limine seeks an advance ruling on the admissibility of evidence. > State v. Young, 136 Idaho 113, 120, 29 P.3d 949, 956 (2001). The motion in limine is based upon an alleged set of facts rather than the actual testimony in order to for the trial court to make its ruling and therefore is not a final order. Id. The trial court may reconsider the issue at any time, *including when the actual presentation of facts is made*. Id.

83 P.3d 773, 139 Idaho 599, Warren v. Sharp, (Idaho 2003)

----- Excerpt from page 83 P.3d 779.

3. Jury Instructions

The forgoing law is intended to support information in the jury instructions and for argument on jury instructions. The defendant reserves the right to add updated instructions as the trial progresses. Jury instructions often require the judge to add instructions not requested to make sure the jury has all applicable law. It is alleged that this trial court may have to add jury instructions to define terms viz. preponderance of the evidence, clear and convincing evidence, oppressive conduct, fraudulent conduct, estoppel, malice, unjust enrichment, oppression and other terms.

**** The defendants have not provided a special verdict with interrogatories because it is unknown how the trial will unfold and what steps the court may take on directed verdict issues and other matters. As such the defendants will supplement the proposed jury instructions to provide for a proper verdict form.

The question whether the jury was properly instructed is a question of law for free review on appeal. > State v. Jones, 125 Idaho 477, 489, 873 P.2d 122, 134 (1994); > State v. Carsner, 126 Idaho 911, 914, 894 P.2d 144, 147 (Ct.App.1995). We ask

whether the instructions as a whole, and not individually, fairly and accurately reflect the applicable law. > State v. Enno, 119 Idaho 392, 405, 807 P.2d 610, 623 (1991); > State v. Velasquez-Delacruz, 125 Idaho 320, 323, 870 P.2d 673, 676 (Ct.App.1994).

Jury instructions utilizing statutory language are proper when they state the law applicable to the facts. > Holland v. Peterson, 95 Idaho 728, 518 P.2d 1190 (1974). 939 P.2d 586, 130 Idaho 267, LaRue v. Archer, (Idaho App. 1997)
----- Excerpt from page 939 P.2d 590.

> Idaho Rule of Civil Procedure 51(a)(1) state that a court is not required to consider jury instructions not received in writing five days prior to the start of the trial. There is an exception to this rule if the instruction relates to a matter which could not reasonably have been anticipated.
963 P.2d 372, 131 Idaho 689, Lunders v. Estate of Snyder, (Idaho 1998)
----- Excerpt from page 963 P.2d 380.

4. Directed Verdict.

The defendants believe that the court will have to review each count of the plaintiffs' case at the conclusion of the evidence presented; and, a directed verdict will be required on some, if not all, counts.

(a) Motion for Directed Verdict--When Made--Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefore. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

IRCP Rule 50, Directed verdicts--Judgments notwithstanding verdict
----- Excerpt from page 154.

Dated this 28th day of December, 2010.



Robin D. Dunn
Attorney for Defendants

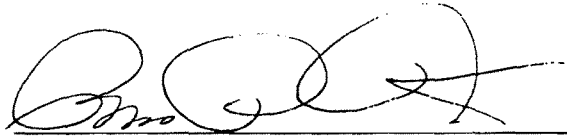
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2010, a true and correct copy of the foregoing was delivered to the following persons(s) by:

Hand Delivery (Weston Davis Received on 12/28/10 at the office of Robin Dunn, Esq.)

Postage-prepaid mail

Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405

Courtesy Copy To: Hon. Gregory Anderson/Hon. Dane Watkins
Bonneville County Courthouse
605 N. Capital
Idaho Falls, ID 83402
(via U.S. Mail)

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM SHAWN GOODSPEED and
SHELLEE BETH GOODSPEED, husband and
wife,

Plaintiffs,

vs.

SHIPPEN CONSTRUCTION, INC., an Idaho
corporation, ROBERT and JORJA SHIPPEN,
husband and wife, ROBERT and JORJA
SHIPPEN, dba SHIPPEN CONSTRUCTION,
ROBERT SHIPPEN, an individual, and
MARRIOTT HOMES, LLC.

Defendants.

Case No.: CV-09-015

**PLAINTIFFS REQUESTED JURY
INSTRUCTIONS (MARKED
DUPLICATE - I.R.C.P. 51(a)(1)
WITH CITATIONS)**

COME NOW Plaintiffs by and through counsel of record and respectfully submit their requested jury instructions in the above entitled matter. Said requested instructions are attached hereto.

