

**IN THE CIRCUIT COURT OF MARSHALL COUNTY, ALABAMA  
GUNTERSVILLE DIVISION**

KEITH A. KUBERT, an individual; )  
BRENDA C. KUBERT, an individual. )

Plaintiffs, )

v. )

TOBYE SCHEER, an individual; )  
STEELE & ASSOCIATES-CENTURY 21 )  
REALTY, a corporation; JOANN SMITH, )  
an individual; THE PREMIERE AGENCY- )  
CENTURY 21 REALTY, a corporation; )  
ADOBE, INC. a/k/a AMERISPEC HOME )  
INSPECTION SERVICE, a corporation; )  
LARRY W. HARDEN, an individual; )  
MARSHA S. HARDEN, an individual. )

Defendants. )

CIVIL ACTION NO.

CV-04- 0244

**COMPLAINT**

**JURISDICTION and VENUE**

1. The Circuit Court of Marshall County, Alabama has subject matter jurisdiction over the above styled action in that the amount in controversy exceeds ten thousand dollars and plaintiffs seek equitable relief. Venue is proper pursuant to the Alabama Rules of Civil Procedure Rule 82, in that the real estate involved in the present action is within this division, and a substantial part of the events or omissions giving rise to plaintiffs' claims arose or occurred in this division.

**PARTIES**

2. Plaintiffs Keith A. Kubert (herein "Mr. Kubert") and Brenda C. Kubert (herein "Mrs. Kubert") are both residents of Marshall County, Alabama.

**FILED**

JUN - 4 2004

SHERRY C. GRIEP  
CIRCUIT / DISTRICT CLERK  
MARSHALL COUNTY, ALABAMA

3. Defendant, Tobby Scheer (herein "Ms. Scheer") is an individual whose residence is Madison County, Alabama. Ms. Scheer does real estate business in and around Marshall County, Alabama.

4. Defendant, Steele & Associates- Century 21 Realty (herein "Steele & Associates") is a corporation having done business or presently doing business in Marshall County, Alabama. Steele & Associates is located at 110 Lily Flagg Road, Huntsville, Alabama.

5. Defendant, JoAnn Smith (herein "Ms. Smith") is an individual whose residence is Marshall County, Alabama. Ms. Smith does real estate business in and around Marshall County, Alabama.

6. Defendant, The Premiere Agency – Century 21 Realty (herein "Premiere") is a corporation having done business or presently doing business in Marshall County, Alabama. The Premiere agency is located at 423 North Main Street, Arab, Alabama.

7. Defendant, Adobe, Inc. a/k/a AmeriSpec Home Inspection Service (herein "AmeriSpec") is a corporation having done business or presently doing business in Marshall County, Alabama.

8. Defendant, Larry W. Harden (herein "Mr. Harden") is an individual whose residence is Marshall County, Alabama.

9. Defendant, Marsha S. Harden (herein "Mrs. Harden") is an individual whose residence is Marshall County, Alabama.

## FACTS

10. On or about March 12, 2004, Mr. & Mrs. Kubert made an offer to purchase residential property at 980 Huntington Circle, Arab, Alabama (herein "Huntington Circle").
11. On or about March 13, 2004, Mr. & Mrs. Harden accepted the offer.
12. The residential property located at 980 Huntington Circle, Arab, Alabama was listed with the Premiere agency in Arab, Alabama.
13. The listing agent for the Huntington Circle property was Ms. Smith of the Premiere agency.
14. Mr. & Mrs. Kubert's agent representing their interest in the purchase of the Huntington Circle property was Ms. Scheer of Steele & Associates.
15. Upon Mr. & Mrs. Kuberts' request, Ms. Scheer arranged to have the Huntington Circle property inspected by a home inspection service to assess the feasibility of purchasing said property.
16. Ms. Scheer arranged for AmeriSpec of 4717 University Drive, Suite 102-C, Huntsville, Alabama to do the inspection.
17. Shortly after the inspection began Ms. Scheer left the Huntington Circle property to attend closings in Huntsville that she failed to complete from the previous day.
18. On or about March 23, 2004, Mr. & Mrs. Kubert received a copy of the appraisal done by Denton Appraisals of 2669 Quarter Lane, Hampton Cove, Alabama, that was delivered to Magellan Mortgage of Huntsville, Alabama, the mortgage company.

