

2000

Mitchell v. Christensen : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Scott B. Mitchell; Attorney for Appellant.

Callister Nebeker & Mccullough; George E. Harris Jr.; Jennifer Ward; Attorneys for Appellees.

Recommended Citation

Brief of Respondent, *Mitchell v. Christensen*, No. 20000593.00 (Utah Supreme Court, 2000).

https://digitalcommons.law.byu.edu/byu_sc2/529

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

DORANN MITCHELL,

Case No. 20000593-SC

Plaintiff/Appellant/
Petitioner,

Priority No. 15

v.

JESSE CHRISTENSEN and BETTY
CHRISTENSEN,

Defendants/Appellees/
Respondents.

BRIEF OF THE RESPONDENTS

On Appeal from a Final Order
of the Third Judicial District Court,
Honorable Dennis M. Fuchs Presiding

Scott B. Mitchell (5111)
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121
Attorney for Appellant

CALLISTER NEBEKER & MCCULLOUGH
George E. Harris, Jr. (4781)
Jennifer Ward (8298)
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, UT 84133
Telephone: (801) 530-7300
Facsimile: (801) 364-9127
Attorneys for Appellees

FILED
UTAH SUPREME COURT

FEB 12 2001

PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE UTAH SUPREME COURT

DORANN MITCHELL,

Case No. 20000593-SC

Plaintiff/Appellant/
Petitioner,

Priority No. 15

v.

JESSE CHRISTENSEN and BETTY
CHRISTENSEN,

Defendants/Appellees/
Respondents.

BRIEF OF THE RESPONDENTS

On Appeal from a Final Order
of the Third Judicial District Court,
Honorable Dennis M. Fuchs Presiding

Scott B. Mitchell (5111)
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121
Attorney for Appellant

CALLISTER NEBEKER & MCCULLOUGH
George E. Harris, Jr. (4781)
Jennifer Ward (8298)
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, UT 84133
Telephone: (801) 530-7300
Facsimile: (801) 364-9127
Attorneys for Appellees

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
ISSUE PRESENTED AND STANDARD OF REVIEW	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS, ETC.	1
STATEMENT OF THE CASE	1
I. NATURE OF THE CASE	1
II. STATEMENT OF THE FACTS	2
SUMMARY OF THE ARGUMENTS	4
ARGUMENT	5
I. THE DECISION OF THE TRIAL COURT AND THE COURT OF APPEALS WAS CORRECT	5
A. No Duty to Disclose Existed Under the Circumstances.	6
1. Plaintiff was expressly advised to obtain a below-surface inspection of the pool	6
2. Reasonable care with respect to the above-surface area of the pool does not constitute reasonable care with respect to the below surface area	7
3. The alleged leaks were easily discoverable	8
4. Plaintiff's claim that she was not concerned about whether the pool leaks does not change the fact that the alleged leaks were discoverable by reasonable care	9

5.	There was no special or confidential relationship between the parties	9
6.	Defendants made no misrepresentations as to the condition of the pool	10
B.	The Decision of the Court of Appeals Does Not Eliminate Fraudulent Nondisclosure Actions.	10
CONCLUSION		12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Elders v. Clawson</u> , 384 P.2d 802 (Utah 1963)	5, 9
<u>First Security Bank v. Banberry Dev.</u> , 786 P.2d 1326 (Utah 1990)	5, 6
<u>Horsh v. Terminix Intern. Co.</u> , 865 P.2d 1044, 1048-49	11
<u>House v. Armour of America, Inc.</u> , 929 P.2d 340 (Utah 1996)	1
<u>Maack v. Resource Design & Construction, Inc.</u> , 875 P.2d 570 (Utah App. 1994)	6, 8
<u>Quashnock v. Frost</u> , 445 A.2d 121 (Penn. 1982)	11
<u>STATUTES</u>	
Utah Code Ann., § 78-2-2(5) (1996)	1
<u>SECONDARY AUTHORITIES</u>	
Restatement, Second, Torts, § 551	7, 9, 11

STATEMENT OF JURISDICTION

The Utah Supreme Court has discretion to exercise certiorari jurisdiction in this matter pursuant to Utah Code Ann., § 78-2-2(5) (1996).

ISSUE PRESENTED AND STANDARD OF REVIEW

Defendants/Appellees/Respondents Jesse and Betty Christensen are dissatisfied with Plaintiff/Appellant/Petitioner Dorann Mitchell's statement of the issue presented in Petitioner's Opening Brief, and, therefore, submit the following statement of the issue and applicable standard of review:

Issue: Whether Defendants had a legal duty to disclose to Plaintiff the existence of alleged leaks in their swimming pool prior to the sale of their property to Plaintiff.