DATED this 26 day of December, 2010.


WESTON S. DAVIS

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CERTIFICATE OF SERVICE


I hereby certify that I served a true copy of the foregoing document upon the following this 28 day of December, 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Robin D. Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

- Mailing
- Hand Delivery
- Fax
- E-Mail
- Overnight Mail
- Courthouse Box

Hon. Gregory Anderson
Bonneville County Courthouse
605 N. Capital Ave.
Idaho Falls, ID 83402

- Mailing
- Hand Delivery
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- E-Mail
- Overnight Mail
- Courthouse Box


WESTON S. DAVIS

L:\wsd\~ Clients\7411.1 Goodspeed\Jury Instructions (Marked).wpd

665

INSTRUCTION NO. 1

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

If there were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection I instructed that the answer or remark be stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what

weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

IDJI 1.00 - Introductory instruction to jury.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

587

INSTRUCTION NO. 2

Trials proceed in the following manner. First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiffs will then present evidence, and counsel for the defendant may cross-examine. Then the defendants may present evidence, and counsel for the plaintiffs may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

Ninth Circuit Model Jury Instruction 1.19.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

688

INSTRUCTION NO. 3

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

IDJI 1.01 - Deliberation procedures.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 4

The entities involved in this case are entitled to the same fair and unprejudiced treatment that an individual would be under like circumstances. You should decide this case with the same impartiality that you would use in deciding a case between individuals.

IDJI 1.02 - Corporate parties.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

670

INSTRUCTION NO. 5

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.
6. You must not go to the place where any alleged event occurred.

IDJI 1.03 - Admonition to jury.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

691

INSTRUCTION NO. 6

Members of the jury, I remind you that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case, until after I finally submit the case to you.

IDJI 1.03.1 - Admonition to jury - short form.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

692

INSTRUCTION NO. 7

Whether a party has insurance is not relevant to any of the questions you are to decide.
You must avoid any inference, speculation or discussion about insurance.

IDJI 1.04 - Insurance cautionary.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

6/12

INSTRUCTION NO. 8

The following facts are not in dispute:

In the summer of 2007, Plaintiffs, Shawn and Shellee Goodspeed, purchased a home located at 319 N. 3709 E., Rigby, Idaho. The Goodspeeds purchased this home as new construction from Robert and Jorja Shippen. The parties agreed to a standard builders warranty for a minimum of one year.

At the time of the sale of the home, Robert and Jorja Shippen were aware that sub-water had invaded the premises and the house. Robert Shippen personally cleaned out the sub-water. They were also aware of sub-water in the subdivision and surrounding area. They did not hire a hydrologist or engineer to examine the property before construction began. Prior to the sale of the home, Robert Shippen told Dave Chapple, the listing real estate agent, that the house had not had sub-water issues and that he would install a sub-pump (leaching system) to prevent the possibility of there ever being sub-issues. These statements were published to the public and to realtors through an MLS listing circulated on www.snakerivermls.com. These statements were never changed or removed from the MLS listing.

Within a month of moving in, the Goodspeed's neighbor notified them of standing sub-water in the basement in the year 2006—a year before the Goodspeeds purchased the property. The house and land have continued to suffer sub-water intrusion since the Goodspeeds purchased the property.

In light of the water intrusion, the Goodspeeds halted improvement on the basement of their residence and purchased a water pump, in addition to the one represented by the seller to prevent water from entering the house and the surrounding area. Even with these efforts, water has still intruded into the basement of the house and surrounding outdoor basement area.

The Goodspeeds sent notice to Robert Shippen they would like the property to be repaired. The Goodspeeds have also requested the Shippens take the home back and restore the purchase price. These requests were refused.

