2-14-2012

Goodspeed v. Shippen Appellant's Brief Dckt. 38829

IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM SHAWN GOODSPEED, and SHELLEE BETH GOODSPEED,	)	
Plaintiffs/Respondents,	)	Docket No. 38829-2011
vs.	)	Jefferson County Case: CV-2009-15
ROBERT D. SHIPPEN and JORJA D. SHIPPEN,	)	
Defendants/Appellants.	)	

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Jefferson County
Honorable Gregory S. Anderson, District Judge, Presiding

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
P.O. Box 277
477 Pleasant Country Lane
Rigby, Idaho 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

rdunn@dunnlawoffices.com

Attorney for Appellants

NELSON HALL PARRY TUCKER, PA
Weston S. Davis, Esq., ISB No. 7449
P.O. Box 51630
Idaho Falls, Idaho 83405
(208) 522-3001 (t)
(208) 523-7254 (f)

wsdavis@nhptlaw.net

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

GENERAL ISSUES ON APPEAL

1. 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?

2. Did the District Court err in granting a new trial on the basis of stating that the jury should have been instructed regarding disclaimer of the implied warranty of habitability, and that Plaintiffs were entitled to a new trial on their breach of implied warranty of habitability claim?

3. Attorneys' fees and costs should be awarded to the Appellant at trial and on appeal.

STATEMENT OF THE CASE

LEGAL EVENTS

Plaintiffs' filed their first complaint (Vol. 1, pp. 2-9) in this matter on or about January 5, 2009 against Defendants, alleging breach of express warranty, breach of implied warranty, breach of implied covenant of good faith and fair dealing, fraudulent concealment of known defect, fraudulent misrepresentation of known fact and unjust enrichment.

On or about September 11, 2009, Plaintiffs filed their motion to amend complaint (R. Vol. 1, p. 156).

On or about October 9, 2009 Plaintiffs filed their amended complaint (R. Vol. 1, p. 205). The September 2009 amended complaint added Defendant, Marriott Homes, LLC.

Plaintiff's third amended complaint was filed on or about November 4, 2010 (R. Vol.

3, p. 567a). The amended complaint was allowed after the District Court's memorandum decision on a hearing to amend complaint. (R. Vol. III, pp. 560-566)

Defendants filed their pretrial memorandum in support of jury instructions and trial positions on or about December 28, 2010 (R. Vol. 3, pp. 676-683). Nowhere in Defendants' pretrial memorandum was the implied warranty of habitability discussed.

On or about January 4, 2011, Plaintiff filed its objection to Defendants' requested jury instructions (R. Vol. 4, pp. 786-792). Nowhere in Plaintiffs' objection to Defendants' requested jury instructions is any discussion made of nor is a proposed jury instruction made regarding any breach of warranty of habitability.

FACTUAL EVENTS

A jury trial was had in this matter. The relevant testimony on the issue of warranty of habitability is set forth from the trial transcript to show that the trial court committed error in its interpretation and memory of the facts at trial. (The trial court did not have a written transcript and relied upon personal notes and memory.) In particular, the real estate contract submitted by the plaintiff to the defendants, via realtors, contained a paragraph on the habitability issue which will be discussed in this brief. It is clear the trial court could not vividly recall the testimony considered by the jury.

Plaintiff, William Shawn Goodspeed, testified as follows during direct examination:

Q. Did you intend to inhabit this home as your primary residence?

A. Yes.

Q. And did you request a warranty on this property?

A. Yes, we requested a standard one year builder's warranty.

Q. Would you please turn to Exhibit Number 3? Do you recognize this document?

A. Yes. It's the sales – purchase and sales agreement from the transaction.

Q. Okay. Did you write every word in that purchase and sale agreement?

A. No. this is, as I understand, kind of a cookie cutter form used for these type of documents.

(Transcript p. 13, ll. 20-25; p. 14, ll. 1-2)

Plaintiff, W. Goodspeed further testified on direct examination:

Q. Okay and did you sign this purchase and sale agreement?

A. Yes I did.

Q. And then did you give it to your agent to convey to the seller?

A. Yes, I did.

(Tr., p. 15, ll. 21-25; p. 16 l. 1.)

Plaintiff testified as to the status of occupancy of the home as of the time of trial:

Q. *So you're living in the home in Jefferson County, Idaho, at this time?*

A. *Yes, it's my primary residence. I work out of town.*

Q. *Does your wife live in this home at the current time?*

A. *Yes, she does.* (Tr., p. 53, ll. 2025; P. 54, l. 1)(emphasis added).

Plaintiff offered further evidence that he and his family continued to reside in the home in question as of the time of trial:

Q. *Is your son currently residing in the home in Jefferson County?*

A. Yes, he is.

Q. So he's habitating in that home or living in that home; correct?

A. Yes.

Q. *And your family is living in that home; correct?*

A. *That's our primary residence, yes.*

(Tr., p. 54, ll. 13-21) (emphasis added).

Plaintiff, William Goodspeed testified that he had hired a realtor to represent his interests, and testified regarding his reading and signing of the Purchase and Sale Agreement:

Q. You hired a realtor out here. What was his name?

A. Randy Stoor.

Q. Randy S-t-o-o-r; is that correct?

A. That sounds correct. It could be a misspelling of his last name, but I'm not – Randy Stoor. It could be S-t-o-o-r.

Q. And he worked for Coldwell Banker; is that correct?

A. Yes.

Q. *You entered into a contract that he wrote; is that correct?*

A. *Yes.*

Q. That was Exhibit 3, I believe; is that right?

A. Yes.

(Tr., p. 55, ll. 15-25; p. 56., ll. 1-4)(emphasis added).

Plaintiff, William Goodspeed offered further testimony that the Purchase and Sale Agreement was prepared by his realtor:

Q. By Mr. Dunn: Mr. Goodspeed, the listing agency was Windstar Realty; is that correct?

A. Yes.

Q. And your agent was Randy Stoor, the selling agent; correct?

A. Yes. Well –

Q. And he prepared this purchase and sale agreement; would you not agree?

A. He – yes.

Q. He had it typed at his office and prepared and that was submitted to the listing agent, Dave Chapple; is that correct?

A. Yes.

(Tr., p. 56., ll. 21-25; p. 57., ll. 1-8).

Plaintiff, William Goodspeed offered testimony that he and his wife, in addition to signing the Purchase and Sale Agreement, initialed each page of the Agreement:

Q. Would that be a fair assessment of page one of Exhibit 3? Is that your initials down there?

A. Yes, they are.

Q. And whose initials appears there, yours and your wife's? WG and SG?

A. Yes.

(Tr., p. 57. ll. 24-25; p. 58, ll. 1-4).

Plaintiff William Goodspeed testified that realtor he hired explained the Purchase and Sale Agreement to him:

Q. *Was this Exhibit 3 [Purchase and Sale Agreement] explained to you by your realtor who you hired?*

A. *Yes.* (Tr., p. 58, ll. 8-10). (emphasis added).

Q. And did you agree with all the terms of page one?

A. Yes.

Q. Was this Exhibit 3 explained to you by your realtor who you hired?

A. Yes.

Q. On page two, we'll go through it a little bit here, is, basically, going through once again dates and times, but your listing broker, once again he puts his name up at the top, Randy Stoor; correct?

A. Correct.

Q. And then at the bottom what I'm trying to point out a little bit is the date of 06/17. Can you see that right there?

A. Yes.

Q. That's when you signed it, so it was June 17, of '07 you made this offer to Mr. and Mrs. Shippen; correct?

A. Correct.

Q. Now page three, I think, is really important.

THE COURT. Before you go on, I'm not sure if it's critical or not, but I'm questioning from what I have whether that's correct. It looks like page two has his signature and his wife's signature as the buyers on 06/16, and the sellers on 06/17.

MR. DUNN. That's correct, your Honor. Let me go back to that, because I don't want to deceive anyone.

Q. by Mr. Dunn: Let me get down to the bottom. There's the Goodspeeds 06/16. I'm sorry Mr. Goodspeed. I got a little ahead of myself 06/16 of '07. And then the Shippens on, at least it's R.S. I assume that stands for Robert Shippen right there on 06/17; is that your understanding?

A. Yes.

Q. So June 16th and 17th was the document come into being; is that correct?

A. Yes.

Q. No on page three is where your realtor makes some – it has a place for him on this document to make some representations. That would be under paragraph four, Other Terms and Conditions, right?

A. Yes.
(Transcript p. 55, ll. 15-25; pp. 56-59)

Q. Now we get to the key of this whole case that the jury is concerned – is going to be concerned with. Builder to complete and – to complete a drainage/leach system. That was part of your terminology; correct? To complete a drainage/leach system around home. Then it has in parenthesis, walkout basement area. That was added by your realtor; correct?

A. It was added because it was listed in the MLS listing.

Q. But it was added by your realtor; correct? A. After review of the MLS listing.

Q. It was added by your realtor; correct?

A. Correct.

Q. And it was added by you; correct?

A. Correct.

Q. And then it talks about mirrors, main bathroom, TVs, other things. You're not claiming any problem except, the drainage/leach system around home (walkout basement area); correct?

A. I'm confused. Can your repeat the question?

Q. Sure. The basis of your lawsuit is the builder to complete a drainage/leach system around home walkout basement area; correct?

A. No, the basis for my lawsuit is the known fact that this house had been flooded before I bought it was not disclosed to me.

Q. Okay. Then this particular item right here, and we'll get to what you want to tell the jury. I understand you want tot tell the jury things, but listen to my prior question. Are you claiming that the builder did not complete a drainage/leach system around the home (walkout basement area)? Are you claiming that did not occur?

