UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

3-14-2012

Goodspeed v. Shippen Respondent's Brief Dckt. 38829

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Goodspeed v. Shippen Respondent's Brief Dckt. 38829" (2012). *Idaho Supreme Court Records & Briefs*. 3655.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3655

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM SHAWN GOODSPEED, and SHELLEE BETH GOODSPEED, Plaintiffs/Respondents vs. ROBERT D. SHIPPEN and JORJA D. SHIPPEN. Defendants/Appellants.	Docket No. 38829-2011

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Jefferson County, Case No. CV-09-15 Honorable Gregory S. Anderson, Presiding District Judge.

Robin Dunn (I.S.B. No. 2903)
DUNN LAW OFFICES, PLLC
P.O. Box 277
477 Pleasant County Lane
Rigby, Idaho 83442
Phone: 208.745.9202
Fax: 208.745.8160
rdunn@dunnlawoffices.com

Attorneys for Appellant.

Weston S. Davis (I.S.B. No. 7449)
NELSON HALL PARRY TUCKER, P.A.
P.O. Box 51630
490 Memorial Drive
Idaho Falls, ID 83405
Phone: 208.522.3001
Fax: 208.523.7254
wsdavis@nhptlaw.com

Attorneys for Respondent.

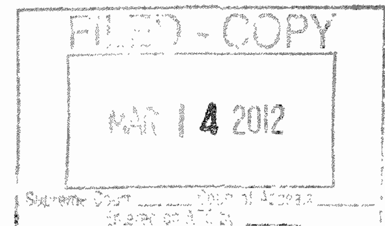


TABLE OF CONTENTS

STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Course of Proceedings Below 1

C. Statement of Facts 3

ISSUE PRESENTED ON APPEAL 9

STANDARD OF REVIEW 9

ARGUMENT 11

I. THE DISTRICT JUDGE RECOGNIZED THE ISSUE OF A NEW TRIAL WAS ONE OF DISCRETION 11

II. THE DISTRICT JUDGE ACTED WITHIN THE BOUNDS OF HIS DISCRETION AND CONSISTENTLY WITH THE LAWS REGARDING THE DISCLAIMER OF THE IMPLIED WARRANTY OF HABITABILITY. 12

A. The Proposed Jury Instruction Is a Correct Statement of the Law. 14

1. The Rise of the Implied Warranty of Habitability. 14

2. The Boiler Plate Terms of the Purchase and Sale Agreement are Insufficient to Waive the Implied Warranty of Habitability. 16

3. The Alleged Disclaimer Is Not Conspicuous And Is Therefore Ineffective. 19

i. The Disclaimer of the Implied Warranty of Habitability Is Not Conspicuous And Is Mere Boilerplate Language. 25

ii. The Disclaimer Provision Contained in the Boilerplate Agreement Was Not The Agreement Reached. 26

B. The Proposed Jury Instruction Was Not Covered by Other Jury Instructions. 33

C. The Proposed Jury Instruction Was Supported by the Facts of the Case. 34

D. Where the Proposed Jury Instruction Was Correct Statement of the Law, it Was Error to Exclude it and a New Trial is Appropriate. 36

III. THE DISTRICT COURT REACHED ITS DECISION BY AN EXERCISE OF REASON. 37

ATTORNEYS FEES ON APPEAL 38

I. APPELLANTS' REQUEST FOR FEES SHOULD BE DENIED. 38

A. The Request for Costs Attorneys Fees at the Trial Level Was Properly Denied. 38

B. Appellants' Request for Costs and Attorneys Fees on Appeal Should Also Be Denied. 39

II. RESPONDENTS SHOULD BE GRANTED THEIR FEES AND COSTS ON APPEAL 41

CONCLUSION 42

TABLE OF CASES AND AUTHORITIES

Cases

Bailey v. Sanford, 139 Idaho 744, 86 P.3d 458 (2004) 9, 10, 12, 36

Batchelor v. Payne, 2009 WL 2929264, (2009) 16

Beale v. Speck, 127 Idaho 521, 903 P.2d 110 (1995) 40

Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966) 14, 20

Blaser v. Cameron, 121 Idaho 1012, 829 P.2d 1361 (1991) 41

Chenery v. Agri-Lines Corp., 106 Idaho 687, 682 P.2d 640 (Ct. App. 1984) 38

Craig Johnson Const., L.L.C. v. Floyd Town Architects, P.A., 142 Idaho 797, 134 P.3d 648 (2006) 9, 10, 13, 33, 34

Crowder v. Vandendeale, 564 S.W. 2d 879 (Mo. 1978) 16, 22

Jacksa v. Gilbert, 4 Idaho 738, 44 P. 555 (1896) 12

Johnson v. McPhee, 147 Idaho 455, 210 P.3d 563 (Ct. App. 2009) 39

Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo.1979) 15

Myers v. A.O. Smith Harvestore Products, Inc,, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988) . . . . *passim*

Petersen v. Hubschman Const. Co., Inc., 76 Ill.2d 31, 27 Ill.Dec. 746, 389 N.E.2d 1154 (1979) 23

Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986) 10

Sammis v. MagneTek, Inc., 130 Idaho 342, 941 P.2d 314 (1997) 40

Schulze v. C &H Builders, 761 S.W.2d 219, 222 (Mo. Ct. App 1988) 22

Sheridan v. St. Luke's Regional Medical Center, 135 Idaho 775, 25 P.3d 88 (2001) 9, 11, 37

Snyder v. Miniver, 134 Idaho 585, 6 P.3d 835 (2000) 16

Standard Brand, Inc. v. Consolidated Badger Co-op, 89 F. Supp. 5 (E.D. Wis. 1950) 17, 26

State v. Elison, 135 Idaho 546, 21 P.3d 483 (2001) 10

Tucek v. Huff, 115 Idaho 905, 771 P.2d 923 (Ct. App. 1989) 17

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

Valley Refrigeration Co. v. Lange Co., 242 Wis. 466, 8 N.W.2d 294 (1943) *26*

Walton v. Portlatch Corp., 116 Idaho 892, 781 P.2d 229 (1985) 13, 36, 37

Statutes and Ordinances

Idaho Code Ann. § 12-120(3) (West) 39

Idaho Code Ann. § 12-121 (West) 40, 41

Idaho Code Ann. § 28-1-201(10) (West) 19, 20, 21

Idaho Code Ann. § 28-2-316 (West) 20

Idaho R. Civ. P. 51(a)(1) 12

Idaho R. Civ. P. 54(d)(1)(A) 38

Idaho R. Civ. P. 54(d)(1)(B) 38

Idaho R. Civ. R. 54(e) 41

Idaho R. Civ. P. 59(a) 9

I.A.R. 40 . . . . . 40, 41

I.A.R. 41 . . . . 40, 41

Other Sources

Black's Law Dictionary, 2nd Pocket Ed., Bryan A. Garner (2001) "Boilerplate" 2, 13, 16

Black's Law Dictionary, 2nd Pocket Ed., Bryan A. Garner (2001) "Conspicuous" 21

Merriam-Webster's Dictionary, "Conspicuous", www.merriam-webster.com/dictionary/conspicuous *(last updated 2012)* 21

Phillip L. Burner & Patrick J. O'Connell on Construction Law, §9:72 (2002) 15

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs, Shawn and Shellee Goodspeed ("the Goodspeeds"), seek damages and rescission of contract against Defendants, Robert and Jorja Shippen ("the Shippens"), relating to the purchase and sale of a newly constructed home in Rigby, Idaho. The Goodspeeds allege, among other things, that the recurring sub-water issues in the basement breached the implied warranty of habitability. The Shippens knew of the sub-water problem prior to selling the residence and did not disclaim the implied warranty of habitability.

B. Course of Proceedings

Upon learning of the intrusion of sub-water in their newly purchased home and of the sub-waters' recurring nature, the Goodspeeds sent notice to the Shippens under the Notice and Opportunity to Repair Act on September 26, 2008 and October 29, 2008 to allow the Shippens to remedy the sub-water issues. R. Exs. 7 and 8. The Shippens denied this request on November 18, 2008. R. Ex. 9. Accordingly, the Goodspeeds filed suit against the Shippens on January 6, 2009. R. Vol. I, pp. 2 - 9.

During the course of the proceedings, the trial court allowed three subsequent amendments to the Goodspeeds' complaint, with the Third Amended Complaint being the final complaint before the Court. R. Vol. III, p. 567a.

Plaintiffs filed a number of requested jury instructions with the trial court on December 28, 2010, among which was proposed Jury Instruction No. 34, which is the subject of this appeal:

> **INSTRUCTION NO. 34**
>
> Disclaiming a warranty requires a conspicuous provision (text in large, bold, or capital letters) which is clear and unambiguous, fully disclosing the consequences of its inclusion. This places a heavy burden on the builder to show the buyer has relinquished the protection afforded to the buyer by public policy and that the buyer has done so knowingly. By this approach, boilerplate clauses (ready made or form language), however worded, are rendered ineffective thereby affording the consumer the desired protection without denying enforcement of what is in fact the intention of both parties. A knowing waiver of this protection will not be readily implied and should be obtained with difficulty.
>
> *Tusch Enterprises v. Coffin*, 113 Idaho 37, 45 - 47 (1987); *Black's Law Dictionary*, 2nd Pocket Ed., Bryan A. Garner (2001) "Boilerplate", *Myers*, 114 Idaho 432, 437 (1988).

R. Vol. III, p. 721. As can be seen, the jury instruction was marked with a number of legal authorities on the topic of the proposed jury instruction. *Id.* A jury trial commenced on January 11, 2011 through January 14, 2011. After the evidence was presented, a jury instruction conference was held in chambers on January 14, 2011 to discuss the ramifications of this and other jury instructions. R. Vol. IV, p. 932. Thereafter, counsel was allowed time to preserve their proposed instruction for appeal, which Plaintiffs did as it relates to proposed instruction No. 34. The Court did not give Instruction No. 34 on the basis it had misunderstood from the evidence that the Goodspeeds had actual knowledge of this provision. R. Vol. IV, p. 931.

After the verdict was rendered, the Goodspeeds filed a Motion for Judgment Notwithstanding the Verdict and Motion for Reconsideration on February 9, 2011 alleging that it was error for the Court to exclude Jury Instruction No. 34 on the basis, as asserted in the instructions and legal authority submitted therewith, that the disclaimer must not only be understood by the buyer but also that it be clear and conspicuous and not just mere boilerplate language. R. Vol. IV, pp. 863 - 865. Upon review of the record, the District Court recognized that Defendants' counsel had erroneously represented that paragraph 32 of the Purchase and Sale Agreement was specifically explained to and understood by the Goodspeeds. *Id.* at pp. 932 - 934. As such, the district court acted within its discretion and granted a new trial based on this mistake of fact and law. *Id.* at pp. 932-935.

The Shippens subsequently filed this appeal with the Court.

C. Statement of Facts

Shawn and Shellee Goodspeed are from Tennessee. Tr. p.8:14-15. They requested a job transfer and came to Idaho to move closer to family and settle down. Tr. p. 15:11-8, 224:10-20. They liked the Rigby, Idaho area because it offered them a place close to work, family, and outdoor recreational activities. Tr. pp. 8:16 - 9:12, 224:10-20. They wanted a house with enough room for the kids and for Shellee's father to come and live with them. *Id.*

In searching for homes, the Goodspeeds learned of sub-water (water that rises from the ground up due to farmer flood irrigation) in the Rigby area and notified their Realtor, Randy Stoor,

that they had no interest in looking at homes with these issues. Tr. p. 11:20-24; 12:17-23; 116:23 - 117:8. In their home search, the Goodspeeds came upon the Shippen house (319 N. 3709 E, Rigby, Idaho) located in Woodhaven Creek Estates subdivision. Its MLS listing read as follows:

> PUBLIC INFO: [. . .] **THERE HAS BEEN CONCERN ABOUT SUB WATER IN JEFFERSON COUNTY, **HOWEVER THIS HOME HAS NOT HAD SUB ISSUES AND TO GIVE THE BUYER PIECE** [s.i.c] **OF MIND** BUILDER WILL INSTALL A LEACHING SYSTEM AROUND HOME AND PROVIDE 1 YEAR WARRANTY ON CONSTRUCTION**
>
> PRIVATE INFO: There has been some concern about sub water in Jefferson County. **This particular home has never had sub issues but to give the buyer peace of mind** the builder is going to install a leaching system with a drainage field from the east side to the west side of the home **to prevent the possibility of there every** [s.i.c.] **being any sub issues.**

(Emphasis added. Capitalization in original). R. Ex. 1. Both of these sections were made available to the Goodspeeds without any wrongdoing on the part of their realtor. Tr. pp. 115:7 - 117:16; R. Ex. 49, Tr. p. 9:6-25. After doing a walkthrough of the house, the Goodspeeds submitted an offer on the house on June 16, 2007. R. Ex. 3. The Shippens accepted the offer the next day. *Id.*

This offer was made on a standard real estate form commonly used by Idaho Realtors which is referred to as Form RE-21. *Id. See also* Tr. pp. 13:20 - 14:2; 99:21-25; 117:24 - 118:10; 125:18-25; R. Ex. 49 Tr. pp. 22:19 - 23:4 and 23:9-13. No evidence was presented that Section 32 of this

agreement stood out or was otherwise brought to the Goodspeed's attention.[1] In fact, the parties never discussed a disclaimer of warranties. Tr. P. 112:14-17; 119:3-9.

