1-10-2012

Goodspeed v. Shippen Clerk's Record v. 4 Dckt. 38829

Vol. 4 of 6

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

VOLUME 4

WILLIAM SHAWN GOODSPEED and SHELLEE BETH GOODPSEED,	)	
Plaintiffs-Respondents,	)	**SUPREME COURT NO. 38829-2011**
-vs-	)	**Jefferson County**
	)	**Case No. CV-2009-15**
ROBERT and JORJA SHIPPEN,	)	
Defendants-Appellants,	)	

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	ATTORNEY FOR RESPONDENT
Robin D. Dunn **P.O. Box 277** **Rigby, ID 83442**	**Weston S. Davis** **P.O. Box 51630** **Idaho Falls, ID 83405-1630**

Filed this the _____ day of _____, 2011

Christine Boulter
Clerk of the District Court

By: *Nancy Andersen*
Deputy

38829

Volume 4

IN THE SUPREME COURT OF THE STATE OF IDAHO

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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

PLAINTIFF'S EXHIBIT LIST

Plaintiffs, Shawn and Shellee Goodspeed, hereby give notice of those exhibits which may be used in the trial of this matter in compliance with this Court's August 3, 2010 Order Setting Trial and Pre-Trial Conference as follows:

Exhibit #	EXHIBIT DESCRIPTION	STIPULATED (Y/N)	Defendant's Objection
1	MLS Listing on Subject Real Property (SRP)	Y	

2	Snake River MLS Change Form dated 1/2/07	Y	
3	Purchase and Sale Agreement and Addendums	Y	
4	Warranty Deed (Inst #359999) (Shippen to Goodspeed)	Y	
5	2009 pictures of SRP sub-water taken by Shawn & Shellee Goodspeed.	N	Relevance
5a	Picture of tennis ball in water by stairs	N	Relevance
5b	Picture of dumbells in water	N	Relevance
5c	Picture of box soaked by water	N	Relevance
5d	Picture of ruler in water by door and carpet	N	Relevance
5e	Picture of ruler in water (ruler centered in the picture)	N	Relevance
5f	Picture of feet in water with ruler	N	Relevance
6	DVD recording of 2009 sub-water	N	Relevance
7	09/26/08 WSD Letter to Robert Shippen	N	Not proper party
8	10/29/08 WSD Letter to Robert Shippen	N	Not proper party
9	11/19/08 Letter from Robin Dunn	N	Attorney conclusion
10	02/15/10 WSD Letter to Robin Dunn	N	Legal conclusion; improper party
11	Home Improvement Receipts	N	Relevance
12	2009 Tax bill receipt on Property	N	Not accurate for value
13	Medical Records Shellee Goodspeed	N	Court ruled no medical expenses
14	Medical Billings & Prescription Receipts for Shellee Goodspeed	N	Court ruled no medical expenses
15	Xcel Construction Invoice (7/23/06)	N	Foundation
16	Deed of Trust on SRP (Inst # 342206) (Jenkins to Shippens)	N	Relevance
17	Deed of Reconveyance (Inst #358688)	N	Relevance

	(Shippen to Jenkins)		
18	Member Service Agreement 04/24/06 (Public Record) (Inst #348023)	Y	With testifying witness
19	District 7 Septic Permit (Public Record) 04/26/06	Y	With testifying witness
20	Shippen Home Equity Line of Credit Agreement 06/14/05	N	Relevance
21	Building Permit & Policies (Public Record) 05/8/06	Y	With testifying witness
22	Wilson Associates Design of Residence (Public Record) 12/1/02 approved 05/08/06	Y	With testifying witness
23	Jefferson County 05/23/06 Letter to Shippen Construction (Public Record)	Y	With testifying witness
24	Building Inspection Tickets (Public Record)	Y	With testifying witness
25	Bureau of Occupational Licenses printout identifying Robert Shippen as registered K'or 02/17/10 (Public Record)	N	Relevance
26	Marriott Homes LLC Custom Detail Transaction Reports (10/05 - 03/07 & 1/1/06 - 12/24/07)	N	No probative value
27	Invoices after 12/06 from Carpet Concepts, L & F Electric, Hallco Heating, Fullmer Excavating	N	No probative value
28	Home Depot Receipt 09/07/06 paid by card # -0129	N	No probative value
29	Lowes Receipts 10/31/06 and 11/02/06 paid by card #-0129	N	No probative value
30	Shippen Construction Accounting (01/06 – 12/07) and Handwritten Deposit Split Slip	N	No probative value
31	RE-26 Property Disclosure Form signed by Goodspeeds	Y	w/ testifying witness
32	FATCO Check (Bank Scan & Check Stub) 07/03/07	N	No probative value
33	FATCO Final Statement signed by the Shippens	N	No probative value

34	Shippen Taxes 2005 – 2009	N	No probative value
35	Marriott Taxes 2006 – 2009	N	No probative value
36	Shippen Inc. Taxes 2006 – 2008	N	No probative value
37	Commercial General Liability Coverage Part (Farm Bureau, "WC")	N	Insurance agreements non admissible
38	06/18/10 WSD letter returned by Robin Dunn with handwriting	N	Communication of attorney not relevant
39	Shippen Property Asset List produced in Discovery Regarding Vehicles and Tax Assessment Notices for property and property parcels.	N	No probative value
40	Money Market Transfer Documents (12/12/06)	N	Claims cannot identify document
41	Jeff Stoddard House Master Home Inspection Report	Y	w/ witness testimony
42	Subdivision On-Site Form & Test Hole Drawing (08/31/04)	Y	w/ testifying witness
43	Woodhaven Creek Estates Plat Map (Inst #335643)	Y	
44	District 7 Health Letter from Ray Keating (09/01/05)	Y	w/ Ray Keating testifying
45	Robert Meikle Survey Report	N	
46	Robert Meikle Survey Bill	N	
47	Mark Leible Appraisal	N	
48	Mark Leible Appraisal Bill	N	

Plaintiffs reserve the right to use any other exhibits which have been identified in the course of discovery.

Plaintiffs reserve the right to use additional exhibits for purposes of rebuttal or impeachment.

Dated this 26 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 26 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
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L:\wsd\~ Clients\7411.1 Goodspeed\Trial Exhibit List.wpd

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Defendants.

Case No.: CV-09-015

PLAINTIFF'S WITNESS LIST

Plaintiffs, Shawn and Shellee Goodspeed, hereby give notice of witnesses who may be called in the trial of this matter in compliance with this Court's August 3, 2010 Order Setting Trial and Pre-Trial Conference as follows:

1. **William Shawn Goodspeed**
   c/o Nelson Hall Parry Tucker, P.A.
   490 Memorial Drive
   Idaho Falls, ID 83402

2. **Shellee Goodspeed**
c/o Nelson Hall Parry Tucker, P.A.
490 Memorial Drive
Idaho Falls, ID 83402

3. **Dylan Reynolds**
3709 E. 319 N.
Rigby, ID 83442

4. **Randy Stoor**
Coldwell Banker
576 3rd Street
Idaho Falls, ID 83401

5. **Eric and Amy Geisler**
324 N. 3718 E.
Rigby, Idaho 83442

6. **Daniel Fohrenck**
Xcel Construction
10525 S. 1st E.
Idaho Falls, ID 83404

7. **Paul Jenkins**
4429 E. 336 N.
Rigby, ID 83442

8. **Justin Fullmer**
3225 East 650 North
Menan, Idaho

9. **Robert Jon Meikle (Expert Witness)**
Mountain River Engineering, Inc.
1020 E. Lincoln Rd.
Idaho Falls, ID 83401

10. **Mark Lieble (Expert Witness)**
Mark Lieble Appraisal Services, Inc.
172 N. Woodruff Ave
Idaho Falls, ID 83406

11. **Jeff Stoddard (Expert Witness)**
House Master
2229 Dickson Cir
Idaho Falls, ID 83402

12. **Ray Keating (Expert Witness)**
Eastern Idaho Public Health District (District Seven Health)
254 E. Street
Idaho Falls, ID 83402

13. **Dave Chapple (TRIAL VIDEO DEPOSITION)**
364 N. 4300 E.
Rigby, ID 83442

14. **Robert Shippen**
c/o Robin Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

15. **Jorja Shippen**
c/o Robin Dunn
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442-0277

16. Plaintiffs reserve the right to call any other individuals who have been identified in the course of discovery.

17. Plaintiffs reserve the right to call as witnesses additional individuals in rebuttal to witnesses who may be called by the other Parties in this action.

Dated this 28 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 28 day of December, 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

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Plaintiffs, Shawn and Shellee Goodspeed, (hereinafter "Goodspeeds"), by and through their counsel of record, Nelson Hall Parry Tucker, P.A., hereby submit this Trial Brief with respect to the jury trial scheduled to commence on January 11, 2011. In support of this Trial Brief, Plaintiffs assert as follows:

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I. INTRODUCTION

This case involves the purchase and sale of real property and the defendants' misrepresentations as it relates to the sale of the property. The resulting claims are (1) breach of express warranty for failing to disclose prior sub-water issues and to protect against future sub-water issues; (2) breach of the implied covenant of good faith and fair dealing for misrepresenting the history and future of the sub-water on the subject real property; (3) breach of the implied warranty of habitability for subsequent sub-water issues on the subject real property; (4) that the corporate veil of Marriott Homes, LLC and/or Shippen Construction, Inc. be pierced to promote justice and recognize the unity of interest between the individual defendants and the entities; (5) that Robert and Jorja Shippen have been unjustly enriched for obtaining the market value of the home as if sub-water were not an issue; (6) that the Shippens fraudulently concealed a known defect by misrepresenting the fact of sub-water on the subject real property; (7) that such conduct also constituted a misrepresentation of a known fact; (8) that such conduct was also used to fraudulently induce the Goodspeeds to purchase the subject real property; and (9) that punitive damages be permitted to punish such misconduct and prevent future misconduct. Robert and Jorja Shippen are liable both individually and through their marital community. The builder and seller of the subject property are also liable for breach of warranty and contract claims.

II. STATEMENT OF FACTS

A. The Parties

Plaintiffs, Shawn and Shellee Goodspeed, purchased the subject real property located at 319 N. 3709 E., Rigby, Idaho in July of 2007. Defendants, Robert Shippen and/or Jorja Shippen and/or Marriott Homes, LLC and/or Shippen Construction, Inc., built the home incorporated into the subject real property. Robert and Jorja Shippen, as owners of the real property, sold the subject real property to the Goodspeeds.

B. The Facts

1. Defendants Were Aware of Sub-Water Before and After Construction of the Residence.

The facts will show that Robert and Jorja Shippen purchased a lot in Woodhaven Creek Estates on August 31, 2005, with the knowledge that sub-water was an issue in that subdivision.

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Prior to the purchase, Paul Jenkins, the original owner of the property, disclosed to the Shippens that high sub-water existed in the subdivision. Both Robert and Jorja Shippen acknowledge they have been aware of the sub-water in the area for at least the past twenty years.

In the spring of 2006, the Shippens, allegedly through their entities Marriott Homes, LLC and/or Shippen Construction, began building a spec home on that lot excavating a foundation to include a basement. The Seventh District Health Department materials, reviewed by Mr. Shippen before excavation began, called for the placement of an enhanced septic system to be excavated no deeper than three feet below ground level due to high sub-water levels.

Despite (1) the high sub-water in the area, (2) the Shippens' prior knowledge and warnings regarding the sub-water in the area, and (3) the restriction calling for an enhanced septic system, Defendants did not hire an engineer or hydrologist to determine the maximum depth of excavation for the residence.

In approximately June or July of 2006, Daniel Fohrenck, a framing sub-contractor who worked on the residence, notified Mr. Shippen he observed sub-water rising out of a test hole dug near the basement of the residence. Robert Shippen stated he knew about it and was going to install a sub-pump from being an issue to the homeowner. Robert Shippen acknowledged in his deposition that he watched the sub-water rise in his test hole by the walk out basement area during the construction of the property.

2. Defendants Failed to Disclose the True Sub-Water Issues Related to the Subject Real Property and Misrepresented the Sub-Water History and Future.

Then, in approximately August of 2006, the Shippens through their real estate agent, Dave Chapple, listed the property for sale stating on the MLS listing that the property had not had any sub-water issues and that the builder would install a leaching system to prevent the possibility of there ever being sub-water issues.

Within approximately a month of listing the property, it flooded from sub-water to a depth of approximately 1 ½ - 2 inches. Robert Shippen admitted this fact in his deposition. He also admitted he told his wife, Jorja Shippen, about the flooding, which Jorja acknowledges in her deposition. Robert Shippen amended the MLS listing approximately four months after the flooding to extend the listing date but did not change the MLS listing to remove the

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representations related to the sub-water. Neither Robert Shippen nor Jorja Shippen made any other changes to the MLS listing.

The Goodspeeds, residents of Tennessee, were looking to purchase a home in southeastern Idaho to relocate for work related purposes. In the course of searching for a home with their real estate agent, Randy Stoor, the Goodspeeds saw the MLS listing related to the real property in question. They relied on the representations of the Defendants as it related to the sub-water.

The Goodspeeds expected to purchase a home that would be fit for human habitation. For that reason, in the contract, they requested "Builder to provide a standard Builder's Warranty for a minimum of 1 year". While doing a walk through of the property with Robert Shippen, he told them that the leaching system would protect against snow melt and fast rainwater runoff from coming into the basement–he did not mention the sub-water flooding of 2006. The Goodspeeds also had a standard home inspection done on the property, relying on the builder's representation that sub-water had not been and would not be an issue.

On July 3, 2007, the Goodspeeds tendered the purchase price of $272,000.00 to Robert and Jorja Shippen via the title company in exchange for the residence.

3. Within One Month of Moving In the Goodspeeds Learned of the Past Sub-Water Issues and Continue to Experience Sub-Water Issues Today.

In August of 2007, approximately one month after purchasing the property, a neighbor stopped by to notify the Goodspeeds that the basement had flooded to a depth of approximately two (2) inches in the summer of 2006. Shawn Goodspeed called Robert Shippen about the 2006 flooding, whereupon Robert Shippen told Shawn the house would not flood.

The premises then began to experience rising sub-water on Labor-Day Weekend of 2007 whereupon Robert Shippen came to inspect the property and again told the Goodspeeds the house would not flood.

The property has subsequently continued to sustained sub-water intrusion on the premises and inside the house. The Goodspeeds have attempted the mitigate these intrusions by installing a second sub-pump to remove water from the basement area and by running the pump previously installed by Robert Shippen. The Goodspeeds have also attempted to mitigate their damages by halting all improvements to the basement, placing all items in the basement on

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blocks, and removing all carpet and placing it on blocks.

Despite the continual and consistent sub-water intrusion, the Defendants have refused to purchase the home back from the Goodspeeds and have further refused to attempt to repair the problem under the Notice and Opportunity to Repair Act. Defendants have notified Plaintiffs the problem cannot be fixed.

III. LIABILITY

A. DEFENDANTS BREACHED THE EXPRESS WARRANTY.

1. Defendants Breached the Express Warranty.

The Defendants created an express warranty to the Goodspeeds. An express warranty is an assurance by overt words or action of the seller guaranteeing a condition of the agreement upon which a buyer may rely. *Clearwater Minerals Corp. v. Presnell*, 111 Idaho 945, 949 (Ct. App. 1986); 17A Am Jur 2d, Contracts § 410 "Warranties", and *Black's Law Dictionary*, 2nd Pocket Ed., Bryan A. Garner (2001) "Warranty: Express Warranty". Restated, a seller can create a warranty by representing the thing being sold is as represented or as promised. In *Clearwater*, the Supreme Court held a warranty was created by a representation found in a brochure regarding the extent of mineral rights available. 111 Idaho at 949. A warranty is intended to relieve the buyer of any duty to ascertain the fact for himself. *Id.*; 17A Am Jur 2d, Contracts § 410 "Warranties".

In the sale of goods, the standard is the same. I.C. § 28-2-313(1)(a). The seller does not need to use formal words such as "warrant" or "guarantee" when creating a warranty nor does a seller even have to intend to make a warranty. I.C. § 28-2-313(2).

In this case, like in *Clearwater*, two express warranties were made in the MLS listing: (1) the property had not had sub-issues and (2) it would not have sub-issues. Further, the seller and builder agreed to an express warranty by promising to provide a "Standard Builder's Warranty" for a *minimum* of one year. The Goodspeeds understood the MLS listing representations were part of the standard builder's warranty. They believed that a standard builder's warranty would warrant a protection against conditions that would make the premises uninhabitable.

The Goodspeeds learned after purchasing the house that it had in fact flooded from sub-water despite the warranty that it had not. Thus, the warranty was breached as soon as the Goodspeeds closed on the property. The Goodspeeds contacted the Defendants prior to

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instigating this litigation in an effort to resolve the defect. The Defendants failed to remedy or even attempt to remedy the defect. Therefore, the Defendants again breached the warranty that the house had not had sub-issues and would not have sub-issues.

2. Parole Evidence Allows the MLS Listing To Be Considered As Part of the Express Warranty.

When a contract is ambiguous and therefore subject to differing interpretations or where the language is nonsensical, a finder of fact may consider evidence outside of the four corners of the written agreement to determine the intent of the parties for the purpose of resolving the ambiguity in the contract. *Potlach Educ. Ass'n v. Potlach School Dist. No. 285*, 148 Idaho 630 *2 (2010); *Perron v. Hale*, 108 Idaho 578, 581 (1985). 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. *Simons v. Simons*, 134 Idaho 824, 828 (2000).

In this case, the purchase and sales agreement executed by both parties expressly states a *minimum* of a one year standard builder's warranty will apply. The scope of the warranty, however, is not defined in the sales agreement. Because the scope is ambiguous, evidence outside of the agreement is necessary.

The Goodspeeds relied on the MLS listing that the residence had not had sub-water issues and that a leaching system would prevent the possibility of sub-water being an issue. It would follow that because Defendants made a written assurance regarding the condition of the property to the public to give the public peace of mind that the Defendants should not be surprised to learn that the Goodspeeds would expect the MLS representation was part of the warranty.

B. DEFENDANTS BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

In every contract there is an implied duty of good faith and fair dealing. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 287 (1991).

> 'This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. . . . [T]he duty of good faith does not extend to 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 only that the parties perform in good faith the obligations imposed by their agreement. . . . Thus, the duty arises only in connection with terms agreed to

by the parties.'

Id. citing Badgett v. Security State Bank, 116 Wash.2d 563, 807 P.2d 356 (1991). In *Idaho First*, the Idaho Supreme Court adopted the Washington Supreme Court's definition of the implied covenant cited above. A violation of the implied covenant is a breach of contract. *Idaho First*, 121 Idaho at 288.

In this case, Defendants had a duty to stand by their representation in the MLS agreement that the property had not had sub-issues and would not. The covenant was breached by misrepresenting the status of the property prior to selling it to the Goodspeeds.

Additionally Defendants again breached the covenant, after the Goodspeeds learned about the 2006 flood and approached Defendants about it. Robert Shippen claimed the 2006 flood was the result of a freak canal rupture and promised the house would not flood. When the property continued to experience sub-water issues, the Defendants would have fulfilled their covenant of good faith and fair dealing by remedying the problem or by rescinding the contract in the event they could not remedy the problem. Defendants failed to do so and therefore breached their duty.

C. DEFENDANTS BREACHED THE IMPLIED WARRANTY OF HABITABILITY.

As a matter of public policy, implied in the sale of newly constructed residences is a warranty of habitability by the builder-vendor that the structure will be fit for habitation. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 46 - 47 (1987). "It depends upon the quality of the home delivered and the expectation of the parties." *Id.*

> *[T]he trend of judicial opinion is to invoke the doctrine of implied warranty of fitness in cases involving sales of new houses by the builder.* The old rule of caveat emptor does not satisfy the demands of justice in such cases. 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 houses, is manifestly a denial of justice.* The implied warranty of fitness does not impose upon the builder an obligation to deliver a perfect house. No house is built without defects, and defects susceptible of remedy ordinarily would not warrant rescission. But *major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution.* The builder-vendor's legitimate interests are protected by the rule which casts the burden upon the purchaser to establish the facts which give rise to the implied warranty of fitness, and its breach.

Bethlahmy v. Bechtel, 91 Idaho 55, 67 - 68, 415 P.2d 698, 710 - 711 (1966) (emphasis added). This implied warranty is a warranty whereby a purchaser is able to rely on the skill of the builder:

> The mores of the day have changed and the ordinary home buyer is not in a position to discover hidden defects in a structure. A home buyer should be able to place reliance on the builder or developer who sells him a new home, the purchase of which in so many instances, is the largest single purchase a family makes in a lifetime. *Courts will judicially protect the victims of shoddy workmanship. Consumer protection demands that those who buy homes are entitled to rely on the skill of the builder and that the house is constructed so as to be reasonably fit for its intended use. The average purchaser is without adequate knowledge or opportunity to make a meaningful inspection of the component parts of a residential structure.*

Tusch, 113 Idaho at 47 *citing Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo.1979) (emphasis added).

Idaho law also provides that the seller of a house under construction impliedly warrants that the house will be completed in a workmanlike manner. *Bethlahmy*, 91 Idaho at 67.

The implied warranty of habitability extends to latent (concealed or dormant) defects which manifest themselves within a reasonable time. *Tusch*, 113 Idaho at 50. It extends to latent defects because "it is unrealistic to expect buyers to consult geotechnical and other experts about defects that are not even apparent." *Id.* at 47. The builder is the one who created the latent defect and the builder is in the better position to remedy and guard against such defects. *Id.*

If the habitability of the home is impaired, liability attaches the builder-vendor of the residential property regardless of fault – a form of strict liability. *Id.* at 46 - 47; *Phillip L. Burner & Patrick J. O'Connell on Construction Law*, §9:72 (2002). 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*, 113 Idaho at 47 - 48.

In this case, the facts will show that major defects exist with regard to sub-water that substantially impair the use of the house and render it unfit for habitation. These defects cannot be remedied. These defects were latent at the time of the sale and defendants' misrepresentation regarding the history and future of the house did not put the Goodspeeds on notice for an inspection of a latent defect. Beyond the builder liability, the facts will also show that Robert Shippen, as an individual and vendor of the property, has expertise in the construction industry

and exercised control over the construction of the residence. Jorja Shippen had sufficient knowledge regarding the history of the latent defect that she should likewise be liable as a vendor.

D. DEFENDANTS FAILED TO DISCLAIM ANY WARRANTIES.

To the extent Defendants intend to claim they disclaimed any express or implied warranties, such an argument must fail.

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. *Tusch*, 113 Idaho at 45 - 46; *Myers v. A.O. Smith Harvestore Products, Inc,*, 114 Idaho 432, 437 (Ct. App. 1988). A disclaimer is construed against the builder-vendor. *Tusch,* 113 Idaho at 45 - 46. 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. *Id.* "'By this approach, boilerplate causes (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.'" *Id. citing Crowder v. Vandendeale*, 564 S.W. 2d 879 (Mo. 1978); *Black's Law Dictionary*, 2nd Pocket Ed., Bryan A. Garner (2001) "Boilerplate". A knowing waiver of a warranty will not be readily implied and should be obtained with difficulty. *Tusch*, 113 Idaho at 46; *Myers*, 114 Idaho at 437.

Restated, it should be clear to both the seller and the buyer that a disclaimer was intended and accepted. If it is not clear or the disclaimer is found in mere boilerplate language, the disclaimer is construed against the builder-vendor.

The facts in this case will show not only that the purchase and sale agreement used for the purchase of the subject property was a standard boilerplate agreement, but also that the type font of any alleged disclaimer is identical to that of all of the other provisions in the contract. Therefore, it is not conspicuous. Further, the customized language in the purchase and sale agreement specifically provided for a warranty for a minimum of one year.

E. DEFENDANTS CANNOT RELY ON AN "ACT OF GOD" DEFENSE.

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, 398-399 (1956).

In that case, the defendants attempted to avoid liability for flooding caused by a canal rupture which resulted from gophers burrowing into the banks of the canal. *Id.* at 395. The defendants were aware there was a problem with burrowing gophers but failed to take corrective measures to police the area when the water in the canal did not reach its maximum flow. *Id.* at 396 - 397. The Court held that even though the defendants did not cause the gopher problem, the fact that the defendants knew of the existing gopher problem and failed to remedy it imputed liability to the defendants: "The distinguishing characteristic of an 'act of God' is that it proceeds from the force of nature alone to the entire exclusion of human agency." *Id.* at 398.

In this case the facts will show the defendants, Robert and Jorja Shippen, have not only known about the sub-water issues in the area for nearly their entire lives but they also could have guarded against sub-water by reducing the depth of excavation for the basement. Robert Shippen has thirty years of construction experience and could have easily built the subject property at a higher elevation to protect from sub-water intrusion. Thus this defense must fail.

F. THE JURY SHOULD PIERCE THE CORPORATE VEIL TO HOLD ROBERT AND JORJA SHIPPEN INDIVIDUALLY LIABLE.

In the event the jury were to find only the entities liable for the breach of express or implied warranties mentioned above, Robert and Jorja Shippen must still be held individually liable.

A corporation or limited liability company may be established to limit personal liability of the shareholders or members of that entity. However, "[t]here are times when the form of a corporate entity [(a corporation or an LLC)] is disregarded and imposed on a corporation's shareholder and president of a corporation. This is called the doctrine of 'piercing the corporate veil.'" *VFC VC v. Dakota Co.*, 141 Idaho 326, 335 (2005). *See also Alpine Packing Co. v. H.H. Keim Co., Ltd.*, 121 Idaho 762 (Ct. App 1991) *affirmed in Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604 (2005).

To pierce the corporate veil, two requirements must be met:

> (1) [T]here must be such a unity of interest and ownership that the separate personalities of the corporation and individual no longer exist, and (2) there must be a showing that, if the acts are treated as those of the corporation, an inequitable result will follow ***or*** that it would sanction a fraud ***or*** promote injustice.

VFC, 141 Idaho at 335.

1. The Shippens Held a Unity of Interest with Marriott Homes, LLC and Shippen Construction, Inc.

In determining whether a unity of interest exists, any of the following factors may be considered:

> [1] was the sole shareholder acting as president of the corporation; [2] was there a lack of corporate formalities, such as directors' meetings; [3] did the shareholders fail to submit the corporate contract and inventory revisions to the board of directors; and [4] were business transactions completed without approval by any director or officer of the corporation.

Id. A court may also consider: [5] the disregard for the separateness of the corporation. *In re Weddle*, 353 B.R. 892, 898 (2006); [6] Whether the sole owner/shareholder acted as the president of the company. *Alpine*, 121 Idaho at 764; [7] Using or anticipating the profits from one corporation to offset losses from the other corporation (i.e. satisfaction of inter-company claims). *Id.*; and [8] The individual using his or her name interchangeably with the corporation's when dealing with third parties. *Hutchinson v. Anderson*, 130 Idaho 936, 941 (Ct. App. 1997); *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 917 (1979), *disagreed with on other grounds by Rueth v. State*, 103 Idaho 74 (1982).

2. An Inequitable Result or Fraud or Injustice Would Occur If the Veil Is Not Pierced.

In addition to showing a unity of interest, the entities' actions must lead to an inequitable result, sanction a fraud or promote injustice.

Acting to perpetuate fraud qualifies as an inequitable result. *In re Weddle*, 353 B.R. 892, 899 (2006). An inequitable result or injustice might also be promoted where the targeted corporation was undercapitalized and thus lacked the resources with which to pay its debts or judgments incurred against it. *Id.* at 899 fn 9; *Hutchinson v. Anderson*, 130 Idaho 936, 941 (Ct. App. 1997).

The enumerated factors listed above for showing either a unity of interest or an inequitable result "are not exclusive because the conditions under which corporate entity may be disregarded vary according to the circumstances to the case." *VFC*, 141 Idaho at 335. Therefore, it is conceivable other factors may be considered as grounds for piercing the corporate veil and not all the factors above must be proven to pierce the veil.

In this case, the facts will show that Marriott Homes, LLC and Shippen Construction, Inc. are merely an *alter ego* of Robert and Jorja Shippen and that the veil should be pierced. The Shippens are the sole shareholders of the entities. Their actions and admissions show they are not aware of corporate formalities as it relates to signing on behalf of the entity or notifying others of their formal entity names. Robert Shippen used his name interchangeably with Shippen Construction, Inc., and Marriott Homes, LLC as it relates to the subject real property. Robert Shippen reports to noone in making transfers to himself and to his entities. The Shippens pay their personal expenses directly from their entities' checking accounts. The Shippens offset the losses and/or satisfied inter-company claims not collecting payment from Marriott Homes, LLC for substantial foundation work done by Shippen Construction, Inc. on the Shippen's properties. The Shippens have failed to register the entities in compliance with the Idaho Contractor's Registration Act (I.C. § 54-5201 *et. seq*). Instead, only "Robert D. Shippen" is a registered contractor with the State of Idaho. Marriott Homes, LLC (the purported general contractor) also used Shippen Construction, Inc.'s (the purported subcontractor's) general liability insurance to cover the subject real property during its construction. Shippen Construction, Inc. paid the insurance premiums without reimbursement from Marriott Homes. Additionally, Marriott Homes, LLC has virtually no assets.

Further, Robert and Jorja Shippen, whether as business owners or as individuals, knew the subject real property had sub-water issues and represented otherwise. They also mis-represented the future condition of the property. Such actions constituted a fraud. In light of the unity of interest between the Shippens and their entities, and in light of the inequitable result that would result through both fraud and the Goodspeeds' inability to collect against the undercapitalized entities, the veil must be pierced subjecting Robert and Jorja Shippen to personal liability.

G. ROBERT AND JORJA SHIPPEN WERE UNJUSTLY ENRICHED.

"The doctrine of unjust enrichment sounds in quasi-contract or implied-in-law contract." *Curtis v. Becker*, 130 Idaho 378, 382 (Ct. App. 1997). The theory is "based upon the defendant having received a benefit which would be inequitable to retain at least without compensating the plaintiff to the extent that retention of the benefit is unjust." *Id.* In a plaintiffs' *prima facia* case for unjust enrichment, the plaintiffs must show:

> (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under the circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof.

Id.

Therefore, even if the jury were to find that a breach of the express or implied warranties did not occur, Plaintiffs may still bring an unjust enrichment claim against the individuals who were paid and received the proceeds of the sale–in this case, Robert and Jorja Shippen. The Shippen's acceptance of the financial benefit was unjust considering the condition of the property.

H. ROBERT AND JORJA SHIPPEN COMMITTED FRAUD.

1. Fraud in General.

To prevail on 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 (2003).

a. Representation and Falsity.

A nondisclosure of material facts amounts to a fraudulent misrepresentation. Tusch, 113 Idaho at 42. "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 (1977) *overruled on other grounds* ("Silence in circumstances where a prospective purchaser might be led to harmful conclusion is a form of 'representation'").

b. Materiality.