A. No.

Q. Your saying that it did occur? It was there?

A. Yes.

Q. And you actually saw it being installed; didn't you?

A. Yes.

Q. And you actually talked to Bob Shippen when it was being installed.

A. Yes.

Q. And you saw him and his other workers installing that through their efforts; correct?

A. Yes.

Q. And you saw that it had wiring that came from the house; correct?

A. Yes.

Q. And maybe,-- I'm just asking this question – maybe you saw that the pump system did drain out through various pipes. Did you see that?

A. Yes.

Q. And do you recall Mr. Shippen telling you that there had been a water problem in the home previously when you viewed this leaching system?

(Transcript p. 63 ll. 16-25; pp. 64, 65)

MR. DUNN: I'm going through the contract to determine what he could or could not do.

THE COURT: Over -- MR. DAVIS: We-re not alleging that there's –

THE COURT: The objection is sustained. Has to have more relevance than simply being in the document.

Q. by Mr. Dunn: You understood the document; correct?

A. Yes.

Q. Well let me go back to that page right at the bottom. It says: You are advised, you are advised to consult with any general contractor subject to Idaho Code 5-25. Did you do that?

A. Can you ask the question again?

Q. It says, you are advised to consult with any general contractor subject to Idaho Code Section 5-525. Did you consult with a general contractor?

MR. DAVIS: Objection, again, Your Honor, as to relevance. This section is talking about mechanics liens and the like. I believe that's a disclosure statement as to whether or not there are liens on the property. I don't believe that's relevant to this case.

MR. DUNN: It says regarding the general contractor disclosure statement.

MR. DAVIS: Right. Your Honor, I withdraw my objection. I didn't see that language –

Q. So did you consult with a general contractor prior to purchasing this property?

A. No. (Transcript p. 70)

Plaintiff William Goodspeed offered substantial testimony regarding Paragraph 32 [disclaimer of warranties] of the Purchase and Sale Agreement:

Q. Now just to make certain everybody understands, you had your own private broker who worked for you, and he was agent for you. That was Randy Stoor; correct?

A. Yes.

Q. And that's disclosed, so there's no misunderstanding that you didn't have your own private real estate agent to advise you and walk through this document with you; correct?

A. Correct.

Q. And it also indicates that the sellers had their own independent real estate agent, Dave Chapple; correct? Doesn't say that. I'm adding a little bit. Dave Chapple was their real estate agent; correct?

A. Yes.

Q. So both of you had real estate agents; is that correct?

A. Yes.

Q. Now this is really significant, so I want you to really pay attention to what I ask you. Paragraph 32 it says as follows: Entire agreement. This agreement contains the entire agreement of the parties respecting the matters herein set forth and supersedes. What does the word supersede mean to you?

MR. DAVIS: Objection. Calls for legal conclusion.

MR. DUNN: I'm just asking what the word supersedes means to him.

THE COURT: Overruled. You may answer.

THE WITNESS: Goes before.

Q. By Mr. Dunn: Supersedes means it overrules everything else; correct?

A. No.

Q. This isn't subsequent to. It supersedes it, overrules everything; right?

A. No. It means that it is – comes after and includes.

Q. Okay. So we'll have to have the Court define what the word supersedes means then. And it says supersedes all prior agreements between the parties respecting such matters. This agreement supersedes all prior agreements between the parties; correct?

A. That's what it says, yes.

Q. And you signed this document.

A. Yes.

Q. Now this goes on to state: No warranties without – including, without limitation, any warranty of habitability, agreements or representations not expressly set forth herein shall be binding upon either party. That's what it says; isn't it?

*A. That's what it says.*****

Q. And you signed this document?

A. Yes. I don't think the intent of this document is to say that I –

MR. DUNN: Objection, non-responsive. I only –

THE COURT: You're both speaking at once. You have to just answer the question. Your attorney can ask additional questions if he wants, but you need to answer Mr. Dunn's question and not become argumentative.

THE WITNESS: Repeat the question?

THE COURT: Yeah. Mr. Dunn, would you ask the question again?

Q. By Mr. Dunn: So this document says no warranties including without limitation any warranty of habitability, agreements or representations not expressly set forth herein shall be binding upon either party. It says that; doesn't it?

A. Yes. That's what it says.

Q. And you signed it; correct?

A. Yes, I did.

Q. And your wife signed it; correct?

A. Yes.

Q. 06/16/07. Is that your signature?

A. I responded yes.

Q. At 1:45 p.m.?

MR. DAVIS: Objection. Asked and answered.

MR. DUNN: That hasn't been asked.

THE COURT: Overruled.

Q. by Mr. Dunn: And that's your wife's signature, Shellie Goodspeed; correct?

A. Yes.

Q. 06/16/ 1:45 p.m.; correct?

A. Correct.

Q. Did you consider this a contract?

A. Yes. (Tr., p 72, l. 25 - p. 76, ll. 11-12)

Plaintiff, William Goodspeed testified regarding the one-year builder's warranty:

Q. And it [Warranty Deed] was recorded in Jefferson County, Idaho; correct?

A. Yes.

Q. And that date was July 7th, of '07 when it was recorded; correct?

A. Yes.

Q. You would agree with me, wouldn't you, that from July 7th of 2007, until July 7th of 2008, you had a one-year warranty per your contract and sale agreement; correct?

A. Yes.

Q. And after that date, you did not have a contractual agreement with Mr.

Shippen, with Marriott Homes, with Shippen construction with any entity after that point in time; correct?

A. No. My opinion is that –

Q. Just contractual that's all I'm saying. You didn't have a contract that extended past one year.

Mr. Dunn: So it was one year, correct?

A. Yes.

(Tr., p. 80., l. 25 – p. 81. ll. 1-25; p. 82., ll. 5-6.)

The District Court ruled that the jury had enough evidence before it to rule on the issue of the warranty of habitability:

Q. Do you believe it ended July 7th of 2008, as to the contract?

A. I think the warranty of habitability would extend past that one year.

Q. That's not my question. My question is did it end on July 1, 2008, as far as the builder's warranty, per the contract.

A. Yes.

Q. Now do you we need to go back to Exhibit 3 that said there was no warranty of habitability?

A. If you feel like that's necessary.

THE COURT: I don't. Let's move along. (Emphasis supplied).

Q. By Mr. Dunn: But you—

THE COURT: You've read that three or four times. The jury will have it, so let's move along.

(Transcript p. 82, ll. 7-21). (Emphasis supplied).

Plaintiff, William Goodspeed testified as to the time-frame and the nature of the "water issues" at the home during the one-year builder's warranty period:

Q. Now you indicated that there was flooding in 2007, 2008, and 2009, correct?

A. Yes.

Q. Now in 2007, you indicated that there was no flooding inside the home, but the water level was high outside your yard, correct?

A. In the yard, yes.

Q. Never got in the house in 2007, correct?

A. That's correct.

Q. 2008, you said that you had some flooding in the home in September of 2008, correct?

A. That's correct.

Q. And that's past the one year we talked about; correct?

A. Correct.

(Tr., pp. 82, ll. 23-25; - p. 83. ll. 1-12).

At trial, Randy Stoor, realtor for the plaintiffs, testified as follows:

Q. by Mr. Davis: Mr. Stoor, would you please state your name for the record?
A. Randy Stoor.

Q. And what is your address?

A. I live in Idaho Falls; work at Coldwell Banker Eagle Rock at 57 3rd Street.

Q. How long have you been a realtor – I'm sorry. You were the realtor for the Goodspeeds on this property.

A. That's correct.

Q. How long have you been a realtor?

A. I've been licensed since 1976.

(Transcript p. 109, ll. 12-23)

Q. Now if you would turn to Exhibit 3, Plaintiffs' Exhibit 3. Do you recognize this document?

A. Yeah, that's a standard purchase and sale agreement we use. This is the offer we made on the property.

Q. I'm sorry. You said that was a standard. Is this a form that's filled out? A. It's a form that's printed by the state association or provided, and we fill in the blanks.

Q. Okay, so kind of a boilerplate type of agreement?

A. Right.

(Transcript p. 118, ll. 1-10)

Stoor further testified:

Q. And now this form that you used, it was prepared by somebody from the realtors association, I take it?

A. Attorneys hired by the realtor association in Boise.

Q. And you're probably after this, what, 30 years you are pretty much familiar with this form.

A. Yes.

(Transcript p. 125, ll. 18-25)

Q. And the language that's contained in this form.

A. Yes.

Q. As a part of your commission and your job as a realtor, do you go over this purchase and sale agreement with your client?

A. Yes.

Q. And you try to explain all of the details of the contract?

A. Yes.

Q. Could I get you to go to paragraph 32.?

A. Okay.

Q. 32, you there?

A. Yes.

Q. Could you silently read that to yourself, and then I want to ask you a few questions.

A. Okay.

Q. Fairly standard language?

A. Yes.

Q. It's not hard for you to understand as a realtor; is it?

A. No.

Q. And you think you understand it?

A. I think so.

Q. What does it mean when it says this agreement contains the entire agreement of the parties respecting the matter set forth and supersedes all prior agreements? What does that mean?

A. If there had been some oral or written agreements prior to this, this agreement signed by the parties would supersede or replace it.

Q. And what does supersede mean for us?

A. Basically, it would replace original or prior agreements.

Q. Kind of trumps them, so to speak?

A. Exactly.

Q. And it's the final expression of negotiations and people's intent; correct?

A. Right.

Q. This goes on to state, no more warranties, including without limitation, any warranty of habitability, agreements or representations not expressly set forth herein shall be binding on either party; correct?

A. Yes.

Q. What does that mean?

A. Basically, I guess it would say that the – if there were any warranties to be included in the property or questions about habitability, unless they were expressed in the document or possibly some subsequent documents, it wouldn't be enforceable. This, basically, is replacing any prior.

