

1988

William M. Masters, Helen C. Masters, Reid Evans,  
Norma T. Evans, James R. Loosemore, and Barbara  
J. Loosemore v. The Lake View Heights  
Homeowners Association Honolulu Federal  
Savings and Loan Association, Ben Lomand  
Estates, P, Clay Thomas : Reply Brief

Utah Court of Appeals

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OF APPEALS

IN THE UTAH COURT OF APPEALS

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WILLIAM M. MASTERS and	:	
HELEN C. MASTERS, husband and	:	
wife, REID EVANS and NORMA T.	:	
EVANS, husband and wife, and	:	
JAMES R. LOOSEMORE and BARBARA	:	
J. LOOSEMORE, husband and wife,	:	
	:	
Plaintiffs/Appellants,	:	Case No. 880465-CA
	:	
vs.	:	
	:	Category No. 14b
THE LAKEVIEW HEIGHTS	:	
HOMEOWNERS ASSOCIATION,	:	
a Utah Non-Profit Corporation,	:	
HONOLULU FEDERAL SAVINGS AND	:	
LOAN ASSOCIATION, a Hawaii	:	
Corporation, BEN LOMAND	:	
ESTATES, a Utah General	:	
Partnership, and P. CLAY	:	
THOMAS,	:	
	:	
Defendants/Respondents.	:	
	:	

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APPELLANTS' REPLY BRIEF

---

BRIEF OF APPELLANT

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## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR NEGLIGENT REPRESENTATION, AS FRAUD REQUIRES A HEAVIER BURDEN OF PROOF THAN NEGLIGENT REPRESENTATION.

The trial Court ruled that on Defendant's Motion for Summary Judgement, Plaintiffs were entitled to proceed to trial on their claim for fraud in the inducement to purchase their home. However, the trial court dismissed all of the Plaintiffs' other claims for relief, including negligent misrepresentation. The law in Utah is well settled that a claim for relief may be brought under a theory of negligent misrepresentation. Dugan v. Jones, 615, P.2d 1239 (Utah 1980) at 1246; Jardine v. Brunswick Corp., 423 P.2d 659 (Utah 1967); Ellis v. Hale, 373 P.2d 382 (Utah 1962).

The distinction between a claim for relief grounded in fraud and a claim grounded in negligent misrepresentation is that the element of "intent" is removed from the claim under negligent misrepresentation, while fraud requires proof that the person who made the false representation either knew it was false or was reckless with respect to its falsity. Negligent misrepresentation

does not require knowledge that the representation is false or reckless. Negligent misrepresentation only requires that the person making the representation act carelessly or negligently with respect to the truth or falsity of the representation. Hale 373 P.2d at 384, 385.

The trial Court found that from the evidence presented in Plaintiffs' and Defendant's Memorandums and oral argument at the hearing, Plaintiffs had established a prime facie case for fraudulent inducement to the extent that there did exist material issues of fact which needed to be decided by the trier of fact. Incongruently, however, apparently relying on the same evidence the court below dismissed plaintiffs' claim for negligent misrepresentation. The lower Court's decision to dismiss the Plaintiffs' claim of negligent misrepresentation while requiring Plaintiffs to proceed to trial on the claim of fraud is not good law.

The difference between fraudulent inducement and negligent misrepresentation which induces the same behavior, is the intent, knowledge or scienter of the action. In this case, representations were made to appellants, upon which appellants relied to their

detriment and injury. One of the key issues for trial is the intent or knowledge of those who made the representations. It is inconceivable that the Court below could rule on this issue that the evidence discovered prior to the dispositive motion showed as a matter of law that plaintiffs could not possibly prove that the statements were made negligently, but could prove they were made fraudulently. The Plaintiff should be allowed to present for a jury's consideration, the elements of both causes of action and allow them to determine the Defendants intent at the time of the misrepresentations.

## **POINT II**

PLAINTIFFS ESTABLISHED THE ESSENTIAL ELEMENTS FOR FRAUD AND NEGLIGENT MISREPRESENTATION.

There are nine elements to the common law tort of fraud. Pace v. Parrish, 247 P.2d 273 (Utah 1952). The Defendants in their Brief, indicate that their Motion for Summary Judgment was based on only two elements i.e., scienter and representations concerning presently existing material facts for purposes of this appeal.



