

1977

Bennion Insurance Company, A Utah Corporation
v. Lst Ok Corporation, A Utah Corporation,
Morrish. Curtis, And Sadie P. Curtis, His Wife, Shell
Oil Co., A Corporation And Sevier Count And Mil
Ton D. Hendrickson v. Lst Ok Corporation, A Utah
Corporation, Morrish. Curtis And Sadie P. Curtis,
His Wife, And Ut Ah Title And Abstract Comp
Any, A Utah Corporation : Brief of Respondents
Morris H. Curtis And Sadie P. Curtis

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IN THE SUPREME COURT OF THE STATE OF UTAH

BENNION INSURANCE COMPANY,)
a Utah corporation,)
)
 Plaintiff and Appellant,)
)
 vs.) No. 14848
)

1ST OK CORPORATION, a Utah)
corporation, MORRIS H. CURTIS,)
and SADIE P. CURTIS, his wife,)
SHELL OIL CO., a corporation)
and SEVIER COUNTY,)
)
 Defendants and Respondents,)
)

and)
)
MILTON D. HENDRICKSON,)
)
 Plaintiff and Appellant,)
) No. 14849
 vs.)
)

1ST OK CORPORATION, a Utah)
corporation, MORRIS H. CURTIS,)
and SADIE P. CURTIS, his wife,)
and UTAH TITLE AND ABSTRACT)
COMPANY, a Utah corporation,)
)
 Defendants and Respondents.)

BRIEF OF RESPONDENTS

MORRIS H. CURTIS and SADIE P. CURTIS

APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL DISTRICT COURT
OF SEVIER COUNTY, DAVID SAM, DISTRICT JUDGE, PRESIDING

FILED

MAR - 4 1977

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IN THE SUPREME COURT OF THE STATE OF UTAH

BENNION INSURANCE COMPANY,)	
a Utah corporation,	:	
)	BRIEF OF RESPONDENTS,
Plaintiff and Appellant,	:	MORRIS H. CURTIS and
)	SADIE P. CURTIS
vs.	:	
)	
1ST OK CORPORATION, a Utah	:	
corporation, MORRIS H. CURTIS,)	No. 14848
and SADIE P. CURTIS, his wife,	:	
SHELL OIL CO., a corporation)	
and SEVIER COUNTY,	:	
)	
Defendants and Respondents,	:	
)	
and	:	
)	
MILTON D. HENDRICKSON,	:	
)	
Plaintiff and Appellant,	:	
)	
vs.	:	No. 14849
)	
1ST OK CORPORATION, a Utah	:	
corporation, MORRIS H. CURTIS)	
and SADIE P. CURTIS, his wife,	:	
and UTAH TITLE AND ABSTRACT)	
COMPANY, a Utah corporation,	:	
)	
Defendants and Respondents.	:	

STATEMENT OF KIND OF CASE

The foregoing cases were consolidated by order of this court because the material facts and law are applicable to both cases with one exception which will be set out in the statement of facts and argument. In each of the consolidated cases, the Plaintiffs brought

actions to secure judgments on promissory notes executed by the 1st Ok Corporation, also to foreclose purported mortgages on real property owned by Morris H. Curtis and Sadie P. Curtis. The Defendants Curtis filed answers in each case asserting that they were not parties to the instruments upon which Plaintiffs seek to recover judgment and foreclose upon property owned by Defendants Curtis and that the mortgages executed by 1st Ok Corporation did not grant any right, title or interest in the real property described.

DISPOSITION OF THE LOWER COURT

The issues were heard before the Honorable David Sam, District Judge, on motions for summary judgment filed by Defendants Curtis and also upon separate motion for summary judgment filed by each of the Plaintiffs. The court granted summary judgments in both cases in favor of the Defendants Curtis and denied summary judgments on separate motions of each of the Plaintiffs.

RELIEF SOUGHT ON APPEAL

Defendants Curtis seek to have affirmed the summary judgments entered by the Lower Court.

STATEMENT OF FACTS

The facts relied upon by the Defendants Curtis are specifically set forth in the uncontroverted affidavit of Morris H. Curtis filed in each separate case. The facts

are those which are conclusively proved in that certain civil case filed in Sevier County under 6860 entitled 1st Ok Corporation vs. Morris H. Curtis, et al and the Utah Title and Abstract Company, a copy of which decision is attached to the identified affidavit. The case was affirmed on appeal to the Utah Supreme Court by decision dated the 17th day of May, 1976, 550 P2d 157, ___Utah 2d___.