Q. So if you had some particular concerns or warranties that you wanted in here, you would probably add an addendum or put it in paragraph 4; correct?

A. Right.

Q. To your knowledge, are there any addendums to this agreement about warranties?

A. No.

Q. Are there any addendums in this agreement about habitability?

A. No.

Q. There were two addendums, basically, that if I could get you to turn the next page, basically, extended time. That's kind of usual; isn't it?

A. That happens when we can't get the sellers' signature and the contract would have expired unless there is an agreement that we've extended that time period.

Q. Because the agreement expires on a certain date; correct?

A. Right.

Q. So this just extended it; right?

A. Right.

Q. Pretty normal in your industry?

A. It happens all the time.

Q. Then on that same addendum goes on the next page you, basically, corrected the physical address; correct?

A. Right.

Q. Sot that everybody knew which piece of property they were talking about?

A. That's correct.

Q. do you find this document to be a – signed by the parties a binding agreement between buyer and seller?

A. Yes.

Q. And, obviously, as a realtor, you want a binding agreement?

A. Certainly, as do the seller and the buyer.

Q. And it's your job and your profession?

A. Correct

.

Q. Was the MLS attached as an addendum to this agreement.

A. No.

MR DUNN: That's all I have.

(Transcript p 125, ll. 18-25; p 126-129)

The respondents may have altered the leaching system which would make

such system ineffective. The following testimony is persuasive:

Questions to Mr. Shippen:

Q. Now in 2008, was there ever a mention of a wet spot in the middle of his lawn?

A. He mentioned to me, and I'm not sure of the time, but he said his lawn was bubbling up. And he said it just happened since the sub-water had come up. And I couldn't, for the life of me, figure out what he was talking about. And so I thought about that that night, trying to figure out what would cause that, and I realized what I thought it was and was going to tell him the next time I saw him. The next time I saw him was when he told me he was going to sue me, and I never did tell him what I thought it was.

Q. And what did you think it was?

A. Where that bubble was a direct line from the pump to where I dug the trench that I put in the two dump trucks loads of washed gravel. It's probably about – that line was probably 110, 120 feet long. And I assumed he must have cut that when he was putting his line in for his sprinkler system. He cut that line, and so that water never was making it to where it was supposed to, but it was bubbling up right there.

Q. Why was it important that the water make it to the washed gravel?

A. It would have made it a lot more effective and could have handled – the size of the gravel I put in there should been able to handle a lot of water.

(Tr. pp. 278, ll. 1-25; 279, ll. 1-2.).

ADDITIONAL ISSUES ON APPEAL

1. The Appellants request their costs and fees for the lower court proceedings.

2. The Appellants request their costs and fees on appeal.

ARGUMENT

1. SUMMARY

The facts are straight-forward. The plaintiffs resided in the house that is the subject in the real estate contract from the time of purchase; and, continued to reside therein even through trial.

The builder's warranty was for one (1) year. No problems occurred in the one (1) year period.

Builder was to put in a leaching system. The buyer was present when the system was placed around the home. The leaching system had no problems during the one (1) year period. Thereafter, the plaintiff altered and/or failed to maintain and service the leaching system. (Tr. pp. 278, ll. 1-25; 279, ll. 1-2.).

The contract was prepared by the plaintiffs. Both the plaintiffs and the defendants had professional realtors representing their various interests. The plaintiffs' realtor worked for over 30 years as a realtor; understood the contract, EXPLAINED the contract to plaintiffs; and, the plaintiffs acknowledged understanding of the contract. The plaintiffs signed the contract offer and presented

it to sellers. The sellers accepted the document prepared, explained and signed by the plaintiffs.

The jury heard all of this testimony and reviewed the real estate contract (Plaintiff Exhibit 3)[1]. The jury found in the defendants' favor. The sitting judge did not accurately recall the testimony and apply the proper law to that testimony.

The defendants prevailed on all counts at jury trial.

2. INTRODUCTION

Respondents, in their Memorandum in Support of Motion for Judgment Notwithstanding the Verdict and Motion for Reconsideration, claimed that the "error occurred by not instructing the jury of the language regarding a disclaimer of warranties." (R., Vol. 4, p.864.) Respondent's claimed that the District Court erred in failing to give the jury the following instruction:

> 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, boiler plate 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. (R., Vol. 4, p. 864).

The District Court granted a new trial on the basis that "[T]he jury should have been instructed regarding disclaimer of the implied warranty of habitability," and ruled that

[1] Plaintiffs' Exhibit 3 is attached to this brief for ease since it is referred to frequently. It is also contained in the exhibits, sent by the clerk, in the record.

"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 the [Respondents] Goodspeeds." (R., Vol 4, p. 935.)

Additionally, the District Court, in its Memorandum Decision Re: Motions for Judgment Notwithstanding the Verdict, New Trial, and Reconsideration, gave its reasoning for not giving the proposed jury instruction: "This Court declined to give the proposed jury instruction on warranty disclaimers because the Court was lead to believe [Respondents] Goodspeeds had waived the implied warranty of habitability." (R., Vol. IV, p. 932.)

Further, the District Court, in its Memorandum for Judgment discussed herein, made findings regarding the waiver issue. (*See* R., Vol. 4, pp. 932-934).

For the reasons discussed *infra*, Appellants respectfully submit that the court erred in its granting new trial on the issue of the warranty of habitability because of the following: (1) The court based its "error" in not giving the "habitability" jury instruction based on alleged information not contained in the court record; (2) Respondent's jury instruction, even if given, does not correctly reflect the state of current law, and (3) The District Court, in its discussion of the issue of waiver and discussion of case law, (a) misapplied the rule found in *Tusch Enterprises v. Coffin,* 113 Idaho 37, 740 P.2d 1022 (Idaho 1987), and (b) erred in its definition of "conspicuous."

Most important, Appellants respectfully submit, as discussed *infra*, that the District Court erred in its superceding the jury's verdict, given the nature of the evidence presented

at trial. The factual testimony clearly showed the respondents/plaintiffs understood the contract and waived the habitability issue. Thus, the appellants set forth the comprehensive introduction in this brief on the facts of the trial from the trial transcript.

Appellants submit that the court erred, by a manifest abuse of discretion standard, by granting a new trial to Plaintiff's on the Implied Warranty of Habitability issue. That issue contained almost the identical testimony and evidence and the other counts in the complaint, to-wit: Implied and Express Warranties. Thus, the jury had the same and/or similar evidence for each of the counts it considered. The jury ruled for the defendants on all counts.

3. THE LEGAL STANDARD REGARDING THE RULING FOR A NEW TRIAL IS ABUSE OF DISCRETION

This Court outlines standard of review when determining whether the court below abused its discretion when ordering a new trial in *Jones v. Panhandle Distributors, Inc.,* 117 Idaho 750, 792 P. 2d 315 (Idaho 1990): "[W]e will not reverse a trial court' order granting or denying a motion for new trial 'unless the court has manifestly abused the wide discretion vested in it." *Jones,* 117 Idaho 750, 755 (citing *Quick v. Crane*, 111 Idaho 759, 727 P. 2d 1187 (1986).

4. THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION BY GRANTING A NEW TRIAL ON PLAINTIFFS IMPLIED WARRANTY OF HABITABILITY CLAIM

A. The District Court, in error, relied on "facts" not in the record as part of its

basis for a new trial.

The District Court in the instant case erred in granting Plaintiffs a new trial on their implied warranty of habitability claim, in part, because the Court did so on the basis of "facts" not in the record.

The trial Court, in its Memorandum Decision Re: Motions for Summary Judgment Notwithstanding the Verdict, New Trial and Reconsideration, stated the following:

> This Court declined to give the proposed jury instruction on warranty disclaimers because the Court was led 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 acknowledgement" (R., Vol. 4, p. 932).

Clearly the jury instruction conference was held in chambers subsequent to the conclusion of jury trial, and the District Court made several erroneous assumptions, as outlined in its memorandum decision quoted herein, in order to not give the jury instruction. Appellants/Defendants respectfully assert that the Court appears to have 1) made conclusions more appropriately given to the jury and 2) based its finding that it should have given a proposed jury instruction based on purported conversation in chambers, not part of the record. For these reasons, it was an abuse of discretion for the Court to grant a new trial on the basis of the Court's failure to give a proposed jury instruction.

B. The court abused its discretion by its reliance on Respondent's inaccurate jury instruction.

Appellants respectfully assert that the Court acted properly, at trial, by declining to give Respondent's proposed jury instruction; and the District Court erred in its finding that the proposed instruction was (1) appropriate, and (2) should have been given by the Court.

In its Memorandum Decision Re: Motions for Judgment Notwithstanding the Verdict, New Trial and Reconsideration, the District Court recited a proposed jury instruction regarding warranty of habitability proffered by Plaintiff, and declined by the Court at trial. Respondent's proposed jury instruction, as outlined in the Court's memorandum decision, read as follows:

> 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, boiler plate 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 readily implied and should be obtained with difficulty" (R., Vol. 4, p. 931).

For the reasons discussed herein, Defendants assert that the Court's refusal to give said instruction was appropriate at the time of trial, and it is an abuse of discretion for the Court to grant a new trial on the basis of its failure to give this jury instruction.

For the reasons explained *infra*, this jury instruction (and, in fact, any jury instruction) was and is inappropriate to give to the jury in this case.

5. IT WAS ERROR FOR THE DISTRICT COURT TO GRANT A NEW TRIAL ON THE BASIS OF THE "WAIVER" ISSUE

A. The District Court Committed Error its is Application of *Tusch* in its

Analysis of the Proposed Jury Instruction and its Discussion of the "Waiver" Issue.