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 (1998) *citing Restatement (Second) of Torts* § 538(2) (1977).

c. Knowledge, Intent, and Ignorance.

"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 the principals of representation and intent clearly for the Court:

i. *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 to inspect it, 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 cites 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.

ii. *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.*

d. Ignorance, Reliance, and Right to Rely on Representation

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 (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*, 131 Idaho at 621. 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.*

2. Parole Evidence Can Be Utilized to Establish Fraud.

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 always consider elements of evidence not found in the contract. *Aspizau v. Mortimer*, 139 Idaho 548, 550 - 551 (2003); *Tusch*, 113 Idaho 37, 45 (1987); *Corbin on Contracts* § 580 (1960); and *Restatement 2nd of Contracts* § 214 (1981). "Agreements and communications prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish fraud." *Tusch*, 113 Idaho at 45 n.5.

As such, a party may reference an MLS listing as evidence that fraud was committed in the purchase and sale of real property. *Large v. Cafferty Realty, Inc.*, 123 Idaho 676, 680 - 682 (1993). "Any misrepresentation made by [the real estate agent] as agent of [the seller] would be imputed to [the sellers]." *Id.* at 681

3. Robert and Jorja Shippen Fraudulently Concealed a Known Defect.

In this case, the facts will show that Robert and Jorja Shippen knew that the subject real property had sub-water issues before they listed it for sale with their realtor. Robert Shippen then met with the realtor and agreed that language should be added to the MLS listing that the subject property had not had sub-water issues and would not have sub-issues. This MLS listing was published to the general public. In this manner, the seller intended to give all potential buyers "peace of mind." Even after the property flooded from sub-water in 2006, neither Robert nor Jorja Shippen requested that their realtor amend the MLS listing to notify the public of the flooding or sub-water issues. The Shippens did not disclose the fact of the 2006 sub-water to the Goodspeeds. Robert Shippen told them the pump would take care of snow melt and rainwater runoff. In this manner, the Shippens fraudulently concealed a known defect of sub-water intrusion from the Plaintiffs. The Goodspeeds did not know about sub-water issues on the proeprty and reasonably relied on the Shippens' representations to their detriment.

4. Robert and Jorja Shippen Fraudulently Misrepresented a Known Fact.

See Section H(3) Fraudulent Concealment of a Known Defect. The Shippens' actions and failures to disclose the known information regarding the sub-water on the subject property constituted a fraudulent misrepresentation of a known fact.

5. Robert and Jorja Shippen Fraudulently Induced the Goodspeeds to Purchase the Property.

See Section H(3) Fraudulent Concealment of a Known Defect. The Shippens's actions and failure to apprise the Goodspeeds of the truth constituted fraud which induced the Goodspeeds to purchase the subject real property. Had the proper disclosures been made to the Goodspeeds, they would not have purchased the subject real property.

J. THE JURY SHOULD PUNITIVE DAMAGES AGAINST THE SHIPPENS FOR THEIR FRAUDULENT CONDUCT.

"It is well established in [the State of Idaho] that punitive damages may be awarded when the Defendant has committed fraud." *Umphrey v. Sprinkel*, 106 Idaho 700, 710 (1983). *Accord Walston v. Monumental Insurance Co.*, 129 Idaho 211, 220 - 221 (1996). "Additionally, exemplary [(punitive)]damage awards are appropriate when the defendant is engaged in deceptive business practices operated for profit posing danger to the general public." *Id.* The purpose of punitive damages is to punish the defendants to deter similar conduct from happening again in the future. *Walston*, 129 Idaho at 221.

An award of punitive damages requires a showing of (1) a bad act and (2) a bad state of mind. *Id* at 220. With regard to showing a bad act/omission, the movant must show that "the defendant acted in a manner that was an extreme deviation from reasonable standards of conduct, that the act was performed by the defendant with an understanding of or disregard for its likely consequences." *Seiniger Law Office P.A. v. North Pacific Ins. Co.,* 145 Idaho 241, 250 (2008). In showing a bad state of mind, the movant must show "the defendant acted with an extremely harmful state of mind, whether or not that state be termed 'malice, oppression, ***fraud***, or gross negligence'; 'malice, oppression, wantonness'; or simply 'deliberate or willful.'" *Umphrey*, 106 Idaho at 710, (1983)*; Doe v. Cutter Biological*, 844 F. Supp. 602, 610 (D. Idaho 1994) *(citations omitted)*. A showing of fraud satisfies both the prong of a bad act and the prong of a bad state of mind to support a claim for punitive damages. I.C. § 6-1604(1); *Umphrey*, 106 Idaho at 710;

Walston, 129 Idaho at 220 - 221

Additionally, in a claim for punitive damages, "a defendant's financial status may be considered in determining whether a damage award will have any deterrent effect." *Umphrey*, 106 Idaho at 710.

In this case, Robert and Jorja Shippen understood that they were undertaking the building of a residence intended for human habitation. Despite the realm of their knowledge regarding sub-water on the property and in the area they represented otherwise. The Shippens had superior knowledge regarding the condition of the subject real property and its latent defects. The Shippens knew the statements contained in the MLS listing were false and failed to take corrective action. These actions and inaction should be punished to deter future similar conduct from happening in the future.

IV. DAMAGES

Generally speaking, "A person who, tortiously or in breach of contractual obligation does an act which has injurious consequences is liable for the damages caused by such wrongful act." 22 Am Jur 2d, Damages, § 4. In this case, damages can be separated into (1) breach of contract claims, (2) claims in tort, (3) claims in equity, and (4) punitive damages.

A. BREACH OF CONTRACT/BREACH OF WARRANTY(IES) DAMAGES.

Contract damages are determined in two ways: ***(1) rescission and (2) restitution.*** *Ervin Construction Co. v. Van Orden*, 125 Idaho 695, 699 (1993).

"Rescission" is an equitable remedy that totally abrogates the contract and seeks to restore the parties to their original position. *Primary Health Network, Inc. v. State Dept. of Admin.*, 137 Idaho 663 (2002). Rescission of contract is available "when a party has committed a material breach which destroys the entire purpose of entering into the contract." *Id. See also Ervin*, at 699; *Bethalamy*, 91 Idaho at 711 ("Major defects which render the house unfit for habitation and which are not readily remediable, entitle the buyer to rescission and restitution."). When a breach of contract is only incidental and subordinate to the main purpose of the contract, rescission may not be available. *Ervin*, 125 Idaho at 700. Whether a breach is material or incidental is a question of fact. *Id.*

"Restitution" is a return or restoration of some specific thing to its rightful owner or status. *Black's Law Dictionary*, 2nd Pocket Ed., Bryan A. Garner (2001) "Restitution". Where a

contract is rescinded, the buyer is restored to the purchase price of the contract. However, when a home or property may be repaired for a reasonable value, the defect is not significant. *Ervin,* 125 Idaho at 700. In such a case, damages are assessed at the value of the repair of the property. *Id.* at 702.

In addition to rescission and restitution, consequential and incidental damages may be awarded. Consequential (Incidental) damages are those losses and expenses which have occurred and which foreseeeably arise as a result of the breach of the contract over and above the expectation damages. *U.S. v. Silver*, 245 F.3d 1075 (9th Cir 2001).

Damages arising from breach of contract under the Notice and Opportunity to Repair Act may not exceed the purchase price of the residence or fair market of the property without the construction defect, whichever is greater. I.C. § 6-2504(4).

In this case, the facts will show that the Shippens' breach of contract and breach of the express and implied warranties destroyed the entire purposes of the real estate contract–providing a house that was fit for habitation and providing a house that *had not* and *would not* have sub-water issues. The facts will show the house had flooded from sub-water prior to the sale, despite the Shippen's representation that it had not. Thus the warranty was breached as soon as the Goodspeeds bought the residence. The facts will further show that the house has since had subsequent years of sub-water intrusion, including flooding of both the basement and landscaping. The Goodspeeds purchased a home with the intention of inhabiting the entire house, basement included. The sub-water has prevented such from happening. As a result a material breach has occurred. With the understanding that the house would be habitable, the Goodspeeds attempted to finish the basement incurring additional consequential damages. They also incurred additional costs to remove the sub-water from their basement.

The Goodspeeds should be entitled to rescission of the contract and restoration of the contract price or fair market value of the property without the construction defect, whichever is greater. Only in the event the breach is not considered material, Plaintiffs are entitled to recover the difference between the contract price and the value of the property received (i.e., the cost to repair the defect and prevent future sub-water issues.).

B. TORTIOUS CONDUCT (FRAUD) DAMAGES.

Generally, the measure of damages in a fraud case is the "difference between the actual value of the property and the value it would have had if it had been as represented." *Walston*, 129 Idaho at 217. However, this measure of damages is not the exclusive remedy for fraud cases. *Shrives v. Talbot*, 91 Idaho 338, 346 (1966).

Rescission may also be granted in fraud cases. *See Murr v. Selag Corp.*, 113 Idaho 773, 777 (Ct. App. 1987) ("No fault is necessary to warrant rescission of such a contract, though rescission is also available where the defendant is guilty of fault, such as fraud."); *McEnrow v. Morgan*, 106 Idaho 326, 329 (Ct. App. 1984) ("Fraud on the part of the seller in inducing a purchaser to enter into a land sale contract renders the contract voidable and gives the purchaser the right to rescind."); *Moon v. Brewer*, 89 Idaho 59, 62 - 63 (1965) (A victim of fraud may seek rescind the contract and sue for restitution but may not obtain a double recovery in doing so).

When seeking to rescind a contract due to fraud, proof of monetary damages is unnecessary. *Layh v. Jonas*, 96 Idaho 688, 690 (1975). Further, in considering damages resulting from fraud, Idaho does not mandate the out-of-pocket rule: "the underlying principle is that the victim of fraud is entitled to compensation for every wrong which is the natural and proximate result of fraud. The measure of damages which should be adopted under the facts of a case is the one which will effect such result." *Id.* at 690 - 691.

In this case, again, the facts will show that the Goodspeeds were defrauded into purchasing a house that had flooded from sub-water and where the Shippens had an understanding that high sub-water was a prevalent issue in the area. The Shippens failed to disclose these material defects in the home to the Goodspeeds and in fact represented to the contrary. These actions give right to the Goodspeeds to rescind the contract and recover any monies spent improving their home. In this manner, the Goodspeeds will be fully restored their actual damages.

C. DAMAGES IN EQUITY (UNJUST ENRICHMENT).

"The measure of damages for unjust enrichment is the value of the benefit bestowed upon the defendant which, in equity, would be unjust to retain without recompense to the plaintiff." *Gillette v. Storm Circle Ranch*, 101 Idaho 663, 666 (1988).

In this case, the facts will show the Shippens obtained a purchase price for a home that

would not be defective. The problem is the house was defective. Further, because the home is materially defective, it has no value and the Goodspeeds should be entitled to recover the purchase price of the house.

D. PUNITIVE DAMAGES.

In the event Plaintiffs are able to prove their case of fraud, they may be entitled to punitive damages in addition to any compensatory damages. *Umphrey*, 106 Idaho at 710 - 711. These damages are to be assessed and in the jury's sound discretion. IDJI 2d 9.20.5. "The law provides no mathematical formula by which punitive damages are calculated, other than any award of punitive damages must bear a reasonable relationship to the actual harm done, to the cause thereof, to the conduct of the defendant, and the primary objective of deterrence." *Id. See also Walston*, 129 Idaho at 222 - 223.

Courts have sustained punitive damage awards that are four and six times the amount of compensatory damages. *Id.* Idaho Statute has capped punitive damages to $250,000.00 or three times the amount of compensatory damages, whichever is greater. I.C. § 6-1604(3). However, no instruction is to be given to the jury regarding a cap on punitive damages. *Id.*

In this case, the facts will show a purchase price of the residence was $272,000.00. Plaintiffs also incurred additional damages of $42,861.86 exclusive of attorneys fees. Total compensatory damages less attorneys fees is$314,861.86. Therefore the cap on punitive damages should be $944,585.58, which is awardable in addition to compensatory damages.

V. CONCLUSION

The Goodspeeds suffered significant damages by the Shippen's misrepresentations and failure to disclose a known material defect in a defective property. The Shippens should be prohibited from placing that burden on the Goodspeeds and should be liable for Goodspeeds' damages. The jury should find in favor of the Plaintiffs.

DATED this 28 day of December, 2010.

WESTON S. DAVIS

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 16 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

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WESTON S. DAVIS

L:\wsd\~ Clients\7411.1 Goodspeed\Trial Brief.wpd

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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' SPECIAL VERDICT

WE, THE JURY, ANSWER THE SPECIAL INTERROGATORIES AS FOLLOWS:

QUESTION NO. 1: Did Robert and/or Jorja Shippen fraudulently induce the Goodspeeds to purchase the subject home?

ANSWER TO QUESTION NO. 1: YES [ ] NO [ ]

If you answered "Yes" please check all defendants that apply:

Robert Shippen [ ]; Jorja Shippen [ ].

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QUESTION NO. 2: Did Robert and/or Jorja Shippen fraudulently conceal a known defect in the course of selling the subject home to the Goodspeeds?

ANSWER TO QUESTION NO. 2: YES [ ] NO [ ]

If you answered "Yes" please check all defendants that apply:

Robert Shippen [ ]; Jorja Shippen [ ].

QUESTION NO. 3: Did Robert and/or Jorja Shippen fraudulently misrepresent a known fact in the course of selling the subject home to the Goodspeeds?

ANSWER TO QUESTION NO. 3: YES [ ] NO [ ]

If you answered "Yes" please check all defendants that apply:

Robert Shippen [ ]; Jorja Shippen [ ].

QUESTION NO. 4: Did the defendant(s) breach their contract with Shawn and Shellee Goodspeed?

ANSWER TO QUESTION NO. 4: YES [ ] NO [ ]

If you answered "Yes" please check all defendants that apply:

Robert Shippen [ ]; Jorja Shippen [ ]; Marriott Homes, LLC [ ]; Shippen Construction, Inc. [ ]

QUESTION NO. 5: Was the defendant's(s') breach of contract a material breach?

ANSWER TO QUESTION NO. 5: YES [ ] NO [ ]

QUESTION NO. 6: Did the defendant(s) breach their express warranty with Shawn and Shellee Goodspeed?

ANSWER TO QUESTION NO. 6: YES [ ] NO [ ]

If you answered "Yes" please check all defendants that apply:

Robert Shippen [ ]; Jorja Shippen [ ]; Marriott Homes, LLC [ ]; Shippen Construction, Inc. [ ]

QUESTION NO. 7: Was the defendant's(s') breach of express warranty a "material" breach?

ANSWER TO QUESTION NO. 7: YES [ ] NO [ ]

QUESTION NO. 8: Did the defendant(s) breach the implied covenant of good faith and fair dealing?

ANSWER TO QUESTION NO. 8: YES [ ] NO [ ]

If you answered "Yes" please check all defendants that apply:

Robert Shippen [ ]; Jorja Shippen [ ]; Marriott Homes, LLC [ ]; Shippen Construction, Inc. [ ]

QUESTION NO. 9: Was defendant's(s') breach of the implied covenant of good faith and fair dealing a "material" breach?

ANSWER TO QUESTION NO. 9: YES [ ] NO [ ]

QUESTION NO. 10: Did the defendant(s) breach the implied warranty of habitability?

ANSWER TO QUESTION NO. 10: YES [ ] NO [ ]

If you answered "Yes" please check all defendants that apply:

Robert Shippen [ ]; Jorja Shippen [ ]; Marriott Homes, LLC [ ]; Shippen Construction, Inc. [ ]

QUESTION NO. 11: Should the corporate veil of Marriott Homes, LLC and/or Shippen Construction, Inc. be pierced to hold Robert and/or Jorja Shippen individually liable for the acts of their entities?

ANSWER TO QUESTION NO. 11: YES [ ] NO [ ]

If you answered "Yes" please check those who should be held liable:

Robert Shippen [ ]; Jorja Shippen [ ]

QUESTION NO. 12: Were Robert and Jorja Shippen unjustly enriched by their actions in this case?

ANSWER TO QUESTION NO. 12: YES [ ] NO [ ]

QUESTION NO. 13: If you answered "Yes" to any of questions 1 - 3 above, please assess an award of damages:

A. The contract should be rescinded: YES [ ] NO [ ]

B. The Plaintiffs should be restored the purchase price of the property. YES [ ] NO [ ]

Purchase Price of Property: $_____

C. The Plaintiffs should be reimbursed damages for money spent improving the property. YES [ ] NO [ ]

Damages to Improve Property: $_____

D. The Plaintiffs should be reimbursed damages related to clean up of sub-water. YES [ ] NO [ ]

Damages for sub-water cleanup: $_____

E. Shellee Goodspeed should be reimbursed her medical bills and prescription expenses. YES [ ] NO [ ]

Damages for medical expenses: $_____

QUESTION NO. 14: If you answered "Yes" to any of questions 1 - 3 above, you may assess additional punitive damages against Robert and/or Jorja Shippen. Punitive damages are awarded in the amount of $_____.

QUESTION NO. 15: As a separate form of measuring damages, if you answered "Yes" to any of questions 4 - 12, please assess an award of damages:

A. The contract should be rescinded: YES [ ] NO [ ]

B. The Plaintiffs should be restored the purchase price of the property. YES [ ] NO [ ]

Purchase Price of Property: $_____

C. The Plaintiffs should be restored the fair market value of the home as if the house did not have a defect. YES [ ] NO [ ]

Fair Market Value of Home
without the defect: $_____

D. Please enter the greater amount found
in 15(B) or 15(C) $_____

E. The Plaintiffs should be reimbursed
damages related to clean up of sub-water. YES [ ] NO [ ]

Damages for sub-water cleanup: $_____

E. Shellee Goodspeed should be reimbursed
her medical bills and prescription expenses. YES [ ] NO [ ]

Damages for medical expenses: $_____

THIS CONCLUDES THE SPECIAL INTERROGATORIES. UPON FINISHING THE QUESTIONS, PLEASE SIGN THE DOCUMENT WHERE INDICATED:

1._____
Foreman
2._____
3._____
4._____
5._____
6._____
7._____
8._____
9._____
10._____
11._____
12._____

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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 OBJECTIONS TO DEFENDANTS' REQUESTED JURY INSTRUCTIONS

COME NOW Plaintiffs by and through counsel of record and respectfully object to Defendants' proposed jury instructions as follows:

1. **IDJI 1.41.2:** Defendants have requested this instruction as a stock instruction, but this instruction calls for insertion of claims made by the Plaintiff and a question to be asked about that specific claim. Defendants have offered no such language to be inserted into the stock instruction. As the form instruction stands alone, it has no instructive effect. Plaintiffs object to the insertion of language by Defendants at a later date, as Defendants have had ample time to

weigh the issues and complete a special verdict form that would adapt to the course of the trial–a requirement of all special verdict forms in any case. Plaintiffs, however, have timely submitted such a special verdict form and statement of the issues. (*See Plaintiffs' Special Verdict* form and Plaintiff's requested jury Instruction (hereinafter "PrjI") No. 9). As a result, a request of a stock instruction to be filled in at a later date is inappropriate.

2. **IDJI 1.41.3:** Plaintiffs object to this request for the same reasons they object to Defendants' proposal of IDJI 1.41.2 above. There is no instructive effect to this instruction as proposed and Defendants have had sufficient time to complete this form in anticipation of the claims alleged by Plaintiffs.

3. **DEFENDANTS' GENERAL REQUEST TO RESERVE THE RIGHT TO SUBMIT A SPECIAL VERDICT SHOULD BE DENIED:** Plaintiffs object to Defendants' request to supplement or submit a special verdict form until after this court rules on Defendants' anticipated motion for directed verdict. Both Plaintiffs and Defendants have a duty to submit a special verdict form with their proposed jury instructions. These special verdict forms may be modified to retract certain questions based upon a ruling for a directed verdict. Therefore, it is incumbent on both parties to draft a special verdict form that can be modified to weigh each claim individually. If the judge denies a motion for a directed verdict, all issues alleged remain at issue. Defendants have failed to comply with their duty to provide a special verdict form that addresses all claims in a manner Defendants see fit. Defendants have further failed to explain to this Court how this case is different from any other case where multiple claims are alleged. Defendants should therefore be precluded from submitting a special verdict form immediately before the jury goes to deliberate. It is a violation of the pretrial orders and I.R.C.P. 51(a)(1).

4. **Instruction No. 1 and 2:** For brevity, both of these instructions may be consolidated to state "entities" rather than establishing a separate instruction for an LLC and a corporation. *See* PrjI No. 4.

5. **Instruction No. 6:** This jury instruction is incomplete. The bottom section does not present the elements of the contract that are not in dispute. If all elements of the contract are disputed by Defendants, Defendants should have modified the jury instruction to state that Defendants contest a contract even exists or which specific elements of the contract they do not contest. *See* PrjI No. 22.

6. **Instruction No. 8:** Plaintiffs believe this jury instruction does not accurately cover the elements of fraud alleged in this case. This proposed jury instruction uses the words "statement" or "stated a fact". This will lead a jury to believe that there must be a statement and that silence cannot amount to fraud. Such an assumption is in contravention to the *Tusch*, *G&M*, *Sorensen*, and *Bethalmy* decisions (*See Plaintiff's Trial Brief* pp. 12 - 17). In this case, fraud was committed not only by Defendants' written and oral misrepresentations, but also by their silence when they had a duty to speak. For this reason the elements of fraud as outlined in the *Aspiazu* decision (*See Plaintiff's Trial Brief* p. 12) more accurately accounts for fraud by silence by use of the word "misrepresentation" instead of "statement." For clarification to the jury on these elements, Plaintiffs' submitted PrjI Nos. 39 - 43. Furthermore, element number 4 of Defendant's proposed jury instruction again alludes to the requirement of an affirmative statement ("statement was true *at the time the statement was made*") rather than allowing for fraud by silence. The authority cited under the form proposed jury instruction do not deal with fraud by silence in a home construction case. PrjI No. 38 remains identical in all other respects to IDJI 4.60 and should be the jury instruction used by this Court. Plaintiffs would concede that the paragraph at the bottom of their PrjI No. 38 is repetitive and may be redacted as Defendants have done.

7. **Instruction No. 9:** Plaintiffs object to the length of this jury instruction as a point of reference as it is eight pages long and is bound to confuse the jury. Each claim should be a separate jury instruction. Furthermore, there is no legal authority cited by Defendants for the proposition of the elements in each claim. Therefore, neither Plaintiffs nor the Court can verify the source of Defendants purported instruction.

For example, Defendant's Count One Breach of Express Warranty appears to combine IDJI 6.08.4, 6.08.5, 6.10.1 and fails to instruct the jury on ambiguity of contract and parole evidence. These numerous issues are best dealt with by separate instructions to reduce confusion by the jury and to ensure the legal standards are fully presented to the jury. *See* PrjI Nos. 22 - 28.

The same objections apply to all of the subsequent counts alleged by Defendants in this proposed jury instruction.

Additionally, with regard to the Count Two: Breach of the Implied Covenant of Good Faith and Fair Dealing instruction, it fails to take into account that a breach of this

covenant can occur by the failure to perform the terms of the contract on the part of seller (see subpart (1)). It also fails to address that this breach is *implied* by the fact there is a contract (see subpart (3))–not that the covenant of good faith and fair dealing must be expressly agreed to. (See Plaintiff's Trial Brief pp. 5 - 6 and PrjI No. 29).

Count Three: Breach of Implied Warranty: This instruction (See subpart (1)) fails to state that liability can also be imputed on the seller/vendor not just the builder (PrjI No. 31) . It (See subpart 2) fails to instruct the jury that this warranty applies to latent defects, and not just that information known to the builder/seller (PrjI No. 32). It (See subparts (3 and 4)) fails to identify the correct standard that this warranty is implied as a matter of public policy not only by written agreement (PrjI No. 32). It also adds an element of disclaimer and fails to discuss cost of repair (See PrjI Nos. 33 and 34). All of these elements are best dealt with on an individual basis to be accurately conveyed to the jury. *See Plaintiff's Trial Brief* pp. 6 - 8 and PrjI Nos. 30 - 34.

Count Four: Alter Ego/Veil Piercing: Again, no legal authority is cited and it fails to give the jury proven examples of what may constitute veil piercing. For a fairly complicated issue, instruction to refresh the juror's mind of the complete standard would be appropriate. See PrjI No. 35.

Count Five: Unjust Enrichment: This instruction should coincide with IDJI 6.07.2 is on point with a claim for unjust enrichment and should be the model for jury instruction. Plaintiffs removed the language in the model instruction stating "Even though there is no agreement between the parties", as such language is very presumptuous where a claim for breach of contract also exists. This is an alternative theory for recovery by Plaintiffs and the jury should not be led to believe that the court believes a contract does not exist. Therefore, PrjI No. 36 should be the instruction given to the jury.

Counts Six Seven and Eight: Fraud Claims. Subsection 4 should state "The plaintiffs' ignorance of its falsity" instead of "defendant's". Subsection 6 should state "The plaintiffs' reliance was reasonable." See IDJI 4.60. Plaintiffs have consolidated all claims on fraud into PrjI No. 38, but do not object to having each claim of fraud separately set forth in a manner generally proposed by Defendants. Defendants' instructions also fail to account for other elements necessary to the fraud claim in this case, namely that information covered by PrjI Nos. 39 - 43 including those issues of fraud by silence, intent to deceive, superior knowledge, parol

evidence, and materiality. Therefore, Plaintiffs believe Defendants' proposed instructions related to fraud do not fully instruct the jury on necessary elements of Plaintiffs' claims.

Count Nine: Punitive Damages: IDJI 9.20 is directly on point. Plaintiff's claim for punitive damages is that the Defendants committed fraud. Where the language in the model jury instruction uses the disjunctive word "or", the word "fraudulent" should be the only word modifying the standard for punitive damages. See PrjI No. 51. The jury may incorrectly confuse "fraud" with "malice" when each is its own standard for punitive damages.

Affirmative Defense: Inspection of Property: Defendants have not cited authority for this defense. Furthermore, this defense is in direct contravention to PrjI No. 41. *See Plaintiff's Trial Brief* pp. 16-17. Without supporting authority, Defendant's proposed jury instruction appears to be in direct contrast to the rulings of the Idaho Supreme Court.

Affirmative Defense: No Warranties Exist for Ground Water: Defendants fail to cite the correct standard for an "Act of God" as they fail to recognize the exception to an "Act of God" defense, which is that Defendants can still be liable for an "Act of God" if they could have used ordinary care to protect against it. Whether the Defendants acted with ordinary care to protect against sub-water is the correct analysis for the jury. *See Plaintiff's Trial Brief* pp. 8 - 9 and PrjI No. 44.

Paragraph on Page 8 of Requested Instruction No. 9: This paragraph is unnecessary. Further, it is confusing to a jury as it may lead a jury to believe that the Plaintiffs are burdened with proving all nine of their nine causes of action and a failure to prove any one of the nine causes of action justifies a dismissal of the case on all other eight counts. Meeting the proposition of each count should be dealt with on an individual basis and not with a blanket instruction covering seven prior pages of instruction. If the Plaintiff does not meet its burden on a cause of action, the jury will obviously not find for the Plaintiffs on that cause of action.

8. **Instruction Nos. 11, 12, and 13:** These instructions fail to instruct the jury on the measure of damages for each cause of action. It is an incomplete form of IDJI 9.03 and combines IDJI 9.12 into the same instruction. In short, there is no instructive value. This is in contrast to PrjI No. 47 and 48, which defines the measure of damages for a breach of contract claim. *See also Plaintiff's Trial Brief* pp. 19-21.

9. **Instruction No. 14.** This instruction is condescending and discredits the theory of

veil piercing by using the words "tries" and "is attempting". The proper instruction for veil piercing should focus on the elements of law as set forth in PrjI No. 35. This instruction is also repetitive of Defendants' requested jury Instruction No. 9.

10. **Instruction No. 15.** This Instruction is repetitive of Defendant's requested jury Instruction No. 9. Furthermore, it instructs the jury that if Plaintiffs can make a claim for breach of contract, Plaintiffs cannot even argue the theory of unjust enrichment. Plaintiffs have protected against a double recovery for contract theories by consolidating all damages related to principles of contract into one damage assessment under the special verdict form.

11. **Instruction No. 16.** This instruction fails to discuss a remedy of restitution and rescission in the event of fraud. *See Plaintiff's Trial Brief* pp. 21 and PrjI No. 50.

12. **Instruction No. 17.** This instruction leaves out the instruction regarding the purpose of hearing about the defendants' wealth. See IDJI 9.20.5. Plaintiffs believe it is important that the jury understand that evidence has been presented for a calculated and permitted purpose and not as a presumptuous debtor's examination. See PrjI No. 52.

13. **Instruction No. 18:** See Plaintiff's prior objection to Count Nine: Punitive Damages.

DATED this 4 day of January, 2011.

WESTON S. DAVIS

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 4 day of January, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

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WESTON S. DAVIS

L:\wsd\~ Clients\7411.1 Goodspeed\Jury Instructions (Objections).wpd

T&T REPORTING

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December 20, 2010

Weston S. Davis, Esq.
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83402

Re: State of Idaho, County of Jefferson
GOODSPEED vs. SHIPPEN CONSTRUCTION
Case No.: CV-09-015
Deposition of: W. Roger Warner
Taken: December 14, 2010

Dear Mr. Davis:

Pursuant to Rule 30 (f) (1), I have enclosed the original and a certified copy of the transcript for the deposition taken in the above captioned matter. The E-Transcript has been electronically sent. I am also enclosing the original exhibits for the depositions taken in the case in a sealed envelope.

Mr. Dunn has been sent a certified copy of the transcript for the deposition taken in the above captioned matter. The E-transcript has been sent electronically.

The witness has been sent a copy for the "Read and Sign."

If you have any questions, please contact our office.

Sincerely,

John Terrill

Enclosures

cc – Robin D. Dunn, Esq.
Clerk of the Court
File

S

Offices at: 525 Park Avenue • Suite 1E • Idaho Falls, ID 83405-1020
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T&T REPORTING

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December 29, 2010

Weston S. Davis, Esq.
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P.O. Box 51630
Idaho Falls, ID 83402

Re: State of Idaho, County of Jefferson
GOODSPEED vs. SHIPPEN CONSTRUCTION, INC., et al.
Case No.: CV-09-015
Video Deposition of: David Chapple
Taken: December 23, 2010

Dear Mr. Davis:

Pursuant to Rule 30 (f) (1), I have enclosed the original and a certified copy of the transcript for the deposition taken in the above captioned matter. The DVD and the videographer's certificate for the deposition are also enclosed. The E-Transcript has been electronically sent.

Mr. Dunn has been sent a certified copy of the transcript for the deposition taken in the above captioned matter. The E-Transcript has been electronically sent.

A copy of the transcript will be available at our office for the witness to "Read and Sign."

If you have any questions, please contact our office.