A. Plaintiffs have shown presently existing material facts for trial.

A fact is material if it relates to a matter of importance as opposed to a minor or trivial detail. A representation of fact is material if: 1. A reasonable person in Plaintiffs position has attached importance to its existence in determining his choice of action in the transaction or, 2. If Defendants knew, or had reason to know, that Plaintiffs considered, or were likely to consider, the matter as important in determining its choice of action, regardless of whether a reasonable person would so consider it. Restatement (Second) of Torts Section 538 (1977).

In reviewing the deposition testimony of Reed and Norma Evans, the record is replete with testimony as to the importance of the view and location of future building. (R. 316, Deposition Reed Evans, page 32, lines 12 through 16; and Deposition Norma Evans, page 32, lines 10 through 14.) The Evans could have purchased any one of a number of twin homes within the same location, but, purchased the "view" and the fact that the lot immediately west of their home was to contain a landscaped walkway and park. With these specific

representations being made, the Evans were induced to purchase their home.

The Utah Supreme Court in Berkeley Bank for Cooperatives v. A. Meibos, 607 P.2d 798, 805 (Utah 1980) explained, quoting Harper & James, The Law of Torts Vol. 1, 571-72 (1956), that a closely similar problem is raised by a promise or statement of future conduct by one, who at the time, intends not to fulfill the promise. The promise itself is regarded as a representation of a present intention to perform. Hence, such a promise, made by one not intending to perform, operates as a misrepresentation -- a representation of the speakers state of mind, at the time, and is actionable as a representation of "fact". "To profess an intent, to do or not to do, when the party intends the contrary, is as clear a case of misrepresentation and fraud as could be made." In this case, the Plaintiffs contend that Defendants claimed through their project manager, Dan Hucks, that the Defendants would build a landscaped walkway, that the lot was too narrow to build on, and that the lot would be made a park. Such statements could properly be regarded as representations of a present, not

a future promise, and could be found by a jury to be actionable as misrepresentations of fact.

The court in D. Conder v. A.L. Williams & Assoc., Inc., 739 P.2d, 640 (Utah 1987) quoted Berkeley Bank for Coops, when it indicated that if defendants "did not intend to perform the future promises, when they made them, the misrepresentations are actionable." Addendum A shows that at the time the subdivision was originally platted, there was no provision for a walk way over lot 150 or a park immediately adjacent thereto, as was represented by Defendants. Thus, Defendant/Respondent showed the intent at the time to actually build homes where they said they would not. The evidence further shows that the Defendants actually did proceed as they originally intended with the project, and did in fact, build on lot 150 in opposite to what they represented to Plaintiffs. The fact that Plaintiffs were basing their purchase on the view as it then existed prior to the purchase of their home, is very material as it determined their choice to purchase the home on lot 149; and not one of the others available within the project with quite similar views.

B. Defendants should have shown that the representations were false.

The Defendants argue that the Evans' "belief" that material misrepresentations were made to them prior to the purchase of their home by Dan Hucks, the project manager, and employee of Defendants are not valid and provide no basis for recovery. The Defendants' justification for this argument are two unrelated cases, E. Lundstrom v. Radio Corp. of America, 405 P.2d 339 (Utah 1965) and Universal C.I.T. Credit Corp. v. Sohm, 391 P.2d 293 (Utah 1964) stating that mere "suspicion and innuendo" and "self-serving testimony of one aggrieved person" defeats the fact that the representations made were in fact false. This case is distinguishable from the above two cases in that they dealt with consumers, who when they became disgruntled with their product or services, decided to not pay the contractual amounts owed and then when sued, used fraud as a defense to their payment. In this case the Evans were very happy with the home they purchased, have paid for their home in full and are only seeking damages caused by Defendants' misrepresentations and adjacent home construction which has severally depreciated the value of Plaintiff's home.

Defendants deliberate attempt to label Plaintiffs' evidence in the context of "belief" should in no way negate the facts as shown. Namely, that there were representations made by the project manager as to material facts that proved to be false. Defendants have not shown any evidence contrary to the statements made by the Evans through deposition or affidavit, and, therefore, have failed to establish the lack of this essential element. A. L. Williams 739 P.2d at 640. Mere labeling does not necessarily make a fact not reliable or truthful but must be opposed by evidence showing such.