IDJI 1.07 - Facts not in dispute (Modified).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 9

To help you follow the evidence, I will give you a brief summary of the claims asserted by the Plaintiffs:

1. Plaintiffs allege the defendants (Robert Shippen and Jorja Shippen; Marriott Homes, LLC; and Shippen Construction, Inc.) materially breached (1) the home purchase agreement's minimum one-year warranty and (2) the warranty that the house has never had sub-water issues and would not have sub-water issues.
2. Plaintiffs further allege the defendants (Robert Shippen and Jorja Shippen; Marriott Homes, LLC; and Shippen Construction, Inc.) breached the implied covenant of good faith and fair dealing in refusing to perform this warranty and by misrepresenting the status of past and future sub-water issues related to the property.
3. Plaintiffs additionally allege the defendants (Robert Shippen and Jorja Shippen; Marriott Homes, LLC; and Shippen Construction, Inc.) breached the implied warranty of habitability by constructing and selling a home that was substantially defective and unfit for human habitation.
4. Plaintiffs allege that the defendants (Robert Shippen and Jorja Shippen; Marriott Homes, LLC; and Shippen Construction, Inc.) share such a unity of interest that the principals of the entities, Robert and Jorja Shippen, should be held individually liable for the acts of Marriott Homes, LLC and/or Shippen Construction, Inc. in the interest of preventing fraud and promoting justice.
5. Plaintiffs allege the defendants (Robert Shippen and Jorja Shippen) were unjustly enriched by receiving a higher purchase price for the home than they would have received had the sub-water issues been disclosed. Plaintiffs allege if the Defendants had disclosed the sub-water issues to the Plaintiffs, Plaintiffs would not have even purchased the home.
6. Plaintiffs allege the defendants (Robert and Jorja Shippen) fraudulently concealed and fraudulently misrepresented the sub-water issues by failing to disclose prior sub-water issues, by stating that the property did not have sub-water issues and would not have sub-water issues, and further by installing a sump-pump under the

premise that it was intended for heavy rain and snow melt run-off.

7. Plaintiffs allege that in so doing, the defendants (Robert and Jorja Shippen) fraudulently induced the plaintiffs into purchasing a residence the plaintiffs would not have otherwise purchased.
8. In relation to the above allegations, Plaintiffs request rescission of the contract and collection of either (1) the full purchase price of the home in addition to incidental and consequential damages or (2) the current fair market value of the home valued as if there were no construction defect.
9. In addition, Plaintiffs request that due to the fraudulent conduct of the Defendants (Robert and Jorja Shippen), an award of punitive damages should be imposed to punish said conduct and prevent future fraudulent conduct.

9th Cir. Model JI 1.2.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 10

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

IDJI 1.05 - Statement of claims not evidence.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 11

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

IDJI 1.09 - Quotient verdicts.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

67

INSTRUCTION NO. 12

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

IDJI 1.11 - Communications with court.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 13

During deliberations, you will have to make your decision based on what you recall of the evidence. You will not have a transcript of the trial. I urge you to pay close attention to the testimony as it is given.

If at any time you cannot hear or see the testimony, evidence, questions or arguments, let me know so that I can correct the problem.

Ninth Circuit Model Jury Instruction 1.13.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 14

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

IDJI 1.20.1 - Burden of proof - preponderance of evidence.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 15

When I say a party has the burden of proof on a proposition by clear and convincing evidence, I mean you must be persuaded that it is highly probable that such proposition is true. This is a higher burden than the general burden that the proposition is more probably true than not true.

IDJI 1.20.2 - Burden of proof - clear and convincing evidence.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 16

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing [and upon video tape]. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

IDJI 1.22 - Deposition testimony.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO 17

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

IDJI 1.24.2 - Circumstantial evidence with definition.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 18

The evidence you are to consider in deciding what the facts are consists of:

1. The sworn testimony of any witness;
2. The exhibits which are received into evidence; and
3. Any facts to which the lawyers have agreed.

Ninth Circuit Model Jury Instruction 1.6.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 19

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness's testimony;
6. the reasonableness of the witness's testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Ninth Circuit Model Jury Instruction 1.11.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

706

INSTRUCTION NO. 20

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Ninth Circuit Model Jury Instruction 2.11.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

4/10/17

INSTRUCTION NO. 21

Certain charts and summaries [may be] [have been] received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Ninth Circuit Model Jury Instruction 2.13.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

708

INSTRUCTION NO. 22

A contract is an agreement between two or more parties to do or not do something that is supported by consideration.

There are four elements to complete a contract. Every contract must have these four elements. The four elements are:

1. Competent parties;
2. A lawful purpose;
3. Valid consideration; and
4. Mutual agreement by all parties to all essential terms.

The parties agree that each of these elements exist in the contract and/or warranty which is at issue in this lawsuit.