The District Court, in its Memorandum, engaged in a discussion and analysis of the waiver issue. The Court relied on *Tusch Enterprises v. Coffin*, 113, Idaho 37, 740 P.2d 1022 (1987) in its discussion of the issue of disclaimer of warranties. (R., Vol. 4, pp. 932-934). The Court's reliance on *Tusch* is misplaced, for the following reasons: (1) the facts in *Tusch* are distinguished from the instant case, (2) the court erred in its discussion of "boilerplate" language, and (3) the court erred regarding its definition of "conspicuous," as applied to the present matter.

6. NATURE OF THE TUSCH CASE

The *Tusch* case involved a lawsuit surrounding the sale of duplexes constructed in Pocatello, Idaho. The duplexes were constructed on a mountainside and the summary judgment was granted to defendants on plaintiffs' claim that "fill was used to shore up the mountainside foundation of the construction site. The district court below granted summary judgment to defendants, the Supreme Court reversed as to, important for the instant matter to plaintiffs, the implied warranty of habitability.

A. The Wording of the Disclaimer in the Instant Case Was not "Boilerplate," and Was Adequate for the Jury to Find that the Warranty of Habitability had been disclaimed.

The District Court, in part, found that a new trial should have been granted on the warranty issue because "it [the disclaimer of warranties] appears among other boilerplate at the end of the Agreement." (R. Vol., 4, p. 933).

Tusch instructs that disclaimer of implied warranties is appropriate and allowed:

"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." *Tusch,* 113 Idaho 37, 45-46. (internal cites omitted). (The named defendants are not the builder of the house in question.)

Further, *Tusch* defines "conspicuous": "[O]ne seeking the benefit of such a disclaimer must not only show a conspicuous provision which fully discloses the consequences of its inclusion." *Id.* (internal citations omitted).

Further, *Tusch* defines "boilerplate": "[W]hen... a 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 is ineffective." *Id.,* at 46 (internal citations omitted).

The facts of *Tusch* are distinguished from the case at bar, in that the implied warranty in *Tusch* was not contained in the contract and, thus, was not disclaimed. The *Tusch* Court reasoned: "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 is 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 that there are no warranties other than those contained within its four corners, any purported waiver of the implied warranty of*

habitability is ineffective. Tusch, at 46 (internal citation omitted) (emphasis added).

As stated herein, in *Tusch*, the contract did not have language regarding disclaimer of the implied warranty of habitability. By contrast, in the instant case, the Purchase and Sale Agreement, Paragraph 32, reads as follows:

"32. ENTIRE AGREEMENT: This Agreement contains the entire Agreement of the parties respecting the matters set forth and supersedes all prior Agreements between the parties respecting said 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." [Plaintiffs' Exhibit 3, page 7].

In summary, the disclaimer in the instant case was *not* "boilerplate," as defined in *Tusch*, and was conspicuous in its plain language. As discussed *infra*, the jury had sufficient evidence for it to properly conclude that the warranty of habitability was disclaimed.

B. The District Court Engaged in Manifest Error in its Requirement that a Disclaimer of Implied Warranty be in Bold Face Type, Large Text, or Capital Letters.

As discussed herein, *Tusch* holds that a disclaimer provision be in fact "conspicuous" when it "fully discloses consequences of its inclusion." *Id.* In the instant case, the plain language of paragraph 32 of the Purchase and Sale Agreement reads that the parties, in executing the Agreement, made no warranties binding upon the other, including but not limited to the warranty of habitability.

The boldfaced language applies to the UCC transactions. The lower court did not

use the *Tusch* standard but jumped to the UCC standard for goods. The lower court notes such jump in a footnote not clearly presented in the body of the decision. Additionally, does this rule mean that all language of a contract that rises to an artificial standard of "importance" be in bold face? Should a party drafting a contract have the entire contract in bold face to stress its importance and, thus, the entire contract would lose the conspicuous language? Is a drafter of contracts now supposed to make an independent determination of what rises to the level of "conspicuous"? The task of the attorney would become a tremendous risk to determine each clause and sentence and whether it should be in bold type, different color or rise to the level discussed in the UCC statutes. *Tusch* is definitive that the conspicuous language calls it to the attention of the party waiving the warranty. The facts in the transcript clearly show that the plaintiffs/respondents completely understood the contract and, in particular, paragraph 32. Thus, it was called to respondents' attention and, the real estate contract was submitted to sellers by respondents.

The District Court, was misplaced in its definition of "conspicuous," requiring that it must consist of "text in large, bold or capital letters." (R., Vol. 4, p.933). The Court defines "conspicuous" not pursuant to *Tusch,* but rather in the context of sale of goods: "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. (R. Vol. 4, p. 933, footnote 3).

The Court does not expand on its statement that a term defined for sale of goods is relevant to the purchase of real property. Notwithstanding, the court uses its "goods"

definition of "conspicuous" as a reason to grant a new trial:

> Conspicuous," with a 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. ... (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, (sic). (R., Vol. 4 p. 933).

The Court, in granting a new trial on the issue of "large, bold or capital letters", using terms from the uniform commercial code for the sale of goods is clearly not applicable to a standard real estate purchase and sale agreement. There was extensive testimony from the real estate agent, Randy Stoor, that the real estate agreement was one that was commonly used. Further, the disclaimer of warranty language was clear from the four corners of the document, and there was extensive testimony given by several parties that the plaintiffs reviewed, read and understood said agreement, and signed the agreement.

7. IT WAS MANIFEST ERROR FOR THE DISTRICT COURT TO OVERTURN THE JURY'S VERDICT

Appellants respectfully submit that it was error for the District Court, in this case, to substitute its opinion for that of the jury. Idaho case law is settled on the standard the court must apply in its decision to grant a new 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 judge may not substitute his/her opinion but rather determine if sufficient facts exist for a jury to render a decision in the fashion it so found. It appears this district court is trying to second-guess the jury. The legal standard is not second-guessing but rather is to determine sufficient facts in the record. The transcript supports the "facts" in the record and contained previously in this brief.

A. The Jury Was Presented Ample Evidence with which to Support its Verdict Regarding the Warranty of Habitability Issue

The District 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 and/or new trial, 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/Respondents on their evidence or theories.

The parties entered into a very detailed verdict form and spent multiple hours arriving at such a form. It should be noted that both parties, on the record, approved the special verdict form and the orderly process to lead the jury through the various theories and counts of the plaintiff. It is beyond dispute that the jury answered each and every question and went through the form in orderly fashion. (R. pp. 821-822).

Furthermore, the transcript is beyond any reasonable inference that ample testimony existed that: 1) the plaintiffs continuously resided in the home in question, 2) the plaintiffs prepared the real estate offer and contract, 3) the plaintiffs had a professional realtor with

over 30 years of experience, 4) that the plaintiffs' realtor explained, in detail, the contract and afterwards obtained initials on each page and final signatures of the plaintiffs.

It is also abundantly clear that the proper leaching system was installed. The plaintiff observed the installation; and, the system did not fail. Furthermore, the builder's warranty was for one (1) year and no problems existed. The transcript also shows that the buyer dug into the ground where the leaching system existed in subsequent years after the one year warranty period. It is believed the plaintiff altered the leaching system. (Tr. pp. 278, ll. 1-25; 279, ll. 1-2.).

Further, the jury conference was not of record; but rather as was the practice of this district court, a general discussion in chambers with counsel to place appropriate conversation, objections and the like on the record as the court went through the proposed jury instructions and those that would not be given. (R. pp. 821-822). To blame both parties' counsel for the court's alleged error is not in keeping with judicial propriety.

Appellants respectfully urge this appellate court to review the record, the contract and the misconceptions of the district court and accept the decision of the sacred province of the jury. To ignore the jury's decision and merely second guess such decision based upon the court's opinion is inappropriate. Clearly, factual evidence exists to support the jury decision. The evidence presented supported defendants' positions on all counts. The court is attempting to isolate one (1) count when the jury consistently ruled in defendants' favor. As such, the jury rendered the correct verdict.

8. THERE IS NO BASIS FOR A NEW TRIAL ON THE IMPLIED

WARRANTY OF HABITABILITY AND NO BASIS TO DISTURB THE JURY'S VERDICT FINDING

A. There Was a Disclaimer of the Implied Warranty of Habitability

As stated previously, the testimony set forth above is clear on the testimony of plaintiffs, Goodspeed, and their agent and realtor, Stoor. Stoor was an experienced realtor of numerous years and meticulously advised the Goodspeeds as to the contract language. Further, Stoor was well versed in the contract and the contract language. It is undisputed that the plaintiffs/respondents were well informed on the contract and understood its contents before submitting the same to the sellers/appellants.

B. Jury found that they did not believe Goodspeeds' argument that "minimum one-year warranty" meant more than one year.

It is clearly stated in the contract that the standard builders warranty was for one year. Further, no problems existed with the leaching system. The only potential problem with the leaching system was the plaintiff/respondent digging into the leaching system and/or proper winterization of the pump and motor. In the opinion of the appellants, the plaintiffs, Goodspeed, did not adequately care for the leaching system. (Tr. pp. 278, ll. 1-25; 279, ll. 1-2.).

C. The Residence was Never Uninhabitable

As stated previously, the Goodspeeds lived in the home from the time of purchase through the date of trial. The home was never non-habitable. The testimony of the hydrologist for the appellants was also placed before the jury. The jury had more than

sufficient evidence to rule in favor of the defendants/appellants. Respondents presented no expert evidence on the leaching system, on the hydrology, topography, construction or other matters for the jury.

The defendants presented such testimony.