### **POINT III**

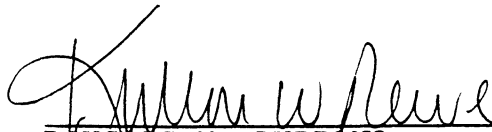
DEFENDANTS WERE IN THE BUSINESS OF SUPPLYING INFORMATION AND SHOULD BE HELD LIABLE FOR NEGLIGENT MISREPRESENTATIONS.

Mrs. Evans in her deposition said "Then, she (Ms. Becksted) took us over to the Lakeview management, and that's where we talked about the view. But like I say, we wouldn't have bought it if we hadn't have been assured that we would have that view. Because that's what we were buying." (Norma Evans Deposition page 32 lines 10 through 14). Also, Mrs. Evans indicated in response to the question "Who then did you talk to?" "I think the

man - - it was then the manager of Lakeview. And I think his name was Mr. Hucks." (Norma Evans Deposition page 35 lines 14 through 16) Mr. Evans also indicated on pages 32 through 37 of his deposition that the representations made to him were by Dan Hucks, the project manager, for Lakeview. Dan Hucks was not a realtor, but the project manager in charge of construction, development and liaison with the Defendants and Plaintiffs. Who better would be in a position to know the overall plans and intent of the Defendants than the person in charge of carrying out their directions. Mr. Hucks was the obvious person to know and provide that information to, not only people interested in purchasing homes and lots within the development, but, also for existing residents. Mr. Hucks was not the realtor selling the project, but a professional employee of Defendant, who would be very much in the business of supplying information, and would have that special expertise or competence upon which the Plaintiffs could rely. Therefore, the laws espoused in Hale, 373 P.2d 382 (Utah 1962) as relied upon by Defendants, are in reality, supportive of Plaintiffs' position.

### CONCLUSION

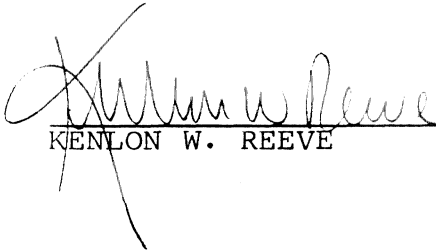
For the reasons set forth above, Plaintiffs/  
Appellants pray this Court to reverse the lower Court's  
Order and allow Plaintiffs to proceed to trial on their  
claims prayed for, and for what other relief it deems  
appropriate under the circumstances. Respectfully  
submitted this 21 day of December, 1988.

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I hereby certify that I mailed and/or hand delivered four true and correct copies of the foregoing Appellants' Reply Brief to Donald Dalton and John Snow at VanCott, Bagley, Cornwall & McCarthy, 50 South Main, Suite 1600, P.O. Box 445340, Salt Lake City, Utah 84145.

DATED this 21 day of December, 1988.

  
KENLON W. REEVE



## **ADDENDUM A**

MAR 16 9 23 AM '83

*[Handwritten signature]*

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

WILLIAM M. MASTERS and HELEN C. )  
MASTERS, REID EVANS and NORMA T. )  
EVANS, JAMES R. LOOSEMORE )  
and BARBARA J. LOOSEMORE, )

Plaintiffs, )

vs. )

THE LAKEVIEW HEIGHTS HOMEOWNERS )  
ASSOCIATION, a Utah non-profit )  
corporation, HONOLULU FEDERAL )  
SAVINGS & LOAN ASSOCIATION, a )  
Hawaii corporation, BEN LOMOND )  
ESTATES, a Utah general )  
partnership, and P. CLAY THOMAS, )

Defendants. )

RULING ON DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT

Case No. 93329

At oral argument, plaintiff fairly well conceded that, of the seven causes of action, they were relying primarily on the fraud and the breach of fiduciary duty, and that the other causes of action, private nuisance, violation of easements of light, air and view, breach of declaration of covenants, etc., were basically window dressing.