Instead, Mrs. Shippen testified she was not aware of anything in the contract that would notify the Goodspeeds the house would not be habitable. Tr. P. 262:8-14. The evidence showed the Goodspeeds intended the home as their primary residence and that it would be habitable. Tr. pp. 13:13-15; 14:15 - 15:6; 15:11-20; 21:12-20; 38:8-13; 41:18-23; 41:24 - 42:15; 104:5 - 105:6; 119:3-9; 225:22 - 226:17. The evidence also showed that the Shippens understood the Goodspeeds would inhabit the home and that the Shippens intended for the home to be habitable. R. Ex. 1, 138:16-23; 145:22 - 146:3; 191:22 - 192:10; 262:1-21.

The Goodspeeds, who are not attorneys and relying on the representations of the MLS listing, even sought to ensure the livability of the home by requesting a builder's warranty for a *minimum*

---

[1] During the trial, Defendants' counsel read Paragraph 32 to Mr. Goodspeed. Tr. 73:18 - 75:2. He also asked Mr. Goodspeed at trial what he thought some of the terms of that paragraph meant. Tr. 74:6-18. He also asked Mr. Goodspeed if he and his wife signed the agreement. Tr. 74:19-20, 75:21 - 76:11. Mr. Goodspeed was never asked whether he read this provision of the contract before signing it. Mr. Goodspeed was never asked whether his realtor drew his attention to this section or explained this section specifically to him. Instead, Mr. Goodspeed confirmed this was a form agreement and that he believed the home would still be habitable. Tr. p. 114:1-2; 99:21 - 100:4.

Without mentioning paragraph 32, Defendants' counsel did previously ask Mr. Goodspeed generally if his realtor explained the contract to him. Tr. 58: 8-10. However, no further testimony was presented regarding the scope of such explanation, so there can be no determination that paragraph 32 was actually called to the Goodspeeds's attention.

Additionally Defendants' counsel asked Mr. Stoor generally whether as part of his job as a realtor he "goes over" the purchase and sale agreement with his clients and whether he "tries" to explain all of the details. Tr. 126:4 - 10. But Defendants' counsel never asked Mr. Stoor whether he specifically reviewed paragraph 32 with the Goodspeeds in this case or explained it to them. Tr. 126:4 - 128:12. Instead, again, Defendants' counsel simply asked Mr. Stoor what he thought that provision meant and whether there were any particular addendums regarding the implied warranty of habitability. *Id.* Therefore, Defendants never established the Goodspeeds actually knew this provision existed or that this provision was anything more than a boilerplate contract.

of one year. R. Ex. 3, Section 4. They had no intention of disclaiming any warranty of habitability after a year of the purchase. Tr. p. 82:7-10.

Contrary to the Goodspeeds, Robert and Jorja Shippen are both from Jefferson County and have lived there almost their entire lives. Tr. pp. 136:18-24. Mr. Shippen has been in the home construction business for over forty (40) years. Tr. p. 137:20 - 138:5. They are very familiar with sub-water in the county and its causation. Tr. pp. 136:24 - 137:7; 179:23 - 180:1; 258:2-22. In fact, they were aware of sub-water problems in the Woodhaven Creek subdivision before they began to construct the residence. Tr. p. 180:2-5; 258:11-15.

Upon commencing construction in the spring of 2006, the Shippens had the home excavated. Mr. Shippen was involved with the inspections and progress of the home. Tr. p. 186:13-15; 259:22-24. He had a hole next to the foundation of the walkout basement dug even deeper so he could observe the subwater over the course of the construction. Tr. p. 187:14 - 188:14. As the construction continued, subwater began to rise. Tr. p. 188:15-19. He could see it. *Id.* The subwater flooded the basement during the final phases of construction in 2006. Tr. pp 188:20 - 190:1. When Mr. Shippen saw this, he told his wife and son. Tr. pp. 189:21-23; 260:5-8.

The Goodspeeds assert that the Shippens never told them of this flooding. Tr. pp. 20:11-19; 64:15-17; 65:23 - 66:4; 84:14-18; 87:8-21; 102:17-23; 112:5-8; 113: 16-20; 133:25 - 134:2; 226:18 - 227:3. Randy Stoor testified there were no discussions by the Shippens or their realtor about the house having subwater problems. Tr. pp. 117:17-20, 132:19-23. The Shippens never

amended the MLS listing to the house. R. Ex. 1, R. Ex. 49 Tr. pp. 10:1-17; 10:24-11:22; 117:17-20; 263:21-25. And so the Goodspeeds purchased the residence on or about July 3, 2007. R. Ex. 4.

After purchasing the house, the Goodspeeds immediately began improving the house, including the basement so the family could move in. Tr. p. 21:21-25. Within a few months of purchasing the home, they learned the house had previously flooded. Tr. pp. 22:16-21; 227:4-9. They were shocked and immediately confirmed their understanding of the MLS representations that the home had not had subwater and would not ever have subwater problems. Tr. pp. 22:23 - 23-3; 227:10-16. They contacted Mr. Shippen who told them not to worry about the 2006 flood because it was due to canal rupture. Tr. p. 23:4-24; 227:14-16.

Despite Mr. Shippen's verbal assurance, the home continued to have subwater problems. In September, 2007, the subwater flooded the grass and landscaping near the walkout basement and came within inches of intruding into the house. Tr. p. 23:25-25:10; 83:1-6; 227:25-228:16. The Goodspeeds added a second sub-pump/leaching system to keep the water away. Tr. p. 26:15 - 27:9. Mr. Goodspeed testified he was sure the problem was not from a broken sprinkler pipe because the well pump would be running all the time. Tr. 24:23 - 25:3. No evidence was presented that Mr. Goodspeed had clipped any pipes working on his property. Tr. pp. 1 - 293. Mr. Shippen assured the Goodspeeds subwater would not come into the house. Tr. p. 24:15-17.

In 2008, the Goodspeeds had the same problems occur, with subwater this time intruding through the cracks in the foundation and causing the basement water's lift station to turn on and run

continually. Tr. pp. 25:11 - 27:15; 83:7-9; 2293 - 230:6; 272:12 - 273:13. The subwater also soaked the carpet and floorboards. Tr. p. 26:4-8. Both sub-pumps/leaching systems were running in 2007 and 2008. Tr. p. 27:10-12. Mr. Goodspeed asked Mr. Shippen what could be done about this now obviously recurring problem, to which Mr. Shippen admitted nothing could be done to stop it. Tr. p. 27:13 - 28:10. The Goodspeeds were met with the same response in their attempts to comply with the Notice and Opportunity to Repair Act, and subsequently filed suit on January 6, 2009. R. Ex. 7, 8, and 9.

Since suit was filed, the subwater problems have continued. In 2009, as is evidenced by the DVD and pictures introduced into evidence (R. Exs. 5a-f and 6), the subwater again sprung up in the yard and through the cracks in the foundation. *See also* Tr. pp. 33:19 - 24:14; 36:3 -38:7; 83:13-15: 231:6 - 242:13. The subwater flooded the entire basement to the depth of a couple of inches and was seeped up by the sheetrock walls six inches high. *Id.* While not in evidence, the house again suffered sub-water problems in the summer of 2011, after the trial.

This recurring problem caused the Goodspeeds to stop finishing the basement in 2008, after the problem was revealed and a pattern of subwater flooding became apparent. Tr. p. 28:11-19. By that time, Shawn had already completed approximately eighty percent (80%) of the basement for his family. Tr. pp. 41:24 - 42:15 The basement covers one half (½) of the square footage of the house. *Id.* The basement contains virtually all of the mechanical devices that make the home habitable (such as the furnace, water heater, water pump, and water softener). Tr. at p. 38:8-13.

As a result, the habitability of the home has been impeded on numerous occasions and the jury should have been instructed on the law as it relates to an adequate disclaimer of the implied warranty of habitability.

ISSUE ON APPEAL

Whether the trial court abused its broad discretion by granting a new trial for not instructing the jury on the law regarding a disclaimer of the implied warranty of habitability.

STANDARD OF REVIEW

Whether the trial court erred in granting a new trial is examined for a manifest abuse of discretion. *Sheridan v. St. Luke's Regional Medical Center*, 135 Idaho 775, 780, 25 P.3d 88, 93 (2001).

"A district court may grant a new trial for an error in law, occurring at the trial." Idaho R. Civ. P. 59(a)(7). The appellate court exercises free review over the correctness of jury instructions because it is a question of law. *Bailey v. Sanford*, 139 Idaho 744, 750, 86 P.3d 458, 464 (2004). If such an error in law occurs, "the district court has a duty to grant a new trial under Rule 59(a)(7), ***even though*** the verdict is supported by substantial and competent evidence." *Craig Johnson Const., L.L.C. v. Floyd Town Architects, P.A.*, 142 Idaho 797, 800 - 801, 134 P.3d 648, 651 - 652

(2006) (emphasis added). A trial court has broad discretion in this ruling. *Sheridan*, 135 Idaho at 780, 25 P.3d at 93.

> Thus, the sequence of [the appellate court's] inquiry is: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the district court reached its decision by an exercise of reason.

Id. The trial court has this broad discretion because it "is in a far better position to weigh the demeanor, credibility and testimony of witnesses, and the persuasiveness of all the evidence." *Id. quoting Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

So long as there is evidence presented at trial to support the instruction, the instruction should be given. *Id.* "A requested jury instruction must be given if it is supported by any reasonable view of the evidence, *Bailey*, 139 Idaho at 750, 86 P.3d at 464, but the determination of whether the instruction is so supported is committed to the discretion of the district court.*State v. Elison*, 135 Idaho 546, 552, 21 P.3d 483, 489 (2001)." *Craig Johnson Const.*, 142 Idaho at 800 - 801, 134 P.3d at 651 - 652 (2006).

All of these elements have been met and the decision of the trial court should be affirmed.

ARGUMENT

I. THE DISTRICT JUDGE RECOGNIZED THE ISSUE OF A NEW TRIAL WAS ONE OF DISCRETION.

This Court is charged with primarily determining whether the District Judge recognized his role as being one of discretion. *Sheridan,* 135 Idaho at 780, 25 P.3d at 93.

The Honorable Gregory S. Anderson, the District Judge in this case, recognized his role in granting a new trial as one of discretion: "The decision or grant to deny relief pursuant to a motion to reconsider is within the sound discretion of the trial court and, absent a manifest abuse of discretion, will not ordinarily be disturbed on appeal." (Citations omitted). R. Vol. IV, pp. 924 - 925. Further the Court recognized:

> On a motion for new trial, a trial court has broad discretion and may weigh the evidence and credibility of the witnesses. [. . .]. Unlike the rule which applies to motions for directed verdict or j.n.o.v., a trial court may set aside the jury's verdict and grant a new trial pursuant to I.R.C.P. 59(a) even though there is substantial evidence to support the verdict. [. . .]A trial court is not required to view the evidence in a light most favorable to the non-moving party.

Id. (Citations omitted). Where the District Judge recognized and perceived his role as one of discretion, this Court must next determine whether the District Judge acted within the outer boundaries of his discretion within the legal standards, and whether he reached his decision by an exercise of reason.