Standard of Review: "Because summary judgment is granted as a matter of law rather than fact, [the Supreme Court] review[s] the legal conclusions of both the trial court and the court of appeals for correctness." House v. Armour of America, Inc., 929 P.2d 340, 342 (Utah 1996) (quotations and citations omitted).

CONSTITUTIONAL PROVISIONS, ETC.

There are no determinative constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of this appeal or of central importance to this appeal.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

Plaintiff/Appellant/Petitioner Dorann Mitchell ("Plaintiff") brought an action in the Third Judicial District Court against Defendants/Appellees/Respondents Jesse and Betty Christensen

(“Defendants”) for fraudulent nondisclosure on the grounds that Defendants had a legal duty to disclose to Plaintiff the existence of alleged leaks in their swimming pool prior to the sale of their property to Plaintiff. The trial court, Judge Dennis M. Fuchs presiding, granted summary judgment in favor of Defendants. The Utah Court of Appeals affirmed.

II. STATEMENT OF FACTS.

1. On or about September 25, 1995, Plaintiff purchased a home from Defendants located at 2820 East Robidoux Road, Sandy, Utah (the “Property”), which included a backyard swimming pool. (R. 51).

2. In connection with the sale of the Property, Plaintiff and Defendants executed a Real Estate Purchase Contract (the “Purchase Contract”). (R. 52).

3. The Purchase Contract gave Plaintiff the right to conduct an inspection of the Property herself and to hire one or more professional inspectors to inspect the Property. (R. 52).

4. Plaintiff inspected the Property herself and hired a professional inspector, AmeriSpec-Salt Lake (“Amerispec”), to inspect the Property. (R. 52).

5. Plaintiff’s access to the Property to conduct inspections was never restricted or prohibited. (R. 52-53).

6. AmeriSpec completed an inspection of the Property and provided Plaintiff with an inspection report (the “Inspection Report”). (R. 89-107).

7. AmeriSpec found the pool area and equipment covered by the inspection to be in working order; however, AmericSpec’s inspection of the pool was limited in scope. (R. 107).

8. With regard to the pool, the Inspection Report stated:

Our review is limited to above ground or visible items only. It is an operational inspection of the accessible equipment and components and is therefore limited in scope. If concerned, client is advised to have a licensed pool company perform an in-depth review and/or service. (R. 107).

9. Prior to closing on the purchase of the Property, Plaintiff did not have a licensed pool company (or anyone else) perform an in-depth review of the pool. (R. 54).

10. Sometime after Plaintiff's purchase of the Property, Plaintiff discovered substantial leaks in the pool. (R. 54).

11. Had the Plaintiff hired a licensed pool company to perform an in-depth review, any leaks existing at the time of sale would have been revealed. (R. 108-109).

12. Defendants were unaware of the existence of any leaks in the pool as of the date of the sale of the Property. (R. 81, 84).

13. Plaintiff never asked Defendants whether the pool leaked, and Defendants never represented to Plaintiff that the pool did not leak, although Defendants believed that it did not. (R. 72, 81, 84).

14. Plaintiff filed her Complaint in this action against Defendants on July 30, 1997. (R. 1-3). Plaintiff's Second Amended Complaint, filed on December 9, 1997, alleges that at the time of the sale of the Property (i) the swimming pool was leaking; (ii) Defendants knew of the existence of the alleged leaks; and (iii) Defendants had a duty to disclose the existence of the leaks to Plaintiff prior to selling the Property. (R. 32-33).

15. Defendants deny Plaintiff's allegations that the pool leaked on or before the sale of the Property closed and that Defendants were aware of any leaks; however, for the purposes of

summary judgment only, Defendants asked the court to assume that they were, in fact, aware of leaks in the pool at the time of sale of the Property. (R. 135).

16. Defendants moved for Summary Judgment against Plaintiff on the grounds that even if Defendants had been aware of the existence of leaks in the swimming pool, Defendants did not have a legal duty to disclose these defects and the doctrine of caveat emptor applied precluding Plaintiff's action. (R. 51-62).

17. On March 18, 1999, the trial court granted Defendants' Motion for Summary Judgment. (R. 150-51).

18. The trial court found that "Plaintiff had a duty and opportunity to conduct a thorough inspection of the pool and failed to do so. Under these circumstances, even if Defendants knew of the defects, based on caveat emptor, Defendants did not have a legal duty to disclose." (R.150).