Despite the fact that Mr. & Mrs. Kubert requested a full appraisal on the Huntington Circle property, an "exterior inspection only" was done.

19. On or about March 27, 2004, Mr. & Mrs. Kubert met with Ms. Scheer at the Huntington Circle property for a walk through. Mr. & Mrs. Kubert were only able to do a quick walk through the property as the sellers, Mr. & Mrs. Harden, were still occupying the property and were in the process of moving their furniture and belongings during this time.

20. On or about March 29, 2004, the parties closed on the Huntington Circle property. Prior to closing on the Huntington Circle property at 1:30 p.m. Ms. Scheer and the Kuberts closed on the sale of the Kubert's home in Huntsville leaving no time for a final walk through before closing.

21. After closing on the property in Arab, Mr. & Mrs. Kubert returned to Huntsville to finish packing and cleaning their home and to prepare to move the next day. At some point late in the afternoon on or about March 29, 2004, Mr. & Mrs. Kubert finally had the opportunity to view the Huntington Circle property without the sellers and their belongings being present. It was at this time, that the Kuberts discovered many flaws in the Huntington Circle property that had been concealed.

22. On or about March 30, 2004, Mr. & Mrs. Kubert moved into the Huntington Circle property. Mr. & Mrs. Kubert discovered that the extent of damage to the Huntington Circle property was extensive, and that the damage had been intentionally concealed from view.

23. On or about March 30, 2004, the day after closing, Ms. Smith of the Premiere agency delivered a copy of the plat plan for the Huntington Circle property to Mr. & Mrs. Kubert.

24. The plat of the Huntington Circle property differs significantly from the MLS listing. Specifically, the front and rear dimensions of the property do not coincide with the MLS dimensions: the actual front dimension is 75.92 feet instead of 98 feet and actual rear dimension is 294.59 feet instead of 410 feet. Ms. Smith, the listing agent, is very familiar with the Huntington Circle property because of the length of time the property was on the market and because she lives within a few lots of the property.

25. Actual room dimensions also differ significantly from MLS listing sometimes by as much as a foot per dimension.

26. Over the course of the next two weeks Mr. & Mrs. Kubert found extensive damage that had been concealed to all areas of the property including but not limited to: floors, windows, exterior and interior doors, walls, roof, water supply system, decks, hot water heaters, facets and other fixtures, plumbing, cabinets, carpeting, sprinkler systems, doors, electrical system, etc.

27. The Kuberts maintain that the residential property had been dressed up in order to deceive buyers. The following is a partial list of the deceptive practices employed: hardwood floors in the residence were refinished around existing rugs and furniture; walls were painted only in visible areas; wood work surrounding entryways was filled with putty and painted to appear sound; cracks in mortar were filled with putty to camouflage damage; decks were covered with a temporary water repellent instead of permanent sealant; windows, cabinets and trim were painted in an attempt to hide

blemishes and flaws in the wood work; rugs were strategically placed to hide blemishes in floors; wholes in walls were camouflaged; damage around the shower stall in one bathroom was papered over to camouflage hole.

## **STATEMENT OF CLAIMS**

### **COUNT ONE**

#### **(Misrepresentation)**

28. Plaintiffs restate and reincorporate the above and forgoing facts and allegations of paragraphs one through twenty seven, inclusive, of this complaint.

29. Plaintiffs, Mr. & Mrs. Kubert, seek to void the sales contract with full restitution in law and equity based on the defendants' misrepresentations regarding the lot size, square footage, and damage to the Huntington Circle property.

### **COUNT TWO**

#### **(Fraudulent Misrepresentation)**

30. Plaintiffs restate and reincorporate the above and forgoing facts and allegations of paragraphs one through twenty nine, inclusive, of this complaint.

31. Defendants have committed the tort of fraudulent misrepresentation in that they knowingly and intentionally misrepresented the Huntington Circle property by misstating the actual lot size, room dimensions and/or square footage, and by concealing and/or camouflaging damage to the interior and exterior of the structure in order to deceive buyers so that the property would sell. Further, Mr. & Mrs. Kubert relied on the defendants' misrepresentations regarding the property to their detriment, and that "but for" the defendants' misrepresentations plaintiffs would not have purchased the property. As a result of the defendants' misrepresentations plaintiffs have been denied the benefit

of their bargain in that the purchased property is not what they wanted, and now they cannot recoup their investment.