II. THE DISTRICT JUDGE ACTED WITHIN THE BOUNDS OF HIS DISCRETION AND CONSISTENTLY WITH THE LAWS REGARDING THE DISCLAIMER OF THE IMPLIED WARRANTY OF HABITABILITY.

For more than one hundred (100) years, the Supreme Court of Idaho has stated that the decision to grant a new trial is solely within the discretion of the trial judge and will not overturn that decision in the absence of an abuse of discretion. *Jacksa v. Gilbert*, 4 Idaho 738, 44 P. 555, 555 (1896) ("the action of the lower court will not be interfered with unless the record shows an abuse of discretion on the part of the lower court"). In *Jacksa*, while the Court states the jury obviously ignored the jury instructions, it also recognized that the trial court is charged with "correctly stat[ing] the law applicable to the case." *Id.*

Further, the trial court has the discretion to instruct the jury on "any matter it believes necessary and appropriate to aid in resolution of the issues at hand." Idaho R. Civ. P. 51(a)(1).

The trial court in this case further correctly recognized:

> A requested jury instruction must be given if it is supported by any reasonable view of the evidence, *Bailey*, 139 Idaho at 750, 86 P.3d at 464, but the determination of whether the instruction is so supported is committed to the discretion of the district court. *State v. Elison*, 135 Idaho 546, 552, 21 P.3d 483, 489 (2001). Clearly, a requested jury instruction need not be given if it is either [**(1)**] an erroneous statement of the law, [**(2)**] adequately covered by other instructions, or [**(3)**] not supported by the facts of the case. *State v. Eastman*, 122 Idaho 87, 89 831 P.2d 555, 557 (1992). Even so, when the instructions taken as a whole do not mislead or prejudice a party, an erroneous instruction does not constitute reversible error. *Bailey*, 139 Idaho at 750, 86 P.3d at 464.

(R. Vol. IV, pp. 934 - 935) *citing Craig Johnson Const.*, 142 Idaho at 800, 134 P.3d at 651. (Enumeration added). The trial court also recognized **(4)** "[w]hen a jury verdict is rendered on the basis of incorrect instructions, the appropriate remedy is the granting of a new trial." *Walton v. Portlatch Corp.*, 116 Idaho 892, 897, 781 P.2d 229, 234 (1985). Respondents will address each of these four issues below.

In this case, Judge Anderson recognized that in instructing the jury on the law, there was a critical deficiency that may substantially affect the outcome of the underlying case, namely the failure to instruct on the disclaimer of the implied warranty of habitability. Such a determination is within the discretion of the trial court. In an effort to educate the jury on the matter, Goodspeeds filed the following proposed jury instruction:

> **INSTRUCTION NO. 34**
>
> Disclaiming a warranty requires a conspicuous provision (text in large, bold, or capital letters) which is clear and unambiguous, fully disclosing the consequences of its inclusion. This places a heavy burden on the builder to show the buyer has relinquished the protection afforded to the buyer by public policy and that the buyer has done so knowingly. By this approach, boilerplate clauses (ready made or form language), however worded, are rendered ineffective thereby affording the consumer the desired protection without denying enforcement of what is in fact the intention of both parties. A knowing waiver of this protection will not be readily implied and should be obtained with difficulty.
>
> *Tusch Enterprises v. Coffin*, 113 Idaho 37, 45 - 47 (1987); *Black's Law Dictionary*, 2nd Pocket Ed., Bryan A. Garner (2001) "Boilerplate", *Myers*, 114 Idaho 432, 437 (1988).

R. Vol. III, p. 721.

A. The Proposed Jury Instruction Is a Correct Statement of the Law.

As will be discussed, the implied warranty of habitability rises as a matter of public policy and is only disclaimed with difficulty. An effective disclaimer must fully disclose the consequences of its inclusion, be conspicuous, and actually be the agreement of the parties.

1. The Rise of the Implied Warranty of Habitability.

The Idaho Supreme Court has specifically declared that public policy demands that the rules of *caveat emptor* do not apply to the purchase and sale of a new residence. *Bethlahmy v. Bechtel*, 91 Idaho 55, 67 – 68, 415 P.2d 698, 710 – 711 (1966). Instead, an implied warranty of habitability will be imputed against the builder-vendor[2] to protect the consumer. *Id.* This is an implied warranty of fitness that the house will be habitable. *Id.* To hold otherwise would be a "manifest denial of justice" where a buyer does not stand on equal ground to inspect the house as a builder who is daily engaged in the building and sale of houses. *Id.* Instead, public policy demands an implied warranty extend from the builder-vendor of the home:

[2] This warranty extends not only from the builder, but also from the seller/vendor, provided the seller/vendor of the new construction has "expertise in the construction business and exercised control over the construction of [the home], as would a builder developer, then the implied warranty would extend from [the Seller]." *Tusch*, 113 Idaho at 48, 740 P.2d at 1033. In *Tusch*, the Court held that because the seller had extensive experience in the road construction industry and periodically stopped by the job site during construction the implied warranty would extend from the seller as well. *Id.* at 48 - 49. *See also Bethlahmy*, 91 Idaho at 67, 415 P.2d at 710 (holding a builder-vendor, bears liability for the warranty of habitability). In this case, Robert Shippen, the principle behind Marriott homes has been in the home construction business for more than 40 years. Tr. pp. 137:17 - 138:5. He was the individual on site inspecting the progress of the home. Tr. pp. 136:13 - 138:15; 147:6 - 9. When he learned of the sub-water, he notified his wife who was also very familiar with sub-water. Tr. pp. 258:15-22; 260:5-8.

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

Tusch Enterprises v. Coffin, 113 Idaho 37, 47, 740 P.2d 1022, 1032 (1987) *citing Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo.1979).

The implied warranty of habitability extends to latent (concealed or dormant) defects which manifest themselves within a reasonable time. *Tusch*, 113 Idaho at 50. It extends to latent defects because "it is unrealistic to expect buyers to consult geotechnical and other experts about defects that are not even apparent."[3] *Id.* at 47. The builder is the one who created the latent defect and the builder is in the better position to remedy and guard against such defects. *Id.*

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

Notably, the habitability of the home need only be impaired for a breach of the implied warranty to arise. *Id.*

---

[3] In this case, where the MLS mentioned sub-water issues were in the county, it specifically stated this house did not have sub-water issues and the Goodspeeds relied on that representation. The MLS listing was never altered.

2. The Boiler Plate Terms of the Purchase and Sale Agreement Are Insufficient to Waive the Implied Warranty of Habitability

A disclaimer is strictly construed against the builder-vendor. *Tusch,* 113 Idaho at 45 - 46. This places a heavy burden on the builder-vendor to show the buyer has relinquished the protection afforded to the buyer by public policy and that the buyer has done so knowingly. *Id.* "'By this approach, ***boilerplate causes, however worded, are rendered ineffective*** thereby affording the consumer the desired protection without denying enforcement of what is in fact the intention of both parties.'" *Id. citing Crowder v. Vandendeale*, 564 S.W. 2d 879 (Mo. 1978) (Emphasis added). A knowing waiver of a warranty will not be readily implied and should be obtained with difficulty. *Tusch*, 113 Idaho at 46; *Myers v. A.O. Smith Harvestore Products, Inc,*, 114 Idaho 432, 437, 757 P.2d 695, 700 (Ct. App. 1988).

"Boiler plate" language is defined as "ready made" or "fixed or standardized contractual language" (i.e. form language). *Black's Law Dictionary*, 2nd Pocket Ed., Bryan A. Garner (2001) "Boilerplate". On the contrary, a term that is individually fashioned in an agreement is not boilerplate language. *Snyder v. Miniver*, 134 Idaho 585, 588, 6 P.3d 835, 838 (2000). In that case, the Court affirmed that a standard earnest money agreement sent through the purchasing agent's real estate agent was a "boilerplate" agreement where it was a pre-printed, generic form. *Id.* at 586 - 588. Even the Idaho District Court has recognized that clauses generally found in most real estate agreements are boilerplate clauses. *See Batchelor v. Payne*, 2009 WL 2929264, 2 - 3 (2009) (Holding a merger clause contained in a purchase and sale agreement was boilerplate language where

the same or similar language can be found in most all real estate purchase agreements). A boilerplate agreement can also be identified as a form contract that has spaces to insert various contract terms. *Tucek v. Huff*, 115 Idaho 905, 905, 771 P.2d 923, 923 (Ct. App. 1989).

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

In this case, the evidence was clear the alleged disclaimer was boilerplate language. Shawn Goodspeed, Randy Stoor (the Goodspeed's realtor), and even Dave Chappel (the Shippen's realtor) testified this was a form or boilerplate contract commonly used throughout Idaho. Shawn Goodspeed testified:

> 20 Q Would you please turn to Exhibit Number 3? Do
> 21 you recognize this document?
> 22 A Yes. It's the sales – purchase and sales
> 23 agreement from the transaction.
> 24 Q Okay. Did you write every word in that
> 25 purchase and sale agreement?
> 1 A No. **This is, as I understand, kind of a**
> 2 **cookie cutter form used for these types of documents**.
>
> [. . .]
>
> 21 Q Was it your intent that the – let me ask
> 22 this: Was this – other than what we just talked about
> 23 in Section 4, is this a pretty standard form contract?
> 24 A Yeah. I think **it's just a form** that's used
> 25 by, you know, realtors every day.

Tr. pp. 13:20 - 14:2; 99:21-25 (Emphasis added). Randy Stoor confirmed this was a boilerplate

agreement:

24 Q Now if you would turn to Exhibit 3,
25 Plaintiffs' Exhibit 3. Do you recognize this document?
1 A Yeah, that's a **standard purchase and sale**
2 **agreement we use**. This is the offer that we made on
3 the property.
4 Q I'm sorry. You said that was a standard. Is
5 this a form that's filled out?
6 A **It's a form that's printed by the state**
7 **association or provided, and we fill in the blanks.**
8 Q Okay. **So kind of a boilerplate type of**
9 **agreement?**
10 A **Right**.

Tr. pp. 117:24 - 118:10. (Emphasis added). Even Shippens' counsel recognized the Purchase and Sale Agreement was a form when inquiring of Randy Stoor:

18 Q And now this **form** that you used, it was
19 prepared by somebody from the realtors association, I
20 take it?
21 A Attorneys hired by the realtor association in
22 Boise.
23 Q And you're probably **after** this, what, **30 years**
24 **you are pretty much familiar** with this **form**.
25 A Yes.

Tr. pp. 125:18 - 25. In fact, the Shippens' own realtor recognized this was a form or boilerplate agreement:

19 Q. (BY MR. DUNN:) **Is that a standard real**
20 **estate document?**
21 A. **Yes.**
22 Q. **I believe it's got a number on it that's**
23 **fairly common in southeast Idaho.**
24 What is that number?

25 A. **RE-21.**
1 Q. And so in your experience, could you
2 tell the jury what's the purpose of Plaintiff's
3 Exhibit 3, which is the RE-21?
[. . .]
9 A. The purpose of the document is to
10 present an offer from a prospective buyer through a
11 Realtor to another Realtor who represents a
12 prospective seller in order to eventually consummate
13 a sale.

R. Ex. 49 Tr. pp. 22:19 - 23:4 and 23:9-13. (Emphasis added). Because the Purchase and Sale Agreement is a boilerplate, cookie cutter, standard form and for the reasons mentioned below, it should be rendered ineffective as a disclaimer of the implied warranty of habitability.

3. The Alleged Disclaimer Is Not Conspicuous And Is Therefore Ineffective.

Disclaiming a warranty also requires a (1) conspicuous provision (text in large, bold, or capital letters) which is (2) clear and unambiguous, fully disclosing the consequences of its inclusion. *Tusch*, 113 Idaho at 45 - 46, 740 P.2d at 1030-1031; *Myers*, 114 Idaho at 437, 757 P.2d at 700. Thus, to disclaim the implied warranty of habitability, not only must the provision meet the clear language requirement, but it must also be conspicuous. Appellants only argue the language was clear, not that it was conspicuous.