IDJI 6.01.1 - Elements of contract - introductory (Modified).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

709

INSTRUCTION NO. 23

To prevail on a breach of contract or breach of express warranty claim, the plaintiffs have the burden of proving each of the following propositions:

1. A contract existed between plaintiff and defendant;
2. The defendant(s) breached the contract;
3. The plaintiffs have been damaged on account of the breach; and
4. The amount of the damages.

If you find from your consideration of all the evidence that each of the propositions required of the plaintiffs has been proved, then you must consider the issue of the affirmative defenses raised by the defendants. If you find from your consideration of all the evidence that any of the propositions in this instruction has not been proved, your verdict should be for the defendants.

**IDJI 6.10.1 - Breach of bilateral contract
(modified).**

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 24

A "material breach of contract," as that term is used in these instructions, means a breach that defeats a fundamental purpose of the contract.

IDJI 6.11

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

711

INSTRUCTION NO. 25

A "material fact" is one which constitutes substantially the consideration of the contract, or without which it would not have been made.

**IDJI 6.08.4 - Interpretation of contract -
definition of material fact.**

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 26

"Materiality" refers to the importance of the representation in determining the party's course of action. A representation is material if (a) a reasonable person would attach importance to its existence or nonexistence in determining a choice of action in the transaction in question, or (b) the maker of the representation knows or has reason to know that the recipient is likely to regard the matter as important in determining the choice of action, whether or not a reasonable person would so consider.

IDJI 6.08.5 - Interpretation of contract - materiality.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

7/3

INSTRUCTION NO. 27

An express warranty is an assurance by overt words or actions of the seller guaranteeing a condition of the agreement upon which a buyer may rely—for example, a seller’s promise that the thing being sold is as represented or promised. A warranty is intended to relieve the buyer of any duty to discover the fact for himself.

**17A Am Jur 2d, Contracts § 410 “Warranties”;
Black’s Law Dictionary, 2nd Pocket Ed., Bryan A.
Garner (2001) “Warranty: Express Warranty”.**

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 28

When a contract is ambiguous, therefore subject to differing interpretations or the language is nonsensical, you may consider evidence outside of the four corners of the written agreement to determine the intent of the parties to resolve the ambiguity in the contract.

An ambiguity can either be evident on the face of the document or manifest itself later when applying the document to the facts as they exist.

Potlach Educ. Ass'n v. Potlach School Dist. No. 285, 148 Idaho 630, *2 (2010); Simons v. Simons, 134 Idaho 824, 828 (2000); Perron v. Hale, 108 Idaho 578, 581 (1985); Molyneux v. Twin Falls Canal Co., 54 Idaho 619, 35 P.2d 651, 654 (1934).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

115

INSTRUCTION NO. 29

In every contract there is an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. The duty of good faith does not obligate a party to accept a material change in the terms of the contract, nor does it inject the substantive terms into the parties contract. Rather, the implied covenant requires that the parties perform in good faith the obligations imposed in this agreement. Thus, the duty arises only in connection with terms agreed to by the parties. A violation of the implied covenant is a breach of contract.

*Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.,
121 Idaho 266, 287 (1991).*

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

7/16

INSTRUCTION NO. 30

As a matter of public policy, implied in the sale of newly constructed residences is a warranty of habitability by the builder-vendor. This implied warranty is a warranty whereby a purchaser is able to rely on the skill of the builder that the structure will be fit for habitation. If you find that the subject home contains defects substantially impairing its habitability, liability attaches the builder-vendor of the residential property regardless of fault.

Tusch Enterprises v. Coffin, 113 Idaho 37, 46 - 47 (1987); Phillip L. Burner & Patrick J. O'Connell on Construction Law, §9:72 (2002).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

1/17

INSTRUCTION NO. 31

The implied warranty of habitability also extends from the seller/vendor of the residence if the seller/vendor has expertise in the construction business and exercised control over the construction of the residence.

Tusch Enterprises v. Coffin, 113 Idaho 37, 48 (1987).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

412

INSTRUCTION NO. 32

The implied warranty of habitability extends to latent (concealed or dormant) defects which manifest themselves within a reasonable time.

Tusch Enterprises v. Coffin, 113 Idaho 37, 50 (1987).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

119

INSTRUCTION NO. 33

Idaho law also provides that the seller of a house under construction impliedly warrants that the house will be completed in a workmanlike manner. Thus, if you find that the home and property was fit for habitation, but has defects which can be remediated, you are to assess the costs for repairs of such defect, which may be measured by the difference between the contract price and the actual value of the property received.