By contrast to the instant cause, Idaho Case law is instructive on when a breach of the warranty of habitability has occurred. In *Bethlahny v. Bectel,* 91 Idaho 55, 415 P.2d 698 (Idaho 1966), the Court found that the warranty of habitability had been breached. *Bethlahny* involves the case wherein the builder put in open irrigation ditch which ran under the garage. He did not disclose the ditch to the buyers. Subsequently the house leaked, and the subsequent foundation damage, rot and mold forced the buyers to abandon the house.

No such problems were hidden in the instant case. Quite simply, the jury accepted the testimony of the appellants and did not believe the opinions of the respondents. The court granted the plaintiffs/respondents every opportunity to place their case before the jury and was very liberal in allowing the various theories of the plaintiffs to be presented.

9. ATTORNEY FEES AND COSTS AT TRIAL

The trial court reserved the attorney fee issue for the trial until this court could rule. However, the defendants prevailed on all issues at trial. The contract provided for fees and costs to the prevailing party. The court should have awarded fees and costs instead of waiting until this appeal was concluded.

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.

> 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* <u>*in any commercial transaction*</u>. *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). <u>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.</u> *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.

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.
IRCP Rule 54, Judgments
---------- Excerpt from page 167.

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/appellants 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.

10. ATTORNEY FEES AND COSTS ON APPEAL

An award of attorney fees on appeal requires a statutory or contractual basis. A contract exists in the case at bar with an attorney fee provision. Appellants rely upon the contract and upon Idaho Code §§ 12-120; 12-121 and I.A.R., Rules 40 and 41 in their request for fees on appeal.

Fees are awarded on appeal as follows:

> Section 12-120(3) of the Idaho Code requires that the court hearing any action arising out of a contract for services award reasonable attorney fees to the prevailing party. This Court has interpreted I.C. § 12-120(3) to mandate the award of attorney fees on appeal as well as at trial. Chemetics, 130 Idaho at 258, 939 P.2d at 577.
>
> . . . also asserts a right to attorney fees and costs on appeal based on I.A.R. 40, I.A.R. 41, I.C. § 12-120 and I.C. § 12-121. As stated above, this Court has held that I.C. § 12-120(3) mandates the award of attorney fees on appeal to the prevailing party. Additionally, costs are properly awarded to the prevailing party on appeal pursuant to I.A.R. 40. Sammis v. Magnetek, Inc., 130 Idaho 342, 353, 941 P.2d 314, 325 (1997).
>
> Hummer v. Evans, 979 P.2d 1188, 132 Idaho 830, (Idaho 1999)
> ---------- Excerpt from page 979 P.2d 1191.

Fees should be awarded to appellant as a prevailing party pursuant to the contract, statutes cited, and Rule 54, I.R.C.P. The lower court erred on the one count that it set for new trial as argued in this brief.

CONCLUSION

The appellants successfully defended all causes of action at trial. The jury ruled in favor of appellants on all issues.

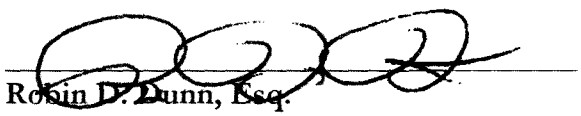
The court abused its discretion in granting a new trial on one isolated count

that required the same and similar testimony for the other causes of action alleged by respondents. The court misinterpreted the *Tusch* case; and, the lower court applied a UCC goods standard to the definition of "conspicuous" not contained in *Tusch.*

No justifiable reason exists to grant a new trial.

The appellants prevailed at trial and were entitled to fees and costs. Fees and costs should be granted to the appellants on appeal.

DATED this 13th day of February, 2012.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC
ATTORNEY FOR APPELLANTS

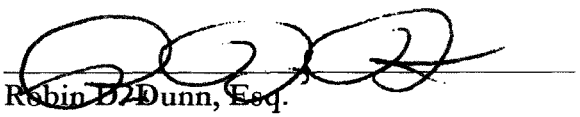
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2012 true and correct copies of the foregoing were delivered to the following persons(s) by:

Hand Delivery

xx Postage-prepaid mail

Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC
ATTORNEY FOR APPELLANTS

Weston S. Davis, Esq.
P.O. Box 51630
Idaho Falls, ID 83405
208.523-7254 (Facsimile)

PLAINTIFFS' EXHIBIT 3

RE-21 REAL ESTATE PURCHASE AND SALE AGREEMENT

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

ID# 24051188 DATE June 16, 2007

LISTING AGENCY WinStar Realty Office Phone # 208-529-8888 Fax #

Listing Agent Dave Chapple E-Mail Phone # 208-351-9951

SELLING AGENCY Coldwell Banker Eagle Rock Office Phone # 208-529-4663 Fax # 208-523-0202

Selling Agent Randy Stoor E-Mail randys@realestate-eastidaho.com Phone # 208-589-4162

1. BUYER: William S. Goodspeed & Shellee B. Goodspeed, husband & wife (Hereinafter called "BUYER") agrees to purchase, and the undersigned SELLER agrees to sell the following described real estate hereinafter referred to as "PREMISES" COMMONLY KNOWN AS 319 N 3709 E. City Rigby Jefferson County, ID, Zip 83442 legally described as: Lot 7, Block 2, Woodhaven Creek Estates

OR Legal Description Attached as addendum # NA (Addendum must accompany original offer.)

2. $ *******272,000.00 PURCHASE PRICE: Two hundred seventy two thousand DOLLARS, payable upon the following TERMS AND CONDITIONS (not including closing costs):

3. FINANCIAL TERMS: Note: A+C+D+E must add up to total purchase price.

$ *******2,500.00 (A). EARNEST MONEY: BUYER hereby deposits Two thousand five hundred DOLLARS as Earnest Money evidenced by: ☐ cash ☒ personal check ☐ cashier's check ☐ note (due date): NA ☐ other NA and a receipt is hereby acknowledged. Earnest Money to be deposited in trust account ☐ upon receipt, or ☒ upon acceptance by all parties and shall be held by: ☐ Listing Broker ☒ Selling Broker ☐ other NA for the benefit of the parties hereto. The responsible Broker shall be Jay Wabb/Coldwell Banker Eagle Rock.

(B). ALL CASH OFFER: ☒ NO ☐ YES If this is an all cash offer do not complete lines 32 through 61, fill blanks with "0" (ZERO.) (IF CASH OFFER, BUYER'S OBLIGATION TO CLOSE SHALL NOT BE SUBJECT TO ANY FINANCIAL CONTINGENCY. BUYER agrees to provide SELLER within NA business days from the date of acceptance of this agreement by all parties, evidence of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes, but is not limited to, a copy of a recent bank or financial statement or contract(s) for the sale of BUYER'S current residence or other property to be sold.

$ *****217,600.00 (C). NEW LOAN PROCEEDS: This Agreement is contingent upon BUYER obtaining the following financing: ☒ FIRST LOAN of $ **********217,600.00 not including mortgage insurance, through ☐ FHA, ☐ VA, ☒ CONVENTIONAL, ☐ IHFA, ☐ RURAL DEVELOPMENT, ☐ OTHER NA with interest not to exceed 7.0 % for a period of 30 year(s) at: ☒ Fixed Rate ☐ Other NA BUYER shall pay no more than -0- point(s) plus origination fee if any. SELLER shall pay no more than -0- point(s). Any reduction in points shall first accrue to the benefit of the ☐ BUYER ☐ SELLER ☐ Divided Equally ☒ N/A.

☐ SECOND LOAN of $ **********0.00 with interest not to exceed NA % for a period of NA year(s) at: ☐ Fixed Rate ☐ Other NA BUYER shall pay no more than NA point(s) plus origination fee if any. SELLER shall pay no more than NA point(s). Any reduction in points shall first accrue to the benefit of the ☐ BUYER ☐ SELLER ☐ Divided Equally ☒ N/A.

→ LOAN APPLICATION: BUYER ☒ has applied ☐ shall apply for such loan(s) within NA business day(s) of SELLER'S acceptance. Within 5 business days of final acceptance of all parties. BUYER agrees to furnish SELLER with a written confirmation showing lender approval of credit report, income verification, debt ratios in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. If such written confirmation is not received by SELLER(S) within the strict time allotted, SELLER(S) may at their option cancel this agreement by notifying BUYER(S) in writing of such cancellation within 2 business day(s) after written confirmation was required. If SELLER does not cancel within the strict time period specified as set forth herein, SELLER shall be deemed to have accepted such written confirmation of lender approval and shall be deemed to have elected to proceed with the transaction. SELLER'S approval shall not be unreasonably withheld. If an appraisal is required by lender, the property must appraise at not less than purchase price or BUYER'S Earnest Money may be returned at BUYER'S request. BUYER may also apply for a loan with different conditions and costs and close transaction provided all other terms and conditions of this Agreement are fulfilled, and the new loan does not increase the costs or requirements to the SELLER

FHA / VA: If applicable, it is expressly agreed that notwithstanding any other provisions of this contract, BUYER shall not be obligated to complete the purchase of the property described herein or to incur any penalty or forfeiture of Earnest Money deposits or otherwise unless BUYER has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Veterans Administration or a Direct Endorsement lender setting forth the appraised value of the property of not less than the sales price as stated in the contract. SELLER agrees to pay fees required by FHA or VA.

$ **********0.00 (D). ADDITIONAL FINANCIAL TERMS:

☐ Additional financial terms are specified under the heading "OTHER TERMS AND/OR CONDITIONS" (Section 4).

☐ Additional financial terms are contained in a FINANCING ADDENDUM of same date, attached hereto, signed by both parties.