The District Judge recognized a definition of "conspicuous" as it relates to commercial transactions under I.C. § 28-1-201:

> (10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or

> not is a decision for the court. Conspicuous terms include the following:
> (A) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; an
> (B) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

Idaho Code Ann. § 28-1-201(10) (West). This definition has been accepted in the case of *Myers*, 114 Idaho at 438, 757 P.2d at 701. In that case, the Court of Appeals held that because the language in the disclaimer contained large, bold, capital letters it was conspicuous. *Id.* While that case dealt with the sale of goods, interestingly it discussed the issue of conspicuous language in the context of disclaiming implied warranties such as the warranty of merchantability and of fitness for a particular purpose–two theories which in essence are the heart of the implied warranty of habitability and are the product of public policy just like the implied warranty of habitability.[4] Further, that case acknowledges that "[t]he breadth of implied warranties is governed by the Uniform Commercial Code."[5] *Id.* at 437. Not insignificantly, even though the buyer had a chance to read the agreement

---

[4] *See Bethlahmy v. Bechtel*, 91 Idaho at 67 – 68, 415 P.2d at 710 – 711.

[5] That case references Idaho Code § 28-2-316 Exclusion or Modification of Warranties. In that statute, subsection 2 references language that would satisfy the language requirement of a disclaimer, but recognizes that language must still be conspicuous. Understandably then, there are two parts to a disclaimer of an implied warranty: (1) that the language to disclaim is sufficient, and (2) that it is conspicuous. Subsection 3 of this statute mentions that warranties may be excluded where the purchaser has an opportunity to inspect the goods. However, this Court has stated that buyers of real property are in no position to discover latent defects that may arise as it relates to the habitability of the property. *Tusch*, 113 Idaho at 47, 740 P.2d at 1032. Therefore, subsection 3 would not apply and the disclaimer must contain not only the right language, but also be conspicuous in nature.

in *Myers*, the Court emphasized that this disclaimer was "*not*" like the other print found in other parts of the document. *Id.* at 438 (emphasis in original). Thus, the language element alone is not enough–the way it is displayed also matters.[6]

While Defendants disavow the authority of the Idaho Uniform Commercial Code to define the term "conspicuous", they are firm in their assertion that they are entitled to attorneys fees because the purchase and sale of a home is a commercial transaction. *See Appellant's Brief* at p. 36. That is, Defendants seek relief for attorneys fees under the allegation that a sale of a house is a commercial transaction, but will not defer to the Idaho Code regarding commercial transactions for a definition of conspicuous. Defendants justify this argument with the argument that a home is not a "good". *See Appellant's Brief* at pp. 28 - 29. However, Defendants fail to recognize that the term "conspicuous" is defined under the "General Provisions" of Chapter 1 of that title, not under Chapter 2, dealing with the sale of goods.

Regardless of whether the commercial code applies, while I.C. § 28-1-201(10) contains a very good definition of the term "conspicuous", it is not the only source of understanding for the term "conspicuous." For example, Merriam-Webster Dictionary defines the term "conspicuous" as "obvious to the eye or mind", or "attracting attention". *Merriam-Webster's Dictionary*, "Conspicuous", www.merriam-webster.com/dictionary/conspicuous (last updated 2012). *Black's Law Dictionary* defines the term as "clearly visible or obvious". *Black's Law Dictionary*, 2nd Pocket

[6] *See* prior footnote.

Ed., Bryan A. Garner (2001) "Conspicuous". Both of these common definitions are in line with the commercial transaction definition of "conspicuous." Text that mirrors the text around it is not obvious to the eye, nor does it attract attention. It is not clearly visible or obvious. Instead, it blends in and is inconspicuous. The typed language is made conspicuous by making it appear in **bold**, *italicized*, underlined, CAPITAL LETTERS, or ***ALL OF THE ABOVE***. Effort must be made to have it stand out or it is not conspicuous.

Other states have recognized that there is more than just a language requirement for a provision to be conspicuous. For example, in *Schulze v. C &H Builders*, the Missouri Court of Appeals again recognized the holding in *Crowder v. Vandendeale*, *supra*, that "to prove a waiver [of the implied warranty of habitability], the seller must 'show [(1)] a conspicuous provision which [(2)] fully discloses the consequences of its inclusion' and [(3)] demonstrate that this agreement was 'in fact" reached; however "[a] knowing waiver of this protection will not be readily implied." 761 S.W.2d 219, 222 (Mo. Ct. App 1988), *citing Crowder* 564 S.W. 2d at 881, n. 4. Even though the court in that case did not rule on whether the language was conspicuous or not, focusing instead on whether the agreement fully disclosed the consequences of its inclusion in light of conflicting provisions, it is clear that being conspicuous is more than a "full disclos[ure of] the consequences of its inclusion" as Appellants argue in their brief here. It must be a ***conspicuous*** provision that makes the disclosure. *Id.* It has to visibly set itself apart from the other language.

While the Court may expect such an interpretation from the "Show Me State" of Missouri,

this Court has already recognized the Missouri precedent in *Tusch*. Notably, this Court addressed the issue of a boilerplate agreement and being conspicuous in tandem:

> The majority of states permit a disclaimer of an implied warranty of habitability, but the disclaimer must be clear and unambiguous and such disclaimers are strictly construed against the builder-vendor. *Belt v. Spencer*, 41 Colo.App. 227, 585 P.2d 922, 925 (1978); *Bridges v. Ferrell*, 685 P.2d 409, 411 (Okla.Ct.App.1984); *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo.1978) (en banc). ***We agree with these courts and particularly with the Missouri Supreme Court:***
>
> > [O]ne seeking the benefit of such a disclaimer must not only show a [1] ***conspicuous*** provision which [2] fully discloses the consequences of its inclusion but also that [3] such was *in fact* the agreement reached. The heavy burden thus placed upon the builder is completely justified, for by his assertion of the disclaimer he is seeking to show that the buyer has relinquished protection afforded him by public policy. A knowing waiver of this protection will not be readily implied. *Crowder, supra*, at 881 n. 4 (emphasis in original).
>
> The Court explains its approach: "By this approach, boilerplate clauses, ***however worded***, are rendered ineffective, thereby affording the consumer the desired protection without denying enforcement of what is in fact the intention of both parties." *Id.*, at 881. *Accord Petersen v. Hubschman Construction Co., Inc.*, 76 Ill.2d 31, 27 Ill.Dec. 746, 751, 389 N.E.2d 1154, 1159 (1979).

Tusch, 113 Idaho at 45-46, 740 P.2d at 1030 - 1031 (Emphasis and enumeration added). While the case in *Tusch* did not have a clause regarding a disclaimer of the implied warranty of habitability, the Court immediately continues its analysis after adopting the Missouri standard:

> ***The disclaimers in the instant case fall woefully short of fulfilling these requirements. Because the implied warranty of habitability is***

> ***a creature of public policy, public policy dictates that it be waived only with difficulty***. The party asserting that it has been waived bears the burden of proving that it has been knowingly waived. *Clearly, when* ***no mention*** is made of the implied warranty of habitability in a contract, and the contract contains only general language stating there are no warranties other than those contained within its four corners, any purported waiver of the implied warranty of habitability is ineffective.
>
> Because we find that the implied warranty of habitability has not been disclaimed, we proceed to the next topic.

Id. (Emphasis added). The Court therefore did not analyze whether the language in the *Tusch* agreement was "conspicuous" because quite simply, the language in that agreement did not exist. However, that does not change this Court's adoption of the standard analyzing whether the implied warranty of habitability has been disclaimed. In doing so, the Court sought to ensure as a matter of public policy the implied warranty of habitability is obtained with difficulty. In essence, this adopted standard contains an ever beloved three part test:

1. **The disclaimer provision must fully disclose the consequences of its inclusion;**

2. **The disclaimer provision must be conspicuous; AND**

3. **The disclaimer provision must in fact be the agreement reached.**

In analyzing these three prongs, it is noteworthy that *Tusch* has recognized as a matter of public policy that such a disclaimer will be construed against the vendor, not against the drafter. *Id.* at 45. In this case, the alleged disclaimer fails at least two of the three prongs. It must only fail one to be rendered ineffective.

i. **The Disclaimer of the Implied Warranty of Habitability Is Not Conspicuous And Is Mere Boilerplate Language.**

The alleged disclaimer in this case states:

> 32. ENTIRE AGREEMENT. This agreement contains the entire Agreement of the parties respecting the matters herein set forth and supercedes 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 on either party.

R. Ex. 3. Notably, Section 32 does not expressly mention "the implied warranty of habitability". It does not even mention the work "implied". But even if the language contained in this provision is deemed sufficient, it is still not conspicuous. No evidence refuted the boilerplate nature of this agreement. There are no blanks filled in relating to a disclaimer of the implied warranty of habitability.[7] *See* R. Ex. 3. As is readily observed, there are no large letters disclaiming the warranty. Further, upon examination of Exhibit 3, this Court will also note that provision 32 is ***identical*** in format to all thirty-six (36) sections of this agreement. It blends in. It does not stand out. It is not obvious. It does not attract attention. It is not in **bold**, *italic*, or CAPITAL letters to set it apart from the rest of the agreement. It is not in any way ***CONSPICUOUS***. Not only must the language exist, however worded, it must also be conspicuous. Therefore, the implied warranty of habitability was not effectively disclaimed.

---

[7] While there was some discussion regarding the scope of the "standard Builder's Warranty" the testimony bifurcates the two warranties such that they should not be construed together. Tr. p. 82:1-14.

ii. <u>The Disclaimer Provision Contained in the Boilerplate Agreement Was Not The Agreement Reached.</u>

It is clear from the record all parties intended the residence to be habitable. Because the warranty is implied, the Court may look beyond the four corners of the document to make this determination. "An implied warranty arises as a matter of law so it is not barred by the parole evidence rule." *Standard Brand, Inc. v. Consolidated Badger Co-op*, 89 F. Supp. 5, 9 (E.D. Wis. 1950). *See also Valley Refrigeration Co. v. Lange Co.*, 242 Wis. 466, 471, 8 N.W.2d 294, 297 (1943) (The parole evidence rule does not apply to implied warranties "because the warranty is created by law and not by the parties' agreement."). Further, this Court recognized in *Tusch* that one of the issues as to whether a warranty was disclaimed was whether the disclaimer was in fact the agreement reached. *Tusch*, 113 Idaho at 46. If the Court is to determine whether the parties actually intended to reach the terms of the written agreement, it must necessarily analyze parole evidence.

Here, it is clear everyone expected the residence to be habitable. Mr. Shippen made a representation that the house would be habitable that was never retracted.

1 Q. Okay. If you look at Plaintiff's
2 Exhibit Number 3 – Number 1, excuse me, in the
3 public information section, if you look about
4 two-thirds of the way through that section, there's
5 some asterisk language there where it says: there
6 has been.
7 A. Uh-huh
8 Q. Coud you read into the record what that
9 says?
10 A. There has been concern about subwater in
11 Jefferson County; however, this home has not had sub

12 issues, and to give buyer peace of mind - excuse
13 me - builder will install leaching system around
14 the home and provide a one-year warranty on
15 construction.
16 Q. Okay. And then would you also read that
17 private info section.

[. . .]

24 A. There has been some concern about
25 subwater in Jefferson County. This particular home
1 has never had sub issues, but to give the buyer
2 peace of mind, the builder is going to install a
3 leaching system with a drainage field from the east
4 side to the west side of the home to prevent the
5 possibility of there ever being any sub issues.
6 Q. Okay. Now, would you classify yourself
7 as a specialist or a home inspector?
8 A. No.
9 Q. Okay. So the only information that you
10 use is information given to you; is that correct?
11 A. Yup. That's my assessment and
12 information given me.
13 Q. Okay. And you obtained that information
14 in the MLS listings from conversations that you had
15 with Robert Shippen, correct?
16 A. Correct.
17 Q. Okay. Was that language that you just
18 read in the MLS listing, was that ever removed from
19 the MLS listing?
20 A. Was it removed?
21 Q. Yes.
22 A. I don't believe so, no.