19. Plaintiff filed a Notice of Appeal on April 12, 1999. (R. 152-153).

20. On June 8, 2000, the Utah Court of Appeals filed its Memorandum Decision, affirming the trial court's grant of summary judgment in favor of Defendants. (Petitioner's Opening Brief, Addendum 2).

21. Plaintiff's Petition for Writ of Certiorari was granted on September 26, 2000.

SUMMARY OF ARGUMENTS

Plaintiff claims that Defendants' failure to disclose alleged leaks in the swimming pool prior to the sale of the Property gives Plaintiff a cause of action against Defendants for fraudulent nondisclosure. A necessary element of the fraudulent nondisclosure cause of action is that the

person being charged had a legal duty to communicate the undisclosed information. This Court has held that whether such a duty exists is determined by all the circumstances of the case.

The Court of Appeals and the trial court determined that the Defendants in this case had no legal duty to disclose the existence of the alleged leaks in the swimming pool prior to Plaintiff's purchase of the Property. Specifically, the Court of Appeals concluded that, considering the facts of this case, Plaintiff acted unreasonably by failing to obtain an in-depth inspection of the swimming pool. The Court of Appeals' decision was based upon the unique facts and circumstances of this specific case including that Plaintiff was expressly advised to obtain such an inspection. The Court of Appeals' decision does not have the effect of requiring all home buyers to obtain an in-depth inspection of every aspect of a home before a claim for fraudulent nondisclosure can be maintained. Rather, whether a buyer will be required to inspect a certain aspect of home will simply depend on the particular facts and circumstances before the court.

ARGUMENT

I. THE DECISION OF THE TRIAL COURT AND THE COURT OF APPEALS WAS CORRECT.

This Court has held that “in order to be liable for fraudulent nondisclosure, there must be a duty to disclose, the burden of establishing which is on the party alleging the fraud” First Sec. Bank v. Banberry Dev., 786 P.2d 1326, 1328-29 (Utah 1990). Whether such a duty exists “is determinable by reference to all the circumstances of the case” Id. at 1331 (quotations and citations omitted). See also, Elder v. Clawson, 384 P.2d 802, 804 (Utah 1963) (“[E]xcept in broad terms the law does not attempt to define the occasions when a duty to speak arises. . . .

The difficulty is not so much in stating the general principals of law . . . as in applying the law to particular groups of facts.”) (quotations and citations omitted). Citing Banberry, the Court of Appeals has held that in vendor-vendee transactions, a duty to disclose “exists only where a defect is not discoverable by reasonable care.” Maack v. Resource Design & Const., Inc., 875 P.2d 570, 579 (Utah App. 1994).

Under the facts and circumstances of this case, the Defendants owed no duty of disclosure to Plaintiff because the alleged leaks in the swimming pool were discoverable by reasonable care. In view of the circumstances, the Court of Appeals was correct in determining that Plaintiff “failed to exercise reasonable care when she did not have an in-depth inspection of the swimming pool completed.” (Memorandum Decision, p.2 (Addendum 2 to Petitioner’s Opening Brief)).

A. No Duty To Disclose Existed Under the Circumstances.

The following facts and circumstances support the decision of the trial court and the Court of Appeals that Defendants did not owe a legal duty to disclose the alleged leaks in the swimming pool:¹

1. Plaintiff was expressly advised to obtain a below-surface inspection of the pool.

The Inspection Report obtained by AmeriSpec stated with regard to the pool that:

Our review is limited to above ground or visible items only. It is an operational inspection of the accessible equipment and components and is therefore limited in scope. If concerned, client is advised to have a licensed pool company perform an in-depth review and/or service.

¹ The relevance of the facts presented in this argument is derived from this Court’s discussion of the duty of disclosure in fraudulent nondisclosure actions in Banberry, 786 P.2d at 1330-31.