Bethlahmy v. Bechtel, 91 Idaho 55, 60 (1966).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 34

Disclaiming a warranty requires a conspicuous provision (text in large, bold, or capital letters) which is clear and unambiguous, fully disclosing the consequences of its inclusion. This places a heavy burden on the builder to show the buyer has relinquished the protection afforded to the buyer by public policy and that the buyer has done so knowingly. By this approach, boilerplate clauses (ready made or form language), however worded, are rendered ineffective thereby affording the consumer the desired protection without denying enforcement of what is in fact the intention of both parties. A knowing waiver of this protection will not be readily implied and should be obtained with difficulty.

Tusch Enterprises v. Coffin, 113 Idaho 37, 45 - 47 (1987); *Black's Law Dictionary*, 2nd Pocket Ed., Bryan A. Garner (2001) "Boilerplate", *Myers*, 114 Idaho 432, 437 (1988).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 35

There are times when the form of a corporate entity (such as a corporation or a limited liability company) is disregarded and imposed on a corporation's shareholder and president of a corporation. This is called the doctrine of "piercing the corporate veil."

Two requirements must be met:

1. There must be such a unity of interest and ownership that the separate personalities of the corporation and individual no longer exist; and
2. That if the acts are treated only as those of the corporation, an inequitable result will follow or that it would sanction a fraud or promote injustice.

There are several factors which may be reviewed when considering whether the corporate veil should be pierced:

1. Whether the individual is the sole shareholder acting as president;
2. Whether the entities employed the same personnel and officers and had identical boards of directors.
3. A lack of corporate formalities;
4. Disregard for the separateness of the entity;
5. Accrual and payments of accounts;
6. Satisfaction of inter-company claims;
7. Using one company to offset the losses of another;
8. The individual using his or her name interchangeably with the entity's name when dealing with third parties;
9. Whether the entity(ies) are undercapitalized and unable to pay their debts;
10. Whether an attempt to collect on a judgment against an entity would likely be futile.

These factors are not exclusive because the conditions under which the corporate entity may be disregarded vary according to the circumstances of the case.

VPC VC v. Dakota Co., 141 Idaho 326, 335 (2005); *In re Weddle*, 353 B.R. 892, 898 - 899 (2006); *Hutchinson v. Anderson*, 130 Idaho 936, 940 - 941 (Ct. App. 1997); *Alpine Packing Co. v.*

H.H. Keim Co., Ltd., 121 Idaho 762, 763 - 764
(Ct. App 1991); *Maroun v. Wyreless Systems,
Inc.*, 141 Idaho 604, 613 (2005); *Baker v. Kulczyk*,
112 Idaho 417, 419 - 420 (Ct.App. 1987).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

1/23

INSTRUCTION NO. 36

Even if you determine there is no agreement between the parties, under certain circumstances where a party has been unjustly enriched by the actions of another the law will require that party to compensate the other for the unjust gain. To recover under this theory, the plaintiff has the burden of proving each of the following:

1. The plaintiffs provided a benefit to the defendants;
2. The defendants accepted the benefit; and
3. Under the circumstances, it would be unjust for the defendants to retain the benefit without compensating the plaintiffs for its value.

IDJI 6.07.2 - Unjust enrichment - equitable theories (modified).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

724

INSTRUCTION NO. 37

The term "agent" refers to a person authorized by another, called the "principal," to act for or in the place of the principal. The principal is responsible for any act of the agent within the agent's scope of authority.

IDJI 6.40.1 - Agency defined; *Large v. Cafferty Realty, Inc.*, 123 Idaho 676, 681 (1993).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

4/25

INSTRUCTION NO. 38

To prevail on an action for fraud or misrepresentation, the plaintiffs have the burden of proving each of the following propositions by clear and convincing evidence:

1. A representation to the plaintiffs;
2. The representation was false;
3. The representation was material;
4. The defendants either knew the representation was false or was unaware of whether the representation was true;
5. The plaintiffs did not know that the representation was false;
6. The defendants intended for the plaintiffs to rely upon the representation and act upon it in a manner reasonably contemplated;
7. The plaintiffs did rely upon the truth of the representation;
8. The plaintiffs' reliance was reasonable under all the circumstances;
9. The plaintiffs suffered damages proximately caused by reliance on the false representation.
10. The nature and extent of the damages to the plaintiffs, and the amount thereof.