Testimony of Dave Chappel, R. Ex. 49 Tr. pp. 10:1-17; 10:24 - 11:22. Randy Stoor also confirmed the no sub-water language was never removed from the MLS listing. Tr. p. 117:21 - 23. The

Goodspeeds relied on the MLS representation, understanding the home had not and would never have sub issues, thus rendering the entire house habitable:

5 Q Were there other things that gave you peace of
6 mind about purchasing this property -- in addition to
7 this language here was there other information in the
8 MLS listing that gave you peace of mind?
9 A **Yeah, the installation of the pump was, to me**
10 **just that. Wasn't needed but to ensure peace of mind.**
11 **That's the way it was conveyed to me by Mr. Shippen.**
12 **It was just going above and beyond to add additional**
13 **security so there wouldn't be something to worry**
14 **about.**
15 Q He had mentioned – Mr. Dunn had mentioned
16 that there were – he had mentioned that information
17 about public information. Was there anything in the
18 private information that gave you peace of mind?
19 A Is it okay if I look at it again?
20 Q I'm sorry. You can't – I think you have it
21 there.
22 THE COURT: Exhibit Number 1.
23 THE WITNESS: Yeah, where it says this
24 particular home has never had subissues, but to give
25 the buyer peace of mind, the builder is going to
1 install a leaching system with a drainage field from
2 the east side to the west side to prevent the
3 possibility of there ever being any subwater issues.
4 Q So is it your testimony that you had
5 peace of mind from that statement?
6 A Yes.

Testimony of Shawn Goodspeed, Tr. pp. 104:5 - 105:6. (Emphasis added). It was the Goodspeed's intent to reside in the house as their primary residence. Mr. Goodspeed testified:

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

15 A. Yes.

[. . .]

11 Q. When you purchased the property,
12 did you expect the home to be habitable?
13 A. Of course, it's a brand new home.
14 Q. So did you expect it to continue to be
15 habitable?
16 A. Yeah. I expected to have my family live in
17 this home for years, if not generations.
18 Q. Did you epect the workmanship of the home to
19 be covered as well?
20 A. Yes.

Tr. pp. 13:13 - 15; 15:11 - 20. Randy Stoor also confirmed that he understood the Goodspeeds intended to inhabit the house. Tr. p. 119:3 - 9. If anything, the Goodspeeds were looking to protect themselves to have the house be habitable any way they knew how:

15 Q. You mentioned that you tried to take steps to
16 protect yourself, as well?
17 A. Yeah, this is where we requested a one year
18 ***minimum*** warranty.
19 Q. Okay. So you understood then, Mr. Goodspeed,
20 that there had been a representation that the home had
21 not had subissues and this was installed to just add
22 another layer of protection?
23 A. Yeah, the MLS listing tells us there's never
24 been any flood subwater issues and that it also insures
25 us peace of mind that there won't be any. And then in
1 addition, in Section 4 of this agreement, is where we
2 mentioned builder provides a standard builder warranty
3 for a minimum of one year.
4 Q. Okay. Did you expect the MLS representations
5 to be included in that warranty?
6 A. Of course.

Testimony of Shawn Goodspeed, Tr. pp. 14:15 - 15:6. (Emphasis added). Shellee Goodspeed also testified of her intent to inhabit the home.

22 Q Okay, and did this MLS listing give you peace
23 of mind about purchasing this property?
24 A Yes, it did.
25 Q Okay, why was that?
1 A Well, it stated in there that were no subwater
2 issues and that there wouldn't be any subwater issues.
3 Q Would you please read there in that exhibit
4 where that's found?
5 A It's under the private info and it's also
6 under the public info.
7 Q Okay, so it's found in two places.
8 A Yes.
9 Q Okay. And you relied on these
10 representations?
11 A Absolutely . Why would somebody put in an MLS
12 listing that the property had never flooded if, indeed
13 it hadn't been flooded? Why would they put that in
14 there.
15 Q You intended to inhabit this house as your
16 primary residence?
17 A Of course, I did.

Tr. pp. 225:22 - 226:17 (Emphasis added). Shellee Goodspeed also testified she was looking for a place to have her father live in the basement of the home and allow rooms in the basement for kids to live in while the kids attended college. Tr. p. 224:13-20.

The Goodspeeds were not reluctant about the habitability of the house. They immediately began landscaping the yard. *Tr.* pp. 21:12 - 20; 41:18 -23. They immediately finished the driveway. *Id.* And, perhaps most significantly, they immediately began finishing their basement. Tr. p. 41:18

-23. The basement constitutes half of the living space in the house, and the Goodspeeds finished eighty percent (80%) of the basement with the intent of inhabiting the basement before learning of the recurring subwater problem. Tr. pp. 41:24 - 42:15. The basement contains the furnace, the water heater, the pump and water softener. Tr. at p. 38:8-13. They only stopped improving the basement when they realized there was a sub-water problem and that it was recurring–both of which they learned after the purchase of the house. Tr. pp. 22:16 - 23:3; 41:24 - 42:15; 79:22 - 80:15.

Maybe even more revealing is the Shippen's testimony regarding their understanding of the purpose of the residence and the effect of subwater. Mr. Shippen testified:

> 16 Q Do you believe a general contractor should be
> 17 aware of subwater issues?
> 18 A Yes.
> 19 Q And is that because subwater impedes the
> 20 livability of a home?
> 21 A Well, yes. There's a lot of factors involved.
> 22 Q So, yes?
> 23 A Yes, uh-huh.
>
> [. . .]
>
> 22 Q Okay. You understood that the Goodspeeds would
> 23 be inhabiting the house as their primary residence?
> 24 A Yes.
> 25 Q Okay. Was there anything in the contract
> 1 you're aware of that should have notified the
> 2 Goodspeeds that the house was not of quality
> 3 construction?
> 4 A It was of quality construction.
> 5 Q Is your answer, no, then?
> 6 A Read the question once more.
> 7 Q Sure is there anything in the contract you're

8 aware of that should have notified the Goodspeeds that
9 the house was not of quality construction?
10 A No.

Tr. pp. 138:16 - 23; 191:22 - 192:10

Further evidence that the parties did not agree on the disclaimer is the fact the parties in communicating through their Realtors never discussed a disclaimer of warranties. Randy Stoor testified:

3 Q. Okay. And did you have any indication from
4 Shawn and Shellee Goodspeed that they did not intend to
5 inhabit this house?
6 A. No.
7 Q. Okay. Did you and Dave Chapple ever discuss a
8 disclaimer of warranties as it related to this house?
9 A. No.

Tr. p. 112:14-17; 119:3 - 9. Jorja Shippen testified there was nothing giving the Goodspeeds notice that the home would not be habitable:

1 sure you've seen that talks about the seller is going
2 to provide a standard builder's warranty. Is that
3 correct?
4 A. Yes.
5 Q. You understood that that warranty would likely
6 cover workmanship on the property.
7 A. Yes.
8 Q. Okay. And is there anything that you're aware
9 of in this contract that would notify the Goodspeeds
10 that this home would [not] be habitable?
11 A. No.
12 Q. And you understand that they intended to
13 inhabit this home as their primary residence.
14 A. Yes.

15 Q. You're familiar with what an MLS listing is;
16 correct?
17 A. Yes.
18 Q. And you understand that that is a listing that
19 is published to the public to showcase a property; is
20 this that correct?
21 A. Yes.

Tr. p. 262:1 - 21. Additionally, if the Shippens were not concerned with whether they would be liable for a breach of the implied warranty of habitability, they would not have installed the leaching system.

It is clear from the evidence that Section 32 was never bargained for–it was just sitting there inconspicuously in the form agreement commonly referred to by Realtors all over the State of Idaho as form RE-21. There was no evidence that it was specifically explained to or brought to the attention of the Goodspeeds.

Because the language was not bargained for and was instead inconspicuous, boilerplate language, Judge Anderson correctly recognized that the jury should be instructed on the standard for the disclaimer of an implied warranty and that the failure to do so was a failure to instruct the jury on the applicable law.

As a result, this Court should affirm the decision of the trial court.

B. <u>The Proposed Jury Instruction Was Not Covered by Other Jury Instructions.</u>

A jury instruction may be given if it is not addressed by other jury instructions. *Craig Johnson Const., L.L.C.*, 142 Idaho at 800, 134 P.3d at 651. However, it is apparent from the record

that the jury instructions actually given to the jury do nothing to instruct the jury regarding the disclaimer of a warranty. Jury Instructions 15 through 21 address the breach of an express warranty. Nothing in these instructions address the disclaimer of a warranty. Jury Instructions 22 and 23 are the only instructions regarding the implied warranty of habitability. These instructions only discuss the rise of the implied warranty and damages related thereto. They do not address the critical requirements for the disclaimer of this implied warranty. For this reason, Respondents submitted their Proposed Jury Instruction No. 34. *See* R. Vol. III, p. 721.

Even if this Court were to construe that some language in Jury Instructions 15 through 21 may somehow be instructive to the jury on the disclaimer of a warranty, as explained above, as a matter of public policy for consumer protection, the standard for disclaiming an implied warranty of habitability is different than other disclaimers and should be treated independently and fully explained to the jury.

Accordingly, this Court should affirm the decision of the trial court where the omitted jury instruction was not covered by other instructions.

C. The Proposed Jury Instruction Was Supported by the Facts of the Case.

A proposed jury instruction must be supported by the facts of the case. *Craig Johnson Const.*, 142 Idaho at 800, 134 P.3d at 651. In the interest of not repeating the arguments and evidence already presented at length, Respondents will briefly outline the facts that support the need for Proposed Jury Instruction No. 34:

- The Purchase and Sale Agreement was a boilerplate agreement. Tr. pp. 13:20 - 14:2; 99:21-25; 117:24 - 118:10; 125:18-25; R. Ex. 49 Tr. pp. 22:19 - 23:4 and 23:9-13; R. Vol. IV p. 933.

- Provision 32 did not expressly state that an "implied" warranty or the "implied warranty of habitability" is disclaimed. R. Ex. 3, p. 7.

- Provision 32 was not conspicuous, but instead is identical in format to all the prior and following provisions of the agreement. R. Ex. 3.

- While the Goodspeeds signed the agreement and reviewed it with their realtor, no evidence exists that provision 32 was specifically brought to the Goodspeeds' attention. Tr. pp. 73:18 - 76:11; 126:4 - 128:12.

- The parties never discussed a disclaimer in the contract. Tr. pp. 112:14-17; 119:3-9; 262:8-11.

- The Goodspeeds intended to inhabit the house. Tr. pp. 13:13-15; 14:15 - 15:6; 15:11-20; 21:12-20; 38:8-13; 41:18-23; 41:24 - 42:15; 104:5 - 105:6; 119:3-9; 225:22 - 226:17.

- The Shippens intended for the Goodspeeds to inhabit the house. R. Ex. 1, 138:16-23; 191:22 - 192:10; 262:1 - 21.

- The Shippens represented in the MLS the home would be protected against sub-water to giver the buyer peace of mind and the MLS was never amended to imply otherwise. R. Ex. 1, R. Ex. 49 Tr. pp. 10:1-17; 10:24-11:22; 117:17-20; 263:21-25.

- The Goodspeeds were not told of the flooding until after the fact of purchase. Tr. pp. 20:11-19; 64:15-17; 65:23 - 66:4; 84:14-18; 87:8-21; 102:17-23; 112:5-8; 113: 16-20; 133:25 - 134:2; 226:18 - 227:3. [8]

---

[8] Robert Shippen disputes this point, claiming he notified the Goodspeeds of the sub-water during one of the walkthroughs. Notably this standard does not require the facts to be undisputed, simply that there be facts to support the instruction. The jury is charged with weighing the evidence ultimately deciding the outcome. Regardless, this does not change the fact the jury should have been given the proper instruction on the law to analyze whether in light of the evidence the implied warranty of habitability was disclaimed. The trial judge has broad discretion in making this determination.

- The habitability of the house was impaired by the intrusion of water. R. Exs. 5a-f (Photographs), R. Ex. 6 (DVD), Tr. R. pp. 23:25 - 28:25; 33:19 - 35:14; 36:3 - 38:13; 83:1-15; 227:25 - 242:14;

- The Goodspeeds stopped improving the home because of the impediment to its habitability. Tr. p. 42:16-22.

- The implied warranty of habitability was not simply a one year warranty. Tr. p. 82:1-14.

As shown in summary here and above, where facts support the issues raised by the law contained in the jury instruction, it should have been presented for the jury to consider in deliberations. Failure to instruct the jury on the law regarding the disclaimer in this case was prejudicial to the Goodspeeds. Judge Anderson correctly recognized this and correctly granted a new trial. This Court should therefore affirm the action of the trial court.