The Appellants were not parties to the action cited above which has been reviewed by this Court. For that reason, the facts before the Lower Court were recited in detail in each of the consolidated cases. Since the facts were not controverted by the Appellants, no fact issue was before the Lower Court.

GENERAL STATEMENT CONCERNING BUSINESS EXPERIENCE
AND BACKGROUND OF DEFENDANTS CURTIS

Defendant Morris H. Curtis was a farmer who supplemented his income as a delivery truck driver. He had very limited business experience and was not acquainted with a lawyer or real estate broker. He does not know how to read real estate descriptions or how to compute acreage. Sadie P. Curtis, wife of Morris H. Curtis, had little formal education. She had no business experience, she did not know how to compute acreage or how to read legal property descriptions.

NEED FOR ASSISTANCE

The Curtises were aware that their property had value

and knew they they needed assistance to plan and organize their property and to sell it for its full value. They knew they had no formal training nor experience with which to make the necessary plans (R.19).¹

FRAUD PRACTICED ON CURTISES

Orlando Fiandaca representing the 1st Ok Corporation, informed the Defendants Curtis that he was capable of performing, willing to perform and in fact would perform all professional and expert services necessary and would advise Curtises in evaluating, classifying, zoning and obtaining access for, marketing, determining the accurate amount of acreage of, offering for sale and selling real property for commercial development (R.19). That the Defendants Curtis did rely upon the representations of Fiandaca and did sign contracts and deeds prepared by him (R.20).

On the 21st day of January, 1972, Fiandaca of the 1st Ok Corporation did represent that he had prepared a description to real property owned by the Curtises containing 70 acres included in a certain option for 1st Ok Corporation and further that Fiandaca did prepare or have prepared a certain Warranty Deed containing the same description representing that said description was for 70 acres of land. The deed dated the 25th day of May, 1973 did in fact include approximately 91 acres of land which was contrary to the specific representations made by

¹Reference to record are to record in Case No. 14849 Milton D. Hendrickson, Plaintiff. Record in Bennion Insurance Company Case is for practical purposes identical.

Orlando Fiandaca for the 1st Ok Corporation to induce execution of the deed by Defendants Curtis (R.20).

The real property described in the deed secured by 1st Ok Corporation included the property on which the Plaintiffs now claim an interest by reason of the mortgages granted to them by 1st Ok Corporation. The Curtises would not have executed the original deed upon which the Plaintiffs now rely had they known the conveyance was for 91 acres of land and not the 70 acres they had believed was contained in the deed (R.22[5g]).

Upon learning the true facts, the Defendants Curtis did assert the fraud practiced upon them and did further assert that any conveyance of title to 1st Ok Corporation was void (R.22).

The Defendants Curtis did further cause notice to be given to the 1st Ok Corporation and to Utah Title and Abstract Company, both Defendants herein, that the contract executed by the Curtises and all conveyances of property were void (R.22 PR6).

Further a second notice was served upon Douglas Church, a representative of Utah Title and Abstract Company, which notification was acknowledged in writing by said Douglas Church and dated the 14th day of February, 1974 (R.22-P7).

That on the 12th day of February, 1974, Milton D. Hendrickson, one of the Plaintiffs herein, did give Utah Title and Abstract specific instructions concerning the

disbursal of proceeds from the mortgage upon which he now relies. The instructions were given in Mr. Hendrickson's handwriting and are as follows:

"Bonneville Distributing Company
34 West Central Avenue
P.O. Box 15353
Salt Lake City, Utah 84115
Phone 226-3058

February 12, 1974

Utah Title and Abstract

Gentlemen:

You are hereby authorized to disburse the attached check, Cashier's in the amount of \$15,250 on behalf of 1st O.K. Corporation upon your ability to insure and record the attached mortgage as a 1st mortgage. We are in receipt of the original note.

Sincerely,

Milton Hendrickson

Received above check in amount
of \$15,250.00 for Curtis payment
February 12, 1974.

/s/ Babette Hancock" (R.36)

That on the 13th day of February, 1974, a deed of conveyance executed by Utah Title and Abstract Company conveying title to real property owned by Defendants Curtis was executed and the deed together with the mortgage relied upon by the Plaintiff Hendrickson was forwarded to Douglas Church as a representative of the Defendants, Utah Title and Abstract Company (R. 23-P9).

That on the 19th day of February, some five days after

formal notice of the Defendants Curtis termination of contract, Douglas Church did record the mortgage and the conveyance, however, the funds held by Utah Title and Abstract Company were undisbursed since they did not write a mortgage policy of insurance for the benefit of the Plaintiff Hendrickson herein, and the said undisbursed funds have been held by Utah Title and Abstract Company as an agent of the Plaintiff Hendrickson.