If you find from your consideration of all the evidence that the elements of fraud have been proved by clear and convincing evidence, then your verdict should be for the plaintiffs on this issue. If you find from your consideration of all the evidence that any of the foregoing propositions has not been proved by clear and convincing evidence, then your verdict should be for the defendants.

IDJI 4.60 - Fraud - issues (modified); *Aspiazu v. Mortimer*, 139 Idaho 548, 550, (2003).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 39

Silence in circumstances where a prospective purchaser might be led to a harmful conclusion is a form of a "representation."

Nondisclosure or concealment of a material fact amounts to a fraudulent misrepresentation.

Sorensen v. Adams, 98 Idaho 708 (1977); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 42 - 43 (1987); *Bethlahmy v. Bechtel*, 91 Idaho 55, 60 (1966); *Kaze v. Compton*, 383 S.W.2d 204, 207 (1955); *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 521 (1991).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

1/27

INSTRUCTION NO. 40

Actual intent to deceive is not an element of fraud or misrepresentation when a seller knows of facts that would have informed a person acting with care of the truth.

Tusch Enterprises v. Coffin, 113 Idaho 37, 42 - 43 (1987); *Bethlahmy v. Bechtel*, 91 Idaho 55, 60 (1966); *Kaze v. Compton*, 383 S.W.2d 204, 207 (1955).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

1/28

INSTRUCTION NO. 41

An owner of real estate has superior knowledge regarding his/her property and is presumed to know about his property. The owner is therefore under a duty to disclose known defects to the buyer because of this superior knowledge.

If the owner does not know the correct information, he/she must find it out or refrain from making representations to unsuspecting strangers. Even honesty in making a mistake is no defense as it is incumbent upon the owner to know the facts.

The buyer is able to rely on the representations, or lack thereof, from the owner, even when the buyer inspected or could have inspected the real estate independently.

Bethlahmy v. Bechtel, 91 Idaho 55, 57, 60, 62 (1966); Tusch Enterprises v. Coffin, 113 Idaho 37, 47 (1987); Sorensen v. Adams, 98 Idaho 708, 715 (1977); and Watts v. Krebs, 131 Idaho 616, 621 (1998).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 42

In cases involving fraud and misrepresentation, the parol evidence rule (which excludes evidence outside of the agreement) does not apply and a finder of fact may consider elements of evidence not found in the contract. Agreements and communications prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish fraud.

Aspizau v. Mortimer, 139 Idaho 548, 550 - 551 (2003); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 45 [Fn. 5] (1987); *Corbin on Contracts* § 580 (1960); and *Restatement 2nd of Contracts* § 214 (1981).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

4/30

INSTRUCTION NO. 43

A representation is "material" if:

(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; *or*

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

Watts v. Krebbs, 131 Idaho 616, 620, 962 P.2d 387, 391 (1998); *Restatement (Second) of Torts* § 538(2) (1977).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 44

A party may not claim that an 'Act of God' (an act that occurs by a superhuman cause or one beyond the control of human agency) as a defense, when the party by use of ordinary care could have guarded against the same and the effects thereof.

***Johnson v. Burley Irrigation District, 78 Idaho
392, 399 (1956).***

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 45

By giving you instructions on the subject of damages, I do not express any opinion as to whether the plaintiffs is entitled to damages.

IDJI 9.00 - Cautionary instruction on damages

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

1/32

INSTRUCTION NO. 46

When I use the term "value" or the phrase "fair market value" or "actual cash value" in these instructions as to any item of property, I mean the amount of money that a willing buyer would pay and a willing seller would accept for the item in question in an open marketplace, in the item's condition as it existed immediately prior to the occurrence in question.

IDJI 9.12 - "Value" or "fair market value" defined

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

11/24

INSTRUCTION NO. 47

If you decide for the plaintiffs on the question of liability with respect to their claims for breach of contract and/or breach of express warranty, you must then fix the amount of money that will reasonably and fairly compensate them for any of the following elements of damages proved by the evidence to have resulted as a natural and ordinary consequence of the defendants' breach:

1. *Direct damages* are equal to rescission of the contract and repayment of the purchase price of the home if you conclude that the breach was material. If you conclude that the breach was not material, direct damages are equal to the cost of repair of the home and property, which may be measured by the difference between the contract price and the actual value of the property received.
2. *Consequential and Incidental damages* are those losses and expenses which have occurred and which may fairly and reasonably be considered as arising in the usual course of things from the defendants breach of the contract and those losses and expenses which may reasonably be supposed to have been in the contemplation of both parties as a probable result of such a breach when the contract was made.