More than anything else, the above-quoted language in the Inspection Report distinguishes this case from those in which a legal duty to disclose has existed. In the Inspection Report, Plaintiff was expressly advised of the limits of AmeriSpec's inspection. Plaintiff was also expressly advised that a more thorough inspection of the swimming pool would be necessary to reveal any below surface defects. Despite AmeriSpec's warning, Plaintiff did not hire a licensed pool company nor did Plaintiff seek any express warranties from Defendants; in fact, Plaintiff made no inquiries whatsoever, either to Defendants or to AmeriSpec, with regard to whether the pool leaked. See, Restatement, Second, Torts, § 551, comment k (explaining that no duty to disclose exists "when the plaintiff has equal opportunity for obtaining information that he may be expected to utilize if he cares to do so . . ."). By choosing not to obtain an inspection by a licensed pool company after being specifically advised by AmeriSpec to do so, Plaintiff accepted the risk that there were unknown defects in the pool. Plaintiff cannot knowingly accept this risk, and then hold Defendants liable for fraud for the consequences of Plaintiff's conscious decision.

2. Reasonable care with respect to the above-surface area of the pool does not constitute reasonable care with respect to the below surface area.

Plaintiff's position is that because she obtained a general inspection of the Property by a professional inspection company, AmeriSpec, she exercised reasonable care and was not required to obtain an additional inspection of the swimming pool by a licensed pool company.

AmeriSpec's inspection, however, expressly states that, regarding the pool, it was "an operational inspection of the accessible equipment and components" only. The Inspection Report made it clear that the inspection was limited in scope and excluded the below surface area

of the pool. With respect to the items covered by AmeriSpec's Inspection Report, Plaintiff satisfied her duty of reasonable care. Plaintiff cannot claim, however, that she exercised reasonable care with respect to items *specifically excluded* from the scope of the inspection.² Reasonable care required Plaintiff to obtain an inspection of the items not covered by AmeriSpec's inspection. Plaintiff is not being asked to inspect the pool twice; AmeriSpec's inspection simply did not include an inspection of the below surface area of the pool.

3. The alleged leaks were easily discoverable.

It is undisputed by the parties that had Plaintiff obtained an inspection of the pool by a licensed pool company, the inspection would have revealed the alleged leaks in the pool. Defendants never restricted Plaintiff's access to the pool nor impeded her ability to have such an inspection performed. Because an inspection of the sub-surface area of the pool would have revealed the alleged leaks, and Plaintiff had a fair and reasonable opportunity to obtain such an inspection, the alleged leaks were easily discoverable.

The Court of Appeal's decision in Maack is persuasive. In Maack, the purchasers of a used home sued the sellers for latent defects discovered in the home's stucco of which the sellers were aware. 875 P.2d 570. The purchasers had not obtained an inspection of the home prior to closing. The Maack Court concluded that purchaser's failure to obtain an inspection of the home was unreasonable because such an inspection would have revealed the claimed defects. See, id. at 579 n.8. Likewise, an inspection of the sub-surface areas of the pool would have revealed the

² This argument is the equivalent of claiming that hiring a professional inspector to inspect the roof of a premises thereby discharges the purchaser from having to obtain an inspection of the walls or foundation of such premises.

alleged leaks. Therefore, under the Maack Court's reasoning, the alleged leaks were discoverable by reasonable care.

4. Plaintiff's claim that she was not concerned about the whether the pool leaked does not change the fact that the alleged leaks were discoverable by reasonable care.

Plaintiff's claim that she was not concerned about the existence of leaks in the pool is not supportive of Plaintiff's claim that she acted reasonably. Defendants submit that it is patently unreasonable when purchasing a home with a pool not to be concerned with whether the pool leaks. Whether a pool leaks is a fundamental question that would concern a reasonable buyer (just as a reasonable buyer would be concerned about whether there were cracks in a home's foundation).³ Moreover, because leaks in a pool are not visible above ground, the fact that Plaintiff could not see the alleged leaks herself or that AmeriSpec's above ground inspection did not reveal any leaks should not have given Plaintiff any assurances that the pool did not leak.

5. There was no special or confidential relationship between the parties.

The buy-sell transaction between Plaintiff and Defendants was at arms-length. Plaintiff and Defendants had no prior dealings or association with each other before entering into the

³ Plaintiff cites Elders v. Clawson, 384 P.2d 802 (Utah 1963), wherein this Court held that purchasers of certain property were not required to obtain an inspection of the property to determine the existence of a quarantine. Whether a quarantine exists on a piece of property is an obscure question not contemplated by unsophisticated buyers. On the other hand, it is within the reasonable contemplation of purchasers of a home with a pool that the pool may leak. Moreover, unlike Elders, whether the pool leaked was not an issue of which Plaintiff "knew nothing." The possibility that the pool leaked was a known risk that Plaintiff accepted.

contractual buy-sell relationship. Consequently, even if Defendants knew of the alleged leaks, Plaintiff had no basis for assuming that Defendants would volunteer this information.⁴

6. Defendants made no misrepresentations as to the condition of the pool.

Finally, there is no allegation that Defendants made any misrepresentations to Plaintiff regarding the existence of any leaks in the pool or the condition of the pool generally. Plaintiff was given unrestricted access to the premises and never so much as even asked Defendants if the pool leaked.