Sincerely,

Debbi Crusat
for:
John Terrill

Enclosures

cc – Robin D. Dunn, Esq.
Clerk of the Court
File

DUNN LAW OFFICES, PLLC
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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., et. al. Defendants.	Case No. CV 09-015 MOTION(S) IN LIMINE

COME NOW, the defendants named above, by and through the undersigned counsel, and moves the above-entitled court for limine orders. The defendants recognized the court cannot rule on some issues until the plaintiff offers or intends to introduce evidence. Theses limine motions are designed to apprise the court of certain objections or requests that the defendant(s) may have at trial. The motion(s) in limine are on the following matters:

1. The purchase and sale agreement (plaintiffs' exhibit 3) provides for a one (1) year builders warranty. The warranty deed between plaintiffs and Robert and Jorja Shippen was recorded July 7, 2007 (plaintiffs' exhibit 4, paragraph 4). Any

warranty would end on July 7, 2008. Any matters which plaintiffs attempt to enter into evidence, either on liability or upon damages would be barred by the written agreement and irrelevant. All named defendants would request the court to exclude any testimony or evidence that would occur after such date of July 7, 2008.

2. All defendants would request that any reference to water issues, either surface or subsurface be stricken, whether it includes exhibits or testimony, as acts of nature are not warrantable and no express provision of any contract warrants the same.
3. Any reference to income tax returns of any of the defendants, including but not limited to, Robert and Jorja Shippen, as individuals; Marriot Homes, LLC; and/or Shippen Construction, Inc. should be excluded from evidence as the same have no relevancy and do not purport to prove any element of plaintiffs' case. Income of any particular year does not purport to show wealth or net assets of an entity or individual. Income does not correspond to individual holdings or assets or an entity or individual. Plaintiffs' exhibits 34, 35 and 36 are the income tax returns in question. The plaintiffs' exhibits are intended to inflame the jury and do not add any probative value.
4. Plaintiffs' exhibit 37 is a statement of liability insurance. Insurance references are prohibited in court settings. Furthermore, the insurance document is for coverages on acts which may occur during construction. These documents are prohibited from being presented to the jury.
5. Plaintiffs' exhibits 7-10 should be excluded as correspondence between attorneys. Such correspondence is not proper to be presented to the fact-finder (jury) and is

merely statements between counsel for each party. Mr. Davis would need to be called as a witness to lay the foundation and to testify as to the letters. These exhibits should not be allowed.

6. Plaintiffs' exhibit 11 are home improvement receipts after the purchase of the home. These receipts have nothing to do with the defendants, Robert and Jorja Shippens', sale to the plaintiffs. Any measure of damages, if any, would be the home as sold and the condition of the home after any alleged damages.
7. Plaintiffs' exhibit 14 has been excluded by Judge St. Clair's ruling.
8. How the defendants, Robert and Jorga Shippen, financed the construction of the home in question is irrelevant and plaintiffs' exhibit 20 should be excluded.
9. Any communications of a "neighbor" concerning water in the basement during construction, without actual viewing, are hearsay and non-admissible and should be excluded from the testimony process.
10. Plaintiffs' exhibit 6 is a video of alleged water flooding attributed to the defendants and has self-serving narrative on the video exhibit. The video, to what extent applicable for the jury, should not have sound on the video as the statements are self serving, hearsay and not covered by any exception. None of the defendants participated in the video document and voiced statements.

ADDITIONAL JURY INSTRUCTIONS

These defendants believe more jury instructions may be applicable as the trial unfolds but cannot predict what evidence or exhibits the jury may be allowed to hear or view. As such the defendants, individually or severally, reserved the right to supplement or to suggest to the court the need for additional jury

instruction(s).

DATED this 10th day of January, 2011

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of January 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

____ Hand Delivery

____ Postage-prepaid mail

_X_ 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

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

WESTON S. DAVIS (I.S.B. # 7449)
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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 **PLAINTIFF'S MOTION IN LIMINIE**

COME NOW, Plaintiffs and file the following Motion in Limine for purposes of excluding the use of certain portions of the testimony of David Chappel contained in his December 23, 2010 deposition.

Plaintiffs move to strike the testimony of David Chappel contained in pages 23:22 - 25:7 (Video time 9:31:22 - 9:32:58) on the basis of relevance (See Exhibit "A" attached hereto). The issue before this Court is whether the Goodspeeds, at the time of the transaction, intended to

inhabit the subject property and whether Robert and Jorja Shippen et al. misrepresented the condition of the home to the Goodspeeds, not what Mr. Goodspeed may or may not do with the home in the indefinite future.

Further, such line of questioning exceeds the scope of direct examination and is therefore improper. Defendants have not given notice of their intent to present Mr. Chappel as a witness on their behalf to establish any affirmative defenses. This was confirmed by counsel and the Court the morning of January 11, 2011.

Dated this 11 day of January, 2011.

WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 12 day of January, 2011, 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
[X] Hand Delivery
[ ] Fax
[ ] E-Mail
[ ] Overnight Mail
[ ] Courthouse Box

WESTON S. DAVIS

L:\wsd\~ Clients\7411.1 Goodspeed\Motion in Limine .wpd

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calls for a legal conclusion.
Q. (BY MR. DUNN:) You can answer. You're a real estate expert.
A. Would you ask the question again, please.
Q. Does the deed, warranty deed, ultimately conclude the sale? I believe you said yes.
A. Yes.
Q. Is the purchase and sale agreement a preliminary document to the final closing and recording of a warranty deed?
MR. DAVIS: Again, I object. I think that calls for a legal conclusion. I don't think it's been established that Mr. Chapple is, in fact, a real estate expert.
THE WITNESS: Based on our training, yeah. This is a document that needs to be prepared for a sale to eventually take place.
Q. (BY MR. DUNN:) Is that a standard real estate document?
A. Yes.
Q. I believe it's got a number on it that's fairly common in southeast Idaho.
What is that number?
A. RE-21.

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Q. And so in your experience, could you tell the jury what's the purpose of Plaintiff's Exhibit 3, which is the RE-21?
MR. DAVIS: Objection. Again, calls for a legal conclusion.
THE WITNESS: The purpose of this document?
Q. (BY MR. DUNN:) Correct.
A. The purpose of the document is to present an offer from a prospective buyer through a Realtor to another Realtor who represents a prospective seller in order to eventually consummate a sale.
Q. And in that -- In this particular instant, this was presented to you as representative of the defendants; is that correct? Marriott Homes, Robert and Georgia Shippen?
A. Correct, yes.
Q. Was there a sale that was consummated in this particular case?
A. Yes.
Q. And you had conversations with the Goodspeeds, in particular William Shawn Goodspeed; is that correct?
A. Yes.

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Q. Did he tell you his reasoning for purchasing this property?
A. He had sold his home in Tennessee, I believe, and took a job here as an independent contractor at the engineering laboratories and purchased a home upon moving here.
Q. Did he explain to you what he had done in purchases in the past and his intentions with this home?
A. He said -- I don't know to what extent how many times, but he said he bought a home in Tennessee, worked as an independent contractor, sold that home, made money, moved out here, took another job as an independent contractor, bought this home, and would probably do the same in the future.
Q. And did he explain to you his length of employment as independent contractors -- as an independent contractor?
A. I believe it was -- I think it's four to five years. I believe it's four to five years.
Q. And then he would move on to another independent contracting job.
Was that his explanation?
A. I don't know that he would move, technically pick up and move from his home, but that

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he would just -- after that one was up and then he would pursue another one. That's what our conversation entailed.
Q. And did he explain to you his intent was to purchase and eventually sell and make money on this particular home?
A. Yes.
Q. At this period of time when this home was built, listed, and sold, was this a fairly typical turnaround time for this type of home?
A. Yeah. For the price range it was in, yes.
Q. Now, you had an opportunity to view this home during the construction process; is that correct?
A. Yes.
Q. And did you ever observe any water standing at any point that you observed, the particular home, in the basement area?
A. No, not in the basement area.
Q. Did you ever observe that there was a leaching system placed in this structure for the purpose of water removal?
A. Yes.
Q. And this particular area of Jefferson

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

SHAWN AND SHELLIE GOODSPEED, Plaintiff, vs. SHIPPEN CONSTRUCTION, ETAL, Defendant.	Case No. CV-2009-15 **JURY TRIAL MINUTE ENTRY**

January 11, 2011, Court convened at the hour of 10:08 a.m. in open court at Rigby, Idaho, the Honorable Gregory S. Anderson, District Judge, presiding.

Ms. Karen Konvalinka, Court Reporter, Ms. Nancy Andersen, Ms. Karol Drake, Deputy Court Clerks and Roger Poole, Deputy, were present.

The plaintiffs were represented by Mr. Weston Davis and Sam Angel.

The defendants were represented by Mr. Robin Dunn.

Prior to Court convening, the jury panel viewed a film regarding jury service, the roll was called, all jurors were present, and twenty prospective jurors were called and seated as follows:

Adam Sullivan
Rhonda Price
Terry Foster
Michael Casteel
Steven Golder
Janet Benedict
Darryl Pinnock
Gloria Murilla
Patricia Hennington
Bonnie Wehausen
LeAnn Ferguson
Megan Martinson
Michele Bradshaw
Michael Bezzant
Rand Dixon
Jerrie Lee
Johns Schernecker
Dawn Holman
Austin Lords
Amber Nicholl

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The parties stipulated that the 20 jurors were pulled.

Upon inquiry from the Court, counsel stated they were ready to proceed.

The Court introduced the Court staff, counsel and the defendant.

The Clerk administered the oath of voir dire to the jurors.

The Court advised the jury panel regarding voir dire and challenges for cause.

The Court conducted voir dire examination.

The Court excused Mr. Adam Sullivan was excused for cause. Ms. Ariana Jurez was called and took her place on the jury panel. The Court excused Ms. Ariana Jurez for cause. Ms. Cynthia England was called and took her place on the jury panel. The Court excused Ms. Megan Martinson was excused for cause. Ms. Donna Reed was called and took her place on the jury panel. The Court excused Mr. Rand Dixon for cause. Ms. Diana Myers was called and took her place on the jury panel. The Court excused Ms. Amber Nicholl was excused for cause. Ms. Corie Waddoups was called and took her place on the jury panel. The Court excused Ms. Corie Waddoups for cause. Mr. Richard Jones was called and took his place on the jury panel. The Court excused Ms. Rhonda Price was excused for cause. Mr. Dallin Gambles was called and took his place on the jury panel. The Court excused Mr. Dallin Gambles was excused for cause. Mr. Kevin Young was called and took his place on the jury panel.

Mr. Davis conducted voir dire examination.

Mr. Davis challenges Ms. Diana Myers.

The Court excused Ms. Diana Myers for cause. Mr. David Solomon was called and took his place on the jury panel.

Mr. Davis passes the panel for cause.

Mr. Dunn conducted voir dire examination. .

Mr. Dunn passes the panel for cause.

The Court instructed the jury panel regarding peremptory challenges.

The plaintiff exercised the following peremptory challenges:

Michael Bezzant, Steven Golder, Darryl Pinnock, Terry Foster

The defendant exercised the following peremptory challenges

Janet Benedict, Austin Lords, Donna Reed, Michael Casteel

The following jurors were sworn to well and truly try this cause:

Cynthia England	Michele Bradshaw
Kevin Young	David Solomon
Gloria Murillo	Jerrie Lee
Patricia Hennington	John Schernecker
Bonnie Wehausen	Dawn Holman
LeAnn Ferguson	Richard Jones

The Court dismissed those jurors challenged or not called to serve in this cause. Upon inquiry from the Court, counsel accepted the jury panel as seated.

The Court admonished the jury and the Court and jury recessed for a short break at 11:58 a.m.

Court and counsel convened in open court outside the presence of the jury at 12:24 p.m.

Counsel indicated they had no objection to the proposed jury instructions.

The Court addressed the jury panel and then read jury instructions nos. 1 through 3.

The Clerk read the Prosecuting Attorney's Information to the jury.

Mr. Davis presented an opening statement.

Mr. Dunn presented an opening statement.

Plaintiffs' Exhibits 1, 2 & 3 were admitted by stipulation.

William Shawn Goodspeed, being called on behalf of the Plaintiff, was duly sworn and examined by Mr. Davis.

1:13 Mr. Dunn objected – overruled.

1:18 Mr. Dunn objected – overruled.

Mr. Davis had the witness view Exhibit #4. Mr. David moved to admit Exhibit #4. No objection. Exhibit #4 was admitted.

1:27 Mr. Dunn objected – sustained.

1:32 Mr. Dunn objected – sustained.

Mr. Davis had the witness view Exhibit #7 and Exhibit #8

1:38 Sidebar

Mr. Davis continues and moved to admit Exhibits #7 and Exhibit #8. Mr. Dunn objected.

Mr. Dunn objected – foundation – sustained.

Mr. Dunn objected – leading – sustained.

Mr. Dunn objected – reading from the exhibit – sustained.

Mr. Dunn objected – legal conclusion/leading – sustained.

Mr. Davis again moved to admit exhibits.

Mr. Dunn objected – sustained.

Mr. Dunn objected – offer of settlement – sustained.

Mr. Dunn objected – asked for answer to be stricken because of warranty time – overruled.

Mr. Dunn made a statement.

Mr. Davis continued.

1:56 the Court adjourned for the day. The court admonished the jury.

The jury leaves the courtroom.

Wednesday, January 12, 2011

Court reconvened at 8:39 a.m., January 12, 2011, with counsel and parties at 8:39 a.m. outside the presence of the jury.

Mr. Dunn addressed the Court regarding defendants' motion in limine on certain exhibits. Mr. Dunn asked the Court to impose a cutoff point of the evidence that would be presented regarding contractual issues as of 7/7/2008.

Mr. Davis responded in objection to the motion in limine.

Mr. Dunn replied.

The Court denied the motion in limine in regards to paragraph 1.

Mr. Dunn presented argument on defendants' motion in limine regarding paragraph 2.

Mr. Davis presented argument in objection.

The Court denied the motion in regard to paragraph 2.

Mr. Dunn cannot argue "act of god" to the jury at this point.

Mr. Dunn presented argument in support of motion in limine regarding paragraph 3.

Mr. Davis presented argument in objection.

Mr. Dunn responded.

The Court denied the motion in limine regarding paragraph 3.

Mr. Dunn presented argument to the motion in limine regarding paragraph 4.

Mr. Davis presented argument in objection.

Mr. Dunn responded.

The Court granted the motion regarding paragraph 4.

Mr. Dunn presented argument to the motion in limine regarding paragraph 5.

Mr. Davis presented argument in objection.

Mr. Dunn responded.

The Court withheld ruling.

Mr. Dunn presented argument to the motion in limine regarding paragraph 6.

Mr. Davis presented argument in objection.

Mr. Dunn submitted.

The Court denied the motion regarding paragraph 6.

Mr. Dunn presented argument to the motion in limine regarding paragraph 7.

Mr. Davis presented argument in objection.

Mr. Dunn stated that Judge St. Clair already ruled on this issue.

Mr. Dunn presented argument to the motion in limine regarding paragraph 8.

Mr. Davis presented argument in objection.

Mr. Dunn responded.

The Court denied the motion in regard to paragraph 8.

Mr. Dunn withdrew motion regarding paragraph 9.

Mr. Dunn presented argument to the motion in limine regarding paragraph 10.

Mr. Davis presented argument in objection.

The Court stated that the video may be shown without audio.

Mr. Davis addressed the Court and presented argument in support of the plaintiffs' motion in limine.

Mr. Dunn presented argument in objection to the motion.

Mr. Davis submitted.

The Court withheld ruling.

Mr. Davis addressed the Court regarding the insurance issue.

Mr. Dunn responded.

Mr. Davis submitted

The Court held that the response would be inadmissible.

The Court recessed at 9:51 am

The Court reconvened at 10:01

The jury joined the proceedings at 10:04 a.m.

Mr. Davis called his witness, William Shawn Goodspeed, who was still under oath, and continues examination.

Mr. Dunn objects – foundation – sustained.

Mr. Dunn objects – foundation – sustained.

Mr. Dunn objects – foundation – sustained.

Mr. Davis reviewed Exhibit #11 with the witness.

Mr. Davis moved to admit Exhibit #11.

Exhibit #11 was admitted without objection.

Mr. Dunn objected – sustained.

Mr. Davis presented a proposed list of damages for Court, counsel and witness to review.

Mr. Davis asked to mark the document as Exhibit #11A.

Mr. Dunn objected – relevance - sustained.

Mr. Davis reviewed Exhibit #12 with the witness.

Mr. Davis moved to admit Exhibit #12. No objection. Exhibit #12 was admitted.

Mr. Dunn objected – overruled.

Nothing further from Mr. Davis

Mr. Dunn begins cross-examination.

Mr. Dunn reviewed previously admitted Exhibit #3 with the witness and the jury.

Mr. Davis objects – overruled.

Mr. Davis objects – calling for legal conclusion – overruled.

Mr. Davis objects – relevance – sustained.

Mr. Davis objects – hearsay – overruled.

Mr. Davis objects – overruled.

Mr. Davis objects – overruled.

Mr. Dunn has nothing further.

Mr. Davis begins re-direct.

Mr. Dunn objects – overruled.

Mr. Davis reviews previously admitted Exhibit #3 with the witness.

Mr. Dunn objected –

11:34 Brief recess.

11:47 Court reconvened with counsel, parties and all jurors present.

Previous objection overruled.

Mr. Dunn objected – leading – sustained.

Mr. Davis reviews previously admitted Exhibit #1 with the witness.

Nothing further, the witness stepped down.

Mr. Davis called his next witness, Mr. Randy Stoor, who was duly sworn and took the stand.

Mr. Davis began examination.

Mr. Dunn began cross-examination.

Mr. Dunn reviewed previously admitted Exhibit #3 with witness.

Mr. Davis began re-direct.

Mr. Dunn asked the Court if he could ask a few more questions.

Mr. David objected.

12:30 Sidebar

12:31 Mr. Dunn re-crossed.

Mr. Davis has nothing further.

12:33 Court recesses for lunch

The Court speaks to counsel regarding the plaintiffs' motion in limine and jury instructions and when counsel thought they would be done with their case-in- chief.

1:30 Court reconvened outside the presence of the jury.

Davis submits argument on the brief in the interest of time.

Mr. Dunn had no objections.

The Court will allow testimony.

1:38 The jury re-entered.

Mr. Davis called his next witness, Mr. Paul Jenkins, who was sworn and took the stand.

Mr. Dunn began cross-examination.

Mr. Davis objected – overruled.

Nothing further. The witness steps down.

Mr. Davis called his next witness, Mr. Dan Foreink, who was sworn and took the stand.

Mr. Davis reviewed Exhibit #15 with the defendant.

Mr. Davis moved to admit Exhibit #15. Mr. Dunn had no objections. Exhibit #15 was admitted.

Mr. Dunn began cross-examination.

Mr. Dunn reviews Exhibit with defendant.

Mr. Davis objects – sustained. Mr. Dunn withdrew the question.

Nothing further. The witness stepped down.

Mr. Davis called his next witness, Mr. Eric Geisler, who was sworn and took the stand.

Mr. Davis began examination.

Mr. Dunn began cross-examination.

Mr. Davis had nothing further.

Mr. Davis offered Exhibit #49, video deposition of Dave Chapple and moved to have it admitted. Mr. Dunn had no objections. Exhibit #49 was admitted.

Parties stipulated that the video did not need to be transcribed.

Mr. Davis played the video to the jury.

Mr. Davis offered the written transcript as Exhibit #49A. Mr. Dunn had no objection. The Exhibit was offered as Exhibit 49A

2:41 Sidebar

2:43 Recess

2:59 Court reconvened with counsel, parties and the jury present.

Mr. Davis called his next witness, Mr. Robert Shippen, who was sworn and took the stand.

Mr. Davis began examination.

Mr. Davis reviews Exhibit #16 with the witness.

Mr. Davis moved to have Exhibit #16 admitted. Mr. Dunn had no objections. Exhibit #16 was admitted.

Mr. Davis reviews Exhibit #33 with the witness.

Mr. Davis moved to have Exhibit #33 admitted. Mr. Dunn had no objections. Exhibit #33 was admitted. Mr. Davis reviews Exhibit #33 with the witness.

Mr. Davis moved to have Exhibit #32 admitted. Mr. Dunn had no objections. Exhibit #32 was admitted.

Mr. Dunn objected – overruled.

Mr. Davis reviewed Exhibit #21 with the witness.

Mr. Davis moved to have Exhibit #21 admitted. Mr. Dunn had no objections. Exhibit #21 was admitted.

Mr. Davis reviewed Exhibit #19 with the witness.

Mr. Davis moved to have Exhibit #19 admitted. Mr. Dunn had no objections. Exhibit #19 was admitted.

Mr. Davis reviewed Exhibit #18 with the witness.

Mr. Davis moved to have Exhibit #18 admitted. Mr. Dunn had no objections. Exhibit #18 was admitted.

Mr. Davis reviewed Exhibit #22with the witness.

Mr. Davis moved to have Exhibit #22 admitted. Mr. Dunn had no objections. Exhibit #22 was admitted.

Mr. Davis reviewed Exhibit #24 with the witness.

Mr. Davis moved to have Exhibit #24 admitted. Mr. Dunn had no objections after the exhibit was modified by taking out the second page. Exhibit #24was admitted.

Mr. Davis reviewed Exhibit #23 with the witness.

Mr. Davis moved to have Exhibit #23 admitted. Mr. Dunn had no objections. Exhibit #23 was admitted.

Mr. Davis moved to publish the deposition of Robert Shippen.

The Court published the deposition.

Mr. Davis reviewed the deposition with the witness.

Mr. Davis reviewed Exhibit #26 with the witness.

Mr. Davis moved to have Exhibit #26 admitted. Mr. Dunn had no objections. Exhibit #26 was admitted

Mr. Davis reviewed Exhibit #27 with the witness.

Mr. Davis moved to have Exhibit #27 admitted. Mr. Dunn had no objections. Exhibit #27 was admitted.

Mr. Davis reviewed Exhibit #28 with the witness.

Mr. Davis moved to have Exhibit #28 admitted. Mr. Dunn objected on relevancy. Objection was sustained.

Mr. Davis reviewed Exhibit #29 with the witness.

Mr. Davis moved to have Exhibit #29 admitted. Mr. Dunn objected on relevancy. Objection was sustained.

Mr. Davis reviewed Exhibit #30 with the witness.

Mr. Davis moved to have Exhibit #30 admitted. Mr. Dunn had no objections. Exhibit #30 was admitted.

Mr. Davis reviewed Exhibit #20 with the witness.

Mr. Davis moved to have Exhibit #20 admitted. Mr. Dunn objected - overruled. Exhibit #20 was admitted.

Mr. Davis reviewed previously admitted Exhibit #19 with the witness.

Mr. Davis reviews page 131 of the witness's deposition.

Mr. Davis reviewed Exhibit #7 and Exhibit #8 with the witness.

Mr. Davis moved to have Exhibit #7 admitted. Mr. Dunn objected. Mr. Davis responded. Mr. Dunn replied. Exhibit #7 was admitted. Mr. Dunn will prepare a proper jury instruction.

Mr. Davis reviewed Exhibit #9 with the witness. Mr. Davis moved to have Exhibit #9 admitted. Mr. Dunn had no objections. Exhibit #9 was admitted.

Mr. Davis moved to have Exhibit #7 admitted as to Marriott Homes, LLC.. Mr. Dunn objected. Objection was sustained.

Mr. Davis reviewed Exhibit #39 with the witness.

Mr. Davis moved to have Exhibit #39 admitted. Mr. Dunn had no objections. Exhibit #39 was admitted.

Mr. Davis reviewed Exhibit #34 with the witness.

Mr. Davis moved to have Exhibit #34 admitted. Mr. Dunn had previously objected - overruled. Exhibit #34 was admitted.

Mr. Davis reviewed Exhibit #36 with the witness.

Mr. Davis moved to have Exhibit #36 admitted. Mr. Dunn had previously objected - overruled. Exhibit #36 was admitted.

5:30 Court recesses for the day.

Thursday, January 13, 2011

9:05 am Court reconvenes with the jury and all parties present.

Mr. Dunn stated that there was a stipulation to have a different witness testify at this point, instead of the defendant who was testifying when court recessed last night, to accommodate the witnesses schedule.

9:07 Sidebar

9:11 Mr. Davis called Ms. Shellee Goodspeed as his next witness who was sworn and took the stand.

Mr. Davis began examination.

Mr. Davis reviews previously admitted Exhibit #1 with the defendant and the jury.

Mr. Dunn objected – foundation – sustained.

Mr. Davis reviewed Exhibit #6 with the witness. Mr. Davis moved to have Exhibit #6 admitted. Mr. Dunn had no objections. Exhibit #6 was admitted.

Mr. Davis published the video to the jury and the witness.

Mr. Davis reviewed Exhibits #5a – 5f with the witness. Mr. Davis moved to have Exhibits #5a – 5f admitted. Mr. Dunn had no objections. Exhibits #5a – 5f were admitted.

Mr. Dunn began cross-examination.

Mr. Davis objected – foundation – sustained.

Mr. Davis objected – relevance – overruled.

Mr. Davis objected – foundation – sustained.

Mr. Davis began re-direct.

Nothing further. The witness steps down.

Mr. Davis called his next witness, Ms. Jorja Shippen, who was sworn and took the stand.

Mr. Davis began examination.

Mr. Dunn will reserve his cross in the interest of time.

Mr. Davis called his next witness, Mr. Jeffery Stoddard, who was sworn and took the stand.

Mr. Davis began examination.

Mr. Dunn began cross-examination.

Mr. Dunn reviewed Exhibits #41 with the witness. Mr. Dunn moved to have Exhibit 41 admitted. Mr. Davis had no objections. Exhibit #41 was admitted.

Mr. Davis began redirect.

Nothing further. The witness steps down.

Mr. Davis called his next witness, Mr. Robert Meikle.

Mr. Davis begins examination.

Mr. Davis reviewed Exhibits #45 with the witness. Mr. Davis moved to have Exhibits #45 admitted. Mr. Dunn had no objections. Exhibits #45 were admitted.

Mr. Dunn began cross examination.

Mr. Davis has nothing further. The witness steps down.

Mr. Davis called his next witness, Mr. Ray Keating, who is sworn and takes the stand.

Mr. Davis began examination.

Mr. Davis reviewed Exhibit #43 with the witness. Mr. Davis moved to have Exhibit #43 admitted. Mr. Dunn had no objections. Exhibit #43 was admitted.

Mr. Davis reviewed previously admitted Exhibits #19 with the witness.

Mr. Dunn began cross-examination.

Mr. Dunn reviewed Exhibit #42 with the witness. Mr. Dunn moved to have Exhibit #42 admitted. Mr. Davis had no objections. Exhibit #42 was admitted.

Mr. Davis re-directs.

Nothing further. The witness steps down.

10:50 Side bar

10:52 The Court breaks for a brief recess.

11:04 Court reconvenes with the jury, counsel and all parties present.

Mr. Davis called his next witness, Mr. Mark Leible, who is sworn and takes the stand.

Mr. Davis began examination.

Mr. Dunn began cross examination.

Mr. Davis has no redirect.

Mr. Davis reviewed Exhibit #47 with the witness. Mr. Davis moved to have Exhibit #47 admitted. Mr. Dunn had no objections. Exhibit #47 was admitted.

Nothing further. The witness steps down.

11:14 Plaintiffs rested.

11:16 Recess

1:07 Court reconvened outside the presence of the jury.

Mr. Dunn moved for a directed verdict.

Mr. Dunn presented argument in support of a directed verdict to dismiss out of the case Marriott Homes and Shippen Construction.

Mr. Dunn continued and stated that Count I, Breach of Contract has been complied with.

Mr. Davis responded.

Mr. Dunn replied.

The Court DENIED the motion for directed verdict regarding Count I.

Mr. Dunn skipped Count II.

Mr. Dunn continued and went on to Count III.

Mr. Davis responded.

Mr. Dunn replied

Mr. Davis addressed the Court.

The Court DENIED the motion for directed verdict regarding Count III.

Count IV is moot and should be stricken.

Mr. Davis agreed.

The Court GRANTED the motion with regard to Count IV.

Mr. Dunn continued with Count V.

Mr. Davis responded.

The Court DENIED the motion with regard to Count V.

Mr. Dunn continued argument with regard to Counts VI, VII, VIII.

Mr. Davis responded.

Mr. Dunn replied.

The Court DENIED the motion with regard to Counts VI, VII & VIII.

Mr. Dunn continued argument with regard to Count IX.

Mr. Davis responded.

Mr. Dunn replied.

Mr. Dunn commented on the water in 2006.

Mr. Davis commented on the water in 2006.

The Court DENIED the motion with regard to Count IX.

Nothing further.

1:52 The jury re-enters.

The Court informs the jury that the cause of action will only be against Robert and Jorja Shippen now.

Mr. Dunn began to present his case.

Mr. Dunn called his first witness, Mr. William Roger Warner, who was sworn and took the stand.

Mr. Dunn begins his examination.

Mr. Davis stipulated that the witness is an expert.

Mr. Dunn reviewed Defendants Exhibits A-E with the witness.

Mr. Dunn moved to admit Defendant's Exhibits A-E. Mr. Davis had no objections. Exhibits A-E were admitted.

Mr. Davis objected – sustained.

Mr. Davis objected – sustained.

Mr. Davis began cross examination to the witness.

Mr. Davis reviewed Exhibit B with the witness.

Mr. Dunn objects – not his area of expertise –overruled.

Mr. Davis reviews Exhibit 50 with the witness.

Mr. Davis moved to admit Exhibit 50. No objections. Exhibit 50 was admitted.

Mr. Davis moved to publish the transcript of the deposition of Roger Warner.

The Court published the transcript of the deposition of Roger Warner.

Mr. Dunn began redirect.

Nothing further. The witness stepped down.

Mr. Dunn called Jorja Shippen, who was previously sworn and took the stand.

Mr. Dunn began examination of the witness.

Mr. Davis had no questions.

Recess

3:03 Court reconvened with the jury, counsel and all parties present.

Mr. Dunn called his next witness, Mr. Robert Shippen, who was previously sworn and took the stand.

Mr. Davis objected – foundation – sustained.

Mr. Davis asked to strike testimony regarding Mr. Goodspeed's job.

Mr. Davis objected – foundation - sustained.

Mr. Davis objected – foundation - sustained.

Mr. Davis objected – foundation - sustained.

Mr. Davis objected – foundation - sustained.

Mr. Davis objected – foundation - sustained.

Mr. Davis began cross-examination.

Mr. Dunn had no further questions.

The witness stepped down.

Mr. Dunn called Mr. William Shawn Goodspeed, who was previously sworn and took the stand.

Mr. Davis objected – sustained.

Mr. Davis objected –sustained.

Nothing further. The witness stepped down.

Mr. Dunn and Mr. Davis had not additional witnesses.

The defense rested.

Mr. Dunn renewed his motion for a directed verdict on punitive damages.

Mr. Dunn presented argument.