Plaintiff runs together the allegation of fraud in the inducement in regard to the purchase of the property, and an allegation of fraud or misrepresentation in obtaining their, plaintiffs', signing of a variance for change in permissible building on Lot 150. It appears quite clear that they were not required or necessary to the obtaining of the variance, and if

In regard to the fraud allegation in the representations made at the time of purchase, I must admit that I have had some problem with this. However, in considering a summary judgment, it must be considered in the light most favorable to the party opposing the motion, it appears there is sufficient issue of fact to retain this issue for trial. Defendants' motion in regard to the cause of action for fraud is denied insofar as it has to do with the alleged misrepresentations made at the time of purchase.

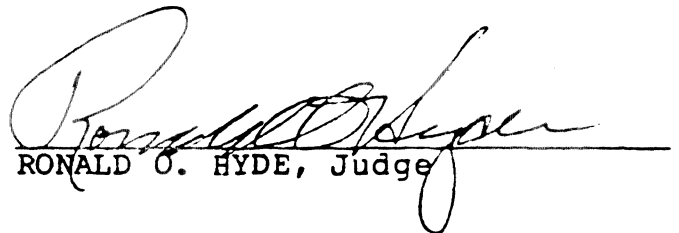
As to breach of fiduciary duty, plaintiffs' have shown nothing that would support such an allegation. Plaintiffs tend to cite cases and phrasing of cases which sound good, but do not necessarily support their position. Even taking the facts most favorable to the plaintiffs, they establish nothing that would indicate a fiduciary duty on the part of the defendants. Plaintiffs tend to argue along the lines that they had superior information and did not tell the plaintiffs, and at the same time argue that what they did tell them constitutes fraud. Defendants' motion for summary judgment is granted in all causes of action except for fraud in the inducement at the time of purchase.

In regard to dismissing defendant Honolulu Federal Savings and Loan, I again have a problem with plaintiffs' position and their briefs. They tend to rely upon allegations, and an affidavit that tends to rely upon belief. The affidavit,

Page 3  
Ruling on Defendant's Motion  
for Summary Judgment  
Case No. 93329

however, does make some factual statements that if considered in the best light, might well be considered as sufficient. For the time being, I grant the plaintiffs the benefit of my expressed doubts and the motion is denied.

DATED this 15 day of March, 1988.

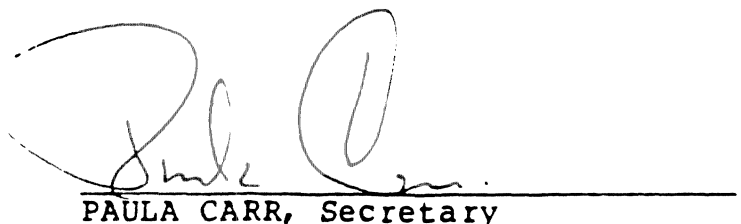
  
RONALD O. HYDE, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of March, 1988, a true and correct copy of the foregoing Memorandum Decision was served upon the following:

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88-0464

IN THE UTAH COURT OF APPEALS

TERRI C. HARDY, widow of  
BRYCE W. HARDY, deceased,

Plaintiff/Respondent

**VS.**

BENEFICIAL LIFE INSURANCE  
COMPANY, a Utah corporation,

Defendant/Appellant

No. 880464-CA

Argument Priority  
Classification 14b

APPELLANT'S REPLY BRIEF

Appeal from Judgment of the  
Third Judicial District Court for Salt Lake County  
Honorable Richard H. Moffat

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IN THE UTAH COURT OF APPEALS

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TERRI C. HARDY, widow of	)	
BRYCE W. HARDY, deceased,	)	
	)	
Plaintiff/Respondent	)	
vs.	)	No. 880464-CA
	)	
BENEFICIAL LIFE INSURANCE	)	Argument Priority
COMPANY, a Utah corporation,	)	Classification 14b
	)	
Defendant/Appellant	)	
	)	

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APPELLANT'S REPLY BRIEF

---

Appeal from Judgment of the  
Third Judicial District Court for Salt Lake County  
Honorable Richard H. Moffat

---

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TABLE OF AUTHORITIES

CASES CITED

<u>Hoffman v. Life Insurance Company of North America</u> , 669 P. 2d 410 (Utah 1983) . . . . .	2
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## SUMMARY OF ARGUMENT

Under Utah insurance law, death is not accidental if it was the natural and probable consequence of an act or course of action undertaken by the insured. The natural and probable consequence of an act or course of action is the result which, from the insured's point of view, may reasonably be expected. The evidence in this case clearly shows that Mr. Hardy expected to die as a result of his act and course of action. His death resulting from his act and course was action was expected by him and was not accidental.