$ *****51,900.00 (E). APPROXIMATE FUNDS DUE FROM BUYERS AT CLOSING (Not including closing costs): Cash at closing to be paid by BUYER at closing in GOOD FUNDS. Includes: cash, electronic transfer funds, certified check or cashier's check. NOTE: If any of above loans being Assumed or taken "subject to", any net difference between the approximate balances and the actual balance of said loan(s) shall be adjusted at closing of escrow in: ☐ Cash ☒ Other: Certified Check.

BUYER'S Initials (WSG X SBG) Date 6-16-07 SELLER'S Initials (_____ X _____) Date _____

Jun 17 07 03:48p Robert D Shippen SHIPPEN 208-745-8241 p.1

Selling Agent Randy Stoor E-Mail randys@realestate-eastidaho.com Phone # 208-589-4162

1. BUYER: William S. Goodspeed & Shellee B. Goodspeed, husband & wife (Hereinafter called "BUYER") agrees to purchase, and the undersigned SELLER agrees to sell the following described real estate hereinafter referred to as "PREMISES" COMMONLY KNOWN AS 319 N 3709 E, City Rigby Jefferson County, ID Zip 83442 legally described as: Lot 7, Block 2, Woodhaven Creek Estates

OR Legal Description Attached as Addendum # NA (Addendum must accompany original offer.)

2. $ *******272,000.00 PURCHASE PRICE: Two hundred seventy two thousand DOLLARS, payable upon the following TERMS AND CONDITIONS (not including closing costs) :

3. FINANCIAL TERMS: Note: A+C+D+E must add up to total purchase price.

$ ******2,500.00 (A). EARNEST MONEY: BUYER hereby deposits Two thousand five hundred DOLLARS as Earnest Money evidenced by: ☐ cash ☒ personal check ☐ cashier's check ☐ note (due date): NA ☐ other NA and a receipt is hereby acknowledged. Earnest Money to be deposited in trust account ☐ upon receipt or ☒ upon acceptance by all parties and shall be held by: ☐ Listing Broker ☒ Selling Broker ☐ other NA for the benefit of the parties hereto. The responsible Broker shall be Jay Webb/Coldwell Banker Eagle Rock.

(B). ALL CASH OFFER: ☒ NO ☐ YES If this is an all cash offer do not complete lines 32 through 61, fill blanks with "0" (ZERO.) IF CASH OFFER, BUYER'S OBLIGATION TO CLOSE SHALL NOT BE SUBJECT TO ANY FINANCIAL CONTINGENCY. BUYER agrees to provide SELLER within NA business days from the date of acceptance of this agreement by all parties, evidence of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes, but is not limited to, a copy of a recent bank or financial statement or contract(s) for the sale of BUYER'S current residence or other property to be sold.

$ ******217,600.00 (C). NEW LOAN PROCEEDS: This Agreement is contingent upon BUYER obtaining the following financing: ☒ FIRST LOAN of $ **********217,600.00 not including mortgage insurance, through ☐ FHA, ☐ VA, ☒ CONVENTIONAL, ☐ IHFA, ☐ RURAL DEVELOPMENT, ☐ OTHER NA with interest not to exceed 7.0 % for a period of 30 year(s) at: ☒ Fixed Rate ☐ Other NA BUYER shall pay no more than -0- point(s) plus origination fee if any. SELLER shall pay no more than -0- point(s). Any reduction in points shall first accrue to the benefit of the ☐ BUYER ☐ SELLER ☐ Divided Equally ☒ N/A.

☐ SECOND LOAN of $ **********0.00 with interest not to exceed NA % for a period of NA year(s) at: ☐ Fixed Rate ☐ Other NA BUYER shall pay no more than NA point(s) plus origination fee if any. SELLER shall pay no more than NA point(s). Any reduction in points shall first accrue to the benefit of the ☐ BUYER ☐ SELLER ☐ Divided Equally ☒ N/A.

LOAN APPLICATION: BUYER ☒ has applied ☐ shall apply for such loan(s) within NA business day(s) of SELLER'S acceptance. Within 5 business days of final acceptance of all parties, BUYER agrees to furnish SELLER with a written confirmation showing lender approval of credit report, income verification, debt ratios in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. If such written confirmation is not received by SELLER(S) within the strict time allotted, SELLER(S) may at their option cancel this agreement by notifying BUYER(S) in writing of such cancellation within 2 business day(s) after written confirmation was required. If SELLER does not cancel within the strict time period specified as set forth herein, SELLER shall be deemed to have accepted such written confirmation of lender approval and shall be deemed to have elected to proceed with the transaction. SELLER'S approval shall not be unreasonably withheld. If an appraisal is required by lender, the property must appraise at not less than purchase price or BUYER'S Earnest Money may be returned at BUYER'S request. BUYER may also apply for a loan with different conditions and costs and close transaction provided all other terms and conditions of this Agreement are fulfilled, and the new loan does not increase the costs or requirements to the SELLER.

FHA / VA: If applicable, it is expressly agreed that notwithstanding any other provisions of this contract, BUYER shall not be obligated to complete the purchase of the property described herein or to incur any penalty or forfeiture of Earnest Money deposits or otherwise unless BUYER has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Veterans Administration or a Direct Endorsement lender setting forth the appraised value of the property of not less than the sales price as stated in the contract. SELLER agrees to pay fees required by FHA or VA.

$ **********0.00 (D). ADDITIONAL FINANCIAL TERMS:
☐ Additional financial terms are specified under the heading "OTHER TERMS AND/OR CONDITIONS" (Section 4).
☐ Additional financial terms are contained in a FINANCING ADDENDUM of same date, attached hereto, signed by both parties.

$ ******51,900.00 (E). APPROXIMATE FUNDS DUE FROM BUYERS AT CLOSING (Not including closing costs): Cash at closing to be paid by BUYER at closing in GOOD FUNDS, includes: cash, electronic transfer funds, certified check or cashier's check. NOTE: If any of above loans being Assumed or taken "subject to", any net differences between the approximate balances and the actual balance of said loan(s) shall be adjusted at closing of escrow in: ☐ Cash ☒ Other: Certified Check.

BUYER'S Initials (WSG X SBG) Date 6-16-07 SELLER'S Initials ([illegible] X _____) Date 6/17/07

RE-21 RESIDENTIAL PURCHASE AND SALE AGREEMENT PAGE 2 of 8 JULY, 2006 EDITION

PROPERTY ADDRESS: 319 N. 3709 E., Rigby, ID 83442 ID#: 24051188

4. OTHER TERMS AND/OR CONDITIONS: This Agreement is made subject to the following special terms, considerations and/or contingencies which must be satisfied prior to closing: All plumbing, heating, electrical, mechanical systems to be in working order at closing. Builder to complete a walk-through inspection with the buyers within 3-5 days prior to closing to identify any items needing attention or completion by the builder in a standard workmanlike manner. Builder to provide a standard Builder's Warranty for a minimum of 1 year, in addtion to manufacturer's warranties on appliances, fixtures etc. Builder to include a central air conditioning system, installed & running by closing. Builder to complete a drainage/leach system around home (walk-out basement area). Builder to install full width mirrors above vanities in main & master bath. TV (cable) jack to be installed on east wall of master bedroom. Locks to operate & secure sliding doors. Builder to provide "Certificate of Occupancy". Permits and approvals for septic system & well. Builder to allow buyers to store belongings in the garage until closing. Buyers agree to hold builder harmless.

5. ITEMS INCLUDED & EXCLUDED IN THIS SALE: All existing fixtures and fittings that are attached to the property are INCLUDED IN THE PURCHASE PRICE (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all attached floor coverings, attached television antennas, satellite dish and receiving equipment, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm windows, storm doors, all window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation fittings and equipment, all water systems, wells, springs, water, water rights, ditches and ditch rights, if any, that are appurtenant thereto that are now on or used in connection with the premises and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than $100.

(A). ADDITIONAL ITEMS SPECIFICALLY INCLUDED IN THIS SALE: Electric range/oven, built-in microwave, disposal, dishwasher.

(B). ITEMS SPECIFICALLY EXCLUDED IN THIS SALE: None

6. TITLE CONVEYANCE: Title of SELLER is to be conveyed by warranty deed, unless otherwise provided, and is to be marketable and insurable except for rights reserved in federal patents, state or railroad deeds, building or use restrictions, building and zoning regulations and ordinances of any governmental unit, and rights of way and easements established or of record. Liens, encumbrances or defects to be discharged by SELLER may be paid out of purchase money at date of closing. No liens, encumbrances or defects which are to be discharged or assumed by BUYER or to which title is taken subject to, exist unless otherwise specified in this Agreement.

7. TITLE INSURANCE: There may be types of title insurance coverages available other than those listed below and parties to this agreement are advised to talk to a title company about any other coverages available that will give the BUYER additional coverage.

(A). PRELIMINARY TITLE COMMITMENT: Prior to closing the transaction, ☒ SELLER or ☐ BUYER shall furnish to BUYER a preliminary commitment of a title insurance policy showing the condition of the title to said premises. BUYER shall have 3 business day(s) from receipt of the preliminary commitment or not fewer than twenty-four (24) hours prior to closing, within which to object in writing to the condition of the title as set forth in the preliminary commitment. If BUYER does not so object, BUYER shall be deemed to have accepted the conditions of the title. It is agreed that if the title of said premises is not marketable, or cannot be made so within 7 business day(s) after notice containing a written statement of defect is delivered to SELLER, BUYER'S Earnest Money deposit will be returned to BUYER and SELLER shall pay for the cost of title insurance cancellation fee, escrow and legal fees, if any.

(B). TITLE COMPANY: The parties agree that First American Title Title Company located at Clark Street, Rigby, ID 83442 shall provide the title policy and preliminary report of commitment.