Mr. Davis presented argument in objection.

The Court GRANTED the motion for a directed verdict on punitive damages.

Mr. Dunn addressed the Court regarding exhibits that no longer apply.

3:58 Court recessed for the day.

Friday, January 14, 2011

1:29 p.m. Court reconvened outside the presence of the jury.

Mr. Davis objected to the Jury Instruction that relates to punitive damages. As punitive damages are no longer before the Court the instruction is prejudicial. Mr. Davis wants the instruction to be stricken.

Mr. Dunn responded.

The Court will allow the instruction will be given.

Mr. Davis objected to the instruction regarding disclaimer of warranty.

Mr. Dunn responded.

Mr. Davis replied.

The Court will not give the instruction.

Mr. Dunn objected to the instruction regarding the buyer knowing.

Mr. Davis responded.

Mr. Dunn submitted.

The Court will allow the instruction to be given with noted objection.

Mr. Dunn stated that plaintiff and defendant have agreed that items not offered to the jury be held from the jury. Mr. Dunn listed the exhibits that shall be reviewed.

The Court spoke with counsel regarding acts of nature/god. Acts of nature/god have been withdrawn and will not be mentioned.

Mr. Dunn listed the exhibits that should be withdrawn from the jury: 10, 13, 14, 23, 24, 26, 27, 28, 29, 30, 37, 38, 25, 31, 34, 35, 37, 38, 41, 44, 46, 48.36, 39 and 17. Exhibit 6 was substituted with a disk that does not have sound.

Nothing further from counsel.

2:31 p.m. The Jury entered.

The Court read jury instructions nos. 5 through 37 and explained them to the jury.

3:03 p.m. Mr. Davis presented closing argument.

3:30 p.m. Mr. Dunn presented closing argument.

4:00 p.m. Mr. Davis presented rebuttal argument.

Mr. Dunn objected – sustained.

4:04 Under the direction of the Court, the bailiff was administered the oath by the Clerk.

The jury retired at 4:05 p.m. for deliberation in the charge of the bailiff.

The Court asked counsel to leave a telephone number where they could be reached with the clerk.

Court recessed at 4:06 p.m.

January 18, 2011

Court reconvened at 2:02 p.m. outside the presence of the jury to address a question regarding the verdict.

Mr. Davis had no objections.

Mr. Dunn responded.

2:06 The jury entered.

The court asked the jury if they had reached a verdict.

The foreperson, Ms. Bonnie Wehausen, stated that a verdict had been reached.

The Court asked the jury if they had any questions regarding the verdict.

The jury foreman stated that they did have a question regarding the signing of the verdict, as there more than one count, do they need a signature on each count.

The Court informed the jury that a new verdict from had been prepared if they wanted to use the new one.

The jury stated that they would like to use the new one.

The jury left the courtroom and 2:09 p.m.

Court reconvened at 2:42 p.m. with the jury, counsel and all parties present.

Counsel stipulated that all jurors were present.

Upon being asked by the Court, the jury foreperson, Ms. Bonnie Wehausen, stated the jury had arrived at a verdict and handed the verdict to the bailiff who delivered it to the Court. Under the direction of the Court, the Clerk read and filed the verdict.

(see filed Special Verdict)

The jury was polled by request of the plaintiff.

No other questions from counsel.

The Court thanked the jurors and excused them..

Mr. Dunn will prepare the judgment.

Mr. Davis asked for a copy of the verdict.

DATED this _____ day of January, 2011.

_____
GREGORY S. ANDERSON
District Judge

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. ROBERT SHIPPEN and JORJA SHIPPEN, husband and wife; Defendants.	Case No. CV-09-15 **SPECIAL VERDICT**

2011 JAN 18 PM 3:09
JEFFERSON COUNTY, IDAHO

INSTRUCTIONS

As stated in Jury Instruction No. 37, at least nine of you must agree on the answer to each question on this verdict form. However, the same nine of you need not agree on the answer to each question. Signature blocks have been provided for each question below. If your answer is unanimous to a question, your foreperson alone should sign for that question. If nine or more, but less than the entire jury, agree on the answer to a question, then those so agreeing will sign for that question.

Most of the questions below have multiple parts. If a different group of you agree on different parts to a question, and you therefore need additional signature lines, notify the bailiff, and the Court will provide a supplemental signature sheet.

The questions on this verdict form require you to determine whether either of the Defendants are liable to the Plaintiffs. If you determine either of the Defendants are liable, you will then be required to assess the damages, if any, to which the Plaintiffs are entitled.

825

In this case, the Plaintiffs have alleged the Defendants are liable for multiple reasons. You will be asked to determine an appropriate remedy for each of the reasons, if any, you find either of the Defendants liable.

In answering questions regarding damages, answer each question independently—without regard for damages associated with other theories of liability. In other words, do not make offsets or take deductions with regard to one theory of liability in an effort to avoid duplicative remedies.

SPECIAL INTERROGATORIES

WE, THE JURY, ANSWER THE SPECIAL INTERROGATORIES AS FOLLOWS:

QUESTION NO. 1: Did Robert and/or Jorja Shippen fraudulently induce Shawn and Shellee Goodspeed to purchase the subject home by making a material misrepresentation or concealment of a known fact or known defect?

ANSWER TO QUESTION NO. 1:

Robert Shippen	YES [ ]	NO [X]
Jorja Shippen	YES [ ]	NO [X]

JURORS WHO AGREE ON THE ANSWER TO QUESTION NO. 1:

Bonnie Wehausen
Foreperson

LeAnn Ferguson

David G Solomon

TH 11/8/11

QUESTION NO. 2: Did Robert and/or Jorja Shippen breach their express warranty with Shawn and Shellee Goodspeed?

ANSWER TO QUESTION NO. 2:

Robert Shippen:	YES [ ]	NO [X]
Jorja Shippen:	YES [ ]	NO [X]

If you answered this question "Yes" with regard to either defendant, was the breach of the express warranty a "material" breach?

YES [ ] NO [ ]

JURORS WHO AGREE ON THE ANSWER TO QUESTION NO. 2:

Bonnie Wilhausen
Foreperson

LeAnn Ferguson

M. B

Dkt

Cindy England

David L Solomon

QUESTION NO. 3: Did Robert and/or Jorja Shippen breach the ~~implied~~ covenant of good faith and fair dealing?

ANSWER TO QUESTION NO. 3:

Robert Shippen	YES [ ]	NO [X]
Jorja Shippen	YES [ ]	NO [X]

If you answered this question "Yes" with regard to either defendant, was the breach of the implied covenant of good faith and fair dealing a "material" breach?

YES [ ] NO [ ]

JUROR WHO AGREE ON THE ANSWER TO QUESTION NO. 3:

Bonnie Wilhausen
Foreperson

LeAnn Ferguson

David G Solomon

Cindy England

Jorja Blee

QUESTION NO. 4: Did Robert and/or Jorja Shippen breach the implied warranty of habitability?

ANSWER TO QUESTION NO. 4:

Robert Shippen	YES [ ]	NO [X]
Jorja Shippen	YES [ ]	NO [X]

JURORS WHO AGREE ON THE ANSWER TO QUESTION NO. 4:

Bonnie Wilhausen
Foreperson

David G Solomon

LeAnn Ferguson

Jorja Blee

Michele Brosseau

QUESTION NO. 5: Were Robert and/or Jorja Shippen unjustly enriched by their actions in this case?

ANSWER TO QUESTION NO. 5:

Robert Shippen	YES [ ]	NO [X]
Jorja Shippen	YES [ ]	NO [X]

JURORS WHO AGREE ON THE ANSWER TO QUESTION NO. 5:

Foreperson

QUESTION NO. 6: If you answered "Yes" to Question No. 1, what remedy or remedies, if any, are the Plaintiffs entitled to as a result of Robert and/or Jorja Shippen's fraud?

A. Direct Damages:

- Rescission of the contract YES [ ] NO [ ]

Purchase price to be restored to Plaintiffs: $_____

- Restoration of the difference between the actual value of the house and the fair market value of the of the house as if it had no defect

YES [ ] NO [ ]

Actual value of house: $_____

Fair market value of house without defect: $_____

B. Consequential and Incidental Damages: YES [ ] NO [ ]

- Restitution for property improvement expenses: $_____
- Restitution for sub-water clean up expenses: $_____

JURORS WHO AGREE ON THE ANSWER TO QUESTION NO. 6:

_____ _____

Foreperson

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

QUESTION NO. 7: If you answered "Yes" to Question No. 2 or Question No. 3, what remedy or remedies, if any, are the Plaintiff's entitled to as a result of Robert and/or Jorja Shippen's breach of contract?

ANSWER TO QUESTION NO. 7:

A. Direct Damages:

- Rescission of the contract (only available if breach was material)

YES [ ] NO [ ]

Purchase price to be repaid: $_____

- Restoration of the difference between the actual value of the house and the fair market value of the of the house as if it had no defect (available whether breach was material or immaterial)

YES [ ] NO [ ]

Actual value of house: $_____

Fair market value of house without defect: $_____

B. Consequential and Incidental Damages (available whether breach was material or immaterial)

YES [ ] NO [ ]

- Restitution for property improvement expenses: $_____
- Restitution for sub-water clean up expenses: $_____

JURORS WHO AGREE ON THE ANSWER TO QUESTION NO. 7:

_____ _____

Foreperson

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

QUESTION NO. 8: If you answered "Yes" to Question No. 4, what remedy or remedies are the Plaintiffs entitled to recover as a result of Robert and/or Jorja Shippen's breach of the implied warranty of habitability?

ANSWER TO QUESTION NO. 8:

A. Direct Damages:

- Rescission of the contract YES [ ] NO [ ]

  Purchase price to be restored to Plaintiffs: $_____

- Restoration of the difference between the actual value of the house and the fair market value of the of the house as if it had no defect

  YES [ ] NO [ ]

  Actual value of house: $_____

  Fair market value of house without defect: $_____

B. Consequential and Incidental Damages: YES [ ] NO [ ]

- Restitution for property improvement expenses: $_____
- Restitution for sub-water clean up expenses: $_____

JURORS WHO AGREE ON THE ANSWER TO QUESTION NO. 8:

_____ _____

Foreperson

_____ _____

_____ _____

_____ _____

_____ _____

QUESTION NO. 9: If you answered "Yes" to Question No. 5 and you find the contact should be rescinded, what is the remedy which the Plaintiffs are entitled to recover as a result of Robert and/or Jorja Shippen's unjust enrichment?

ANSWER TO QUESTION NO. 9:

- Amount that would be unjust for Defendants to retain and which should be restored to the Plaintiffs: $_____

JURORS WHO AGREE ON THE ANSWER TO QUESTION NO. 9:

Foreperson

DATED this 18 day of January, 2011.

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)

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. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-015 DEFENDANTS' MOTION RE: ATTORNEY FEES AND COSTS

COME NOW, the defendants, Robert and Jorja Shippen, by and through the undersigned attorney, Robin D. Dunn, and move the above-entitled court for an award of attorney fees and costs in defending the above-entitled action. The request for attorney fees and costs is based upon the underlying contract, upon statute that provides for awards of fees and costs in commercial transactions (I.C. 12-120), upon rule (I.R.C.P. 54); and, upon case law consistent with the foregoing principles pertaining to the award of fees and costs.

Dated this 26th day of January, 2011.

Robin D. Dunn
Attorney for the Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

____ Hand Delivery

__X__ Postage-prepaid mail

__X__ 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 (Facsimile)

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

DUNN LAW OFFICES, PLLC
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Amelia A. Sheets, Esq., ISB #5899
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(208) 745-9202 (t)
(208) 745-8160 (f)

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. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-015 DEFENDANTS' BRIEF RE: ATTORNEY FEES AND COSTS

COME NOW, the defendants, Robert and Jorja Shippen, by and through the undersigned attorney, Robin D. Dunn, and submit this brief in support of an award for fees and costs as follows:

1. The underlying contract (Plaintiffs' Exhibit 3) provides for an award of fees and costs to the prevailing party in any litigation concerning the purchase and sale of the real estate which was the subject of the litigation.

2. Idaho Code Section 12-120 provides for fees and costs in commercial

transactions. I.R.C.P. 54 provides for a reasonable award of fees when based upon contract or upon statute.

3. The plaintiffs acknowledge an award of fees and costs should be granted via their verified complaint. Likewise, the defendants acknowledge that an award of fees and costs was a risk of trial via their answer to plaintiffs' complaint.

CONTRACT:

Paragraph 27 of the Purchase and Sale Agreement between the parties (Plaintiffs' Exhibit #3) states:

"If either party initiates or defends any arbitration or legal action or proceeding which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal."

The defendants were the prevailing party, on all issues, and a jury rendered a verdict in favor of the defendants.

STATUTE

The attorney fee statute relied upon states as follows:

(3) In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party *shall be allowed a reasonable attorney's fee* to be set by the court, to be taxed and collected as costs.

The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

ID ST Sec. 12-120, Attorney's fees in civil actions
---------- Excerpt from page 6224.

Commercial transaction has been defined in case law as follows:

Brower establishes that there are two stages to the analysis. First, there must be a commercial transaction that is integral to the claim. Second, the commercial

transaction must be the basis upon which recovery is sought.
Brooks v. Gigray Ranches, Inc., 910 P.2d 744, 128 Idaho 72, (Idaho 1996)
---------- Excerpt from page 910 P.2d 750.

This case was based upon the purchase and sale agreement which is a commercial transaction.

COMPLAINT OF PLAINTIFFS AND DEFENDANTS' ANSWER

The plaintiffs recognize that an award of fees was to be given to the prevailing party and asked for fees in their complaint. Likewise, the defendants asked for attorney fees in their Answer to the Complaint. It cannot be disputed that fees were sought by both parties. Nor can it be disputed that both parties knew the risk of trial carried the attorney fee and cost award based upon both the underlying contract and upon the statutory scheme in Idaho on commercial transactions.

RULE

The rule for an award of attorney fees is as follows:

(e)(1) Attorney Fees. In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract.
RCP Rule 54, Judgments
---------- Excerpt from page 167.

CONCLUSION

Attorney fees are mandatory in this case and an appropriate award to the defendants is required. The memorandum of fees will indicate a reasonable amount for fees and will document the mandatory costs. Based upon discovery and knowing of the plaintiffs fees incurred, the defendants' request for fees is reasonable and far less than those incurred by the plaintiffs.

Dated this 26th day of January, 2011.

Robin D. Dunn
Attorney for the Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

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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. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-015 DEFENDANTS' MEMORANDUM ON ATTORNEY FEES AND COSTS

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 defendants in the above-captioned matter;
2. That he makes this sworn statement under oath and in support of an award of fees and costs; that he is over the age of 18, competent to enter into this sworn statement and does so freely and voluntarily;

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3. That he has defended the actions pursued by the plaintiffs against his clients, the defendants;
4. That he has practiced law in the State of Idaho since the year 1982;
5. That the issues presented in this case were multiple and presented extensive research, time, hearings and the like. The issues were often complex and required extensive reference to case law as promulgated in the state of Idaho. For example, the jury instructions, in particular, required extensive effort by the court, by counsel for both parties and were based upon various and multiple sources not contained in the standard IDJI instructions.
6. That this case required extensive time and the charges herein for both fees and costs are reasonable. That the undersigned charges $200.00 per hour for non-trial time; and, that for trial time the rate is adjusted according to length of trial and type of trial. No adjustments were made in this case to fees or costs and were based upon the per hour rate.
7. That the undersigned prepares this sworn statement pursuant to IRCP, Rule 54, to enable the court to award a fair and reasonable fee to the defendants. To the best of the undersigned's knowledge and belief the items are correct and that the fees and costs claimed are in compliance with said rule.
8. Attached to this sworn statement is Exhibit A, which is incorporated herein by reference as though fully set forth, to enable the court to examine the fees and costs incurred in this case.
9. Further, the undersigned sayeth naught.

Dated this 26th day of January, 2011.

Robin D. Dunn
Attorney for the Defendants

SUBSCRIBED AND SWORN to before me this 26th day of January, 2011.

Notary Public for Idaho
Residing: Rigby, Idaho
Commission: 1/31/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

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Idaho Falls, ID 83402

DUNN LAW OFFICES, PLLC
Attorneys at Law
477 Pleasant Country Lane
P.O. Box 277
Rigby, ID 83442

(208) 745-9202 (208) 745-8160

EXHIBIT A

Robert Shippen
518 North 3950 East
Rigby, ID 83442

Matter: Goodspeed
Statement Date: 1/26/2011
AMOUNT DUE: $35,176.82

FEES

Date	Biller	Description	Hours	Amount
11/19/2008	RDD	Dictate letter to Weston Davis	0.50	$100.00
11/19/2008	JN	Preparation of letter to Weston Davis	0.30	$9.00
1/13/2009	RDD	Dictate letter to Davis;Miscellaneous	0.50	$100.00
1/13/2009	JN	Preparation of letter to Davis	0.20	$6.00
2/5/2009	JN	Preparation of answer to complaint	0.40	$12.00
2/6/2009	RDD	Legal research;Dictate answer	3.50	$700.00
5/13/2009	RDD	Review & revise discovery answers	2.00	$400.00
5/14/2009	RDD	Preparation of discovery documents	2.00	$400.00
7/15/2009	RDD	Preparation, review & revise discovery	1.80	$360.00
7/16/2009	RDD	Dictate motion to dismiss & affidavit	1.50	$300.00
7/16/2009	JM	Preparation of affidavit & hearing notice	0.90	$27.00
7/27/2009	RDD	Dictate motion, affidavit & notice of hearing	0.50	$100.00
7/29/2009	JN	Preparation of motoin, affidavit & notice of hearing	0.40	$12.00
9/16/2009	RDD	Office visit with client;Preparation of documents;Review & revise	3.10	$620.00
9/25/2009	RDD	Phone Conference with client	0.20	$40.00
9/28/2009	RDD	Court hearing-summary judgment	1.00	$200.00
11/4/2009	RDD	Miscellaneous	0.20	$40.00
11/5/2009	RDD	Preparation of amended complaint	1.20	$240.00
11/6/2009	RDD	Miscellaneous;Phone Conference with client	1.20	$240.00
1/5/2010	RDD	Dictate letter to Davis	0.30	$60.00
1/5/2010	JN	Preparation of letter to Davis	0.30	$9.00
1/22/2010	RDD	Office visit with client;Preparation, review & revise discovery	1.50	$300.00
2/10/2010	RDD	Preparation, review & revise motion to protect	1.20	$240.00
2/22/2010	RDD	Preparation for depositions;Depositions;Miscellaneous	8.60	$1,720.00
2/25/2010	RDD	Preparation for deposition;Deposition of Fullmer;Review documents re: orders	1.60	$320.00
3/2/2010	RDD	Phone Conference with Chapple	0.50	$100.00
3/4/2010	RDD	Depositions Chapple; Jenkins;Shippen	3.00	$600.00
3/10/2010	RDD	Legal research;Preparation of discovery	2.70	$540.00
3/11/2010	RDD	Preparation of discovery	1.20	$240.00
3/15/2010	RDD	Legal research;Preparation of discovery	1.50	$300.00
3/29/2010	JN	Letter to Davis	0.10	$3.00
4/21/2010	RDD	Dictate letter to Davis	0.30	$60.00
4/21/2010	JN	Preparation of letter to Davis	0.20	$6.00
6/9/2010	RDD	Preparation of discovery;Dictate letter to Davis	1.30	$260.00
6/9/2010	JN	Preparation of letter to Davis	0.20	$6.00
6/21/2010	JN	Letter to client w/enclosure	0.10	$3.00
6/24/2010	RDD	Office visit with client;Preparation of discovery	1.50	$300.00

FEES (continued)

Date	Biller	Description	Hours	Amount
6/24/2010	JN	Preparation of answer to admissions and Notice of depositions	1.00	$30.00
7/30/2010	RDD	Preparation for depositions;Depositions	4.10	$820.00
8/3/2010	RDD	Review & revise discovery	1.50	$300.00
8/4/2010	RDD	Preparation of discovery;Review & revise discovery	2.00	$400.00
8/12/2010	RDD	Review of deposition	0.20	$40.00
8/17/2010	RDD	Dictate response to motions	1.00	$200.00
8/17/2010	JN	Preparation of response to motions	0.40	$12.00
8/20/2010	RDD	Review & revise objection & memorandum to amend	2.00	$400.00
8/30/2010	RDD	Preparation for court hearing;Court hearing	1.00	$200.00
9/9/2010	RDD	Miscellaneous-discovery	0.20	$40.00
9/9/2010	JN	Letter to Davis	0.10	$3.00
9/20/2010	JN	Preparation of discovery/answer	0.30	$9.00
9/20/2010	RDD	Preparation of reponse to discovery;Review & revise discovery	1.50	$300.00
10/7/2010	RDD	Legal reserach;Review documents	1.00	$200.00
10/7/2010	RDD	Legal research;Preparation of memorandum/punitive damages;Review & revise documents	4.00	$800.00
10/18/2010	RDD	Preparation of motion/punitive damages;Court hearing	0.90	$180.00
10/21/2010	RDD	Preparation of brief/punitive damages	1.70	$340.00
10/25/2010	RDD	Review & revise brief/punitive damages	0.50	$100.00
11/10/2010	RDD	Preparation of answer to amend complaint	1.50	$300.00
11/20/2010	RDD	Legal research;Preparation of objection to exclude witnesses, review &revise objection	2.30	$460.00
11/29/2010	RDD	Court hearing	1.10	$220.00
12/1/2010	RDD	Dictate order;Revise order	0.50	$100.00
12/1/2010	JN	Preparation of order on motion exclude witnesses	0.20	$6.00
12/8/2010	RDD	Miscellaneous (Storer/Bob);Office visit with Roger Warner	1.60	$320.00
12/14/2010	RDD	Preparation for deposition;Warner deposition	3.20	$640.00
12/20/2010	RDD	Phone Conference with Davis;Reorganize file for trial	0.70	$140.00
12/20/2010	RDD	Preparation of video deposition	1.80	$360.00
12/23/2010	RDD	Chapple video deposition	1.00	$200.00
12/27/2010	RDD	Legal research;Preparation/review/revise of pre-trial brief/jury instructions	7.00	$1,400.00
12/28/2010	RDD	Preparation for trial	4.00	$800.00
12/29/2010	RDD	Trial preparation w/clients	2.00	$400.00
1/7/2011	RDD	Preparation for jury trial	6.00	$1,200.00
1/8/2011	RDD	Preparation for jury trial	5.00	$1,000.00
1/9/2011	RDD	Preparation for jury trial	8.00	$1,600.00
1/10/2011	RDD	Jury trial	3.00	$600.00
1/11/2011	RDD	Jury trial	7.00	$1,400.00
1/12/2011	RDD	Preparation for jury trial;Jury trial	9.00	$1,800.00
1/13/2011	RDD	Preparation for jury trial;Jury trial	8.50	$1,700.00
1/14/2011	RDD	Miscellaneous;Preparation for jury trial;Jury trial	7.50	$1,500.00
1/17/2011	RDD	Miscellaneous	1.00	$200.00
1/18/2011	RDD	Miscellaneous;Jury trial	4.00	$800.00
1/19/2011	RDD	Preparation of documents	2.00	$400.00
1/22/2011	RDD	Legal research;Preparation, review & revise fees & costs	2.30	$460.00
		SUBTOTAL FEES:	**161.10**	**$31,353.00**

EXPENSES

Date	Biller	Description	Amount
2/9/2009	RDD	Jefferson County Clerk (Chk #6474)	$58.00
3/15/2010	RDD	T&T Reporting (Chk #7027)	$484.33
3/15/2010	RDD	T&T Reporting (Chk #7027)	$128.90

8/4/

EXPENSES (continued)

Date	Biller	Description	Amount
3/26/2010	RDD	T&T Reporting (Chk #7037)	$268.29
10/12/2010	RDD	T&T Reporting (Chk #7272)	$723.30
1/22/2011	RDD	Exhibits for trial	$161.00
1/22/2011	RDD	Rocky Mountain Environmental - Roger Warner expert witness	$2,000.00
		SUBTOTAL EXPENSES:	**$3,823.82**

BILL SUMMARY

Previous Balance:	$0.00
Current Fees:	$31,353.00
Current Expenses:	$3,823.82
Current Other Charges:	$0.00
New Interest:	$0.00
Payment:	$0.00
TOTAL AMOUNT DUE:	$35,176.82

We Now Accept Credit Card Payments
(3% added fee)

INVOICE

PROJECT NUMBER: 10-0136-1,
Bob Shippen

C:\Roger_2011\Bob Shippen\project management\INVOICE1.wpd

Rocky Mountain ENVIRONMENTAL ASSOCIATES, INC.

ROCKY MOUNTAIN ENVIRONMENTAL
482 CONSTITUTION, SUITE 303
IDAHO FALLS, ID 83402-3537
(208) 524-2353 FAX (208) 524-1795

To: Bob Shippen
518 N 3950 E
Rigby, ID 83442

Reference:
Various visits Bob and Robin Dunn.

CLIENT CONTACT	CLIENT P.O. NO.	INVOICE DATE	TERMS
Roger Warner		December 28, 2010	BALANCE DUE UPON RECEIPT. ACCOUNTS 30 DAYS PAST DUE ACCRUE INTEREST AT 1.5% PER MONTH

QTY.	DESCRIPTION	UNIT PRICE	TOTAL
Progress billing for expert witness testimony for Goodspeed v Shippen, Case No.: CV-09-015.			
3	Rocky Mountain Environmental℠ Professional Labor: Senior Professional Hydrologist - Expert Testimony rate per hour	$125.00	$375.00
18	Rocky Mountain Environmental℠ Professional Labor: Senior Professional Hydrologist - normal rate per hour	$85.00	$1,530.00
	Interest at 1.5% per month Due from Date Shipped when 30 past due	1.50%	
	INVOICED AMOUNT		**$1,905.00**

INVOICE

PROJECT NUMBER: 10-0136-1,
Bob Shippen

C:\Roger_2011\Bob Shippen\project management\INVOICE1.1.wpd

Rocky Mountain ENVIRONMENTAL ASSOCIATES, INC.

ROCKY MOUNTAIN ENVIRONMENTAL
482 CONSTITUTION, SUITE 303
IDAHO FALLS, ID 83402-3537
(208) 524-2353 FAX (208) 524-1795

To: Bob Shippen
518 N 3950 E
Rigby, ID 83442

Reference:
Various visits Bob and Robin Dunn.

CLIENT CONTACT	CLIENT P.O. NO.	INVOICE DATE	TERMS
Roger Warner		January 24, 2011	BALANCE DUE UPON RECEIPT. ACCOUNTS 30 DAYS PAST DUE ACCRUE INTEREST AT 1.5% PER MONTH

QTY.	DESCRIPTION	UNIT PRICE	TOTAL
Final billing for expert witness testimony for Goodspeed v Shippen, Case No.: CV-09-015.			
3	Rocky Mountain Environmental℠ Professional Labor: Senior Professional Hydrologist - Expert Testimony rate per hour	$125.00	$375.00
2	Rocky Mountain Environmental℠ Professional Labor: Senior Professional Hydrologist - normal rate per hour	$85.00	$170.00
	Interest at 1.5% per month Due from Date Shipped when 30 past due	1.50%	
	INVOICED AMOUNT		**$545.00**

DUNN LAW OFFICES, PLLC
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rdunn@dunnlawoffices.com

2011 JAN 28 PM 1:35

DISTRICT COURT
JEFFERSON COUNTY, IDAHO

FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Honorable Gregory S. Anderson
Date January 26, 2011
Time 3:00 pm
Deputy Clerk

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. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-015 JUDGMENT

This matter came on for jury trial on the 11th day of January, 2011; the evidence was presented on the 11th, 12th 13th and 14th days of January 2011; the case was submitted to the jury late in the afternoon of January 14, 2011; and, the jury returned for deliberation, after the weekend and holiday, on the 18th day of January, 2011.

The jury concluded its deliberation and rendered a special verdict in favor of the defendants on all causes of action. No damages were awarded since the jury returned a verdict in favor of the defendants.

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NOW, THEREFORE, the court does hereby render judgment in favor of the defendants on all issues.

RULE 54(b) CERTIFICATE, IDAHO RULES OF CIVIL PROCEDURE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 21 day of January, 2011.

Approved as to form:

Weston Davis, Esq.

Robin D. Dunn, Esq.

DATED this 25 day of January, 2011.

Honorable Gregory Anderson
District Judge

DISTRICT COURT
JEFFERSON COUNTY
IDAHO
SEVENTH JUDICIAL DISTRICT

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NOTICE OF ENTRY

I HEREBY CERTIFY that on the 20 day of January, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

___ Hand Delivery

/ Postage-prepaid mail

___ Facsimile Transmission

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Clerk

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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.

ROBERT and JORJA SHIPPEN, husband and wife,

Defendants.

Case No.: CV-09-015

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

COME NOW Plaintiffs, William Goodspeed and Shellee Goodspeed, by and through counsel of record, and hereby moves the Court pursuant to I.R.C.P. 50(b) for an order and judgment from this Court notwithstanding the verdict. Alternatively, Plaintiffs request a new trial.

This motion is supported by the memorandum in support and affidavits filed herewith as well as all of the files and pleadings in this case including but not limited to Plaintiff's Trial Brief.

Oral argument is requested on this motion.

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DATED this 9 day of February, 2011.

WESTON S. DAVIS

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 9 day of February, 2011, 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 [X] Fax *208.745.8160* [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box
Hon. Dane Watkins Hon. Gregory Anderson Bonneville County Courthouse 605 N. Capital Ave. Idaho Falls, ID 83402	[ ] Mailing [X] Hand Delivery [ ] Fax [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box

WESTON S. DAVIS

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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. ROBERT and JORJA SHIPPEN, husband and wife, Defendants.	Case No.: CV-09-015 **MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR RECONSIDERATION**

COME NOW Plaintiffs, William Goodspeed and Shellee Goodspeed, by and through counsel of record, and hereby offer the following memorandum in support of their Motion for Judgment Notwithstanding the Verdict and Motion for Reconsideration on the following grounds:

I. CLEAR AND CONVINCING EVIDENCE EXISTS TO SHOW THAT NOT ONLY DID THE SHIPPENS COMMIT FRAUD, BUT ALSO THAT THE GOODSPEEDS REASONABLY RELIED ON THE SHIPPENS FRAUDULENT MISREPRESENTATIONS.

In this case, Plaintiffs have the burden of showing fraud by clear and convincing evidence. Fraud requires a showing that:

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1. A representation was made to the plaintiff;
2. The representation was false;
3. The representation was material;
4. The defendant either knew the representation was false or was unaware of whether the representation was true;
5. The plaintiff did not know that the representation was false;
6. The defendant intended for the plaintiffs to rely upon the representation and act upon it in a manner reasonably contemplated;
7. The plaintiff did rely upon the truth of the representation;
8. The plaintiff's reliance was reasonable under all the circumstances;
9. The plaintiff 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.