## ARGUMENT

### I. Bryce Hardy's Death from an Overdose of Narcotics was not an Accident

Mrs. Hardy's brief characterizes Beneficial's denial of benefits in this case as being based upon an "unstated premise that anyone who engages in illegal drug usage has to be deemed to have intended to die by virtue of that conduct", or being predicated "upon the false premise that Bryce Hardy somehow died as a result of a pattern of drug abuse" or being based on the ground that Mr. Hardy's conduct "was so reckless that it deprived his death of an accidental character". These characterizations of Beneficial's position are simply not accurate. Beneficial's argument, pure and

simple, is that Mr. Hardy's death was not an accident under Utah law.

The Utah Supreme Court has held that "where the insured expected or anticipated that death would follow from his or her conduct, recovery has been denied" and that "An effect which is the natural and probable consequence of an act or course of action is not an accident." Hoffman v. Life Insurance Co. of North America, 669 P.2d 410, 417 and 415 (Utah 1983). In order to determine whether an effect is the natural and probable consequence of an act or course of action, one must know what that act or course of action was. It must also be determined what the decedent expected to result therefrom.

Mr. Hardy's conduct consisted of a continuous series of narcotic ingestion episodes. Beneficial's reference to this conduct is directed to the question of what Mr. Hardy's act or course of action was and to what he expected or anticipated would follow from such acts. It is true, as Mrs. Hardy states, that Mr. Hardy's death was the result of one overdose of drugs. The question, however, is whether Mr. Hardy expected to die from such an overdose of drugs. The evidence clearly shows that he did. The facts are that Mr. Hardy's physicians and counselors didn't give him "good advice" as argued by Mrs. Hardy. They gave him specific instruction that if he continued to ingest drugs he would kill himself. Mr. Hardy understood this and expected that that result would follow if he continued to ingest drugs. He had, on at least two prior occasions, taken overdoses of drugs and nearly died. One

of these occasions was just five months before his death. When hospitalized following that occasion he expressed to his nurse that if he didn't stop his act or course of action he would "be dead". Mr. Hardy expected to die from exactly what killed him, an overdose of drugs.

None of the cases cited by Mrs. Hardy have facts similar to those in this case. None present the situation of a person who had almost died on previous occasions from taking overdoses of drugs or who a few months before his death expressed his specific understanding that if he continued his course of action he expected that he would "be dead". Mr. Hardy clearly expected and anticipated that if he kept abusing drugs he would die from an episode of drug abuse. He kept abusing drugs and he died from an episode of drug abuse.

Mrs. Hardy also argues that Beneficial was free to incorporate a provision into its policy excluding death from drugs from coverage and that the Court should not write such an exclusion into the policy. Mrs. Hardy misses the point. Beneficial is not arguing that all drug related deaths are non-accidental. In many cases death from a drug overdose would clearly be accidental. In this case, however, the facts prove that Mr. Hardy expected and anticipated that his death would follow from his conduct.

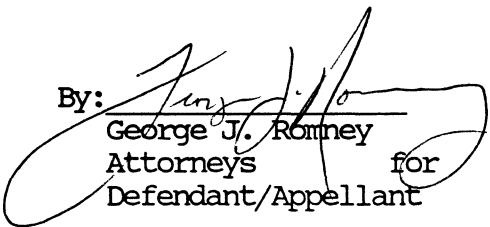
CONCLUSION

Mr. Hardy's death was the natural and probable consequence of his own actions. He expected and anticipated those actions would result in his death. Mr. Hardy's death was not an accident.

DATED this 21<sup>st</sup> day of November, 1988.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 21st day of November, 1988, I caused to be mailed in the United States Mail at Salt Lake City, Utah, first class, postage prepaid, four true and correct copies of the foregoing Appellant's Reply Brief addressed to the following:

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