(C). STANDARD COVERAGE OWNER'S POLICY: SELLER shall within a reasonable time after closing furnish to BUYER a title insurance policy in the amount of the purchase price of the premises showing marketable and insurable title subject to the liens, encumbrances and defects elsewhere set out in this Agreement to be discharged or assumed by BUYER unless otherwise provided herein. The risk assumed by the title company in the standard coverage policy is limited to matters of public record. BUYER shall receive a ILTA/ALTA Owner's Policy of Title Insurance. A title company, at BUYER's request, can provide information about the availability, desirability, coverage and cost of various title insurance coverages and endorsements. If BUYER desires title coverage other than that required by this paragraph, BUYER shall instruct Closing Agency in writing and pay any increase in cost unless otherwise provided herein.

(D). EXTENDED COVERAGE LENDER'S POLICY (Mortgagee policy): The lender may require that BUYER (Borrower) furnish an Extended Coverage Lender's Policy. This extended coverage lender's policy considers matters of public record and additionally insures against certain matters not shown in the public record. This extended coverage lender's policy is solely for the benefit of the lender and only protects the lender.

8. MECHANIC'S LIENS - GENERAL CONTRACTOR DISCLOSURE STATEMENT NOTICE: BUYER and SELLER are hereby notified that, subject to Idaho Code §45-525 *et seq.*, a "General Contractor" must provide a Disclosure Statement to a homeowner that describes certain rights afforded to the homeowner (e.g. lien waivers, general liability insurance, extended policies of title insurance, surety bonds, and sub-contractor information). The Disclosure Statement must be given to a homeowner prior to the General Contractor entering into any contract in an amount exceeding $2,000 with a homeowner for construction, alteration, repair, or other improvements to real property, or with a residential real property purchaser for the purchase and sale of newly constructed property. Such disclosure is the responsibility of the General Contractor and it is not the duty of your agent to obtain this information on your behalf. You are advised to consult with any General Contractor subject to Idaho Code §45-525 *et seq.* regarding the General Contractor Disclosure Statement.

BUYER'S Initials (MM X CBS) Date: 6-16-07 SELLER'S Initials (RDS X ___) Date 6/17/07

RE-21 RESIDENTIAL PURCHASE AND SALE AGREEMENT PAGE 3 of 6 JULY 2006 EDITION

PROPERTY ADDRESS: 319 N. 3709 E., Rigby, ID 83442 ID#: 24051183

8. INSPECTION:

(A). BUYER chooses [X] to have inspection [ ] not to have inspection. If BUYER chooses not to have inspection skip section 8C. BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies at BUYER'S expense. BUYER shall, within 7 business day(s) of acceptance, complete those inspections and give to SELLER written notice of disapproved of items. BUYER is strongly advised to exercise these rights and to make BUYER'S own selection of professionals with appropriate qualifications to conduct inspections of the entire property.

(B). FHA INSPECTION REQUIREMENT, if applicable: "For Your Protection: Get a Home Inspection". HUD 92564-CN must be signed on or before execution of this agreement.

(C). SATISFACTION/REMOVAL OF INSPECTION CONTINGENCIES:

1). If BUYER does not within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall conclusively be deemed to have: (a) completed all inspections, investigations, review of applicable documents and disclosures; (b) elected to proceed with the transaction and (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

2). If BUYER does within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall provide to SELLER pertinent section(s) of written inspection reports. SELLER shall have 2 business day(s) in which to respond in writing. The SELLER, at their option, may correct the items as specified by the BUYERS in their letter or may elect not to do so. If the SELLER agrees to correct the items asked for in the BUYERS letter, then both parties agree that they will continue with the transaction and proceed to closing. This will remove the BUYER'S inspection contingency.

3). If the SELLER elects not to correct the disapproved items, or does not respond in writing within the strict time period specified, then the BUYER(S) have the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written notice within 2 business days that they will not continue with the transaction and will receive their Earnest Money back.

4). If BUYER does not give such written notice of cancellation within the strict time periods specified, BUYER shall conclusively be deemed to have elected to proceed with the transaction without repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct. SELLER shall make the property available for all inspections. BUYER shall keep the property free and clear of liens; indemnify and hold SELLER harmless from all liability, claims, demands, damages and costs; and repair any damages arising from the inspections. No inspections may be made by any governmental building or zoning inspector or government employee without the prior consent of SELLER unless required by local law.

10. LEAD PAINT DISCLOSURE: The subject property [ ] is [X] is not defined as "Target Housing" regarding lead-based paint or lead-based paint hazards. If yes, BUYER hereby acknowledges the following: (a) BUYER has been provided an EPA approved lead-based paint hazard information pamphlet, "Protect Your Family From Lead In Your Home", (b) receipt of SELLER'S Disclosure of Information and Acknowledgment Form and have been provided with all records, test reports or other information, if any, related to the presence of lead-based paint hazards on said property, (c) that this contract is contingent upon BUYER'S right to have the property tested for lead-based paint hazards to be completed no later than NA or the contingency will terminate, (d) that BUYER hereby [ ] waives [ ] does not waive this right, (e) that if test results show unacceptable amounts of lead-based paint on the premises, BUYER has the right to cancel this contract subject to the option of the SELLER (to be given in writing) to elect to remove the lead-based paint and correct the problem which must be accomplished before closing, (f) that if the contract is canceled under this clause, BUYER'S earnest money deposit will be returned to BUYER.

11. SQUARE FOOTAGE VERIFICATION: BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE REAL PROPERTY OR IMPROVEMENTS IS APPROXIMATE. IF SQUARE FOOTAGE IS MATERIAL TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION PERIOD.

12. SELLER'S PROPERTY DISCLOSURE FORM: If required by Title 55, Chapter 25 Idaho Code SELLER shall within ten (10) days after execution of this Agreement provide to BUYER "SELLER'S Property Disclosure Form" or other acceptable form. BUYER has received the "SELLER'S Property Disclosure Form" or other acceptable form prior to signing this Agreement: [ ] Yes [X] No [ ] N/A

13. COVENANTS, CONDITIONS AND RESTRICTIONS (CC& R'S): BUYER is responsible to obtain and review a copy of the CC& R's (if applicable). BUYER has reviewed CC& R's. [ ] Yes [X] No

14. SUBDIVISION HOMEOWNER'S ASSOCIATION: BUYER is aware that membership in a Home Owner's Association may be required and BUYER agrees to abide by the Articles of Incorporation, By-Laws and rules and regulations of the Association. BUYER is further aware that the Property may be subject to assessments levied by the Association described in full in the Declaration of Covenants, Conditions and Restrictions. BUYER has reviewed Homeowner's Association Documents: [ ] Yes [ ] No [X] N/A Association fee/dues are $ NA per NA [ ] BUYER [ ] SELLER [X] N/A to pay Homeowner's Association SET UP FEE of $ NA and/or property TRANSFER FEE of $ NA at closing.

15. "NOT APPLICABLE DEFINED:" The letters "n/a," "N/A," "n.a.," and "N.A." as used herein are abbreviations of the term "not applicable." Where this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.

BUYER'S Initials [illegible] X [illegible] Date 6-18-07 SELLER'S Initials [illegible] X _____ Date 6/17/07

PROPERTY ADDRESS: 318 N. 3709 E., Rigby, ID 83442 ID#: 24051188

14. COSTS PAID BY: Costs in addition to those listed below may be incurred by BUYER and SELLER unless otherwise agreed herein, or provided by law or required by lender, or otherwise stated herein. The below costs will be paid as indicated. Some costs are subject to loan program requirements.
SELLER agrees to pay up to $ 1,000.00 of lender required repair costs only.
BUYER or SELLER has the option to pay any lender required repair costs in excess of this amount.

	BUYER	SELLER	Shared Equally	N/A		BUYER	SELLER	Shared Equally	N/A
Appraisal Fee	X				Title Ins. Standard Coverage Owner's Policy		X		
Appraisal Re-Inspection Fee				X	Title Ins. Extended Coverage Lender's Policy – Mortgagee Policy	X			
Closing Escrow Fee			X		Additional Title Coverage				
Lender Document Preparation Fee	X				Fuel in Tank – Amount to be Determined by Supplier				
Tax Service Fee	X				Well Inspection		X		
Flood Certification/Tracking Fee	X				Septic Inspections		X		
Lender Required Inspections				X	Septic Pumping				X
Attorney Contract Preparation or Review Fee				X	Survey				X
					Eagle Policy (Extended)		X		

17. OCCUPANCY: BUYER [X] does [ ] does not intend to occupy property as BUYER'S primary residence.

18. FINAL WALK THROUGH: The SELLER grants BUYER and any representative of BUYER reasonable access to conduct a final walk through inspection of the premises approximately 3 calendar day(s) prior to close of escrow, NOT AS A CONTINGENCY OF THE SALE, but for purposes of satisfying BUYER that any repairs agreed to in writing by BUYER and SELLER have been completed and premises are in substantially the same condition as on acceptance date of this contract. SELLER shall make premises available for the final walk through and agrees to accept the responsibility and expense for making sure all the utilities are turned on for the walk through except for phone and cable. If BUYER does not conduct a final walk through, BUYER specifically releases the SELLER and Broker(s) of any liability.

19. RISK OF LOSS: Prior to closing of this sale, all risk of loss shall remain with SELLER. In addition, should the premises be materially damaged by fire or other destructive cause prior to closing, this agreement shall be void at the option of the BUYER.