Aspiazu v. Mortimer, 139 Idaho 548, 550, (2003) (Jury Instruction No. 5)

In support of the foregoing burden, the following undisputed evidence was presented:

- Mr. and Mrs. Shippen are long time natives of the area and have known about sub-water essentially their entire lives.
- Mr. Shippen has been in the construction industry since the mid 1970's and has been independently building homes since about 1988.
- In 2006, the Shippens only had two homes under construction.
- At the time the Shippens purchased the subject property, the seller of the parcel, Paul Jenkins, told the Shippens about high sub-water on the property and that Robert Shippen said he knew about it.
- Ray Keating testified that the plat map for Woodhaven Creek Estates put the public on notice that an enhanced septic system was required on each lot and than an experienced builder would know the purpose was for high sub-water and that the enhanced systems are more expensive. (Exhibit 43)
- Mr. Shippen testified that he looked for sub-water in the foundational hole shortly after the hole was dug.
- Mr. Shippen testified that he dug a hole next to the concrete porch in the back of the house that he used to watch sub-water rise during construction of the house.
- Dan Fohrenck testified that during the construction in mid July 2006,

he saw standing sub-water outside of the property and that he approached Mr. Shippen about it and Mr. Shippen claimed he knew about it.

- Mr. Shippen testified he personally observed water come out of the test hole and flood the basement on Labor-Day weekend 2006. He cleaned it up and told his wife about it.

- Mr. Shippen testified he has constructed over 20 homes, listing over 19 of those homes with realtors who all used the MLS system.

- The Shippens were both familiar with the MLS system and were aware that realtors used the MLS system to find potential buyers.

- The Shippens knew this subject real property was listed by Dave Chapple through the MLS listing.

- In fact, five months after the Shippens listed the property and learned about the sub-water flood of 2006, Mr. Shippen even signed a MLS change form to extend the date of the MLS listing. (See Exhibit 2)

- No evidence was ever presented that Dave Chapple acted outside the scope of his representation in the MLS listing.

- In fact, Dave Chapple specifically stated he obtained his information in the MLS listing directly from Robert Shippen and that Dave Chapple was not a home inspector.

- This MLS listing stated (Exhibit 1):

> "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 PIECE [s.i.c.] OF MIND BUILDER WILL INSTALL A LEACHING SYSTEM AROUND HOME AND PROVIDE A 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 puyer peace of min 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 [s.i.c.] being any sub issues."

- Both Dave Chapple and Randy Stoor testified the MLS public and private information can be shared with potential buyers.
- On the one issue that was disputed, namely disclosure of the actual status of the property, five witnesses and the writings all point to a non-disclosure of the 2006 flooding:
    - Shawn and Shellee testified there was no disclosure by Mr. Shippen about sub-water at any time.
    - Dave Chapple testified Mr. Shippen never contacted him to tell him to remove the language in the MLS listing or that the property had flooded. As a result, Mr. Chapple stated that the MLS statement regarding sub-water was never removed.
    - Randy Stoor mentioned he never heard any communication from Mr. Shippen or Mr. Chapple regarding sub-water o the property.
    - Jorja admitted Robert told her about the 2006 flooding but she never said anything to the Goodspeeds or their realtor about the sub-water.
    - None of Mr. Shippen's alleged witnesses to his alleged disclosure conversation with Shawn ever testified.
    - All writings point to no disclosure of the flooding.
- The Shippens accepted the Goodspeed's first offer the same day of the offer without counter-offering.
- Mr. Shippen testified he did not take into account any special considerations with regard to the sub-water at this house until after the fact of construction.
- Mr. Shippen admitted he did not know for sure whether the system would stop the sub-water.
- Shawn Goodspeed told Randy Stoor he was not interested in houses

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that had subwater issues and that he did not want to look at any.

- Shawn Goodspeed testified would not have made a near full-asking price offer if he knew about sub-water.

- Shawn and Shellee Goodspeed both testified they relied on the MLS listing because who better than the builder to make a representation about the past and future status of the house.

- The Goodspeeds and the Shippens both testified they understood the Goodspeeds intended to reside in this house as their primary residence.

- Shawn Goodspeed and Randy Stoor both testified that the reason the Goodspeeds took the Shippens up on the sump-pump was to protect against snow melt and rainwater due to the landscaping sloping in toward the house, which Mr. Shippen claimed it would protect against.

- After closing on the property, the Goodspeeds testified they immediately began finishing their basement and yard.

- When the Goodspeeds learned from Eric Geisler about the sub-water of 2006 after they purchased the property, they testified they were shocked. In fact, Shellee was so shocked that she immediately went and looked at the MLS listing which confirmed the Goodspeeds' only understanding–that the house had not and would not have sub-issues.

- Shawn Goodspeed called Mr. Shippen in 2007 who claimed the 2006 flood was a freak canal rupture and not to worry about it.

- The premises flooded in 2007.

- The premises flooded in 2008 with water pooling in the house through the crack in the basement concrete pad.

- The premises and the house flooded in 2009. (Exhibits 5 and 6)

- Shawn Goodspeed was not fired from his employment. He quit to find a higher paying job to fund the litigation.

- Shellee testified she quit her job to live with her husband only after months of Shawn being away trying to fund the litigation.

- Both Shawn and Shellee testified they intend to remain in Rigby.

The foregoing shows not only that (1) a misrepresentation was made to the Goodspeeds, but also that (2) the representation was false, (3) that it was material, (4) that the Shippens knew the representation about the house not having had sub-water issues was false and that they did not know whether the representation that the house would not have sub-water issues was true, (5) that the Goodspeeds did not know the representation was false, (6) that the Shippens intended for the Goodspeeds to rely on the representations, and that the (7) Goodspeeds did rely on the representations of the Shippens when they purchased the house at almost full asking price. Further, the foregoing shows that the Goodspeeds (8) reasonably relied on the representations and that (9) their damages were proximately cause by this reliance. The issue of (10) damages, which will be discussed below was never disputed by Defendants and therefore shown by clear and convincing evidence.

Clear and convincing evidence is the burden of showing that it is highly probable that a proposition is true. IDJI 1.20.02. This is not a "beyond a reasonable doubt" standard. Above, there is only one disputed fact, namely whether the 2006 flooding was disclosed to the Goodspeeds. However, in light of the sheer number of people testifying against Mr. Shippen's testimony that he made the disclosure (namely Shawn Goodspeed, Shellee Goodspeed, Dave Chapple, Randy Stoor, Jorja Shippen, and the written documents themselves) and the fact that Mr. Shippen's deposition had to be pulled out on numerous occasions to correct his testimony on several issues, no reasonable juror could have found that there was not a high probability that the evidence Plaintiffs submitted was true. The burden of fraud was met.

Meeting this burden becomes even more clear through Jury Instruction No. 9, which, if

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applied correctly, solidifies a finding in favor of Plaintiffs on the issue of fraud:

> 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.

See 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). In this case, Mr. Shippen himself testified that he did not know whether or not the leaching system he installed would handle the sub-water and that any considerations he took into effect regarding the sub-water were done after the fact of construction. So the defendants do not dispute that they did not know whether or not the statement in the MLS listing was true about a leaching preventing the possibility of there ever being any sub-water issues. The possibility of the Goodspeeds obtaining their own experts to evaluate the property is irrelevant as the Idaho Supreme Court has recognized that buyer have the right to rely on the skill of the builder. In fact, the Goodspeeds testified they never asked the home inspector to look at the sub-water issue because they had been assured by the MLS listing that sub-water was not an issue.

Indeed, the facts of this case fall in line with a number of other Supreme Court decisions previously cited and explained at length to this Court in Plaintiffs' Trial Brief including the *Tusch, Bethlahmy, Sorensen,* and *Watts* decisions. In those cases, the fact a home inspection was done or could have been done had no bearing.

II. IN THE EVENT THIS COURT FINDS THAT FRAUD WAS COMMITTED, THIS COURT SHOULD RECONSIDER ITS FINDING ON SUBMISSION OF THE ISSUE OF PUNITIVE DAMAGES TO THE FINDER OF FACT.

In the event this Court grants a judgment notwithstanding the verdict on fraud, consideration of punitive damages is a permissible form of damages.

"It is well established in [the State of Idaho] that punitive damages may be awarded when the Defendant has committed fraud." *Umphrey v. Sprinkel*, 106 Idaho 700, 710 (1983). The disjunctive language ("or") of I.C. § 6-1604(1) states that fraud alone may be used to justify an award of punitive damages. When a statute is clear, courts must presume the legislature meant what it said and apply the clear language of the statute. *McNeal v. Idaho Public Utilities Com'n*, 142 Idaho 685 (2006) *citing State Dept. Of Law Enforcement v. One 1955 Willy Jeep*, 100 Idaho 150, 153 (1979). Therefore, oppressive, malicious, or outrageous conduct are other circumstances where punitive damages are allowed but the statute does not call for an interdependent consideration of all of the grounds for which punitive damages may be applied for fraud to be grounds for punitive damages.

Additionally, as the jury was instructed, 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. *See Jury Instruction No. 10. See also 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). This proposition and a summary of the cases was briefed at length in Plaintiff's Trial Brief. In short, if a builder knows something about a property and fails to disclose it, intent does not become an element of fraud. As a result, an analysis of malice or other intent for assessing punitive damages relating to fraud is inappropriate.

In evaluating the issue of punitive damages, this Court had some concern whether or not the parties' realtor was acting outside the scope of his authority, and accordingly whether the Shippens would have acted with malice. While maliciousness is one of the grounds for which punitive damages may be granted, fraud alone is a ground for punitive damages. Furthermore, there was never any testimony that the realtor was acting outside the scope of his authority.

However, there was testimony that the Shippens have used realtors in the past and are familiar with the purpose and use of realtors and the MLS listing. The testimony was that with the exception of their first house or two they built, all of their homes have been sold using a realtor. In fact, Mr. Shippen signed an MLS change form, signifying he was in fact aware of the MLS listing and that it needed to be changed. Mr. Chapple denied ever receiving instruction for the Shippens to change the language regarding sub-water in the MLS listing and that all information in the MLS listing came from Mr. Shippen in determining how to market the property. Also, a finding of fraud is supported by the bullet points above showing not only a nondisclosure of a known defect but also that the Shippens did not know whether the installation of a sump-pump would take care of future sub-water issues.

III. NO REASONABLE JUROR COULD HAVE FOUND THAT A BREACH OF CONTRACT DID NOT OCCUR WHEN THE EVIDENCE SHOWED A REPRESENTATION THAT THE HOUSE HAD NOT FLOODED AND WOULD NOT FLOOD.

Once the Court instructed the jury that the term "Standard Builder's Warranty" was ambiguous, the jury should have found the MLS listing (drafted by the Shippen's agent with information obtained from Robert Shippen) which guaranteed the property had not had sub-water issues and would never have sub-water issues acted as a warranty. This is the only document in writing explaining any coverage as to what was included in the builder's warranty.

The jury was correctly instructed:

> An express warranty is an assurance by overt words or actions of a seller guaranteeing a condition of an agreement upon which a buyer may rely–for example, a seller's promise that the thing being sold is as represented or promised.

See 17A Am Jur 2d, Contracts § 410 "Warranties"; *Black's Law Dictionary*, 2nd Pocket Ed., Bryan A. Garner (2001) "Warranty: Express Warranty"; *See also Jury Instruction No. 18*.

In this case, the MLS listing said the property had not had any sub-water issues and would not. This written assurance created a warranty. Further, five witnesses all testified that they were not aware of whether a disclosure of the 2006 sub-water was ever made to the Goodspeeds, including Mr. Shippen's own wife and realtor. Mr. Shippen, whose testimony had to be corrected on several occasions by use of his deposition, was the only individual who testified differently. Therefore, based upon the sheer number of witnesses against Mr. Shippen's testimony and the fact Mr. Shippen's own credibility was compromised during his testimony, no reasonable juror could have believed the Goodspeeds did not meet their burden of proving that the MLS listing created a warranty and that it was breached.

The warranty was breached when the Goodspeeds signed the Purchase and Sale Agreement and subsequently closed on the house, because the property had in fact had sub-water issues by way of the 2006 flooding even when the MLS listing asserted the property had not. Further, the warranty created by the MLS listing was again breached when the premises flooded in 2007, and the premises and the house sustained flooding in 2008 and 2009.

At a bare minimum, even if this Court were to determine that the warranty was only extended for a period of one year, which Plaintiffs assert differently, then when the landscaping flooded in 2007, the warranty was breached because the property had sub-water issues contrary to

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MLS listing that this property would not have any sub-water issues. Plaintiffs damages in 2007 were testified to be $150.00 for the additional sump pump that Shawn Goodspeed had to install to keep water out of the house.

IV. NO REASONABLE JUROR COULD HAVE FOUND THAT THE WARRANTY OF HABITABILITY WAS NOT BREACHED.

The jury erred in concluding that the warranty of habitability was not breached, as both the MLS listing and the Purchase and Sale Agreement sought to protect the buyer for a MINIMUM of one year under the standard builder's warranty.

Shawn and Shellee Goodspeed both testified at the time they purchased the property they understood that the home would be habitable and that it would continue to be habitable indefinitely. The Shippens both stated they intended for the home to be habitable, and Mr. Shippen also admitted that sub-water impedes the liability of the home. All parties testified they understood the Goodspeeds would be inhabiting the residence as their primary residence.

Further, the jury was shown the 2009 DVD (Plaintiffs' Exhibit 6) and the 2009 flooding pictures (Plaintiffs' Exhibits 5(a- f)) showing sub-water intrusion into the basement from approximately September 8, 2009 through September 17, 2009. These exhibits and the testimony of the Goodspeeds showed at times this water reached a depth of approximately 2" and absorbed into the sheet rock approximately 6"-8" high on the walls of the basement. They further showed loss of the carpet pad and the fact that all of their personal property is up on blocks to protect it from sub-water. They showed the mechanical room was in the basement as well as half of the square footage of the home that the Goodspeeds testified they intended to use to have family members inhabit.

Considering the 2009 flood in light of the foregoing sub-water history and in light of

expert testimony that the house would likely continue to suffer sub-water issues, no reasonable juror can find under these conditions that the residence is habitable and therefore the jury's decision on this issue should be reversed.

V. ERROR OCCURRED BY NOT INSTRUCTING THE JURY ON THE LANGUAGE REGARDING A DISCLAIMER OF WARRANTIES.

Plaintiff's proposed jury instruction relating to disclaimer of warranties on the property was not given over Plaintiffs' objection on the theory that Mr. Stoor admitted he explained the provisions of Section 32 of the Purchase and Sale Agreement to the Goodspeeds. However, a disclaimer of an implied warranty should only be obtained with difficulty, which requires not only (1) that the disclaimer be understood by the buyer (in this case through explanation of the seller) ***but also that (2) the disclaimer be clear and conspicuous***. In the case of *Tisch*, a case nearly identical to the facts of this case, the Supreme Court explained this two part test:

> [One seeking the benefit of such a [warranty] disclaimer must not only show [(1)] a conspicuous provision which fully discloses the consequences of its inclusion but also [(2)] that such was in fact the agreement reached. The heavy burden thus placed on the builder is completely justified, for by his assertion of the disclaimer he is seeking to show that the buyer has relinquished protection afforded him by public policy. A knowing waiver of this protection will not be readily implied.

Tisch, 113 Idaho at 46. For that reason, boilerplate clauses are not sufficient to disclaim an implied warranty. *Id.*

Shawn Goodspeed admitted that the contract was generally explained to him, but also stated he fully expected to be covered against past and future sub-water issues. In fact, the custom provisions of the contract stated that the buyer wanted a warranty for a *minimum* of one year, which tends to show that the warranty of habitability was not disclaimed. (Plaintiff's Exhibit 3). Therefore, the intent of the parties regarding whether an implied warranty was

effectively disclaimed was not clear. For this reason, and because a disclaimer should only be obtained with difficulty, for the sellers to protect themselves and render effectiveness to the disclaimer, the disclaimer must be in clear and conspicuous language as stated in *Tusch*. Randy Stoor testified that the Purchase and Sale Agreement was boilerplate language and that Section 32 was boilerplate language. Furthermore, observation of the Purchase and Sale Agreement itself shows the text and heading for Section 32 looks exactly like the other provisions in the contract and is not in any sort of bold, italics, capital letters, or larger font. Indeed the language is not conspicuous and fails the first prong of a disclaimer of an implied warranty.

For this reason, in Plaintiffs' objection to the disallowance of their proposed disclaimer instruction, Plaintiffs' counsel read the following proposed instruction into the record as one that should have been given to the jury:

> 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.

Referencing Tusch, 113 Idaho at 45 - 47; *Black's Law Dictionary*, 2nd Pocket Ed., Bryan A. Garner (2001) "Boilerplate", and *Myers*, 114 Idaho 432, 437 (1988). Because both conspicuousness and intent are required elements in considering a disclaimer of warranty, this instruction should have been given. Such would have notified the jury that the implied warranty of habitability was not effectively disclaimed, allowing them to find in favor of Plaintiffs on the issue of the warranty of habitability.

VI. PLAINTIFF'S DAMAGES WERE UNDISPUTED BY DEFENDANTS AND A JUDGMENT FOR PLAINTIFFS' DAMAGES IS APPROPRIATE UNDER EITHER TORT THEORIES OR CONTRACT THEORIES.

Plaintiffs set forth the following damages with specificity:

DAMAGE	AMOUNT	WITNESS
PURCHASE PRICE	**$ 272,000.00**	Goodspeeds, Shippens, (Exhibit 3)
FINISHING HOUSE PRIOR TO FIRST FLOODING Basement Carpet and Pad ($1,500.00) Blinds for Entire House ($2,785.68) Eaton Quality Gutters ($875.00) Basement sheetrock, trim, electrical equipment, tape, texture, paint (Home Depot and Lowe's) ($4,119.63)	**$ 9,280.31**	Shawn Goodspeed (Exhibit 11)
IMPROVEMENTS TO YARD PRIOR TO FIRST FLOODING Just Ask Rental ($1,295.92) A-1 Rental ($300.72) UAP ($1,311.44) Wholesale Yard (Sprinklers) ($2,083.40) Falls Plumbing (Sprinklers) ($2,784.57) Custom Curb ($295.00)	**$ 8,071.05**	Shawn Goodspeeed (Exhibit 11)
INSTALLATION OF DRIVEWAY Driveway dirt/fill ($201.40) Spaletta Concrete ($10,430.45)	**$ 10,631.85**	Shawn Goodspeed (Exhibit 11)
SUB-TOTAL OUT-OF-POCKET	**$ 299,983.21**	
FAIR MARKET VALUE OF RESIDENCE	**$ 290,000.00 - $ 295,000.00**	Shawn and Shellee Goodspeed, Mark Leible
SECOND SUB-PUMP TO PROTECT AGAINST SUB-WATER	**$ 150.00**	Shawn and Shellee Goodspeed
PRO-RENTAL (2009 Flood clean up)	**$ 495.60**	Shawn Goodspeed (Exhibit 11)

DAMAGES FOR FRAUD	**$ 300,568.81**
DAMAGES FOR BREACH OF CONTRACT	**$ 290.645.60**

Plaintiffs proved their damages with specificity and by clear and convincing evidence such that a judgment is appropriate from this Court. Defendants failed to present evidence objecting to the amount of Defendant's damages. Therefore, there is no issue of fact as to the amount of damages, only as to whether Defendants are liable. In the event that this Court find liability above, a judgment for damages should be entered as follows:

A. Fraud

Rescission ***and*** restitution of direct and consequential damages are appropriate remedies in cases of fraud. 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). *See also Jury Instruction No. 12.*

Therefore, under rescission of the contract, the Plaintiffs would be restored their purchase price of $272,000.00. Also, the Goodspeeds would be entitled to restitution of their damages improving the residence, as the residence was intended to be a fully habitable house and it was foreseeable that the Goodspeeds would landscape the yard and finish the basement. Further, the Goodspeeds should be restored their expenses in attempting to keep sub-water out of their house.

Under fraud, a judgment should be issued that the contract should be rescinded and the Goodspeeds be restored in the amount of $300,568.81.

B. Breach of Express or Implied Warranty.

The appropriate remedy for a breach of contract/warranty is (1) rescission ***and*** (2)

restitution. *Ervin Construction Co. v. Van Orden*, 125 Idaho 696, 699 (1993). *See also Jury Instruction No. 20.*

When the breach is material, rescission is appropriate. *Primary Health, Network, Inc. v. State Dept. of Admin*, 137 Idaho 663 (2002). In this case, a warranty was extended either expressly and/or by public policy that the house had not had sub-water issues and would not. The breach of the warranty was material because the Goodspeeds testified they did not want a house with sub-water issues and they intended to inhabit the residence as their primary residence full time. The Shippens also testified they knew the Goodspeeds intended to occupy the residence as their primary residence. Therefore, the warranty was breached at the time of closing because the house had in fact had sub-water issues when the Shippens said it had not. Additionally, the warranty was again breached in 2007 when the landscaping had sub-water issues. Because the warranty extended beyond a year ("minimum of one year" and "prevent the possibility of there ever being any sub issues), the further sub-water intrusion into the house and landscaping of 2008 constituted a breach as well as the sub-water flooding of the residence in 2009.

Therefore, the contract should be rescinded. Further, the Goodspeeds are entitled to incidental and consequential damages for the improvements made to the property and for expenses incurred in attempting to prevent sub-water from intruding into their house and damaging their personal property. These damages foreseeably arose as a result of the breach because the Goodspeeds intended to reside at their house and improve it for the use for which it was intended including the used of the yard and basement. *See U.S. v. Silver*, 245 F.3d 1075 (9th Cir 2001) (Consequential damages are those losses and expenses which have occurred and which

foreseeably arise as a result of the breach of contract over and above expectation damages). Therefore, as illustrated above, the Goodspeeds total damages are $300,568.81.

However, I.C. §6-2504(4) limits damages in a contract action to the greater of the purchase price or the fair market value of the home without the defect. In light of the improvements made to the house and considering the expert testimony of Mark Leible regarding his evaluation of the house and the state of the economy, both he, Shawn, and Shellee all testfied the fair market value of the home without the defect was between $290,000.00 - 295,000.00. Defendants did not present any testimony regarding the present value of the home. Taking then, the lower of the testified range of value ($290,000), plus the incidental damages of $645.60 for cleaning up and preventing sub-water in 2007 and 2009, the appropriate contract damages are $290,645.60. A judgment should be entered for this amount and should further rescind the contract.

Only in the event this Court finds the breach was not material, and only in the event the Court finds the warranty extended for only one year, at the very least the Goodspeeds should be awarded their damages for the 2007 breach. Shawn Goodspeed incurred the expense of $150.00 to install a second sump pump to keep sub-water off of the property and out of the house. At the very least, this amount should be restored for a judgment of $150.00.

Additionally, in the event this Court finds the warranty did in fact extend beyond one year (as it states in the custom language of the contract and the MLS listing) but still finds the breach was not material, Defendants should be restored the $150.00 for the 2007 sub-water and the $495.60 incurred to clean up the sub-water in 2009. This results in a judgment against Defendants in the amount of $645.60.

Defendants attempted to proffer through speculative testimony that the Goodspeeds were the cause of their own damages in 2009 because the Goodspeeds moved the second sump-pump (installed by the Goodspeeds in 2007) into their house to prevent property damage to carpet, sheetrock, and other personal property. Defendants wholly ignored the fact that the pump Mr. Shippen installed was not keeping up with the sub-water by itself as Mr. Shippen asserted it would.

Further, Defendants attempted to proffer speculative evidence that the pump Mr. Shippen installed was not working in 2008 and 2009 because the Goodspeeds did not winterize the pump. Mr. Shippen never testified that the pump he installed was not working properly in 2007, 2008, or 2009. Mr. Shippen did admit however that he never hired an engineer to diagnose whether the original pump he installed would keep up with the volume of sub-water and that he did not know whether it would keep up or not. Further, Mr. Goodspeed testified that he personally observed the pump working to pump out sub-water in 2007 and that the pump was working in the same manner in 2008 and 2009 as it was functioning in 2007.

C. **Punitive Damages.**

In the event this Court determines a consideration of punitive damages is appropriate: "The law provides no mathematical formula by which punitive damages are calculated, other than any award of punitive damages must bear a reasonable relationship to the actual harm done, to the cause thereof, to the conduct of the defendant, and the primary objective of deterrence." IDJI 2d 9.20.5; *See also Walston v. Monumental Insurance Co.*, 129 Idaho 211, 222 - 223 (1996).

Courts have sustained punitive damage awards that are four and six times the amount of compensatory damages. *Walston*, 129 Idaho at 222 - 223. Idaho Statute has capped punitive

damages to $250,000.00 or three times the amount of compensatory damages, whichever is greater. I.C. § 6-1604(3). However, no instruction is to be given to the jury regarding a cap on punitive damages. *Id.*

In this case, the facts show compensatory damages in the amount of $300,568.81. Therefore the cap on punitive damages should be $901,706.43, which is awardable in addition to compensatory damages.

Plaintiffs request this Court exercise its discretion in granting an award of punitive damages.

CONCLUSION

Based on the foregoing, Plaintiffs request that this Court grant its motion for judgment notwithstanding the verdict and enter a judgment for damages in accordance with the damages set forth above. Only in the alternative, this Court should grant a new trial.

DATED this 9 day of February, 2011.

WESTON S. DAVIS

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 9 day of February, 2011, 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 [X] Fax *208.745.8160* [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box
Hon. Dane Watkins Hon. Gregory Anderson Bonneville County Courthouse 605 N. Capital Ave. Idaho Falls, ID 83402	[ ] Mailing [X] Hand Delivery [ ] Fax [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box

WESTON S. DAVIS

L:\wsd\~Clients\7411.1 Goodspeed\JNOV Motion (Memo).wpd

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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.

ROBERT and JORJA SHIPPEN, husband and wife,

Defendants.

Case No.: CV-09-015

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 28th day of February, 2011, at 1:35 p.m., of said day, or as soon thereafter as counsel can be heard in the above court, in Rigby, Jefferson County, Idaho, Plaintiffs will call up for hearing Plaintiffs' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT before the Honorable Gregory Anderson (Dane Watkins), District Judge.

DATED this 9 day of February, 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 9 day of February, 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight 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. ROBERT and JORJA SHIPPEN, husband and wife, Defendants.	Case No.: CV-09-015 **PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION FOR FEES AND COSTS**

COME NOW, Plaintiffs in response to Defendants' Motion RE: Attorneys Fees and Costs and object and respond as follows:

1. Plaintiffs have filed a Motion for Judgment Notwithstanding the Verdict, and therefore a determination on an award of fees is premature. In the event the Court were to reverse the jury verdict, Defendants will no longer be the prevailing party and an award of fees to Defendants would not be appropriate either by contract, statute, or other means.

OBJECTIONS TO COSTS

2. I.R.C.P. 54(d)(1)(C) allows this Court to "disallow any of the above described

costs upon finding that said costs were not reasonably incurred." In this case, Defendants called Roger Warner as an expert witness hydrologist. Mr. Warner testified he had not personally inspected the property in question more than driving past the property. He testified he had no conclusions regarding the subject property or the case in general, only that he could explain the phenomena of the sub-water in Jefferson County. He testified sub-water has always been a problem in Jefferson County north of the Burgess Canal. However, this phenomena was testified to by almost every other lay and expert witness put on the stand, including the Shippens themselves. In fact, Mr. Warner essentially again affirmed causation of the sub-water on behalf of the Plaintiffs. Therefore the Rocky Mountain Environmental Expert Witness Fee ($2,000.00) should be disallowed.

OBJECTION TO FEES

3. Attorneys fees are not permitted in tort actions related to fraud: "There is no sound reason apparent in our mind why [attorneys fees] should be allowed in [fraud] actions rather than in any other kind of tort action. We believe the correct rule is to disallow them entirely." *Baird v. Gibberd et. al.*, 32 Idaho 796, 188 P.56, 58 (1920). Because the gravamen of this lawsuit involves fraud, Defendants are not entitled to award of fees related to fraud unless Plaintiffs pursued this case frivolously.

4. Based upon the evidence submitted in Plaintiff's Motion for Judgment Notwithstanding the Verdict, it is apparent that based on the sheer volume of supporting evidence, plaintiff's motion was not brought forth frivolously and an award of fees is inappropriate. *See* I.R.C.P. 54(e)(1) and *Sorja v. Sierra Pacific Airlines, Inc.*, 111 Idaho 596, 615 (1986).

5. Furthermore, based upon Defendants' failure to bifurcate their damages into work done for claims of fraud versus claims on contract, Defendants have failed to set forth with specificity their damages as required by I.R.C.P. 54(e)(3) and it is impossible what if any fees are awardable to Defendants. *See Hackett v. Streeter*, 109 Idaho 261, 264 (Ct. App. 1985).

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6. Even when I.R.C.P.54(e)(1) allows an award of reasonable attorneys fees to the prevailing party when provided for by statute or contract, such a determination is still within the sound discretion of the Court. *Id. See also Golder v. Golder*, 110 Idaho 57, 61 (1986).

7. Because there is a genuine issue as to what fees were incurred in defending the fraud action versus the contract action and other causes of action, it would be wholly inappropriate to make an award of fees as they are presented to this Court because it is impossible to bifurcate the work. No description is available for the type of research done, the purpose of each motion, hearing, client conference, and the amount of time dedicated in each hearing or deposition to the fraud claim versus other claim.

8. The requesting party has a duty to supply the Court with information regarding the reasonableness of the fee. See I.R.C.P. 54(e)(3)(A). Even if fees were available in a fraud case, Defendants provide no description in their memorandum of fees to define the scope of research performed, the scope of the hearings attended, the basis of correspondence, or conferences with clients so that Plaintiffs would be able to ascertain whether the fee incurred is reasonable. Therefore the attorney fees should be denied.

9. A large number of fees on both Plaintiff and Defendant's sides were incurred in the discovery of Defendants' assertion that Robert and Jorja Shippen bore no personal liability on this action and that Marriott Homes, LLC was the only proper party to the action as the builder. In fact Defendants filed a Motion to Dismiss the action of Plaintiff's alleged failure to name Marriott Homes and for Plaintiff's inclusion of Robert and Jorja Shippen as individuals. In the end, the Court determined the only parties that should be named in the complaint were Robert and Jorja Shippen, the sellers of the subject real property. Therefore, Plaintiffs should not be liable for those fees Defendants incurred on matters of veil piercing, especially in light of Plaintiff's resources spent pursuing Defendant's assertion. See I.R.C.P. 54(e)(3)(A and B). Furthermore, Plaintiffs should not be granted those fees incurred on July 16, 2009 through September 28, 2009, as such fees were all related to Defendant's Motion to Dismiss which was

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converted to a Motion for Summary Judgment.

10. The time in Defendant's attorneys fees is lumped together and Plaintiffs cannot ascertain the amount of time spent on any given individual task when that task is lumped with a group of tasks. Therefore Plaintiff cannot ascertain whether the time spent on the project listed was commensurate with the scope and difficulty of each task.