D. <u>Where the Proposed Jury Instruction Was Correct Statement of the Law, it Was Error to Exclude it and a New Trial is Appropriate.</u>

A requested jury instruction must be given if it is supported by any reasonable view of the evidence. *Bailey*, 139 Idaho at 750, 86 P.3d at 464. The trial court also recognized "[w]hen a jury verdict is rendered on the basis of incorrect instructions, the appropriate remedy is the granting of a new trial." *Walton*, 116 Idaho at 897, 781 P.2d at 294. Respondents hereby reincorporate their argument presented in Section II (A) (1 - 3) of this memorandum in support of the fact that proposed Jury Instruction No. 34 is in fact a correct statement of the law in the State of Idaho. To disclaim a warranty, not only must a disclaimer exist, but it must also be conspicuous to the buyer, not just mere boilerplate language, and that the disclaimer must in fact be the agreement of the parties. This

disclaimer must be obtained with difficultly and be construed against the builder. Accordingly, the jury instruction should have been given and a new trial is appropriate.

III. THE DISTRICT COURT REACHED ITS DECISION BY AN EXERCISE OF REASON.

The final element that this Court must evaluate under the standard of review is that of whether the District Judge reached his decision through an exercise of reason. *Sheridan,* 135 Idaho at 780, 25 P.3d at 93. Given the foregoing explanation, and in light of the law and facts, Judge Anderson did not merely hold that a new trial was necessary without further analysis. Instead he held, after considering all the facts and having considered the applicable law, that the alleged disclaimer was a boilerplate, inconspicuous disclaimer where "it is not in bold face type, large text, or capital letters. There are no symbols or other marks that set it apart from the surrounding text. And, it appears among other boilerplate at the end of the Agreement." R. Vol. IV, p. 933. The court further reasoned:

> [I]t is possible the jury determined the implied warranty of habitability was not breached because it had been disclaimed by Goodspeeds. Therefore, the jury should have been instructed on how to determine if the implied warranty of habitability had been waived. [. . .]. This Court cannot rule out the possibility that the proposed jury instruction may have provided needed guidance to the jury regarding the existence and/or waiver of the implied warranty of habitability. Failure to give the instruction may have been prejudicial to Goodspeeds.

Id. Therefore, the trial judge recognized under *Walton, supra* that the failure to properly instruct the jury was grounds for a new trial and correctly granted a new trial. His decision should be affirmed.

ATTORNEYS FEES ON APPEAL

I. APPELLANTS' REQUESTS FOR FEES SHOULD BE DENIED.

A. The Request for Costs Attorneys Fees at the Trial Level Was Properly Denied.

The issue of attorneys fees below is improperly before this Court. Appellants' request for attorneys fees at the trial level below fails to recognize the trial court's decision as it relates to granting a new trial regarding the warranty of habitability. While Appellants point to law and contract provisions allegedly allowing attorneys fees and costs to the prevailing party, Appellants fail to recognize they have not prevailed.

Further, the agreement states that it relates to "legal action[s] or proceeding[s] which are in any way connected with the Agreement." R. Ex. "3". Appellants themselves argue the contract disclaims any implied warranties. Appellants would therefore have to concede that the contractual issues have not been resolved.

Further the prevailing party determination is within the sound discretion of the trial court. Idaho R. Civ. P. 54(d)(1)(A) and (B). "Where [. . .] there are claims [. . .], the mere fact that a party is successful in asserting or defeating a single claim does not mandate an award of fees to the prevailing party on that claim. The rule does not require that. It mandates an award of fees only to the party or parties who prevail **'in the action.'**" *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 693, 682 P.2d 640, 646 (Ct. App. 1984). *Citing* Idaho R. Civ. P. 54(d)(1)(B). So just because a party prevails on one, three, or even seven of the claims in the action, that party may still not be considered

the prevailing party.

Judge Anderson correctly used his sound discretion in recognizing this principle:

> Plaintiffs are entitled to a new trial on one of the numerous causes of action that were originally tried. Nevertheless, Plaintiffs could obtain the relief they seek–and ultimately become the prevailing party--if they successfully prove a breach of the warranty of habitability. Accordingly, it would be premature for this Court to issue a decision either granting or denying Defendants' motion for attorneys fees and costs.

R. Vol. IV, p. 957.

Appellants cite to *Johnson v. McPhee* as authority that this Court has the authority to grant fees under 12-120(3) provided the party prevails on the commercial transaction. *Johnson v. McPhee*, 147 Idaho 455, 470, 210 P.3d 563, 578 (Ct. App. 2009). That case did not involve an implied warranty of habitability and dealt instead with separate claims of negligence and a commercial transaction related to a real estate agent's representation of a developer. *Id.* However, if the purchase and sale of a personal residence is recognized as a commercial transaction, surely the warranties, express or implied, that stream from the purchase would also be part of the commercial transaction. Therefore, where Respondents may still ultimately prevail at trial on the warranty of habitability, an award of fees is improper on appeal. Because Appellants are not the prevailing party below, their request for fees and costs should be denied.

B. Appellants' Request for Costs and Attorneys Fees on Appeal Should Also Be Denied.

An award of fees is improper on appeal where the appellants do not prevail. *See* Idaho Code

§ 12-121 and I.A.R. 40 and 41. Given the trial court's broad discretion and the record that supports the trial court's decision, Appellants should not prevail in this action.

Regarding I.C. § 12-121, any request for fees must be brought pursuant to Idaho R. Civ. P. 54(e)(1) which states: "attorneys fees under section 12-121, Idaho Code, may be awarded by the court ***only*** when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably, or without foundation." *See also Sammis v. MagneTek, Inc.*, 130 Idaho 342, 354, 941 P.2d 314, 326 (1997) (denying a request for fees where the position on the appeal was not unreasonable or frivolous). For the aforementioned reasons contained in this Response, Respondents' arguments are well reasoned and based upon well established principals of law.

Regarding I.A.R. 40, again, Appellants must prevail to be granted their costs.

Furthermore, the standard for the award of attorneys fees pursuant to I.A.R. 40 is the same or similar to that of I.C. § 12-121: "an award of attorneys fees on appeal may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party when this Court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation." *Beale v. Speck*, 127 Idaho 521, 539, 903 P.2d 110, 128 (1995). Again, for the aforementioned reasons, Respondents defenses are well reasoned and supported by the aforementioned authorities. Appellants should be denied their requests for costs and fees.

II. RESPONDENTS SHOULD BE GRANTED THEIR FEES AND COSTS ON APPEAL.

Respondents request their attorneys fees and costs in responding to this appeal pursuant to I.C. § 12-121, Idaho R. Civ. P. 54(d) and (e), and I.A.R. 40 and 41.

Pursuant to I.A.R. 40, costs are allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the court. *Beale*, 127 Idaho at 539, 903 P.2d at 128.

As it relates to attorneys fees, the Shippens' appeal has been brought frivolously, unreasonably, and/or without foundation. *See Beale, supra.* Further, Respondents are entitled to an award of attorneys fees where appellants request the appellate court to do no more than second guess the trial court on conflicting evidence. *Blaser v. Cameron*, 121 Idaho 1012, 1018, 829 P.2d 1361, 1367 (1991).

In this case, Appellants' position is contrary to the clear legal authority presented above. The plain appearance of Section 32 is obviously inconspicuous, where it matches all the other language in the contract. Plaintiffs have only addressed the content of the warranty (which incidentally does not expressly disclaim the implied warranty of habitability) but fail to address how the language itself is conspicuous or was actually the intent and agreement of the parties. The authority above clearly suggests that conspicuous means more than just including the disclaimer language. The clear evidence before this Court shows that the language was a boilerplate agreement used by real estate agents all over the State of Idaho. Appellants further misrepresent to this Court that Section 32 specifically was brought to the Goodspeed's attention or explained to the Goodspeeds. Judge

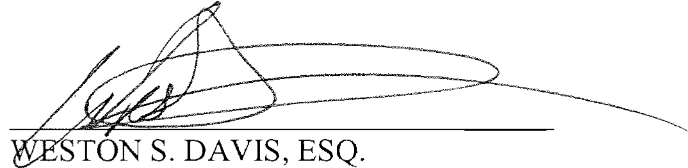
Anderson recognized this misrepresentation of fact and granted a new trial. Appellants instead ask this Court to exercise its discretion and stand in the place of the trial court. Accordingly, this Court should likewise deny this appeal and grant Plaintiffs' attorneys fees and costs in defending this appeal.

CONCLUSION

For the foregoing reasons, Respondents, Shawn and Shellee Goodspeed, respectfully request this Court deny this appeal and remand this case to the trial court for a new trial, consistent with the trial court's memorandum decision. Respondents further request their attorneys fees and costs in responding to this appeal.

Respectfully submitted this 12 day of March, 2012.

NELSON HALL PARRY TUCKER, P.A.

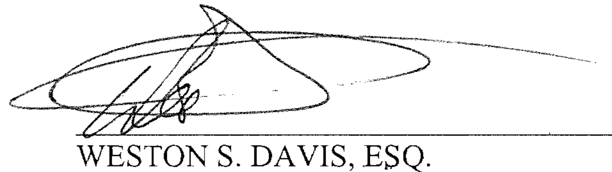


WESTON S. DAVIS, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 12 day of March, 2012, by hand delivery or mailing, with the necessary postage affixed thereto.

Robin Dunn (I.S.B. No. 2903)	[X] Mailing
DUNN LAW OFFICES, PLLC	[ ] Hand Delivery
P.O. Box 277	[ ] Fax ***208.745.8106***
477 Pleasant County Lane	[X] E-Mail rdunn@dunnlawoffices.com
Rigby, Idaho 83442	[ ] Overnight Mail
	[ ] Courthouse Box



WESTON S. DAVIS, ESQ.

L:\wsd\~ Clients\7411.1 Goodspeed\Appeal\SC #1 Respondent's Brief.wpd

PLAINTIFFS' EXHIBIT "1"

PLAINTIFFS' EXHIBIT "1"

MLS #: RR141140A (Active) List Price: $278,700 — 319 N 3709 E RIGBY, ID 83442

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

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

LEGAL DESCRIPTION: LOT 7 BLK 2 WOODHAVEN CREEK ESTATES
LOT SIZE (APX SQFT): *APX ACREAGE:* 1 *FRONTAGE:* *DEPTH:* *FLOOD PLAIN:* N
TOPO:
LOCATION:
PRCL #: *TAXES:* TBD *TAX YR:* 2006 *CBEXMPT:* N
HO EXEMPT: N *ASSOC FEE $:* *ASSOCIATION FEE INCLUDES:*

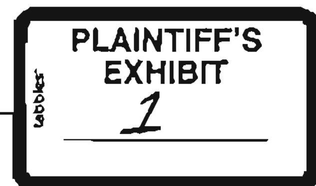
	SqFt:	#Bdrms	#FB:	#HB:	#Fam.	#Lvg.	#Kit:	#FrmlDng	#Den/Ofc:	#Lndry	#Frplc:
Upper:	0	0	0	0	0	0	0	0	0	0	0
Main:	2144	3	2	0	1	0	1	1	0	1	1
Lower:	0	0	0	0	0	0	0	0	0	0	0
Bsmnt:	2144	0	0	0	0	0	0	0	0	0	0