20. CLOSING: On or before the closing date, BUYER and SELLER shall deposit with the closing agency all funds and instruments necessary to complete this transaction. Closing means the date on which all documents are either recorded or accepted by an escrow agent and the sale proceeds are available to SELLER. The closing shall be no later than (Date) July 2, 2007
The parties agree that the CLOSING AGENCY for this transaction shall be First American Title
located at Clark Street, Rigby, ID 83442
If a long-term escrow / collection is involved, then the long-term escrow holder shall be N/A

21. POSSESSION: BUYER shall be entitled to possession [X] upon closing or [ ] date _____ time _____ [ ] A.M. [ ] P.M.
Property taxes and water assessments (using the last available assessment as a basis), rents, interest and reserves, liens, encumbrances or obligations assumed and utilities shall be pro-rated as of Day of closing/recording .

22. SALES PRICE INFORMATION: SELLER and BUYER hereby grant permission to the brokers and either party to this Agreement, to disclose sale data from this transaction, including selling price and property address to the local Association / Board of REALTORS®, multiple listing service, its members, its members' prospects, appraisers and other professional users of real estate sales data. The parties to this Agreement acknowledge that sales price information compiled as a result of this Agreement may be provided to the County Assessor Office by either party or by either party's Broker.

23. FACSIMILE TRANSMISSION: Facsimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either party or the Closing Agency, the parties will confirm facsimile and electronic transmitted signatures by signing an original document.

BUYER'S Initials (WSH) ( ) Date 6-16-07 SELLER'S Initials ( ) ( ) Date 6/16/07

RE-21 RESIDENTIAL PURCHASE AND SALE AGREEMENT PAGE 6 of 8 JULY 2006 EDITION
PROPERTY ADDRESS: 319 N. 3709 E., Rigby, ID 83442 ID#: 24051188

24. SINGULAR AND PLURAL terms each include the other, when appropriate.

25. BUSINESS DAYS & HOURS A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real property is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized by the state of Idaho as found in Idaho Code §73-108. The time in which any act required under this agreement is to be performed shall be computed by excluding the date of execution and including the last day. The first day shall be the day after the date of execution. If the last day is a legal holiday, then the time for performance shall be the next subsequent business day.

26. SEVERABILITY: In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

27. ATTORNEY'S FEES: If either party initiates or defends any arbitration or legal action or proceedings 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.

28. DEFAULT: If BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right and/or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by SELLER'S Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of title insurance, escrow fees, appraisal, credit report fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER'S Broker, provided that the amount to be paid to SELLER'S Broker shall not exceed the Broker's agreed to commission. SELLER and BUYER specifically acknowledge and agree that if SELLER elects to accept the Earnest Money as liquidated damages, such shall be SELLER'S sole and exclusive remedy, and such shall not be considered a penalty or forfeiture. If SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred by SELLER'S Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of brokerage fee, title insurance, escrow fees, appraisal, credit report fees, inspection fees and attorney's fees, with any balance of the Earnest Money to be held pending resolution of the matter.

If SELLER defaults, having approved said sale and fails to consummate the same as herein agreed, BUYER'S Earnest Money deposit shall be returned to him/her and SELLER shall pay for the costs of title insurance, escrow fees, appraisals, credit report fees, inspection fees, brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be entitled.

29. EARNEST MONEY DISPUTE / INTERPLEADER: Notwithstanding any termination of this contract, BUYER and SELLER agree that in the event of any controversy regarding the Earnest Money and things of value held by Broker or closing agency, unless mutual written instructions are received by the holder of the Earnest Money and things of value, Broker or closing agency shall not be required to take any action but may await any proceeding, or at Broker's or closing agency's option and sole discretion, may interplead all parties and deposit any monies or things of value into a court of competent jurisdiction and shall recover court costs and reasonable attorney's fees.

30. COUNTERPARTS: This Agreement may be executed in counterparts. Executing an agreement in counterparts shall mean the signature of two identical copies of the same agreement. Each identical copy of an agreement signed in counterparts is deemed to be an original, and all identical copies shall together constitute one and the same instrument.

31. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S).

Section 1:

- [X] A. The brokerage working with the BUYER(S) is acting as an AGENT for the BUYER(S).
- [ ] B. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), without an ASSIGNED AGENT.
- [ ] C. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S) and has an ASSIGNED AGENT acting solely on behalf of the BUYER(S).
- [ ] D. The brokerage working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).

Section 2:

- [X] A. The brokerage working with the SELLER(S) is acting as an AGENT for the SELLER(S).
- [ ] B. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), without an ASSIGNED AGENT.
- [ ] C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S) and has an ASSIGNED AGENT acting solely on behalf of the SELLER(S).
- [ ] D. The brokerage working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).

Each party signing this document confirms that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Idaho real estate commission and has consented to the relationship confirmed above. In addition, each party confirms that the brokerage's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.

BUYER'S Initials ( ) X ( ) Date 6-16-07 SELLER'S Initials ( ) X ( ) Date 6/17/07

RE-21 RESIDENTIAL PURCHASE AND SALE AGREEMENT PAGE 5 of 8 JULY 2006 EDITION

PROPERTY ADDRESS: 319 N. 3709 E., Rigby, ID 83442 ID#: 24051188

32. ENTIRE AGREEMENT: This Agreement contains the entire Agreement of the parties respecting the matters herein set forth and 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.

33. TIME IS OF THE ESSENCE IN THIS AGREEMENT.

34. AUTHORITY OF SIGNATORY: If BUYER or SELLER is a corporation, partnership, trust, estate, or other entity, the person executing this agreement on its behalf warrants his or her authority to do so and to bind BUYER or SELLER.

35. ACCEPTANCE: BUYER'S offer is made subject to the acceptance of SELLER on or before (Date) 06/18/2007 at (Local Time in which property is located) 8:00 ☐A.M. ☒P.M. If SELLER does not accept this Agreement within the time specified, the entire Earnest Money shall be refunded to BUYER on demand.

36. BUYER'S SIGNATURES:

☐SEE ATTACHED BUYER'S ADDENDUM(S): _____ (Specify number of BUYER addendum(s) attached.)

BUYER Signature [signature] BUYER (Print Name) William S. Goodspeed

Date 6-16-07 Time 1:45 ☐A.M. ☒P.M. Phone # 865-556-7234 Cell # _____

Address 913 Oak Haven Rd. City Knoxville State TN Zip 37932

E-Mail Address _____ Fax # _____

BUYER Signature [signature] BUYER (Print Name) Shellee B. Goodspeed

Date 6-16-07 Time 1:45 ☐A.M. ☒P.M. Phone # _____ Cell # _____

Address _____ City _____ State _____ Zip _____

E-Mail Address _____ Fax # _____

37. SELLER'S SIGNATURES:
On this date, I/We hereby approve and accept the transaction set forth in the above Agreement and agree to carry out all the terms thereof on the part of the SELLER.

☐SIGNATURE(S) SUBJECT TO ATTACHED COUNTER OFFER

☐SIGNATURE(S) SUBJECT TO ATTACHED ADDENDUM(S) # _____

SELLER Signature [signature] SELLER (Print Name) Robert D Shippen

Date 6/17/07 Time 3:35 ☐A.M. ☒P.M. Phone # 313-6241 Cell # _____

Address 516 N 3950 E. Rigby City Rigby State ID Zip 83442

E-Mail Address shippencon@cableone.com Fax # 745-8241

SELLER Signature _____ SELLER (Print Name) _____

Date _____ Time _____ ☐A.M. ☐P.M. Phone # _____ Cell # _____

Address _____ City _____ State _____ Zip _____

E-Mail Address _____ Fax # _____

CONTRACTOR REGISTRATION # (If applicable) _____

Jun 17 07 03:52p Robert D Shippen SHIPPEN 208-745-8241 p.9
May 24 07 12:09p Patrick Duffin (208) 552-9805 P.1

RE-11 ADDENDUM # 1 (1,2,3, etc.)

Date: 6-17-07

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

This is an ADDENDUM to the Purchase and Sale Agreement and Receipt for Earnest Money.
("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

PURCHASE AND SALE AGREEMENT DATED: 6-16-07 ID #: 24051188
ADDRESS: 319 N. 3709 E. Rigby, Id. 83442
BUYER(S): William S. Goodspeed and Shellee B. Goodspeed
SELLER(S): Bob Shippen

The undersigned parties hereby agree as follows:

Sellers acceptance is to be extended to 6/18/2007 at 11:00 A.M. Seller agrees to all other terms.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made a integral part of the aforementioned Agreement.

BUYER: William S. Goodspeed Date: 6-18-07
BUYER: Shellee Goodspeed Date: 6-18-07
SELLER: Robert D. Shippen Date: 6-17-07
SELLER: _____ Date: _____

RE-11 ADDENDUM # ONE (1,2,3, etc.)

Date: July 2, 2007

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

This is an **ADDENDUM** to the Purchase and Sale Agreement.
("Addendum" means that the information below is added material for the agreement {such as lists or descriptions} and/or means the form is being used to change, correct or revise the agreement {such as modification, addition or deletion of a term}).

PURCHASE AND SALE AGREEMENT DATED: June 16, 2007 ID # 24051188

ADDRESS: 319 N. 3709 E., Rigby, ID 83442

BUYER(S): William S. Goodspeed & Shellee B. Goodspeed

SELLER(S): Robert Shippen Construction

The undersigned parties hereby agree as follows:

1. Buyers & Sellers acknowledge that the correct Address for this property is:
3709 E. 319 N., Rigby, ID 83442 and hereby amend the purchase & sale agreement
(the address used had the street number swapped with the house number)

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. **All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same.** Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: William S. Goodspeed Date: 7/2/07

BUYER: Shellee Goodspeed Date: 7-2-07

SELLER: Robert Shippen Date: 7/2/07

SELLER: Tonya Shippen Date: 7/2/07

Company: Coldwell Banker Eagle Rock S/N: PCF5-06387
Provided by: Randy Stoor