Whether any of these elements of damages has been proved by the evidence is for you to determine.

IDJI 9.03 - Damages for breach of contract (Amended); IDJI 902; IDJI 916; *Primary Health Network, Inc. v. State Dept. of Admin.*, 137 Idaho 663, 52 P.3d 307 (2002); *Ervin Construction Co. v. Van Orden*, 125 Idaho 695, 699 (1993); *Bethlahmy v. Bechtel*, 91 Idaho 55, 57, 60, 68 (1966).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

435

INSTRUCTION NO. 48

If you find that the defendants breached the implied warranty of habitability, Plaintiffs are entitled to rescission of the home purchase agreement and restitution of their direct, consequential, and incidental damages.

***Bethlahmy v. Bechtel*, 91 Idaho 55, 57, 60, 68 (1966); *Ervin Construction Co. v. Van Orden*, 125 Idaho 695, 699 (1993).**

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

1/18/89

INSTRUCTION NO. 49

The measure of damages for unjust enrichment is the value of the benefit bestowed upon the defendants which would be unjust to retain without compensation to the plaintiffs.

Gillette v. Storm Circle Ranch, 1-1 Idaho 663, 666 (1980).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 50

If you decide for the plaintiffs on the question of liability with respect to the claims for fraud, you must then fix the amount of money which will reasonably and fairly compensate them for any of the following elements of damage proved by the evidence to have been proximately caused by the wrongful conduct of the defendant:

1. Rescission of the agreement that was incident to the fraud, repayment of the contract price, and restitution of any additional direct or consequential damages;
or
2. The difference between the actual value of the property and the value it would have had if it had been delivered as represented.

Whether any of these elements of damage have been proved by the evidence is for you to determine. It is up to the plaintiffs to persuade you that it is more probable than not that they suffered damages and the nature and extent of the damages.

IDJI 901 (Modified); *Moon v. Brewer*, 89 Idaho 59, 62 - 63 (1965); *Layh v. Jonas*, 96 Idaho 688, 690 - 691 (1975); *Addy v. Stewart*, 69 Idaho 357, 357 (1949); *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 217 (1996); *Murr v. Selag Corp.*, 113 Idaho 773, 777 (App, 1987).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 51

If plaintiffs prove by clear and convincing evidence that the defendants' acts which proximately caused injury to the plaintiffs were an extreme deviation from reasonable standards of conduct and that these acts were fraudulent, you may, in addition to any compensatory damages to which you find the plaintiff entitled, award to plaintiffs an amount which will punish the defendants and deter the defendants and others from engaging in similar conduct in the future.

**IDJI 9.20 - Punitive damages (Amended);
Walston v. Monumental Life Ins. Co, 129 Idaho
211, 221 (1996); *Umphrey v. Sprinkel*, 106 Idaho
700, 710 (1983)**

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 52

You have been permitted to hear evidence pertaining to the defendants' wealth and financial condition. This evidence was admitted for your consideration only with reference to the question of punitive damages in light of all other evidence before you if you determine that such an award should be made in this case.

Punitive damages are not a matter of right, but may be awarded in the jury's sound discretion, which is to be exercised without passion or prejudice. The law provides no mathematical formula by which such damages are to be calculated, other than any award of punitive damages must bear a reasonable relation to the actual harm done, to the cause thereof, to the conduct of the defendant, and to the primary objective of deterrence.

IDJI 9.20.5 - Punitive damages - consideration of defendant's wealth; *Walston v. Monumental Life Ins. Co*, 129 Idaho 211, 223 (1996); *Umphrey v. Sprinkel*, 106 Idaho 700, 710 (1983).

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

10/17

INSTRUCTION NO. 53

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges - judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

IDJI 1.13.1 Alternate form - concluding remarks.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____

INSTRUCTION NO. 54

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

Appropriate forms of verdict will be submitted to you with any instructions. Use only the ones conforming to your conclusions and return the others unused.

A verdict may be reached by three-fourths of your number, or nine of you. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict, you will notify the bailiff, who will then return you into open court.

IDJI 1.15.1 Completion of verdict form - general verdict.

GIVEN: _____
REFUSED: _____
MODIFIED: _____
COVERED: _____
OTHER: _____