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

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

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

INCLUSIONS: RANGE, MICROWAVE, DISHWASHER
EXCLUSIONS: TOOLS, PERSONAL PROPERTY
PUBLIC INFO: GREAT FLOOR PLAN WITH LOTS OF SPACE! LOCATED IN WOODHAVEN CREEK ESTATES ON JUST OVER AN ACRE AND WITHIN WALKING DISTANCE TO TWO SCHOOLS.THIS HOME WILL FEATURE A WALKOUT BASEMENT, WRAP AROUND DECKING, A LARGE 3-CAR GARAGE, KNOTTY-ALDER OR MAPLE CABINETS (YOUR CHOICE), TILED ENTRY WAYS AND KITCHEN AND SO MUCH MORE. THE LIVING ROOM IN THE BASEMENT WILL BE FINISHED GIVING THE HOME NEARLY 2600 FINISHED SQUARE FOOTAGE, AND HALF OF THE BASEMENT LEFT TO FINISH FOR ADDITIONAL BEDROOMS AND ONE MORE BATH. HOME WILL HAVE A TOTAL OF NEARLY 4290 SQ FT. DEFINITELY A GREAT BUY IN RIGBY. **THERE HAS BEEN CONCERN ABOUT SUB WATER IN JEFFERSON COUNTY, HOWEVER THIS HOME HAS NOT HAD SUB ISSUES AND TO GIVE BUYER PIECE OF MIND BUILDER WILL INSTALL A LEACHING SYSTEM AROUND HOME AND PROVIDE 1 YEAR WARRANTY ON CONSTRUCTION**
PRIVATE INFO: There has been some concern about sub water in Jefferson County. This particular home has never had sub issues but to give the buyer peace of mind the builder is going to install a leaching system with a drainage field from the east side to the west side of the home to prevent the possibility of there every being any sub issues.
DIRECTIONS: HEADING WEST ON HWY 48 TRN RT ON 3700 E TRN RT INTO WOODHAVEN CREEK ESTATES HOME IS ON LEFT LOOK FOR SIGN
OWNER NAME: Marriott *OCCUPANT/CONTACT PRIMARY PHONE:*
OCC/CNTCT NM: *ALT PHN1:* *ALT PHN2:*
CNTRTYPE: ERS *BA COMP:* 3 *NAGTOFFR:* 3 *DUAL/VAR:* No *AGTBONUS:* *MIN COMM:*
KEYBXTYPE: INFRARED *KEYBXTIME:* *KEYLOCATN:* LOCKBOX *FXR UPPR:* No
BUILDER: *SIGN:* Yes *AGENT OWNED:* No *BUYER EXCLUSIONS:* No
SHOWING INSTRUCTIONS: Lockbox Vacant *POSSESSION:*
POSSESSION:
TERMS: Cash, Conventional, FHA, IHFA *PENDING DATE:*
LIST DATE: 8/10/2006 *EXPIRE DATE:* 7/30/2007 *DISPLAY ON INTERNET:* Yes



CO-LIST OFFICE:

CO-LIST AGENT:

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

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

Information Herein Deemed Reliable but Not Guaranteed

PLAINTIFFS' EXHIBIT "3"

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 # 208-361-9951

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 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 (WG X SG) Date 6-16-07 SELLER'S Initials (______ X ______) Date ______

This form is printed and distributed by the Idaho Association of REALTORS®, Inc. This form has been designed for and is provided only for use by real estate professionals who are members of the National Association of REALTORS®. USE BY ANY OTHER PERSON IS PROHIBITED. Copyright Idaho Association of REALTORS®, Inc. All rights reserved.

PLAINTIFF'S EXHIBIT 3

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

8 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

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

15 2. $ *******272,000.00 PURCHASE PRICE: Two hundred seventy two thousand DOLLARS, payable upon the following TERMS AND CONDITIONS (not including closing costs):

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

20 $ ******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.

26 (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.

32 $ ****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.

38 ☐ 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.

42 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.*

52 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.

58 $ ***********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.

62 $ *****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.

67 BUYER'S Initials (WSG)(SBG) Date 6-16-07 SELLER'S Initials (RDS)( ) Date 6/17/07

This form is printed and distributed by the Idaho Association of REALTORS®, Inc. This form has been designed for and is provided only for use by real estate professionals who are members of the National Association of REALTORS®. USE BY ANY OTHER PERSON IS PROHIBITED. Copyright Idaho Association of REALTORS®, Inc. All rights reserved.

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 addition 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 Occupany". 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 fixtures 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 (WA x CB) Date 6-16-07 SELLER'S Initials (RDS x ___) Date 6/17/07

This form is printed and distributed by the Idaho Association of REALTORS®, Inc. This form has been designed for and is provided only for use by real estate professionals who are members of the National Association of REALTORS®. USE BY ANY OTHER PERSON IS PROHIBITED.
Copyright Idaho Association of REALTORS®, Inc. All rights reserved.

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

155 **9. INSPECTION:**
156 (A). BUYER chooses [X] to have inspection [ ] not to have inspection. If BUYER chooses not to have inspection skip section 9C. 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 these 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.

161 (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.

164 (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.

187 **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 BUYERS 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 the 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.

197 **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.

200 **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

204 **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

207 **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 fees/dues are $ NA per NA [ ] BUYER [ ] SELLER [X] N/A to pay Homeowner's Association SET UP FEE of $ NA and/or property TRANSFER FEES of $ NA at closing.

214 **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.

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

219 This form is printed and distributed by the Idaho Association of REALTORS®, Inc. This form has been designed for and is provided only for use by real estate professionals who are members of the National Association of REALTORS®. USE BY ANY OTHER PERSON IS PROHIBITED. Copyright Idaho Association of REALTORS®, Inc. All rights reserved.

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

16. 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 $ **********0.00 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 ☒ 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 NA.

21. POSSESSION: BUYER shall be entitled to possession ☒ 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 ([initials] X [initials]) Date 6-16-07 SELLER'S Initials ([initials] X ______) Date 6/16/07

This form is printed and distributed by the Idaho Association of REALTORS®, Inc. This form has been designed for and is provided only for use by real estate professionals who are members of the National Association of REALTORS®. USE BY ANY OTHER PERSON IS PROHIBITED.
Copyright Idaho Association of REALTORS®, Inc. All rights reserved.

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 ([signature] X [signature]) Date 6-16-07 SELLER'S Initials ([signature] X ______) Date 6/17/07

This form is printed and distributed by the Idaho Association of REALTORS®, Inc. This form has been designed for and is provided only for use by real estate professionals who are members of the National Association of REALTORS®. USE BY ANY OTHER PERSON IS PROHIBITED. Copyright Idaho Association of REALTORS®, Inc. All rights reserved.

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) 06/16/2007 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 shippenconst@yahoo.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) ______

This form is printed and distributed by the Idaho Association of REALTORS®, Inc. This form has been designed for and is provided only for use by real estate professionals who are members of the National Association of REALTORS®. USE BY ANY OTHER PERSON IS PROHIBITED.
Copyright Idaho Association of REALTORS®, Inc. All rights reserved.

Company: Coldwell Banker Eagle Rock S/N: PCE5-06387
Provided by: Randy Stoor Printed using Software from Professional Computer Forms Co. © 7/06

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 an integral part of the aforementioned Agreement.

BUYER: [signature] Date: 6-18-07

BUYER: Shellee Goodspeed Date: 6-18-07

SELLER: [signature] Date: 6-17-07

SELLER: Date:

This form is printed and distributed by the Idaho Association of REALTORS® Inc. This form has been designed for and is provided only for the real estate professionals who are members of the National Association of REALTORS®. USE BY ANY OTHER PERSON IS PROHIBITED.

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 QUESTION CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

1 This is an **ADDENDUM** to the Purchase and Sale Agreement.
2 ("Addendum" means that the information below is added material for the agreement {such as lists or descriptions} and/or means the form is being us
3 to change, correct or revise the agreement {such as modification, addition or deletion of a term}).
4
5 **PURCHASE AND SALE AGREEMENT DATED:** June 16, 2007 ID # 24051188
6 **ADDRESS:** 319 N. 3709 E., Rigby, ID 83442
7 **BUYER(S):** William S. Goodspeed & Shellee B. Goodspeed
8 **SELLER(S):** Robert Shippen Construction
9 The undersigned parties hereby agree as follows:
10
11
12 1. Buyers & Sellers acknowledge that the correct Address for this property is:
13 3709 E. 319 N., Rigby, ID 83442 and hereby amend the purchase & sale agreement
14 (the address used had the street number swapped with the house number)
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

32 To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prio
33 Addendums or Counter Offers, these terms shall control. **All other terms of the Purchase and Sale Agreement including all prio**
34 **Addendums or Counter Offers not modified by this ADDENDUM shall remain the same.** Upon its execution by both parties, thi
35 agreement is made an integral part of the aforementioned Agreement.
36
37 BUYER: [signature] Date: 7/2/07
38 BUYER: [signature] Date: 7-2-07
39 SELLER: [signature] Date: 7/2/07
40 SELLER: [signature] Date: 7/2/07

This form is printed and distributed the Idaho Association of REALTORS® Inc. This form has been designed for and is provided only for the real estate professionals who are members of the National Association of REALTORS ®. USE BY ANY OTHER PERSON IS PROHIBITED.
©Copyright Idaho Association of REALTORS®, Inc., All rights reserved.

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

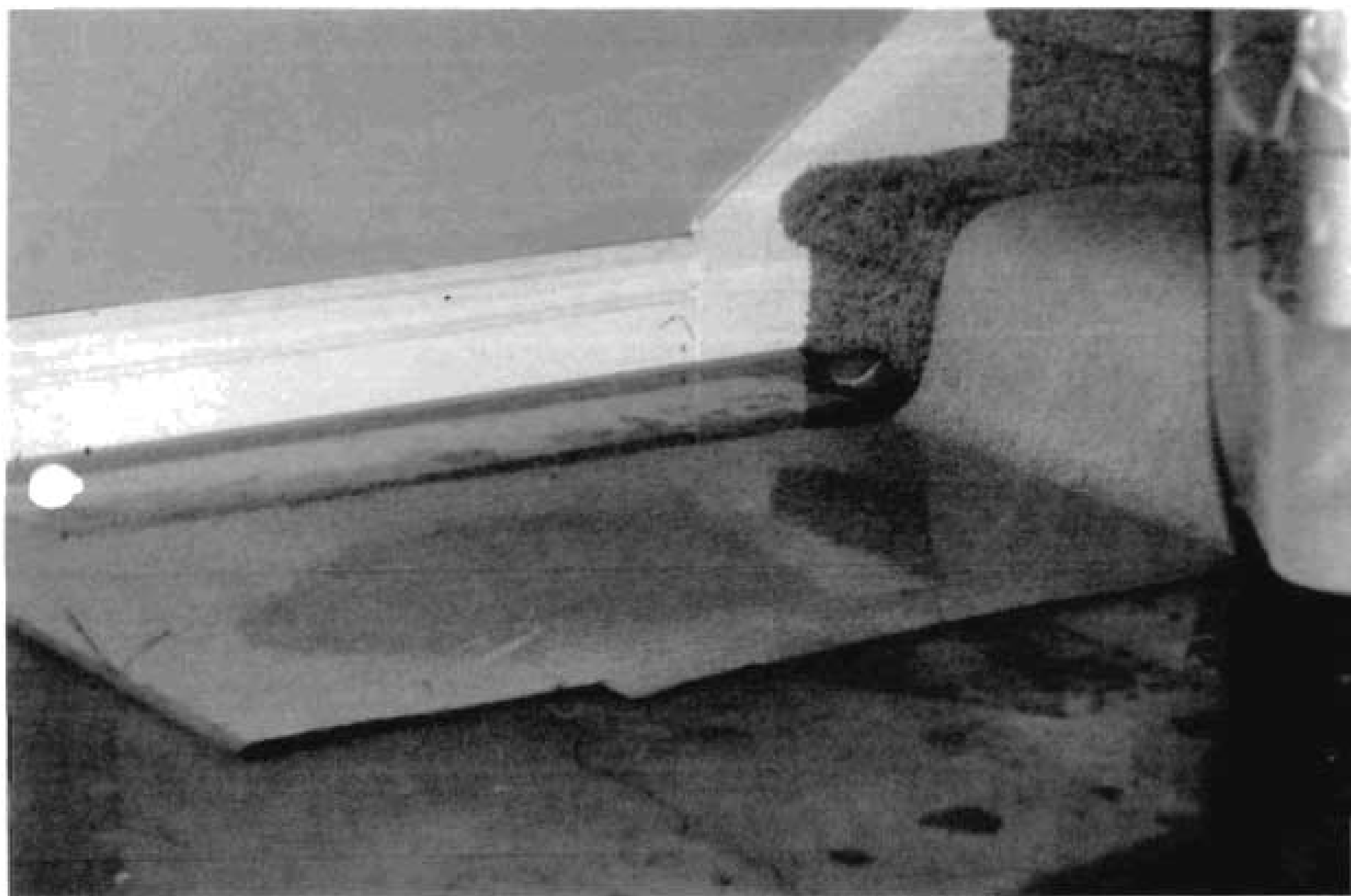
Printed using Software from Professional Computer Forms Co. v. 7/06

PLAINTIFFS' EXHIBIT "5"

PLAINTIFFS' EXHIBIT "5"