**COUNT THREE**

**(Fraudulent Suppression)**

32. Plaintiffs restate and reincorporate the above and forgoing facts and allegations of paragraphs one through thirty one, inclusive, of this complaint.

33. Defendants have committed the tort of fraudulent suppression and/or concealment in that they were under a duty to truthfully disclose to Mr. & Mrs. Kubert material facts relating to the lot size, room dimensions and/or square footage, and concealed and/or camouflaged damage that exists in the interior and the exterior of the Huntington Circle property.

**COUNT FOUR**

**(Breach of Contract)**

34. Plaintiffs restate and reincorporate the above and forgoing facts and allegations of paragraphs one through thirty three, inclusive, of this complaint.

35. Defendants, AmeriSpec, Mr. & Mrs. Harden, Ms. Scheer and Steele & Associates, are liable for breach of contract in that they failed to perform their contractual duties.

**COUNT FIVE**

**(Negligence and/or Wantonness)**

36. Plaintiffs restate and reincorporate the above and forgoing facts and allegations of paragraphs one through thirty five, inclusive, of this complaint.

37. Defendants, AmeriSpec, Ms. Scheer and Steele & Associates owed a duty to act as competent agents for plaintiffs in regards to their purchase of the Huntington Circle property. Defendants breach their duty to plaintiffs by negligently and/or wantonly failing to inspect and/or disclose the defects in the Huntington Circle property, and as a result of the defendants' breach of duty plaintiffs were harmed in that they purchased the property when they would not have purchased it "but for" the defendants' negligence and/or wantonness.

### **COUNT SIX**

#### **(Breach of Fiduciary Duty)**

38. Plaintiffs restate and reincorporate the above and forgoing facts and allegations of paragraphs one through thirty seven, inclusive, of this complaint.

39. Defendants, AmeriSpec, Ms. Scheer and Steele & Associates owed a duty of loyalty to act with a single-minded devotion towards the plaintiffs' best interest in regards to the purchase of the Huntington Circle property. Defendants breached their duty of loyalty to the plaintiffs by acting on behalf of their own interest of acquiring a fee and securing a commission and by failing to properly inspect and/or investigate pertinent aspects of the property and/or by failing to reveal known defects in the Huntington Circle property.

### **PRAYER FOR RELIEF**

Based on the foregoing actions of the defendants plaintiffs have suffered injury entitling them to relief in both law and equity.

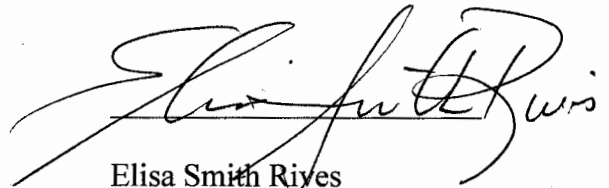
**WHEREFORE** plaintiffs demand judgment as follows:

- (i). A trial by jury on all issues;



- (ii). Contractual, compensatory, consequential, and punitive damages;
- (iii). Judicial determination in equity that plaintiffs are entitled to restitution;
- (iv). Award plaintiffs any other remedy that the court deems appropriate.

Respectfully submitted,



Elisa Smith Rives  
Attorney for plaintiffs  
Keith and Brenda Kubert  
(riv-012)

OF COUNSEL:

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**PLEASE SERVE DEFENDANTS BY CERTIFIED MAIL**

Defendants' Address:

Adobe, Inc. a/k/a AmeriSpec Home Inspection Service  
c/o Philip M. Fraley  
121 Maximillion Dr.  
Madison, AL 35758-8154

Century 21-The Premiere Agency AND Ms. JoAnn Smith  
c/o  
Tara L. Helms, Esq.  
WATSON JIMMERSON GIVHAN  
MARTIN & MCKINNEY, P.C.  
203 Greene Street  
P.O. Box 18368  
Huntsville, AL 35804

Century 21 - Steele & Associate, Inc. AND Ms. Tobye Scheer  
c/o  
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