11. Defendants have listed fees for work done by Janeal Nield "JN". These expenses are merely administrative expenses, as it is apparent that Mr. Dunn dictated letters that Ms. Nield typed. Both charged a fee for this work. Such represents duplicative billing which is not reasonable and all fees incurred by Janeal Nield should be disallowed.

12. Defendants present in justification of their fees that the issues in formulating jury instructions were complex requiring extensive work beyond the scope of I.D.J.I. Defendants fail to recognize, however, that the majority of the jury instructions used were formulated by Plaintiffs with citations to the applicable case law supporting said instructions. Defendants only supplied the Court with stock IDJI instructions, a number of which were never formatted for this particular case. Further, Defendants fail to mention that Defendants' objections to said instructions were not found to be supported by the law. Therefore, Plaintiffs object to the amount of time Defendants spent on the jury instructions as being overly excessive.

13. Plaintiffs assert that billing rate of $200.00 per hour is excessive for the subject matter of this case and that said request is further an excessive billing rate for the region. See I.R.C.P. 54(e)(3)(B - D).

14. On November 5, 2009, Defendants billed for preparing an amended complaint. Defendants never filed an amended complaint.

For the forgoing reasons, Plaintiffs object to Defendant's request for fees and costs and request that this Court deny Defendants their request for said fees and costs.

Dated this 9 day of February, 2011.

WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 9 day of February, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

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WESTON S. DAVIS

L:\wsd\~ Clients\7411.1 Goodspeed\Attorneys Fees (Objection).wpd

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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. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-015 NOTICE OF HEARING ON DEFENDANTS' REQUEST FOR ATTORNEY FEES

PLEASE TAKE NOTICE that on the 28th day of February, 2011 at 1:30 p.m. of said day, or soon thereafter as counsel may be heard, in the above-named in Jefferson County at the Jefferson County Courthouse, Rigby, Idaho, defendants will call up for hearing their *"Motion for Attorney Fees and Costs"* before the above-entitled Court, Honorable Gregory Anderson, District Judge, presiding.

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DATED this 14 day of February, 2011.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 14 day of February, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

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23

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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. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-015 RESPONSE TO PLAINTIFFS' OBJECTION TO DEFENDANTS' REQUEST FOR FEES AND COSTS

COME NOW, defendants, by and through the undersigned attorney and respond to the Plaintiffs' Objection to the Fees and Costs which have been requested by the defendants.

DISCUSSION

No question exists that if the plaintiffs had been the prevailing party in this action that a request for fees and costs would have been made to this court. The plaintiffs incurred significantly greater fees and costs in this action than the defendants. Thus, the reasonableness of defendants' fee and cost memorandum,

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including updates, should not be questioned.

Previously, the defendants submitted a brief on the discussion of fees and costs to this court. The defendants have relied upon the attorney fee provision in the subject real estate and sale purchase agreement, signed by both parties, and was included as Exhibit 3 to the jury as one important basis for the award of fees. That document which included the fee and cost provision is very clear and uses the additional words "in any way connected with this agreement".

"If either party initiates or defends any arbitration or legal action or proceeding which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal."

Certainly, no litigation would have been brought if the plaintiffs did not purchase the home in question. Further, in cannot be rationally argued that the contract formed the basis of the entire litigation. "But for" the real estate purchase via the contract, nothing would have been before the court.

Notably, the gravamen of this lawsuit is a commercial transaction arising from the contract. The contract is clear when it states "in any way connected with this lawsuit". Gravamen is defined in *Blacks Law Dictionary* as: "the material part of a grievance." Case law indicates as follows:

I.C. § 12-120(3) makes mandatory the award of attorney fees in any civil action to recover on a contract relating to the purchase or sale of goods, wares, merchandise or services and in any commercial transaction. . .

With respect to the provision allowing attorney fees in a commercial transaction, the statute defines a commercial transaction as all transactions except transactions for personal and household purposes. This Court has held that the test is whether the commercial transaction comprises the gravamen of the lawsuit. *Spence v. Howell*, 126 Idaho 763, 890 P.2d 714 (1995); *Brower* v. [126 Idaho 900] *E.I. DuPont De Nemours and Co.*, 117 Idaho 780, 792 P.2d 345 (1990)

The gravamen of the lawsuit refers to whether the commercial transaction is integral to the claim and constitutes the basis upon which the party is attempting to recover.

Brower, 117 Idaho at 784, 792 P.2d at 349.

Property Management West, Inc. v. Hunt, 894 P.2d 130, 126 Idaho 897, (Idaho 1995)
---------- Excerpt from pages 894 P.2d 132-894 P.2d 133.

The plaintiffs attempt to argue that the gravamen of the lawsuit is tort. No tort would have been applicable but for the commercial transaction involved with the contract. The contract controlled the lawsuit. The plaintiffs filed an initial complaint based upon the contract. Thereafter, the plaintiffs filed three (3) amended complaints. The court allowed the plaintiffs to continually amend. Thus, fees continually increased for the defendants.

The court should be cognizant that the plaintiffs "controlled" the litigation and the defendants had to respond to the various amendments and theories of the plaintiffs. Veil piercing was propounded by the plaintiffs not the defendants. The determination of which parties to sue were determined by the plaintiffs not the defendants. The request for punitive damages was requested by the plaintiffs and not the defendants. In each instance, the defendants were compelled to respond through no fault of their own. The jury agreed.

The main question before the court is the reasonableness of the fees charged by defense counsel to his clients. Those fees are extremely reasonable if the court examines the billing sheet. If anything, the fees of the undersigned did not include time waiting for other hearings, travel, discussions in the hallways, discussions with the attorney at courtroom appearances and other considerations that the undersigned has not traditionally billed clients. It is alleged that the undersigned has never been questioned on reasonableness of fees; of fees in the like kind of case; or, of fees for similar types of work or experience in such work. The hourly rate of the undersigned

is less than most practitioners of similar experience in the surrounding area. It is believed that such fees are less than most attorneys in the field of trial litigation.

The undersigned knows of few attorneys with over 28 years of experience with a lesser rate than the undersigned.

Janeal Nield has performed legal services in a paralegal capacity over 30 years for Steven Blazer, Blair Grover and the undersigned. Her fee, as set by the office, is $30.00, per hour, and is extremely reasonable and less than any other paraprofessional that the undersigned is aware of in southeastern Idaho. She is expected to perform services above and beyond the mere typing of dictation.

Plaintiff counsel refers to jury instructions, theories and other matters that his clients asserted throughout the action. Because those various theories and matters are presented to the court, the undersigned was obligated to research and respond to such issues.

The fees and costs requested are fair and reasonable and in accordance with the Idaho Rules of Civil Procedure, Rule 54.

CONCLUSION

Because of the reasonableness of the fees, the contract, statutes and rules relied upon, the court should grant the same. Counsel will answer any questions that may be propounded by the court on the reasonableness and time spent in this matter.

Dated this 14 day of February, 2011.

Robin D. Dunn
Attorney for the Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of February, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

____ Hand Delivery

X Postage-prepaid mail

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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. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-015 SUPPLEMENTAL AFFIDAVIT: ATTORNEY FEES AND COSTS

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 defendants in the above-captioned matter;
2. That he makes this sworn statement under oath and in support of a supplemental award of fees and costs; that he is over the age of 18, competent to enter into this sworn statement and does so freely and voluntarily;

3. That he has defended the actions pursued by the plaintiffs against his clients, the defendants;
4. That he has practiced law in the State of Idaho since the year 1982;
5. That this affidavit supplements the prior affidavit of counsel in support of fees.
6. That the undersigned prepares this sworn statement pursuant to IRCP, Rule 54, to enable the court to award a fair and reasonable fee to the defendants.
7. The fees and costs of the defendant are significantly lower than those incurred by plaintiffs and would substantiate the reasonableness of defendants' fee request.
8. The plaintiffs request additional fees of 7.7 hours at $200.00 per hour for a sum of $1,540. Further, a correction in the original affidavit had courtroom charts at $161.00 which was a typographical error and should have been $276.66 (see attached invoice) for a total additional request of $1,655.66.
9. Further, the undersigned sayeth naught.

Dated this 14 day of February, 2011.

Robin D. Dunn
Attorney for the Defendants

SUBSCRIBED AND SWORN to before me this 14 day of February, 2011.

Notary Public for Idaho
Residing: Rigby, Idaho
Commission: 4/5/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of February, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

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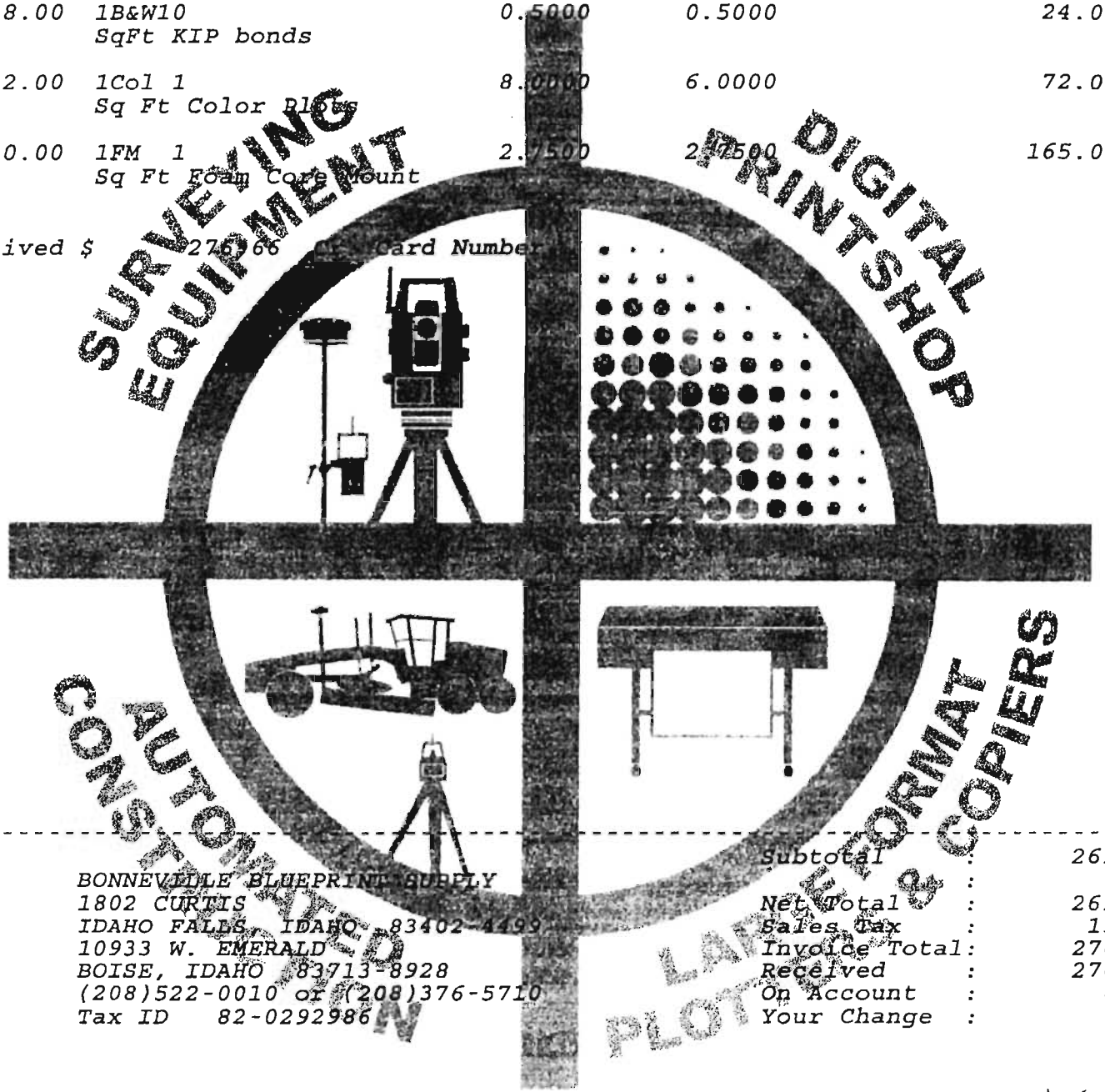
Quantity	Item Number / Item Description	List Price	Sale Price	Extension	Tx
48.00	1B&W10 SqFt KIP bonds	0.5000	0.5000	24.00	Y
12.00	1Col 1 Sq Ft Color Plots	8.0000	6.0000	72.00	Y
60.00	1FM 1 Sq Ft Foam Core Mount	2.7500	2.7500	165.00	Y

Received $ 276.66 Card Number



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Subtotal	:	261.00
Net Total	:	261.00
Sales Tax	:	15.66
Invoice Total	:	276.66
Received	:	276.66
On Account	:	0.00
Your Change	:	

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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. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-015 RESPONSE TO PLAINTIFFS' JNOV REQUEST IRCP, Rule 50(b)

This matter came on for jury trial on the 11th day of January, 2011; the evidence was presented on the 11th, 12th 13th and 14th days of January 2011; the case was submitted to the jury late in the afternoon of January 14, 2011; and, the jury returned for deliberation, after the weekend and holiday, on the 18th day of January, 2011.

The jury concluded its deliberation and rendered a special verdict in favor of the defendants on all causes of action. No damages were awarded since the jury returned a verdict in favor of the defendants.

The plaintiffs have now requested of the above-named court to grant judgment to the plaintiffs notwithstanding the verdict pursuant to Rule 50(b) of the Idaho Rules of Civil Procedure. That rule states as follows:

(b) Motion for Judgment Notwithstanding the Verdict. A motion for judgment notwithstanding the verdict shall be served not later than fourteen (14) days after entry of the judgment and may be made whether or not the party moved for a directed verdict; or if a verdict was not returned a motion for judgment notwithstanding the verdict shall be served not later than fourteen (14) days after discharge of the jury. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative, in conformance with the requirements of Rule 59(a); and a motion to set aside or otherwise nullify a verdict or for a new trial shall be deemed to include this motion as an alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment. If no verdict was returned the court may direct the entry of judgment or may order a new trial. The failure of a party to move for a directed verdict, for a judgment notwithstanding the verdict or for a new trial shall not preclude appellate review of the sufficiency of the evidence when proper assignment of error is made in the appellate court.

IRCP Rule 50, Directed verdicts--Judgments notwithstanding verdict
---------- Excerpt from page 154.

ARGUMENT

The trial by jury principle is engrained in the American judicial system and allows for the collective knowledge of jurors to render various legal decisions.

§ 7. Right to trial by jury

The right of trial by jury shall remain inviolate; but in civil actions, three-fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of all parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions the jury may consist of twelve or of any number less than twelve upon which the parties may agree in open court. Provided, that in cases of misdemeanor and in civil actions within the jurisdiction of any court inferior to the district court, whether such case or action be tried in such inferior court or in district court, the jury shall consist of not more than six.

ID CONST Art. I, Sec. 7, Right to trial by jury.

In this case, a jury of 12 people made decisions on the issues presented. A civil trial requires that 9 of the 12 jurors agree on issues of liability and, if liability is determined to be applicable, upon potential damages. In the instant case, a jury was convened and entered its decision in favor of the defendants.

In the instant case, the verdict form is very clear that the jury reached its decision on the issues of liability and determined that the plaintiff did not meet its burden on any of the theories presented. Quite simply, the jury did not accept the testimony and arguments of the plaintiffs.

Furthermore, the objections at trial between the parties were few in nature and centered on evidentiary issues. The plaintiffs do not cite any objections that rise to the level of the JNOV standard or of a new trial. Moreover, any matters contained within the plaintiffs' Memorandum were already considered by the above-entitled court during or prior to the trial.

"In reviewing a decision to grant or deny a motion for directed verdict or a judgment notwithstanding the verdict, this Court applies the same standard as that applied by the trial court when originally ruling on the motion." *Waterman v. Nationwide Mut. Ins. Co.*, 146 Idaho 667, 672, 201 P.3d 640, 645 (2009). "[W]e determine whether there was sufficient evidence to justify submitting the claim to the jury, viewing as true all adverse evidence and drawing every legitimate inference in favor of the party opposing the motion for a directed verdict." *Todd v. Sullivan Constr. LLC*, 146 Idaho 118, 124, 191 P.3d 196, 202 (2008). This Court "*must simply determine whether there is substantial evidence to support the jury's verdict.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Howell v. Eastern Idaho R.R., Inc.*, 135 Idaho 733, 737, 24 P.3d 50, 54 (2001) (citation omitted).

A trial judge may grant a new trial on the ground that the evidence was insufficient to justify the verdict if: (a) "after making his or her own assessment of the credibility of the witnesses and weighing the evidence, the judge determines that the verdict is not in accord with the clear weight of the evidence" and (b) the judge "conclude[s] that a different result would follow a retrial." *Hudelson v. Delta Intl.*

Mach. Corp., 142 Idaho 244, 248, 127 P.3d 147, 151 (2005) (citation omitted). We review a trial court's decision under an abuse-of-discretion standard. Id.

Weinstein v. Prudential Property and Cas. Ins. Co. ,2010 WL 2163391, (Idaho 2010)
---------- Excerpt from page 2010 WL 2163391 *11.

The above-entitled court had a very detailed special verdict form that asked, in an orderly fashion, various questions of the jury. It is beyond dispute that the jury answered each and every question on the special verdict form favorably to the defendants. Furthermore, both parties, via their legal counsel, approved the special verdict form and the format of such verdict form. Neither party can argue that the jury was not well instructed as to the law as few objections existed by either party to the legal instructions presented. The jury followed the special verdict form and received proper jury instructions.

A trial court will deny a motion for judgment notwithstanding the verdict if there is evidence of sufficient quantity and probative value that reasonable minds could have reached a similar conclusion to that of the jury. Id. (citing *Hudson v. Cobbs*, 118 Idaho 474, 478, 797 P.2d 1322, 1326 (1990)). *A trial court is not free to [146 Idaho 775] weigh the evidence or pass on the credibility of witnesses, making its own independent findings of fact and comparing them to the jury's findings. Griff, Inc.,* 138 Idaho at 319, 63 P.3d at 445. A trial court reviews the facts as if the moving party admitted any adverse facts and draws all reasonable inferences in favor of the non-moving party. *Ricketts v. E. Idaho Equip. Co., Inc.*, 137 Idaho 578, 580, 51 P.3d 392, 394 (2002).

Bates v. Seldin, 203 P.3d 702, 146 Idaho 772, (Idaho 2009)
---------- Excerpt from pages 203 P.3d 704-203 P.3d 705.

The plaintiffs, in their motion for a JNOV, fail to recognize the very verdict form and instructions they approved. Instead, the memorandum is simply a re-hash of the plaintiffs closing argument. The jury did not accept or agree with the plaintiffs on their evidence or theories.

DISCUSSION

The defendants will address points in the plaintiffs' memorandum and also some of those points that the plaintiffs omitted as follows:

1. No question exists that the court made detailed jury instructions with a detailed verdict form. As such, it was readily ascertainable how each juror stood on the five (5) claims that were submitted to the jury. Thus, the first question for response is whether the court properly instructed the jury. The plaintiffs make few claims that the jury was not properly instructed. The court made rulings on any objections to the law via instructions. Thus, the court should not be required to second guess itself on the state of the law provided to the jury.
2. The defendants requested a directed verdict on each and every count of the plaintiffs' case at the conclusion of the plaintiffs' evidence. The court ruled on the directed verdict issues. Thus, the court had already determined that factual disputes existed that the jury must decide. Since the court determined there were factual issues in dispute, JNOV would be inappropriate since the factual determinations were for the trier-of-fact. The law is clear that the court cannot second-guess a jury but rather must find sufficient evidence in the record to support the decision. (*Bates v. Seldin, supra.*) The court has already determined that issue by allowing the jury to make the factual findings and applying the given law to the facts. Thus, since the jury had the proper law and determined the facts, JNOV is inappropriate.
3. It is beyond dispute that Jorja Shippen, co-defendant and wife of Robert Shippen, had no dealings in this case. Thus, the parties, the jury and the court must all

concede she had no individual liability; and, the jury was correct in respect to their decision with the special verdict form.

4. Various factual determinations in regards to Mr. Shippen were the key to this case. From the very commencement of this case, counsel for the plaintiff was informed of the defense posture of the defendants. Quite simply, Mr. Shippen informed the plaintiffs of the irrigation (sub-water) problem during construction and prior to any contractual relationship between the parties. The defendants never varied from that position that Mr. Shippen informed Mr. Goodspeed of the water issue during construction AND prior to any contractual relationship with the plaintiffs. Common sense must prevail somewhere. Why would the subwater issue even come to light if Mr. Shippen were not installing a leaching system with sump pump. The jury believed the testimony of Mr. Shippen that he told Mr. Goodspeed, when Goodspeed observed the construction of the sump system, of the prior water issues. Disclosure removes any possibility of fraud or breach of any contractual issues. The jury accepted, as would any rational person, that there was proper disclosure since Mr. Goodspeed observed the installation of the sump pump and leaching system. It is implausible for Mr. Goodspeed to be present at the construction of such a system and not ask questions regarding this installation. Further, Mr. Shippen testified that Mr. Goodspeed stated: "they had high ground water in Tennessee and he was not concerned".
5. No water damage ever occurred during the one (1) year builder's warranty. Contrary to any statements of the plaintiffs in their memorandum, water never invaded the house during the one year from purchase in July of 2007 through July

of 2008.

6. Mr. Goodspeed testified of his lack of maintenance on the sump pump and "blowing" out the pipes before the winter of 2007 and into the spring of 2008. The water on the video contained in exhibit 6 was well after a lawsuit had been commenced by the plaintiffs; well after the one year warranty and after Goodspeed had Mr. Shippen leave the property when adjusting the sump pump. Furthermore, testimony existed of "water ponding" in the middle of the lawn which suggests the drainage line to the leaching system was cut.
7. Errors and misstatements of the plaintiff in their memorandum on pages 2-5 are as follows:
    A. Ray Keating never testified that an enhanced septic system was for the purpose of sub-water. He testified that a 3 foot minimum depth was required in most of Jefferson County. Ray Keating indicated that multiple factors determine enhanced systems, including but not limited to, size of lot, soil, drainage, water levels, type of construction, slope and other significant factors. A high water table is one of many factors in determining an enhanced system. Furthermore, an enhanced septic system has no relation to depth of foundation or of design of a house.
    B. Mr. Shippen never testified that he looked into the foundation hole for testing of subsurface water. He indicated that he looked at a retaining wall that was dug much deeper than the foundation for his testing. He testified he did not backfill the wall next to the retaining wall and porch to observe any potential for water. This wall was well below the foundation.

C. The water Mr. Fohrenck observed was four (4) feet in depth which was lower than the foundation on the subject house.

D. Mr. Shippen never testified that water came through the "test hole" into the home during construction. The water came from irrigation and not through a test hole.

E. Mr. Shippen indicated he told Mr. Chapple of water during construction; and, that Mr. Chapple indicated if it was irrigation water that was not a problem. Regardless, Mr. Shippen ***disclosed*** the construction water issue to Mr. Goodspeed prior to any contractual relationship and prior to any purchase. Additionally, Mr. Shippen never viewed the MLS and testified he disclosed of water during construction to Mr. Chapple. As important, the MLS document was superseded by the contract written by the plaintiffs.

F. Mrs. Goodspeed was never present during any of the inspection of the real property by Mr. Goodspeed. She could not testify to any of the matters between Mr. Shippen and Mr. Goodspeed.

G. Mr. Stoor, real estate agent for the plaintiffs, placed the language in the real estate purchase and sale agreement, paragraph 4 as to the installation of a leaching system. He did not "dream up" this language and was on notice to place the same in the contract. The contract was written by Stoor, agent for the plaintiffs. He testified that the entire contract was reviewed and the plaintiffs went through and understood each and every paragraph. Mr. Stoor was extensively examined concerning paragraph 32

of Exhibit 3 (real estate contract) and he stated the plaintiffs specifically understood the language "supersedes all prior Agreements between the parties respecting such matters. No warranties, including, without limitation any warranty of habitability, agreements or representations not expressly set forth herein shall be binding upon either party." The defendants cross-examined Mr. Stoor extensively on this issue to the point that the court asked counsel "to move on". Mr. Stoor indicated the plaintiffs understood this paragraph. Also, the court previously ruled on this issue at trial. Plaintiffs now ask the court to once again, second-guess, the reasoning applied at trial.

H. Mr. Shippen never stated to Mr. Goodspeed that "nothing could be done" in regards to subsurface water but rather "nothing could be done about subsurface water" in general. The testimony of Roger Warner to the jury indicated systems, such as leaching systems, could control subsurface water issues but not subsurface water itself. A big difference exists in the statements plaintiff makes to the court and takes out of context and of the context of reality.

I. Mr. Goodspeed, via testimony of both Dave Chapple and Mr. Shippen, indicated that the purpose of the purchase on the subject property was to live in the same during his contract (employment with the INL) in Idaho and then "turn" the property.

J. The premises never flooded in the year 2007. The premises never flooded in 2008 when Mr. Shippen was monitoring the sump pump into October of

said year.

A misrepresentation cannot occur if Mr. Shippen specifically disclosed the same to Mr. Goodspeed. The jury believed this disclosure occurred. The plaintiffs did not and could not meet the burden of "clear and convincing evidence" in proving any fraud or fraudulent claim. Likewise, the plaintiffs could not prove any breach of contract by a preponderance of the evidence.

8. The real estate contract (Exhibit 3) required the installation of a sump pump and leaching system. This system was installed and was functional during the time Mr. Shippen monitored the system. Mr. Shippen monitored the system even after the one year warranty had expired until Mr. Goodspeed said he was going to sue him. That year was after July in the Fall of 2008.

9. The court has already considered and re-considered the issue of punitive damages. Once again, the memorandum of the plaintiff only asks the court to second guess a matter that has been heard over and over. The court, at the conclusion of the defendants' testimony, believed there was insufficient evidence to submit punitive damages to the jury. The court has already exercised its discretion on this issue. The jury indicated that the defendants did not commit fraud. There are no other legal theories that the plaintiffs can rely upon to support such a contention for punitive damages. The statute on punitive damages requires "oppressive, malicious or outrageous conduct". None of those events occurred. The jury indicated fraud did not occur. Thus, the plaintiffs have nothing left to argue.

10. Plaintiffs mistake quantity of evidence with quality of evidence. Plaintiffs try to indicate that five witnesses dispute that Mr. Shippen did not disclose the water problem to

Mr. Goodspeed. Who are those five witnesses? Neither Jorja Shippen nor Shellee Goodspeed was present during the disclosure conversation. Neither of the realtors who represented each of the parties was present. Thus, there are only two witnesses, to-wit: Mr. Shippen and Mr. Goodspeed who were present during the conversation. Mr. Shippen is installing a sump pump and leaching system. It is unthinkable that Mr. Goodspeed did not question this installation process since he was present. Who did the jury believe of the two witnesses present? The answer is clear—they believed Mr. Shippen.

11. The house in question had no flooding in 2007 or 2008. The first admission appears on page 10 of plaintiffs' memorandum. Until that point, the plaintiffs try to disguise the flooding. Plaintiffs finally indicate in the second to last line and final line as follows: "the landscaping flooded in 2007". The house did not flood. What caused the landscaping flooding is unknown and has nothing to do with the house. Was it faulty installation of a sprinkler system? We know that there was a "flooding or ponding" issue in the middle of the yard in later years. That certainly was not subsurface problems related to the leaching system. However, no evidence, whatsoever, exists as to flooding in the house in 2007 and 2008.

12. The court already considered, in great detail, jury instructions. What more could the court do? Once again, the plaintiffs merely ask the court to second guess that which it has already considered.

13. The plaintiffs own admissions in their memorandum support the position of the defendants. The plaintiffs indicate that jury instruction #9 and #18 were correct propositions of law. The jury had these instructions and applied such instructions to the contested facts. The jury correctly applied instruction #9 to fraud; and correctly applied

instruction #18 to express warranties. The jury performed their function properly and evidence upheld their findings in the special verdict form.

14. Both Mr. Goodspeed and his realtor admitted the real estate contract (Exhibit 3) were explained before signature and submission to the defendants. The court is well aware of the defense counsel's constant cross-examination on this point. The court considered the argument of waiver of warranties and was not previously persuaded by the same argument now being tendered. Regardless of plaintiffs argument, the construction water had been disclosed by Mr. Shippen and was readily apparent by the plaintiffs inclusion of such language in the real estate contract. The jury made no error on the factual determination or upon the application of law.

15. The plaintiffs set forth a damage chart on page 14 of their briefing. The chart is inapplicable since the jury did not find liability under any of the numerous theories of the plaintiffs. Furthermore, the damages have no basis in the legal theories advanced. Remodeling, improvements, installation of driveways have nothing to do with the contract between the parties. The court will recall that no expert testimony was offered on damages by anyone. Mr. Goodspeed indicated, in his lay opinion, that the real property was of no or zero value.

In sum, the plaintiffs have re-tendered their closing argument to this court. The same general arguments were made to the jury which was not accepted by the collective minds of the jurors. Jury verdicts are paramount and the jury function should retain its valued position in our system of justice.

CONCLUSION

For the reasons tendered above, the request by the plaintiffs for Judgment Notwithstanding the Verdict or for a new trial should be denied. Additional attorney fees should be granted for responding to the motion of the plaintiffs.

DATED this 14 day of February, 2011.

Robin D. Dunn, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of February, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

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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.

ROBERT and JORJA SHIPPEN, husband and wife,

Defendants.

Case No.: CV-09-015

PLAINTIFFS' MOTION TO STRIKE SUPPLEMENTAL AFFIDAVIT: ATTORNEYS FEES AND COSTS

COMES NOW the Plaintiffs by and through their attorney of record, Weston S. Davis of Nelson Hall Parry Tucker, P.A., and hereby move the Court to Strike the supplemental affidavit of Robin Dunn in Support of his request for fees as it is untimely under I.R.C.P. 7(b)(3)(B), which requires all affidavits to be filed with the motion they support. This additional request for fees was also not made within fourteen (14) days of the date of the judgment as required by rule 54(d and e). Additionally, this affidavit should not be considered as Defendants seek to have the Court augment their initial request for fees without explaining the need for an additional 7.7 hours or $1,540.00 of work.

Therefore, due to the lack of foundation and untimely of the affidavit, it should be stricken.

Plaintiffs request oral argument on this motion.

DATED this 22 day of February, 2011.

WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 22 day of February, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

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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. ROBERT and JORJA SHIPPEN, husband and wife, Defendants.	Case No.: CV-09-015 **REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S JNOV REQUEST**

COME NOW Plaintiffs, William Goodspeed and Shellee Goodspeed, by and through counsel of record, and hereby reply to Defendants' Response to Plaintiff's JNOV request as follows:

Plaintiffs' memorandum supporting the legal authority and facts are sufficiently pled before this Court and the Plaintiffs hereby reincorporate their memorandum by reference into this reply. The facts simply show that no reasonable juror could have reached the conclusion the jurors in this case reached.