ARGUMENT

The Respondents are of the opinion that the Appellants have broken the three major issues into several points. We do not follow the outline of the Appellants since we find it difficult to present our argument under the points adopted.

POINT I.

APPELLANTS ARE BOUND BY FACTS DETERMINED UPON UNCONTROVERTED AFFIDAVITS.

(a) A LEGAL DESCRIPTION OF 91 ACRES IS SUCH A MATERIAL DEPARTURE FROM A LEGAL DESCRIPTION INTENDED FOR 70 ACRES THAT IT CANNOT BE RECONCILED AS THE DEED OF THE GRANTORS.

The Appellants were not parties to the Court proceedings in the action entitled 1st Ok Corporation, Plaintiff vs. Morris H. Curtis and Sadie P. Curtis and Utah Title and Abstract Company, filed in Sevier County under Civil Number 6860, which case was reviewed by this Court in an affirming opinion found in 550 P2d 157, Utah 2d.

However, the true facts were set out by affidavit in accordance with Rule 56(a) Utah Rules of Civil Procedure. The detailed affidavit of Morris H. Curtis is found in the record commencing on page 18 and continuing through page 38. The Appellants did not controvert any of the facts by opposing affidavits. The facts were thereby established and were before the Lower Court and did show the fraud practiced on the Defendants Curtis. For the purpose of this hearing one of the most significant facts was that Orlando Fiandaca of the 1st Ok Corporation did prepare a deed of conveyance for the signature of Morris H. Curtis and Sadie P. Curtis. He represented to them that the deed he had prepared contained 70 acres of their land. The deed in fact contained 91 acres of land.

(a) A LEGAL DESCRIPTION OF 91 ACRES IS SUCH A MATERIAL DEPARTURE FROM A LEGAL DESCRIPTION INTENDED FOR 70 ACRES THAT IT CANNOT BE RECONCILED AS THE DEED OF THE GRANTORS.

A prepared description for 91 acres of land is so different from a description for 70 acres of land that the deed signed by the Curtises was entirely contrary to any instrument intended to be executed by them. Curtises were aware of the amount of land they had which was dissected by the freeway. They were also informed by Orlando Fiandaca that he would reserve accesses for them to all of their

lands and that all their lands would have substantial value.

Under such circumstances the speculation of the Appellants that the matter of acreage amounted to little more than a computation error cannot be permitted.

POINT II.

THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFFS HAVE NO RIGHT, TITLE OR INTEREST IN OR TO CURTIS' LAND BECAUSE THE DEED RELIED UPON BY 1ST OK CORPORATION WAS VOID AB INITIO AND PASSED NO TITLE.

A general statement of the law in this particular area is found in American Jurisprudence and also in Corpus Juris Secundum in the following:

First in *23 American Jurisprudence 2d under the Section of Deeds 142*:

"The validity of a deed is of course, affected by the existence of fraud or deception in its procurement or by deception practiced or fraudulent inducement held out to gain title. Whether the deed is void at law or only voidable in equity depends upon the character of the fraud perpetrated upon the injured party. Generally it may be said that if the grantor's signature to a deed is procured by fraudulently reading the instrument to him in terms different from the real ones or by fraudulently misrepresenting its terms, or its character, provided such fraud or misrepresentations goes to the essential of the deed and does not relate to mere details, . . . the instrument is void at law."

In *Corpus Juris Secundum under Deeds Section 67 and 68*

a similar statement is made:

"While a void deed passes no title, a voidable deed passes a defeasible title which may be set aside except when it has been acquired by an innocent purchaser for value.

It is a well established rule, which has been frequently quoted and cited, that a void deed passes no title, and cannot be made the foundation of good title even under the equitable doctrine of bona fide purchase . . . on the other hand, where a deed is regarded as merely voidable, it is good against anyone, including the grantor until it has been disaffirmed or set aside by a court of competent jurisdiction. . .

Section 68 page 789:

Thus, where the grantor knowingly executes the very instrument intended, but is induced to do so by some fraud in treaty or by some fraudulent representation or pretense, his deed is merely voidable. However, where there is fraud in the factum as where the grantor intends to execute one instrument, but another is surreptitiously substituted in its place and grantor is fraudulently made to sign, seal and deliver an instrument different than that intended, it would seem that such fraud in the factum renders the deed not merely voidable but absolutely void."