* * * * *

In view of the above facts and circumstances, the alleged leaks in the swimming pool were discoverable by reasonable care. Therefore, the Court of Appeals correctly concluded that Plaintiff failed to meet here burden of establishing that Defendants had a legal duty to disclose the existence of the alleged leaks.

B. The Decision of The Court of Appeals Does Not Eliminate Fraudulent Nondisclosure Actions.

The Court of Appeals' decision by no means eliminates a cause of action for fraudulent nondisclosure as Plaintiff contends. Nor does the decision require a buyer to perform an "in-depth inspection of every aspect of the home." (Petitioner's Opening Brief, p. 8). Rather, the Court of Appeals' conclusion that Plaintiff's failure to obtain an in-depth inspection of the pool

⁴ The arms-length relationship between Plaintiff and Defendants distinguishes Illustration 9 of Section 551 of the Restatement, Second, Torts, cited by Plaintiff, where the seller "knows also that [buyer] regards him as an honest and fair man and one who would disclose any such fact if he knew it." Such an expectation was not present between the Plaintiff and Defendants in this case.

was unreasonable is limited to the unique facts and circumstances of this specific case.⁵ The

Restatement, Second, Torts, § 551, comment 1, explains that:

In general, the cases in which the rule [relating to disclosure of facts basic to the transaction] has been applied have been those in which the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware.

Given that (i) Plaintiff was expressly advised to obtain an inspection of the area of the pool not covered by the Inspection Report; (ii) the alleged leaks would have been discovered by a licensed pool company; (iii) Plaintiff took no precautions whatsoever with respect to determining whether the pool leaked; and (iv) considering the other facts of this case, the “shocking”

⁵ The Court of Appeals Memorandum Decision in this case is not contrary to the authorities cited by Plaintiff in Petitioner's Opening Brief. Instead, the cited authorities are readily distinguishable from the facts presented here:

Plaintiff cites Horsh v. Termini Intern. Co., 865 P.2d 1044 (Kan. App. 1993). This case is inapposite, however, because in Horsh, the plaintiff hired a *professional termite inspector* and it was the professional termite inspector, not the seller, who failed to disclose his discovery of termite damage. In Quashnock v. Frost, 445 A.2d 121 (Penn. 1982), the Pennsylvania Court required the sellers to disclose the existence of termites explaining that, “It is important to remember that the defect has to be dangerous in order for the duty of disclosure to exist. For example, termite infestations are dangerous because the structural soundness of the building is affected.” 445 A.2d at 125 n.4. Leaks in a pool certainly are not a dangerous condition.

Nor is the Court of Appeals' decision in this case contrary to the Illustrations from Section 551 of the Restatement, Second, Torts cited by Plaintiff. Illustration 3 again involves termites which pose a danger to the structural safety of the home. Illustration 9, as noted in footnote 4, above, is factually distinguishable in that the seller knows that the buyer regards him as an honest man who would disclose the defective condition of the house. Finally, Plaintiff's example from comment 1 of the Restatement regarding the seller's diseased cattle bears little or no resemblance to the facts of this case.

circumstances required to create a legal duty to disclose simply were not present in this case. In Under the circumstances, the Court of Appeals correctly concluded that Plaintiff failed to exercise reasonable care by not obtaining an in-depth inspection of the pool. The Court of Appeals' decision, however, does not extend beyond the unique facts of this specific case. Consistent with this Court's statements in Banberry and Elders, whether other buyers will be required to perform in-depth inspections of various aspects of a home will depend upon the facts and circumstances of the particular case.

CONCLUSION

For the foregoing reasons, Defendants respectfully requests that the Memorandum Decision of the Court of Appeals be affirmed.

DATED: February 12, 2001.

CALLISTER NEBEKER & MCCULLOUGH

By: 

GEORGE E. HARRIS, JR.

Attorneys for Defendants

Jesse and Betty Christensen

CERTIFICATE OF SERVICE

I HEREWITH CERTIFY that two (2) true and correct copies of the foregoing BRIEF OF
THE RESPONDENTS were caused to be served via U.S. first-class mail, postage pre-paid, this
15 day of February, 2001.

Scott B. Mitchell
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121