Defendants have mischaracterized plaintiffs' argument and the evidence submitted to the

jury. Defendants argue the only people who could have known about the disclosure or non-disclosure was Mr. Shippen and Shawn Goodspeed. This ignores Mrs. Shippen's testimony that she never contacted her agent, Dave Chapple, to disclose the house flooding and Mr. Chapple's testimony that neither of the Shippens contacted him to disclose the sub-water flooding of 2006. Randy Stoor and Shawn and Shellee Goodspeed both testified that neither the Shippens nor their agent ever disclosed the sub-water issues to them. Furthermore, the only witnesses that could have corroborated Mr. Shippen's testimony regarding his alleged disclosure to Shawn Goodspeed (Mr. Shippen's own sons) did not testify. Mr. Stoor and Shawn Goodspeed testified the reason the Goodspeeds took the Shippens up on the leaching system was to prevent snow melt and rain melt from coming into the basement due to the inward sloping landscaping. Shawn and Shellee both testified they relied on the Shippens' MLS representation that the house had not and would not have sub-water issues.

The MLS listing made by the Shippens' own real estate agent, a listing process the Shippens are familiar with and have used on over 95% of their houses, was never changed and was never requested to be changed. The Shippen's own agent, a non-party to this suit, testified he obtained the information in the MLS listing from Robert Shippen and that Mr. Shippen never called to have the language removed.[1] As a result, the warranty that the house had never flooded was never removed. Because the builder's warranty was ambiguous and not defined in the contract, the MLS listing was the source of defining the scope of the warranty. The warranty that the house had not flooded was breached at the time the Goodspeeds purchased the property

[1] Interestingly, Defendants argue Mr. Chapple exceeded the scope of his authority, but they never sued Mr. Chapple in this action and Mr. Chapple did nothing more than use the Shippens' representations in the MLS listing-something the Shippens had their agents do on at least 20 other properties.

Additionally, the Shippens cannot claim they never saw the MLS listing where Mr. Shippen himself filed an MLS change form request.

because in fact it had flooded. Further, because the alleged disclaimer of the warranty boilerplate language and was not clear and conspicuous (i.e. boilerplate language), the disclaimer is invalid–especially where the Seller did not draft the disclaimer and never evidenced an intent to emphasize the disclaimer to the buyers. The Defendants then, cannot argue it was their intent to disclaim the warranty, and a disclaimer for a warranty on a residence is construed against the builder/seller.

With regard to the MLS warranty, the MLS listing stated that the "property" (not "house") had never had sub-issues and would not. The testimony was that the property (i.e. the yard) suffered flooding in 2007. So whether the warranty was limited to one year or not, there was still a breach within the one year period of time when the yard flooded in 2007 and again every year after that. Plaintiffs claim no *water* damage occurred in 2007. The Goodspeeds still incurred *damages* in 2007 of the purchase of a second pump ($150.00) used *in addition* to the Shippen pump to keep water out of the house.

There was never any testimony that the sub-water came from irrigation water, as Defendants now allege in their response. In fact, the clear weight of Defendants' own testimony proves otherwise. Mr. Shippen, Mrs. Shippen, and Roger Warner all testified that the sub-water is highest during the period of time surrounding Labor Day Weekend. This was the time the Goodspeeds experienced flooding in 2007, 2008, and 2009. If the flooding were caused by a sprinkler line, the flooding would have occurred much sooner. Also, Shawn Goodspeed testified that there was no change to the pressure in his sprinkler system at any time and that the pump installed by Mr. Shippen was working in the same manner in 2008 and 2009 as it was in 2007, the year the Goodspeeds purchased the property. Shawn also testified that leaching system drainage area on the west side of his lot was wet from the leaching system pumping out water, so

Defendants cannot argue a failure to winterize the pump was the cause of the flooding if the pump was pumping enough water out into another areas of the yard to flood it.

Defendants argue without any evidence presented below that it is obvious the drainage line to the leaching system was cut, causing flooding to the back patio area. This was never argued at trial and no evidence was presented to even hint at this argument. Defendants never established where the leaching system line was positioned in the back yard, much less what activity would have cut the leaching line. Defendants only argued the system was not winterized. Incidentally, the back patio area was the same area that Dan Fohrenck testified he saw water in July of 2006 before a sprinkler system was installed.

The Shippens did not refute that they have known about sub-water in the area their whole lives and that Paul Jenkins specifically told them about sub-water in this subdivision when they purchased the lot in 2005. Contrary to Defendants' assertion in their response, Robert Shippen *did* testify that when construction began, he observed the foundational hole that Justin Fullmer excavated and that he looked in the foundational hole after it was dug in approximately May 2006 to see if there was any sub-water in the hole. After that, Mr. Shippen continued to monitor the sub-water level in the summer of 2006 through the hole around the retaining wall in the back yard. Dan Fohrenck testified that the sub-water around the back patio was only a few inches from coming into the house in July 2006, not four feet as Defendants' alleged. Mr. Shippen testified that he saw water rise in that retaining wall hole until it rose out of the hole; that the sub-water continued to rise and flood the basement to a depth of 1-2" in 2006; that he personally cleaned it up; and that he told his wife about it. No sprinklers were installed at that time, thus Defendants cannot argue that subsequent flooding was caused by a undefined alleged defect in a functioning sprinkler system if the same flooding was happening before the system was installed

and was an issue in that area well before the Goodspeeds moved in.

Further, Defendants argue in their response that the sump pump system was functional while Mr. Shippen was monitoring it. This cannot be true, however, because the yard was flooding in 2007, the year that Mr. Shippen was monitoring the system. Defendants also claim in their response the leaching system line was cut and was the obvious cause of the flooding. Thus, if the yard was flooding in 2007 and if the line was cut as Defendants allege in 2007, the system was not functioning when Mr. Shippen was monitoring it and therefore there was a breach of the warranty.

Defendants ask the question why the Goodspeeds never questioned the need for a leaching system if sub-water was not going to be an issue. The MLS listing itself gives the answer–even though "this particular home has not had sub-issues", the pump was to give the buyer peace of mind against there ever being any sub-water issues. Based upon the evidence, it is clear that the builder did not know this system would take care of the sub-water issues, and that alone was a misrepresentation upon which the Goodspeeds could rely, even if they saw Mr. Shippen installing the system, and even if he disclosed the flooding of 2006. This is because the law prohibits the Shippens from making representations they did not know to be true. Public policy allows the buyers to rely on the skill of the builder, rather than require that the buyer go hire an inspector to independently establish the fact for the buyer. Defendants have routinely evaded this point.

Defendants argue that Mr. Warner testified that a sump pump could resolve the problem. Mr. Warner testified that while a leaching system could help for a little while, eventually the use of a pump would be like putting a pump in a lake to bail out a boat. Mr. Warner's own pre-trial deposition had to be used at trial to help him remember that he made this statement.

Mr. Chappel and Mr. Shippen claimed that Mr. Goodspeed wanted to make a profit off of this house after his contract with the INL was up. However, what they failed to explain was why when Mr. Goodspeed was four months into his employment contract (from which he was never terminated and which had not even come close to expiration) and only two months into his house why he contacted Robert Shippen and began complaining about sub-water. Initial complaints proceeded the real estate crash and were far in advance of anyone's knowledge of the long lasting effects of the crash. This same sub-water complaint consistently came around Labor Day each year when the property and/or the house began to flood. Mr. Goodspeed testified he had to quit his job to find a higher paying job to fund the litigation–a point Defendants never disputed. The evidence was clear the Goodspeeds were not trying to get out of the house because they could not "turn" a profit.

As to the value of the property, Mr. Goodspeed testified the house was worth $290,000.00 to $295,000.00 *without* the defect and worth nothing *with* the defect. Again, Defendants rely on the argument that expert testimony must be brought forth to prove damages–a point this court quickly corrected Defendants on with the analogy of a child who breaks his arm on a bicycle. Plaintiffs set forth their damages with specificity under a clear basis in law.

Therefore Plaintiffs respectfully request this Court reverse the jury's holding in light of the clear weight of the evidence and law as no reasonable juror could have found in favor of the Defendants.

DATED this 23 day of February, 2011.

WESTON S. DAVIS

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 23 day of February, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

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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. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-015 SUPPLEMENTAL MEMORANDUM RE: ATTORNEY FEES ON ISSUE OF COMMERCIAL TRANSACTIONS

The court requested the defendant to indicate whether the purchase of a real estate lot and home triggered the "commercial transaction" language of Idaho Code Section 12-120. This memorandum of defendants indicates that the instant case was a commercial transaction as a secondary source for the award of attorney fees. (The contract itself provided for fees and is the primary source.)

The court requested that two cases be reviewed. Those two cases are not applicable to the instant cause before the court.

COMMERCIAL TRANSACTIONS

§ 12-120. Attorney's fees in civil actions

(1) Except as provided in subsections (3) and (4) of this section, in any action where the amount pleaded is twenty-five thousand dollars ($25,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees. For the plaintiff to be awarded attorney's fees, for the prosecution of the action, written demand for the payment of such claim must have been made on the defendant not less than ten (10) days before the commencement of the action; provided, that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety-five percent (95%) of the amount awarded to the plaintiff.

(2) The provisions of subsection (1) of this section shall also apply to any counterclaims, cross-claims or third party claims which may be filed after the initiation of the original action. Except that a ten (10) day written demand letter shall not be required in the case of a counterclaim.

(3) In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, *the prevailing party shall be allowed a reasonable attorney's fee* to be set by the court, to be taxed and collected as costs.

The term "commercial transaction" is defined to mean *all transactions except transactions for personal or household purposes*. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

ID ST Sec. 12-120, Attorney's fees in civil actions
---------- Excerpt from page 6224.

CASE LAW REQUESTED BY THE COURT

The court requested the defendants to review two (2) cases:

The transaction involved in this case--the refinancing of the Bajrektarevics' home loan--was clearly made "for personal or household purposes," and does not constitute a commercial transaction as contemplated by > Idaho Code § 12-120(3). 155 P.3d 691, 143 Idaho 890, *Bajrektarevic v. Lighthouse Home Loans, Inc.*, (Idaho 2007)
---------- Excerpt from page 155 P.3d 694.

This matter was not a purchase of a home but rather a refinance "for personal or household purposes". Individuals refinance their homes often for purchase of other goods, for lower interest rates and other maters. This case is inapplicable to the instant case since the cited case above was not a PURCHASE OF A HOME. The purchase of a home is a commercial transaction and this case is distinguishable.

The second case is not applicable because the prevailing party did not cite any statutory authority. Thus, the case is inapplicable to the instant case where a house was purchased in a commercial setting.

They cite no authority for that award. They simply state, "If Perreira is found to be the prevailing party on appeal, Perreira requests that attorney fees be awarded for costs and fees reasonably incurred in the appeal." Because they have failed to cite any statutory or contractual authority for awarding attorney fees, we will not address that issue.

PHH Mortg. Services Corp. v. Perreira, 200 P.3d 1180, 146 Idaho 631, (Idaho 2009)
---------- Excerpt from page 200 P.3d 1190.

Both cases that the court suggests stand for the proposition of non-commercial transactions in home purchases are distinguishable or non-applicable to the instant case. A real estate purchase is neither a personal or household purchase.

OTHER CASE LAW

I.C. § 12-120(3) (italics added). A two-prong test exists for awarding attorney fees under > I.C. § 12-120(3). First, an alleged commercial transaction must be integral to the claim. Second, the commercial transaction must be the basis upon which a party is attempting to recover. Brooks v. Gigray Ranches, Inc., 128 Idaho 72, 78, 910 P.2d 744, 750 (1996) (citing Brower v. E.I. DuPont de Nemours & Co., 117 Idaho 780, 792 P.2d 345 (1990).)

Andrea v. City of Coeur D'Alene, 968 P.2d 1097, 132 Idaho 188, (Idaho App. 1998)
---------- Excerpt from page 968 P.2d 1099.

Idaho Code § 12-120(3) compels an award of attorney fees to *the prevailing party in a civil action to recover in any commercial transaction*. *Blimka v. My Web Wholesaler*, LLC, 143 Idaho 723, 729, 152 P.3d 594, 600 (2007).

Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust, 177 P.3d 955, 145 Idaho 208, (Idaho 2008)
---------- Excerpt from page 177 P.3d 965.

The case that is most applicable to the instant case states as follows:

McPhee also claims entitlement to an award of attorney fees incurred on appeal in connection with the breach of contract claim pursuant to > I.C. § 12-120(3). That statute mandates an award of fees to the prevailing party in civil actions that are based on, among other things, a contract for services or a commercial transaction. See *Farm Credit Bank of Spokane v. Stevenson,* 125 Idaho 270, 274-75, 869 P.2d 1365, 1369-70 (1994); *Karterman v. Jameson,* 132 Idaho 910, 916, 980 P.2d 574, 580 (Ct.App.1999). When a party has alleged the existence of a contract of the type encompassed in this statute, the prevailing party is entitled to recover fees even though no liability under the alleged contract was established. *Farmers Nat'l Bank v. Shirey,* 126 Idaho 63, 73, 878 P.2d 762, 772 (1994). Johnson's breach of contract claim here was predicated on an alleged contract for services, which also constituted a commercial transaction. Therefore, McPhee is entitled to recover his attorney fees incurred on appeal with respect to the contract claim only.

210 P.3d 563, 147 Idaho 455, Johnson v. McPhee, (Idaho App. 2009)
---------- Excerpt from page 210 P.3d 578.

The foregoing case, *Johnson,* involved a real estate contract and was a commercial transaction.

CONCLUSION

The instant case was a commercial transaction. In any event, the contract provides for attorney fees in the case at bar. Under either theory, defendants are entitled to fees.

Avoiding liability is a significant benefit to a defendant. In baseball, it is said that a walk is as good as a hit. The latter, of course, is more exciting. In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff. The point is, while a plaintiff with a large money judgment may be more exalted than a defendant who simply walks out of court no worse for the wear, courts must not ignore the value of a successful defense.

Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc., 117 P.3d 130, 141 Idaho 716, (Idaho 2005)
---------- Excerpt from page 117 P.3d 133.

DATED this 2nd day of March, 2011.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of March, 2011 a true and correct copy of the foregoing was delivered to the following persons(s) by:

____ Hand Delivery

____ Postage-prepaid mail

_X__ 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

Courtesy Copy: Hon. Gregory Anderson, District Judge, Bonneville County

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

2011 APR 18 PM 2:36

DISTRICT COURT
JEFFERSON COUNTY, IDAHO

WILLIAM SHAWN GOODSPEED and SHELLEE BETH GOODSPEED, husband and wife, Plaintiffs, vs. ROBERT SHIPPEN and JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-15 **ORDER RE: MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL, AND RECONSIDERATION**

FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Honorable Judge Anderson
Date April 18 2011
Time 2:00 pm
Deputy Clerk SK

This cause having come before this Court pursuant to Goodspeeds' February 9, 2011, motions for judgment notwithstanding the verdict, new trial, and reconsideration; this Court being fully advised in the premises, and good cause appearing;

NOW, THEREFORE:

Goodspeeds' motion for judgment notwithstanding the verdict is denied.

Goodspeeds' motion for reconsideration is denied.

Goodspeed's motion for new trial is granted on the issue of breach of implied warranty of habitability.

DATED this 18th day of April 2011.

JEFFERSON COUNTY IDAHO DISTRICT COURT SEVENTH JUDICIAL DISTRICT

Gregory S. Anderson

GREGORY S. ANDERSON
Senior District Judge

911

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of April 2011, 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
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630

Robin D. Dunn
DUNN LAW OFFICES, PLLC
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Rigby, ID 83442

CHRISTINE BOULTER
Clerk of the District Court
Jefferson County, Idaho

By _____
Deputy Clerk

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

2011 APR 18 PM 2:38

DISTRICT COURT
JEFFERSON COUNTY, IDAHO

WILLIAM SHAWN GOODSPEED and SHELLEE BETH GOODSPEED, husband and wife, Plaintiffs, vs. ROBERT SHIPPEN and JORJA SHIPPEN, husband and wife, Defendants.	Case No. CV-09-15 **MEMORANDUM DECISION RE: MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL, AND RECONSIDERATION**

FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Honorable Judge Anderson
Date April 14, 2011
Time 2:00 p.m.
Deputy Clerk JH

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter was tried before a jury in January 2011. Evidence was presented on January 11, 12, 13 and 14. The case was submitted to the jury the afternoon of Friday, January 14, 2011. The jury returned a verdict in favor of the defendants on January 18, 2011. The evidence presented at trial is summarized below.

On or about August 20, 2005, Robert and Jorja Shippen purchased a lot at 37089 East 319 North, Rigby, Idaho. Shippens thereafter constructed a home (hereafter "Home") on the property. While the Home was under construction, Mr. Shippen hired Dave Chapple of Winstar Realty to list it for sale. Based on a conversation with Mr. Shippen, Mr. Chapple created an MLS listing, which 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 MIND BUILDER WILL INSTALL A LEACHING SYSTEM AROUND THE 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.

In the Summer of 2007, Shawn and Shellee Goodspeed began looking for property in Eastern Idaho. They were looking for a house with a basement where her father could live. After reading the MLS listing on the Home, Goodspeeds came to Idaho and, while visiting the Home, spoke with Mr. Shippen as he was working on the leaching system. The substance of that conversation is disputed. Mr. Shippen testified he told Mr. Goodspeed the basement of the Home had flooded during construction in 2006.[1] Mr. Goodspeed denies Mr. Shippen made that disclosure.

On or about July 2, 2007, Goodspeeds and Shippens executed a Purchase and Sale Agreement (hereafter, "Agreement"), and Shippens transferred the Home to Goodspeeds by warranty deed. The basement of the Home flooded in the fall of 2008 and again in the fall of 2009.

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 of habitability, 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 November 1, 2010, this Court granted that motion. As

[1] At trial, when asked if his conversation with Mr. Goodspeed occurred in June 2006, Mr. Shippen responded "yes." Mr. Shippen also testified the conversation occurred a month or two prior to the sale of the Home, which occurred in July 2007. Thus, it appears, Mr. Shippen was either mistaken or simply misspoke regarding the year in which the conversation occurred.

stated above, the case proceeded to trial in January 2011. After reviewing the evidence presented during the trial, this Court found insufficient evidence to support a claim for punitive damages. Therefore, it declined to instruct the Jury regarding punitive damages. This Court entered judgment in favor of Shippens on January 26, 2011.

On February 9, 2011, Goodspeeds filed a motion for judgment notwithstanding the verdict or alternatively for a new trial. Their supporting brief also seeks reconsideration of this Court's decision not to submit the issue of punitive damages to the jury. On February 14, 2011, Shippens filed a brief in opposition to Goodspeeds' motion. On February 23, 2011, Goodspeeds filed a reply brief. On February 28, 2011, this Court heard oral argument regarding Goodspeed's motion for judgment notwithstanding the verdict.[2]

II. STANDARD OF ADJUDICATION

A. Judgment Notwithstanding the Verdict

Whether to grant a motion for judgment notwithstanding the verdict (JNOV) "is purely a question of law and the trial court's decision will be freely reviewed by an appellate court without special deference to the views of the trial court." *Quick v. Crane,* 111 Idaho 759, 764, 727 P.2d 1187, 1192 (1986).

Under Rule 50(b) of the Idaho Rules of Civil Procedure, "[i]f a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment. I.R.C.P. 50(b). The party moving for a JNOV "admits the truth of all the adverse evidence and all inferences that can be drawn legitimately from it." *Leavitt v. Swain*, 133 Idaho 624, 628, 991 P.2d 349, 353 (1999). The court must determine whether there is substantial evidence upon which a jury could have found for the non-moving party. *Id.* The

[2] At the hearing on February 28, 2011, the Court also heard oral argument on a motion for attorney's fees and costs filed by Shippens on January 26, 2011. This Court will issue a separate decision with regard to attorney's fees and costs after a final judgment has been entered in this case.

court may not reweigh the evidence or consider the credibility of the witnesses and will not grant a JNOV unless it finds that there could have been but one conclusion as to the verdict that reasonable minds could have reached and the jury failed to reach it. *Id.* Conflicting circumstantial evidence is sufficient to withstand a motion for JNOV. *Id.* The function of Rule 50(b) "is to give the trial court the last opportunity to order the judgment that the law requires." *Quick,* at 763, 727 P.2d at 1191.

Regarding a motion for judgment notwithstanding the verdict, the Idaho Supreme Court stated,

> When a trial judge receives such a motion, the judge begins the inquiry by asking him or herself whether there is substantial evidence in the record upon which the jury could properly find a verdict for the party against whom the judgment notwithstanding the verdict is sought. *See Quick v. Crane,* 111 Idaho 759, 763, 727 P.2d 1187, 1191 (1986). The judge's task in answering this question is to review all the evidence and draw all the reasonable inferences therefrom in the light most favorable to the non-moving party. *Id.* at 764, 727 P.2d at 1192. (The party seeking a judgment notwithstanding the verdict admits the truth of all the other side's evidence and every legitimate inference that can be drawn from it. *Stephens v. Stearns,* 106 Idaho 249, 252-53, 678 P.2d 41, 44-45 (1984).) The judge is not an extra juror, though; there is no weighing of evidence or passing on the credibility of witnesses or making of independent findings on factual issues. *Gmeiner v. Yacte,* 100 Idaho 1, 4, 592 P.2d 57, 60 (1979). Instead, the judge must determine whether the evidence is substantial--that is, whether it is of sufficient quality and probative value that reasonable minds could arrive at the same conclusion as did the jury. *Mann v. Safeway Stores, Inc.,* 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974).

Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dept., 142 Idaho 826, 830, 136 P.3d 297, 301 (2006).

B. Reconsideration

The decision or grant to deny relief pursuant to a motion to reconsider is within the sound discretion of the trial court and, absent a manifest abuse of discretion, will not ordinarily be

disturbed on appeal. *Win of Michigan, Inc. v. Yrekd United, Inc.*, 137 Idaho 747, 754, 53 P.3d 330, 337 (2002); *Kirkland v. State*, 143 Idaho 544, 547, 149 P.3d 819, 822 (2006).

C. New Trial

> On a motion for new trial, a trial court has broad discretion and may weigh the evidence and credibility of the witnesses. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986). Unlike the rule which applies to motions for directed verdict or j.n.o.v., a trial court may set aside the jury's verdict and grant a new trial pursuant to I.R.C.P. 59(a) even though there is substantial evidence to support the verdict. *Id.* A trial court is not required to view the evidence in a light most favorable to the non-moving party. *Id.*

Jones v. Panhandle Distributors, Inc., 117 Idaho 750, 754, 792 P.2d 315, 319 (1990).

III. DISCUSSION

A. Fraud

Goodspeeds argue they met their burden of proving fraud by clear and convincing evidence. They allege Mr. Shippen made two misrepresentations in the MLS listing that induced them to purchase the Home. The first allegation of fraud is based on the representation that the Home "never had sub issues." The second allegation of fraud is based on representations that the leaching system would "prevent the possibility of there every being any sub issues."

To prevail on an action for fraudulent misrepresentation, the following elements must be established by clear and convincing evidence:

> (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).

1. Sub-Water

Goodspeeds do not dispute their fraud claim on the sub-water issue would fail if Mr. Shippen disclosed to Mr. Goodspeed that the Home had flooded in 2006. However, Goodspeeds argue that no reasonable jury could have believed Mr. Shippen made that disclosure.

Mr. Shippen testified that in June of 2007, Goodspeeds visited the Home while he was working on the leaching system. Mr. Shippen's testimony proceeded as follows:

> Mr. Shippen: Then Mr. Goodpeed come down and was visiting with me, uh, I told him what I was doing there, that I was, that I put, uh, the lift pump in for the drainage system—explained to him how I had run a line over and I had excavated out of the ground and I had put in about, I think it was 15, well it would have been more that, it would have been two truck loads of gravel—crushed washed gravel—and I had dug down to the gravel below the dirt in the existing field so there would be no way for the water to hold up so it could just go through the gravel into the other gravel. I told him I did this because the previous year during construction I had gotten one inch of water from the irrigation.
>
> Mr. Dunn: And you told that to the plaintiff, Mr. Goodspeed?
>
> Mr. Shippen: Yes, um hum.
>
> Mr. Dunn: And you are positive you did that?
>
> Mr. Shippen: Yes, I am.
>
> . . . .
>
> Mr. Dunn: And as a result of what you told the plaintiff, what did he say?
>
> Mr. Shippen: He said that he wasn't really concerned about it. He'd just come from Tennessee and they had a high ground water in Tennessee and he didn't think it would be an issue. Uh, He asked me if I thought it was, I remember, and I said I don't think it is—this should take care of it if you do have a problem.
>
> . . . .
>
> Mr. Shippen: That's when I told him that that I'd gotten the water and it was an inch deep and, you know, that I had monitored it, started going out

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after a day, and then I'd cleaned it up. I told him I didn't think there would be water in the future.

Goodspeeds allege the following evidence proves that Mr. Shippen did not disclose the 2006 flooding:

- Mr. and Mrs. Goodspeed testified there was no disclosure by Mr. Shippen about sub-water at any time.
- Dave Chapple testified Mr. Shippen never told him to remove the language regarding sub-water issues from the MLS listing or that the property had flooded.
- Randy Stoor mentioned he never heard any communication from Mr. Shippen or Mr. Chapple regarding sub-water on the property.
- Mrs. Shippen admitted Mr. Shippen told her about the 2006 flooding, but she never said anything to Goodspeeds or their realtor about the sub-water
- None of Mr. Shippen's alleged witnesses to his conversation with Mr. Goodspeed ever testified.
- All writings point to no disclosure of the flooding.

Plaintiff's Brief in Support at 4. Goodspeeds also allege Mr. Shippen's testimony is tainted by the fact that his deposition was used to correct him on numerous issues at trial.

There was nothing inherently incredible about the testimony given by Mr. Shippen at trial. The discrepancies between Mr. Shippen's deposition testimony and his testimony at trial were negligible. The fact that other people were unaware of the alleged disclosure does not prove that the disclosure did not occur.

This Court concludes that there was substantial evidence, including Mr. Shippen's testimony, on which the jury could have found Mr. Shippen disclosed the 2006 flooding to Goodspeeds, and that Goodspeeds knew the representation in the MLS listing regarding sub-water was false.

2. Leaching System

Goodspeeds allege the representation in the MLS listing regarding the leaching system's ability to "prevent the possibility of there every being any sub issues" was fraudulent.

In addition to the representations in the MLS listing, Mr. Shippen made a representation about the leaching system during the conversation he had with Mr. Goodspeed in June 2007. When Mr. Goodspeed asked Mr. Shippen if he thought sub-water would be an issue, Mr. Shippen replied that he didn't think it would be and, if it was, the leaching system "should take care of it." Mr. Shippen's representations were affirmative statements about the *future performance* of the leaching system that *would be* installed.

Shippens allege Mr. Shippen's disclosure in June 2007 "removes any possibility of fraud." Brief in Opposition at 6. Shippens also argue there is substantial evidence the jury could have relied on to conclude the system was adequate—as represented—but had been damaged by Goodspeeds after they purchased the Home.

In *Sharp v. Idaho Inv. Corp.*, 95 Idaho 113, 122-23, 504 P.2d 386, 395-96 (1972), the Idaho Supreme Court stated "there is a general rule in law of deceit that a representation consisting of promise or a statement as to a future event will not serve as basis for fraud, even though it was made under circumstances as to knowledge and belief which would give rise to an action for fraud had it related to an existing or past fact." The court stated further, "Assuming that Neilson's statements were in fact promises or statements that a certain act would be done, we can find no evidence establishing any of the elements of fraud, i.e. intent, knowledge of falsity, etc. Actually, these statements of Neilson can be characterized as 'puffing.'" *Id.*

In *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 615, 114 P.3d 974, 985 (2005), the Idaho Supreme Court held,

> "An action for fraud or misrepresentation will not lie for statements of future events." *Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 207, 61 P.3d 557, 564 (2002) (other citations omitted). "[T]here is a general rule in [the] law of deceit that a representation consisting of [a] promise or a statement as to a future event will not serve as [a] basis for fraud . . . ." *Sharp v. Idaho Inv. Corp.*, 95 Idaho 113, 122, 504 P.2d 386, 396 (1972) (other citations omitted). . . . . "[T]he representation forming the basis of a claim for fraud must concern past or existing material facts." *Magic Lantern Prods, Inc. v. Dolsot*, 126 Idaho 805, 807, 892 P.2d 480, 482 (1995) (overruled on other grounds by *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 36 P.3d 218 (2001)). . . . . A "promise or statement that an act will be undertaken, however, is actionable, if it is proven that the speaker made the promise without intending to keep it." *Id.* (citing *First Sec. Bank of Idaho v. Webster*, 119 Idaho 262, 268, 805 P.2d 468, 474 (1991)).

Id.

Mr. Shippen's representations about the leaching system were statements about future events. Under the general rule, Mr. Shippen's representations concerning the leaching system would not be actionable as fraud.

Goodspeeds have not alleged any exceptions to the general rule are applicable in this case. Even if Mr. Shippen's representations about the capacity of the leaching system constituted a promise to install a system of a certain quality, such a promise would not be actionable as fraud unless accompanied by evidence that Mr. Shippen made the promise without intending to keep it. Such evidence was not presented in this case. In fact, Mr. Shippen testified he thought the leaching system he designed and installed would be adequate.

3. Conclusion

Considering all evidence adverse to Goodspeeds as true and drawing all reasonable inferences from that evidence in favor of Shippens, this Court concludes there is substantial evidence in the record upon which the jury could have found Shippens did not commit fraud.

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B. Punitive Damages

If this Court finds Shippens committed fraud, Goodspeeds ask it to reconsider its prior decision to not submit the issue of punitive damages to the jury.

Having concluded the jury verdict with regard to Goodspeeds' fraud claim should be upheld, there is no basis for punitive damages.

C. Breach of Express Warranty

1. MLS Listing

Goodspeeds argue no reasonable jury could have found Shippens did not a breach an express warranty. Goodspeeds assert that, because this Court instructed the jury that the term "Standard Builder's Warranty" was ambiguous, the jury was free to consider parol evidence and "should have found the MLS listing . . . acted as a warranty" because it "is the only document in writing explaining any coverage as to what was included in the builder's warranty." Plaintiff's Brief in Support at 9.

If the terms of a contract are determined to be ambiguous, the interpretation of the document is a factual question that focuses upon the intent of the parties. *Page v. Pasquali*, 150 Idaho 150, 244 P.3d 1236 (2010).

In ascertaining the intent of the parties regarding the term "Standard Builder's Warranty," the jury could have considered the MLS listing, but there is no rule of law or logic that would require the jury to do so.

The express warranty alleged to have been included in the MLS listing was limited to sub-water flooding. Sub-water flooding is not common. Therefore, it would not necessarily be a "standard" construction problem.