We have been unable to find a case where the Utah Supreme Court has been called upon to make a determination of when a deed is void ab initio or simply voidable. However, in all of the cases we have examined from other jurisdictions, we have found a clear distinction is made between fraud in factum (fraud which affects the instrument itself) and fraud in the inducement where the grantors have actual knowledge of the terms of the deed and intended the very instrument executed, but were induced to do so by other acts of fraud.

In the case of *Erickson vs. Bohne, (California) 279 P2d 619* the Court held:

"A deed fraudulently procured from a grantor who did not know that she was signing such a deed and had no intention, would be void ab initio and could not be a foundation of good title even under the

equitable doctrine of bona fide purchase, and the action to avoid it could be brought at any time."

The Oklahoma Supreme Court in the case of *Burns vs.*

Woodson, et al, 363 P2d 233 stated:

"Deed of land to defendants by plaintiff's father conferred nothing on defendants, and no lien in favor of defendants attached to land for father's obligation, where purported deed from plaintiff to father was void.:

The Supreme Court of Oregon in the case of *Branchfield vs. Culley*, 231 P2d 771 held:

"A void deed passes no title."

The uncontroverted facts as shown by the affidavit of Morris H. Curtis demonstrates many acts of fraud and the fact of a confidential relationship which existed between Defendants Curtis and Orlando Fiandaca, President of the 1st Ok Corporation. The deed was drafted by Orlando Fiandaca and he informed Curtises that the deed contained a description of 70 acres of their land. They were unable to read legal descriptions and relying on that representation did execute the instrument. Defendants Curtis would not have executed the conveyance had they known the true fact. The Curtises were induced by fraud to execute an instrument which was totally different from the agreement they had made. The instrument was void. Since the deed upon which the Plaintiffs rely is void ab initio, it passed no title and it cannot be made the foundation of a good title even under the doctrine of a bona fide purchase.

POINT III.

MILTON D. HENDRICKSON IS NOT A BONA FIDE PURCHASER FOR VALUE.

The claim of Milton D. Hendrickson cannot stand under any theory. The uncontroverted facts which have been enumerated under the Statement of Facts shows the funds of Milton D. Hendrickson have never been released by the Utah Title and Abstract Company to 1st Ok Corporation or any other party.

Utah Title and Abstract Company acted as an agent for Mr. Hendrickson and it was given specific instructions for the handling of Mr. Hendrickson's funds. An exact copy of Plaintiff Hendrickson's handwritten instructions are included in the record at page 104 and have been set out at page 6 of this brief.

The instructions set two conditions to be met before the funds could be released. One condition was that the mortgage relied upon by Hendrickson be recorded. The second condition was that funds could not be released unless Utah Title and Abstract did issue a policy of title insurance in Mr. Hendrickson's favor on the property described in the mortgage. Utah Title and Abstract Company was put on notice of the various claims of Defendants Curtis. A title insurance policy was never issued and the funds belonging to Hendrickson were never released, but have been held by the Utah Title and Abstract Company for further instructions from Hendrickson (R.23).

Hendrickson has not parted with any consideration to any party in these proceedings and, therefore, there can be no theory asserted in his complaint against the Defendants Curtis upon which he can be permitted to foreclose upon their lands.

CONCLUSION

We submit the Trial Court did not error in making the following Findings of Fact:

"The deeds executed by Morris H. Curtis and Sadie P. Curtis purporting to transfer title to real property to Plaintiff's predecessors in interest were fraudulently obtained. The grantors did not intend to execute the instruments in such form and said instruments were void ab initio and therefore could not be the foundation of title for Plaintiff's mortgage." (R.113)

We respectfully submit the findings of the Lower Court and the separate judgments against Plaintiff Milton D. Hendrickson and Plaintiff Bennion Insurance Company should be affirmed.

Defendants Curtis were not parties to either note or mortgage upon which the Plaintiffs rely. Defendants Curtis did not receive any part of the loan proceeds released by Bennion Insurance Company to 1st Ok Corporation and in the case of the mortgage relied upon by Plaintiff Hendrickson, the loan proceed funds were never released to anyone.

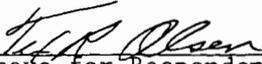
Respectfully submitted,

TEX R. OLSEN
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Attorneys for Defendants-Respondents

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of March, A. D., 1977, four copies of the within and foregoing Brief of Respondents, Morris H. Curtis and Sadie P. Curtis were served upon Appellants by mailing to their attorney, Mr. Grant M. Prisbrey, 2155 South Main, Salt Lake City, Utah 84115.



Attorneys for Respondents,
Morris H. Curtis and Sadie P. Curtis