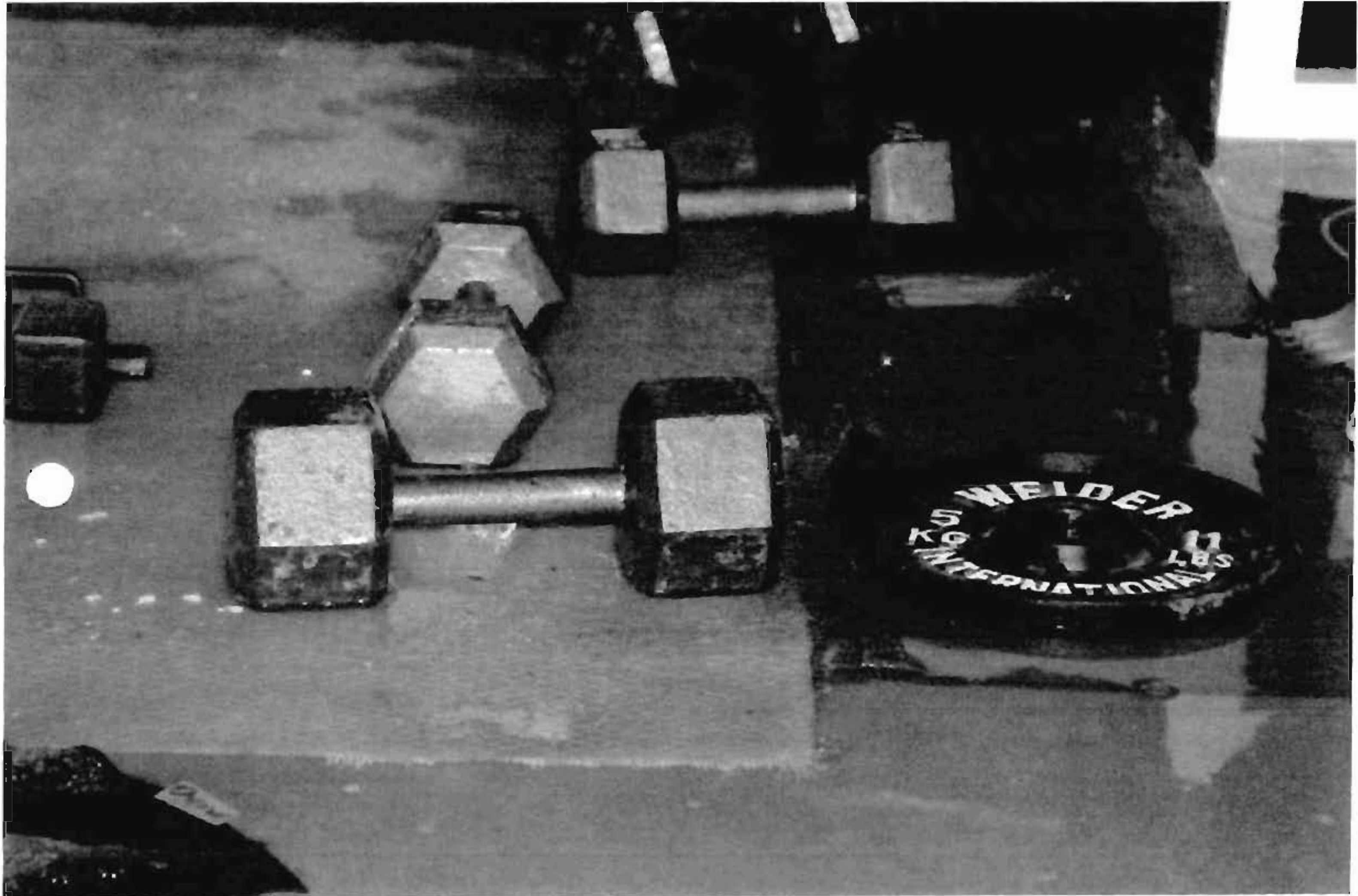
PLAINTIFFS' EXHIBIT "5A"

PLAINTIFFS' EXHIBIT "5A"



PLAINTIFFS' EXHIBIT "5B"

PLAINTIFFS' EXHIBIT "5B"


WEIDER
5 KG
11 LBS
INTERNATIONAL

PLAINTIFFS' EXHIBIT "5C"

PLAINTIFFS' EXHIBIT "5C"

BAGS

MFG. DATE

Kibbles 'n Bits 'n Bits 'n Bits™ Dog Food

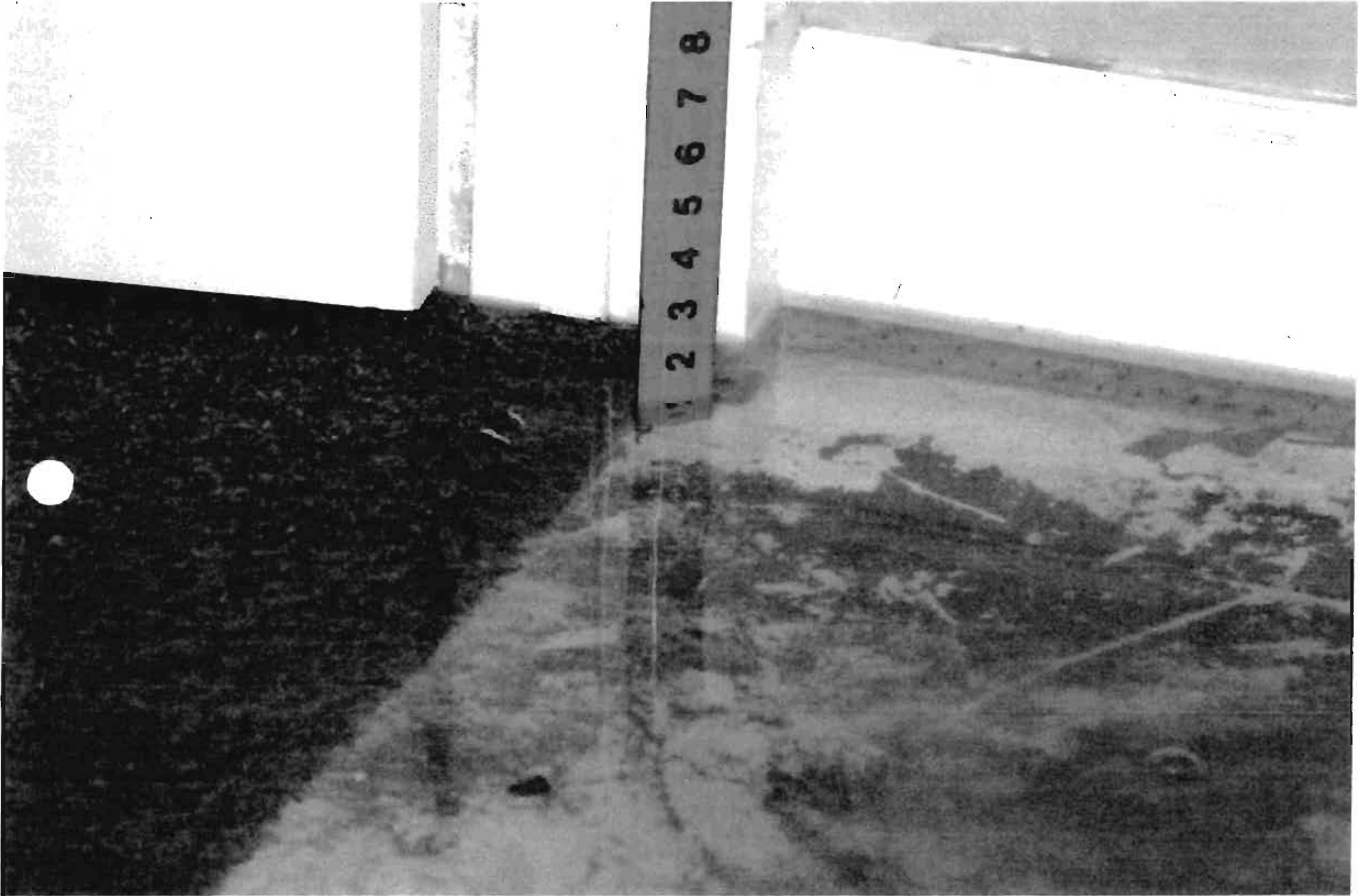
1B14L70256

PALLET STACK
2 HIGH ONLY

Heinz Pet Products,
an affiliate of H.J. Heinz Company,
Newport, KY 41071

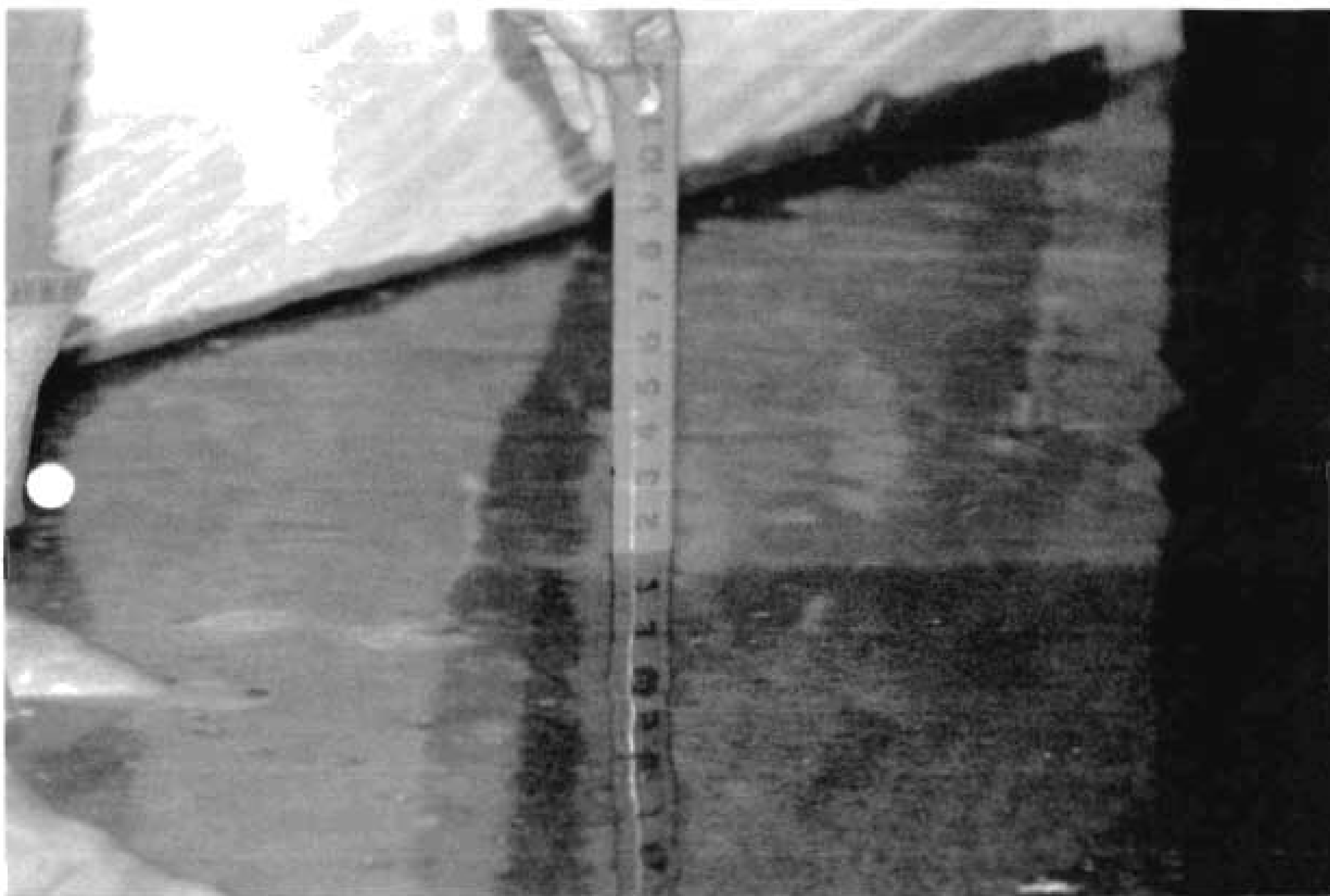
PLAINTIFFS' EXHIBIT "5D"

PLAINTIFFS' EXHIBIT "5D"


2 3 4 5 6 7 8

PLAINTIFFS' EXHIBIT "5E"

PLAINTIFFS' EXHIBIT "5E"



Plaintiffs' Exhibit "5F"

Plaintiffs' Exhibit "5F"