Considering the limited scope of the MLS listing, the jury could have concluded that the representations in the MLS listing did not constitute a standard builder's warranty.

2. Mr. Stoor's Testimony

It was Goodspeeds' burden to prove an express warranty was breached. This Court is aware of Mr. Stoor's testimony regarding the definition of a "Standard Builder's Warranty." Mr. Stoor gave an ambiguous opinion about what a standard builder's warranty would cover. The jury was not obligated to adopt his view.

3. Conclusion

Drawing all reasonable inferences in the light most favorable to Shippens, the status of the evidence is such that the jury could have found Shippens did not breach the express warranty provisions of the Agreement.

D. Requested Jury Instruction/New Trial

Goodspeeds argue this Court erred by not giving the following jury instruction that they proposed:

> 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.

Shippens argue the proposed instruction on warranty disclaimers was unnecessary because Mr. Goodspeed admitted that he read paragraph 32 and his realtor, Mr. Stoor, explained it to him before he and his wife signed the Agreement.

This Court declined to give the proposed jury instruction on warranty disclaimers because the Court was lead to believe Goodspeeds had waived the implied warranty of habitability. During the jury instruction conference, Shippens' counsel erroneously represented to this Court that Goodspeeds acknowledged having read and understood paragraph 32 prior to signing the Agreement. Adding to this Court's misunderstanding was Goodspeeds' counsel's failure to adequately rebut the alleged acknowledgment.

1. Waiver

The Idaho Supreme Court has said the following regarding disclaimer of the implied warranty of habitability:

> The majority of states permit a disclaimer of an implied warranty of habitability, but the disclaimer must be clear and unambiguous and such disclaimers are strictly construed against the builder-vendor. *Belt v. Spencer*, 41 Colo.App. 227, 585 P.2d 922, 925 (1978); *Bridges v. Ferrell*, 685 P.2d 409, 411 (Okla.Ct.App.1984); *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo.1978) (en banc). We agree with these courts and particularly with the Missouri Supreme Court:
>
> > "[O]ne seeking the benefit of such a disclaimer must not only show a *conspicuous* provision which fully discloses the consequences of its inclusion but also that such was *in fact* the agreement reached. The heavy burden thus placed upon the builder is completely justified, for by his assertion of the disclaimer he is seeking to show that the buyer has relinquished protection afforded him by public policy. A knowing waiver of this protection will not be readily implied." *Crowder, supra*, at 881 n. 4 (emphasis in original).
>
> The Court explains its approach: "*By this approach, boilerplate clauses, 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." *Id.*, at 881. *Accord Petersen v. Hubschman Construction Co., Inc.*, 76 Ill.2d 31, 27 Ill.Dec. 746, 751, 389 N.E.2d 1154, 1159 (1979) (emphasis added).
>
> The disclaimers in the instant case fall woefully short of fulfilling these requirements. Because the implied warranty of habitability is a creature of public policy, public policy dictates that it be waived only with difficulty. The party asserting that it has been waived bears the burden of proving that it has been *knowingly* waived. Clearly, when no mention is made of the implied warranty of habitability in a contract, and the contract contains only general language stating

there are no warranties other than those contained within its four corners, any purported waiver of the implied warranty of habitability is ineffective.

Tusch Enterprises v. Coffin, 113 Idaho 37, 45-46, 740 P.2d 1022, 1030-31 (1987).

> "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term in "conspicuous" or not is a decision for the court. Conspicuous terms include the following:
>
> (A) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
>
> (B) Language in the body of a record or display in larger type than the surrounding text, of in contrasting type, font, or color to the surrounding text of the same sice, or set of from the surrounding test of the same size by symbols or other marks that call attention to the language.

I.C. § 28-1-201.[3]

Paragraph 32 of the Agreement states, in part: "No warranties, including, without limitation any warranty of habitability, agreements or representations not expressly set forth herein shall be binding upon either party."

Although paragraph 32 specifically disclaims the warranty of habitability, it is not in bold face type, large text, or capital letters. There are no symbols or other marks that set it apart from the surrounding text. And, it appears among other boilerplate at the end of the Agreement.

Whether paragraph 32 constitutes a conspicuous disclaimer of the implied warranty of habitability appears to be a mixed question of law and fact. However, "if reasonable minds [can] not differ on issues of fact—then those issues become questions of law upon which the court may freely rule." *Sorensen v. Saint Alphonsus Regional Medical Center, Inc.*, 141 Idaho 754, 761, 118 P.3d 86, 93 (2005).

---

[3] This Court acknowledges the Agreement in this case does not concern the sale of goods. Nevertheless, the definition of "conspicuous" from the Idaho Commercial Code is relevant and informative on the issue before the Court.

This Court concludes paragraph 32 is a boilerplate disclaimer. Furthermore, this Court finds reasonable minds could not differ in finding that paragraph 32 falls short of the requirements for a conspicuous disclaimer. This Court, therefore, concludes the implied warranty of habitability was not effectively disclaimed by the mere inclusion of paragraph 32 in the Agreement.

2. Actual Notice of Waiver

After reviewing the testimony of Goodspeeds and Mr. Stoor, this Court concludes there was evidence that Goodspeeds read the Agreement and that Mr. Stoor generally explained it to them. However, there is no evidence that paragraph 32 was expressly brought to Goodspeeds' attention and explained to them. Therefore, this Court concludes the evidence at trial did not clearly show Goodspeeds were aware of and agreed to paragraph 32 and its consequences.

3. Jury Instruction

The Idaho Supreme Court has set forth the following standard regarding jury instructions:

> If the court's instructions, considered as a whole, fairly and adequately present the issues and state the applicable law, then no error is committed. *See Pacific Northwest Pipeline Corp. v. Waller*, 80 Idaho 105, 326 P.2d 388 (1958); *Union Seed Co. of Burley v. Savage*, 76 Idaho 432, 283 P.2d 918 (1955); *Koehler v. Stenerson*, 74 Idaho 281, 260 P.2d 1101 (1953).

McBride v. Ford Motor Co., 105 Idaho 753, 760, 673 P.2d 55, 62 (1983).

> A requested jury instruction must be given if it is supported by any reasonable view of the evidence, *Bailey*, 139 Idaho at 750, 86 P.3d at 464, but the determination of whether the instruction is so supported is committed to the discretion of the district court. *State v. Elison*, 135 Idaho 546, 552, 21 P.3d 483, 489 (2001). Clearly, a requested jury instruction need not be given if it is either an erroneous statement of the law, adequately covered by other instructions, or not supported by the facts of the case. *State v. Eastman*, 122 Idaho 87, 89, 831 P.2d 555, 557 (1992). Even so, when the instructions taken as a whole do not mislead or prejudice a party, an erroneous instruction does not constitute reversible error. *Bailey*, 139 Idaho at 750, 86 P.3d at 464.

Craig Johnson Const., L.L.C. v. Floyd Town Architects, P.A., 142 Idaho 797, 800, 134 P.3d 648, 651 (2006).

When a jury verdict is rendered on the basis of incorrect instructions, the appropriate remedy is the granting of a new trial. *Walton v. Portlatch Corp.*, 116 Idaho 892, 781 P.2d 905 (1985).

Question No. 4 of the Special Verdict Form asked the Jury "Did Robert and/or Jorja Shippen breach the implied warranty of habitability?" The jury answered "no" with regard to both Mr. and Mrs. Shipppen. There are at least two possible explanations for the jury's answer. First, it is possible the jury determined the implied warranty of habitability was not breached because it had been disclaimed by Goodspeeds. Therefore, the jury should have been instructed on how to determine if the implied warranty of habitability had been waived. Second, the jury may have decided there were insufficient facts to support finding the implied warranty of habitability had been breached.

4. Conclusion

The jury should have been instructed regarding disclaimer of the implied warranty of habitability. This Court cannot rule out the possibility that the proposed jury instruction may have provided needed guidance to the jury regarding the existence and/or waiver of the implied warranty of habitability. Failure to give the instruction may have been prejudicial to Goodspeeds.

Pursuant to Rule 59(a) of the Idaho Rules of Civil Procedure, Goodspeeds are entitled to a new trial on their breach of implied warranty of habitability claim.

IV. CONCLUSION

Goodspeeds' motion for judgment notwithstanding the verdict and motion for reconsideration are denied. Goodspeed's motion for new trial is granted on the issue of breach of implied warranty of habitability.

DATED this 14th day of April 2011.

Gregory S. Anderson

GREGORY S. ANDERSON
Senior District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of April 2011, 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
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630

Robin D. Dunn
DUNN LAW OFFICES, PLLC
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442

CHRISTINE BOULTER
Clerk of the District Court
Jefferson County, Idaho

By _____
Deputy Clerk

SEVENTH JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF JEFFERSON
210 Courthouse Way, Suite 120
RIGBY, IDAHO 83442

William Shawn Goodspeed, etal.	)	
	)	
vs.	)	Case No: CV-2009-0000015
	)	
Shippen Construction, Inc., etal.	)	**NOTICE OF HEARING**
	)	

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Status Conference	***Tuesday, May 24, 2011***	***09:00 AM***
Judge:	***Gregory S. Anderson***	
Courtroom:	***Telephonically in Chambers in Bonneville County***	

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date Tuesday, May 03, 2011.

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

Mailed ✓

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442

Courthouse Box ✓

Dated: Tuesday, May 03, 2011
Christine Boulter
Clerk Of The District Court

By: _____
Deputy Clerk

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB #2903
Amelia A. Sheets, Esq., ISB #5899
Paul Ziel, Esq., ISB #7497
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

rdunn@dunnlawoffices.com

Robin D. Dunn, Attorney 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/Respondents, vs. ROBERT AND JORJA SHIPPEN, husband and wife, Defendants/Appellants.	Case No. CV-09-015 NOTICE OF APPEAL I.A.R. 11; 17

TO: THE ABOVE NAMED RESPONDENTS; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants appeal against the above named Respondents to the Idaho Supreme Court from the final Order Re: Motions for Judgment Notwithstanding the Verdict, New Trial, and Reconsideration entered in the above entitled action on the 14th

day of April, 2011, the Honorable Gregory S. Anderson, presiding.

2. The Appellants have a right to appeal to the Idaho Supreme Court, and the judgment/order described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a)(5) I.A.R., as follows:

(a) Civil Actions. From the following judgments and orders of a district court in a civil action: . . .

(5) An order granting or refusing a new trial, including such orders which contain a conditional grant or denial of a new trial subject to additur and remittitur.

I.A.R. Rule 11, Appealable judgments and orders
---------- Excerpt from page 610.

3. The issue(s) on appeal include, but are not limited, to the following:

a. Did the Court err by granting a new trial on the issue of "Breach of Implied Warranty of Habitability" which set aside the jury verdict on this isolated count in the plaintiffs' third amended complaint.

b. Attorney fees and costs should be awarded to the Appellants.

4. No order has been entered sealing all or any portion of the record.

5. A reporter's transcript is requested including the third amended complaint of the plaintiffs and the answer to such amended complaint filed by the defendants.

6. The Respondents request that the following documents be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

-The repository of the case;

-The jury trial minute entry consisting of 33 pages;

-Trial Exhibit: Plaintiffs' Number 3

-The court's memorandum decision and order dated April 14, 2011.

7. The undersigned certifies:

a. That a copy of the notice of appeal has been served on the certified short hand reporter and specifically requests the trial testimony of William Shawn Goodspeed, Randy Stoor and Robert Shippen to be provided in a transcript form;

b. That the Appellants have made contact with the clerk of the district court and are in the process of obtaining the estimated fee for preparation of the clerk's record;

c. That the estimated fee for preparation of the clerk's record has been paid or will be paid;

d. That the estimated fee for preparation of the pertinent portions of the trial transcript of the short hand reporter's record has been paid or will be paid;

e. That appellate filing fee has been paid; and

f. That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 24th day of May, 2011.

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

Robert Shippen, Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of May, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

xx Hand Delivery (To Court in Jefferson)

xx Postage-prepaid mail

xx Facsimile Transmission

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

Jefferson County Clerk
Courthouse Way
Rigby, Idaho 83442

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405
208.523-7254 (Facsimile)

Karen S. Konvalinka
Bonneville County Courthouse
605 N. Capital
Idaho Falls, ID 83402

Courtesy Copy To: Honorable Gregory Anderson
Bonneville 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

2011 JUN -8 PM 2:49

DISTRICT COURT
JEFFERSON COUNTY, IDAHO

SHELLEE BETH GOODSPEED and WILLIAM SHAWN GOODSPEED	)	
Plaintiff,	)	Case No. CV-2009-15
vs.	)	MINUTE ENTRY
SHIPPEN CONSTRUCTION, INC.,	)	
Defendants.	)	

May 24, 2011, at 10:30 A.M., a status conference came on for hearing before the Honorable Gregory S. Anderson, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Lettie Messick, Deputy Court Clerk, were present.

Mr. Weston Davis appeared by telephone on behalf of the plaintiffs. Mr. Robin Dunn appeared by telephone on behalf of the defendants.

Mr. Davis noted his clients wanted to proceed with trial on the remaining limited issue. Mr. Davis requested the Court allow the parties to engage in discovery up to 30 days prior to trial.

Mr. Dunn anticipates filing an appeal today. The Court noted the filing of an appeal would stay these proceedings 14 days unless an order is entered extending they stay.

The Court noted a decision regarding an award of attorney fees and costs has not been made an Idaho Appellate Rule 13 allows for that and inquired if that was appropriate at this time.

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Mr. Dunn requested the Court rule on the issue of attorney fees.

Mr. Davis requested the Court reserve the issue of fees until the case is finalized.

The Court and counsel had a discussion regarding the entry of a final judgment.

Court was thus adjourned.

Gregory S. Anderson

GREGORY S. ANDERSON
District Judge

SEVENTH JUDICIAL DISTRICT JEFFERSON COUNTY IDAHO DISTRICT COURT

c: Weston Davis
Robin Dunn

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/Respondents,

vs.

ROBERT and JORJA SHIPPEN, husband and wife,

Defendants/Appellants.

Case No.: CV-09-015

NOTICE OF REQUEST TO SUPPLEMENT TRANSCRIPTS AND RECORD ON APPEAL AND REQUEST FOR APPELLANTS TO BEAR COSTS

I.A.R. 19

COME NOW Plaintiffs/Respondents, William Goodspeed and Shellee Goodspeed, by and through counsel of record, and hereby requests pursuant to Idaho Appellate Rule that the record requested by Appellants be augmented from the sections of the record chosen by Defendants to represent themselves on appeal.

Respondents request that in addition to the

- Repository of the case;
- The jury trial minute entry consisting of 33 pages;

- Trial Exhibit: Plaintiff's Number 3;
- The Court's memorandum decision and order dated April 14, 2011; and
- The transcript testimony of William Shawn Goodspeed, Randy Stoor, and Robert Shippen.

requested by Appellants, that the following ***also*** be included in the record to complete the record on the issue of the disclaimer of the warranty of habitability, which is the subject of this appeal:

- Trial Exhibit: Plaintiffs' Numbers 1, 2, 3, 11, 18, and 19; and
- The transcript testimony of Shellee Beth Goodspeed, Dave Chappel (already transcribed from prior video deposition), and Jorja Shippen.

Further, pursuant to I.A.R. 19(a), the costs for the production of such records are to be born by Appellant and paid within 14 days of the date of this Notice.

As it relates to the production of the additional transcripts, pursuant to I.A.R. 19(b), Respondents request that Appellants bear the cost of the production of said transcripts, where Appellants have only selected a portion of the testimony that relates to the warranty of habitability and its disclaimer. All relevant testimony to this issue should be included.

Respondents give notice of their intent to present oral argument on the issue of costs relating to the production of the transcripts.

DATED this 6 day of June, 2011.

WESTON S. DAVIS

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 6 day of June, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Jefferson County Clerk Jefferson County Courthouse 210 Courthouse Way, Suite 120 Rigby, ID 83442	[ ] Mailing [ ] Hand Delivery [X] Fax *208.745.6636* [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box
Robin D. Dunn P.O. Box 277 477 Pleasant Country Lane Rigby, ID 83442-0277	[ ] Mailing [ ] Hand Delivery [X] Fax *208.745.8160* [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box
Hon. Dane Watkins Hon. Gregory Anderson Bonneville County Courthouse 605 N. Capital Ave. Idaho Falls, ID 83402	[ ] Mailing [ ] Hand Delivery [X] Fax *208.524.7909* [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box
Karen Konvalinka Bonneville County Courthouse 605 N. Capital Ave. Idaho Falls, ID 83402	[ ] Mailing [ ] Hand Delivery [X] Fax *208.522.1300* [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box

WESTON S. DAVIS

L:\wsd\~ Clients\7411.1 Goodspeed\Appeal (Request to Augment).wpd

947

IDAHO SUPREME COU...

Clerk of the Courts
(208) 334-2210

IDAHO COURT OF APPEALS

P.O. Box 83720
Boise, Idaho 83720-0101

2011 JUN -6 PM 2:33
DISTRICT COURT
JEFFERSON COUNTY, IDAHO

CHRISTINE BOULTER, CLERK
Attn: NANCY
JEFFERSON COUNTY COURTHOUSE
210 COURTHOUSE WAY STE 100
RIGBY, ID 83442

NOTICE OF APPEAL FILED (T)

Docket No. 38829-2011	WILLIAM SHAWN GOODSPEED v. ROBERT D. SHIPPEN	Jefferson County District Court #2009-15

A NOTICE OF APPEAL in the above-entitled matter was filed in this office on MAY 27, 2011. The DOCKET NUMBER shown above will be used for this appeal regardless of eventual Court assignment.

The CLERK'S RECORD and REPORTER'S TRANSCRIPT(S) must be filed in this office on or before SEPTEMBER 1, 2011.

The REPORTER'S TRANSCRIPT(S) MUST BE LODGED with the District Court Clerk or Agency **35 DAYS PRIOR** to the date of filing in this office.

THE REPORTER SHALL FILE A NOTICE OF LODGING WITH THIS COURT.

THE FOLLOWING TRANSCRIPTS (PURSUANT TO I.A.R. 25) SHALL BE LODGED:

JURY TRIAL (NO DATES LISTED ON ROA)

For the Court:
Stephen W. Kenyon
Clerk of the Courts

06/02/2011 DB

948

IDAHO SUPREME COURT

Clerk of the Courts
(208) 334-2210

IDAHO COURT OF APPEALS

P.O. Box 83720
Boise, Idaho 83720-0101

2011 JUN -6 PM 2:34
JEFFERSON DISTRICT COURT
JEFFERSON COUNTY, IDAHO

CHRISTINE BOULTER, CLERK
Attn: NANCY
JEFFERSON COUNTY COURTHOUSE
210 COURTHOUSE WAY STE 100
RIGBY, ID 83442

CLERK'S CERTIFICATE FILED

Docket No. 38829-2011	WILLIAM SHAWN GOODSPEED v. ROBERT D. SHIPPEN	Jefferson County District Court #2009-15

Enclosed is a copy of the CLERK'S CERTIFICATE for the above-entitled appeal, which was filed in this office on MAY 27, 2011.

Please carefully examine the TITLE and the CERTIFICATE and advise the District Court Clerk (or the Agency secretary, if applicable) AND this office of any errors detected on this document.

The TITLE in the CERTIFICATE must appear on all DOCUMENTS filed in this Court, including all BRIEFS. An abbreviated version of the TITLE may be used if it clearly identifies the parties to this appeal when the title is extremely long.

For the Court:
Stephen W. Kenyon
Clerk of the Courts

06/02/2011 DB

149

WESTON S. DAVIS (I.S.B. # 7449)
NELSON HALL PARRY TUCKER, P.A.
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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/Respondents,

vs.

ROBERT and JORJA SHIPPEN, husband and wife,

Defendants/Appellants.

Case No. CV-09-015

STIPULATION TO BEAR COSTS OF RECORD

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through their attorneys of record, that pursuant to Respondent's Request for Appellants to Bear Costs, Defendants/Appellants will bear the cost of production and transcription of the following documents and testimony in addition to those documents and testimony originally requested by Defendants/Appellants in their Notice of Appeal:

1. Trial Exhibit: Plaintiffs' Numbers 1, 2, 3, 11, 18, and 19; and
2. The transcript testimony of Shellee Beth Goodspeed, Dave Chappel (already transcribed from prior video deposition), and Jorja Shippen.

750

6/8/11
Date

WESTON S. DAVIS
Attorneys for Plaintiffs/Respondents

6/8/11.
Date

ROBIN D. DUNN
Attorney for Defendants/Appellants

L:\wsd\~ Clients\7411.1 Goodspeed\Appeal (Request to Augment - Stipulation).wpd

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

FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Honorable Judge Anderson
Date 6-23-2011
Time 10:30 a.m.
Deputy Clerk

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/Respondents, vs. ROBERT and JORJA SHIPPEN, husband and wife, Defendants/Appellants.	Case No.: CV-09-015 **ORDER ON COSTS OF PRODUCTION OF RECORD**

This cause having come up before this Court on Plaintiff's Request for Appellants to Bear Costs; and both parties through counsel of record thereafter stipulating to the same with a copy of said stipulation being filed with this Court; and this Court otherwise being fully advised in the premises;

NOW, THEREFORE, it shall be the order of this court and it is hereby ordered that Defendants/Appellants shall bear the costs of the clerks' production/transcription of the following:

1. Trial Exhibit: Plaintiffs' Numbers 1, 2, 3, 11, 18, and 19; and

2. The transcript testimony of Shellee Beth Goodspeed, Dave Chappel (already transcribed from prior video deposition), and Jorja Shippen.

ENTERED this 22nd day of June, 2011.

Gregory S. Anderson
DISTRICT JUDGE

SEVENTH JUDICIAL DISTRICT
JEFFERSON COUNTY
IDAHO
DISTRICT COURT

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2011, a true and correct copy of the foregoing Order was served upon the following by first class mail, postage prepaid, or by hand delivery:

Jefferson County Clerk Jefferson County Courthouse 210 Courthouse Way, Suite 120 Rigby, ID 83442	[X] Mailing [ ] Hand Delivery [ ] Fax ***208.745.6636*** [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box
Robin D. Dunn P.O. Box 277 477 Pleasant Country Lane Rigby, ID 83442-0277	[X] Mailing [ ] Hand Delivery [ ] Fax ***208.745.8160*** [ ] E-Mail [ ] Overnight Mail [ ] Courthouse Box
WESTON S. DAVIS, ESQ NELSON HALL PARRY TUCKER, P.A. 490 Memorial Drive Post Office Box 51630 Idaho Falls, Idaho 83405-1630	[ ] Mailing [ ] Hand Delivery [ ] Fax ***208.523.7254*** [ ] E-Mail [ ] Overnight Mail [X] Courthouse Box
Karen Konvalinka Bonneville County Courthouse 605 N. Capital Ave. Idaho Falls, ID 83402	[ ] Mailing [ ] Hand Delivery [ ] Fax ***208.524.7909*** [ ] E-Mail [ ] Overnight Mail [X] Courthouse Box

CLERK OF THE COURT

By: _____
Deputy Clerk

L:\wsd\-- Clients\7411.1 Goodspeed\Appeal\Appeal (Request to Augment Record - Order).wpd

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.

ROBERT SHIPPEN and JORJA SHIPPEN, husband and wife,

Defendants.

Case No. CV-09-15

MEMORANDUM DECISION RE: MOTION FOR FEES AND COSTS

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter was tried before a jury in January 2011. The case was submitted to the jury the afternoon of Friday, January 14, 2011. The jury returned a verdict in favor of Defendants on January 18, 2011. This Court entered judgment in their favor on January 26, 2011.

On January 26, 2011, Defendants filed a motion for attorney fees and costs.

Plaintiffs filed a motion for judgment notwithstanding the verdict or alternatively for a new trial on February 9, 2011,.

On February 28, 2011, this Court heard oral argument regarding Defendants' motion for fees and costs and Plaintiffs' motion for judgment notwithstanding the verdict or a new trial. On April 14, 2011, this Court entered a memorandum decision granting Plaintiffs' request for a new trial on Plaintiffs' claim of an alleged breach of a warranty of habitability. Footnote 2 of that decision stated, "This Court will issue a separate decision with regard to attorney's fees and costs after a final judgment has been entered in this case."

II. DISCUSSION

Rule 54(d)(5) of the Idaho Rules of Civil Procedure provides:

> At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment. Such memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. Failure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right of costs. A memorandum of costs prematurely filed shall be considered as timely.

Defendants filed a memorandum of costs based on the judgment entered by this Court on January 26, 2011. Defendants urge this Court to consider their motion for attorney's fees despite this Court's April 14, 2011, order granting Plaintiffs' motion for a new trial. Plaintiffs object.

In *Sanchez v. Galey*, 115 Idaho 1064, 772 P.2d 702 (1989), the district court entered an "alternative" Order. The district court described the Order and stated its effect as follows: ". . . the Order dated January 25, 1985 and entered herein on January 28, 1985 which granted a new trial unless a remittitur was accepted, effectively vacated the Judgment and Amended Judgment previously entered on the jury's verdict." *Id.* at 1067, 772 P.2d at 705. The Idaho Supreme Court held the district court erred with respect to the effect of is Order stating:

> . . . the district court was thus led into the error of asserting that the order of January 28, 1985, "effectively vacated the Judgment . . . entered on the jury's verdict."
>
> The final judgment, however, has not been vacated *specifically* [which is the ordinary and better practice] nor has it been vacated *effectively.* The trial court's view would have been correct only if Sanchez had properly signified his refusal to consent to a reduction in the judgment on the verdict and the alternative of a new trial became effective. Then the earlier judgment would have been vacated

Id.

Unlike the Order in *Sanchez*, the order entered by this Court was not entered in the alternative. It simply stated: "Goodspeeds' motion for judgment notwithstanding the verdict is denied. Goodspeeds' motion for reconsideration is denied. Goodspeed's motion for new trial is granted on the issue of breach of implied warranty of habitability." The order for a new trail in this case was effective when entered. Therefore, the judgment was also vacated when the order was entered. *Cf. Coeur D'Alenes Lead Co. v. Kingsbury*, 56 Idaho 475, 55 P.2d 1307, 1311 (1936) (holding, "a reversal on appeal from the order denying a motion for a new trial and remanding the case for re-trial, as effectually vacates the judgment as a reversal of the judgment upon a direct appeal therefrom").

Furthermore, to decide whether Defendants are entitled to attorney fees and costs, this Court would need to determine whether Defendants are the prevailing parties. *See* I.R.C.P. 54(D)(1)(A). Rule 54(d)(1)(B) provides, "In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties."

In January 2011, the jury found for Defendants on all issues. Pursuant to this Court's April 14, 2011 decision, Plaintiffs are entitled to a new trial on one of the numerous causes of action that were originally tried. Nevertheless, Plaintiffs could obtain the relief they seek—and ultimately become the prevailing party—if they successfully prove a breach of the warranty of habitability. Accordingly, it would be premature for this Court to issue a decision either granting or denying Defendant's motion for attorney fees and costs.

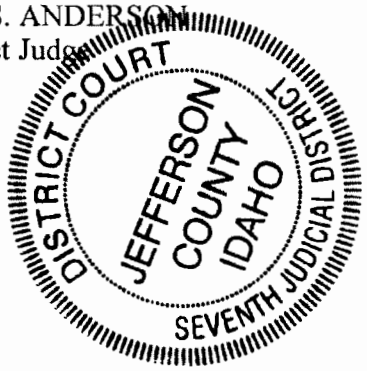
III. CONCLUSION

This Court should not render a decision on Defendants' entitlement to an award of attorney's fees and costs until a final judgment is entered in this case.

DATED this 2nd day of June 2011.

Gregory S. Anderson

GREGORY S. ANDERSON
Senior District Judge



CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of June 2011, 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
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630

Robin D. Dunn
DUNN LAW OFFICES, PLLC
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442

CHRISTINE BOULTER
Clerk of the District Court
Jefferson County, Idaho

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR JEFFERSON COUNTY

WILLIAM SHAWN GOODSPEED and SHELLEE BETH GOODPSEED,	)	
Plaintiffs-Respondents,	)	**SUPREME COURT NO. 38829-2011**
-vs-	)	**Jefferson County**
	)	**Case No. CV-2009-15**
ROBERT and JORJA SHIPPEN,	)	
Defendants-Appellants,	)	**CLERK'S CERTIFICATE OF EXHIBITS**

I, Christine Boulter, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for Jefferson County, do hereby certify that the following is a list of the exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

NO.	DESCRIPTION	SENT/RETAINED
	Plaintiffs exhibits 1-50	sent
	Defendants exhibits A-E	sent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 19 day of Sept, 2011.

CHRISTINE BOULTER
CLERK OF THE DISTRICT COURT

By_____
Deputy Clerk

DISTRICT COURT JEFFERSON COUNTY IDAHO SEVENTH JUDICIAL DISTRICT

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 GOODPSEED,	)	
Plaintiffs-Respondents,	)	SUPREME COURT NO. 38829-2011
-vs-	)	Jefferson County Case No. CV-2009-15
ROBERT and JORJA SHIPPEN,	)	**CLERK'S CERTIFICATE**
Defendants-Appellants,	)	

I, Christine Boulter, Clerk of the District Court of the 7th Judicial District of the State of Idaho, in and for the County of Jefferson, do hereby certify that the foregoing Clerk's Record in the above entitled cause was compiled and bound under my direction and contains true and correct copies of all pleadings, documents and papers designated to be included under Rule 28, IAR, the Notice of Appeal, any Notice of Cross Appeal, and any additional documents requested to be included.

I further certify that all documents, x-rays, charts and pictures offered or admitted as exhibits in the above entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court with any Reporter's Transcript and the Clerk's Record (except for exhibits, which are retained in the possession of the undersigned), as required by Rule 31 of the Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 19 day of Sept, 2011.

CHRISTINE BOULTER
CLERK OF THE DISTRICT COURT

By _____
Deputy Clerk

DISTRICT COURT JEFFERSON COUNTY IDAHO SEVENTH JUDICIAL DISTRICT

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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 GOODPSEED,	)	
Plaintiffs-Respondents,	)	SUPREME COURT NO. 38829-2011
-vs-	)	Jefferson County Case No. CV-2009-15
ROBERT and JORJA SHIPPEN,	)	**CERTIFICATE OF SERVICE**
Defendants-Appellants,	)	

I, Christine Boulter, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Jefferson, do hereby certify that I have personally served or mailed, by United States mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the parties or their Attorney of Record as follows:

ATTORNEY FOR APPELLANT

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442

ATTORNEY FOR RESPONDENT

Weston S. Davis
P.O. Box 51630
Idaho Falls, ID 83405-1630

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 19 day of Sept, 2011.

CHRISTINE BOULTER
Clerk of the Court
Jefferson County, Idaho

BY _____
Deputy Clerk

DISTRICT COURT JEFFERSON COUNTY IDAHO SEVENTH JUDICIAL DISTRICT

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