

2001

Maurice W. Smith and Anita L. Smith, his wife v.  
Mrs. Beth Pearmain, Barry D. Johnson and  
heartland Realtors, a Utah Corporation : Brief of  
Respondent

Utah Supreme Court

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14163

IN THE SUPREME COURT OF THE STATE OF UTAH

MAURICE W. SMITH and :  
ANITA L. SMITH, his wife,

Plaintiffs-Respondents, :

- vs - :

MRS. BETH PEARMAIN, :  
BARRY D. JOHNSON and :  
HEARTLAND REALTORS, a :  
Utah corporation,

Defendants-Appellants. :

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School  
Case No. 14163

RESPONDENT'S BRIEF

Appeal from the Third Judicial District Court of

Salt Lake County, State of Utah, Honorable

Maurice Harding, Judge

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ANITA L. SMITH, his wife,

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### PRELIMINARY STATEMENT

For the purposes of this Brief, the following references will be used throughout. When referring to the transcript of the record, the term "Tr." followed by page and line will be used.

When referring to the pleadings and file sent up from the District Court, the term "R" followed by a page number will be used.

When referring to exhibits, the term "exhibit" followed by the identifying "P" or "D" and its number will be used.

### NATURE OF THE CASE

The Respondent herein concurs with the statement of the case made in Appellants' Brief. (See Appellants' Brief, page 1.)

### DISPOSITION IN LOWER COURT

The Respondent herein concurs with the statements in Appellants' Brief concerning the disposition made in the lower Court. (See pages 1 and 2 of Appellants' Brief.)

### NATURE OF THE RELIEF SOUGHT

Defendants-Appellants seek to have the decision of the lower Court reversed and judgment entered in favor of defendant and further relief as appears equitable to the Court.

### STATEMENT OF FACTS

The Respondents agree with the statement of facts as contained in Appellants' Brief, except as to the following points:

1) In the year 1930 when the first variance was granted, there is no evidence as to who owned the property. Appellants allege at page 2 of their Brief that Mr. N. P. Neilson was the owner; this statement is not supported by the evidence.

2) At the top of page 3 of their Brief, Appellants state that when his petition to the city was granted, "Mr. Nielson was not living on the property". Again the evidence doesn't sustain this statement. Exhibit 34-D doesn't disclose who was living on the property; however, if he wasn't, what prompted the Board of Adjustment to state that "an unnessary hardship will be suffered by petitioner" if the variance is not granted. (See page 2 of City Decision, June 20, 1930.) The reference to the R. 95 to sustain this statement is pure boot-strapping as R. 95 represents argument of counsel for the Appellants -- which, of course, is not evidence.

3) With regard to the variance granted in 1942, Appellants omit the fact that the applicant, the Appellant's predecessor, stated "there will be no foundry nor anything that will cause noise and disturbance". (See page 1 of City finding on June 29, 1942; exhibit 35-D.) From this evidence before it, the city granted the variance.

4) The statement of Appellants on page 4 of their Brief indicating that in 1950 when Appellant moved in there was R-2 zoning which permitted two-family dwellings, and thus the duplex on 1131 Wilson, is not supported in the evidence. Neither exhibit 35-D nor R-29, used by Appellants to substantiate this statement, are pertinent or relevant. However, there is evidence in exhibit 35-D to indicate that the house on 1131 Wilson Avenue had been changed from a single dwelling residence to a two-family dwelling without "permit" or "approval". (See report of Harry A. Hurley in exhibit 35-D.)

5) In addition to the facts as stated at page 5 of Appellants' Brief concerning the property at the time Appellant purchased it, it should be pointed out that the house was vacant, and had been for two to three months (Tr. page 113, line 27), and that Appellant did extensive repair to the house, for which she never obtained permits or approval from the city. (Tr. page 113, line 12; Tr. page 17, line 14.)

Also, that at the time of purchase, the Appellant did not check with the city for the non-conforming uses (Tr. page 17, line 15-18), and when Appellant re-rented the premises as a duplex, she never inquired if it was a proper and conforming use. (Tr. page 114, lines 4-6.)

6) Finally, the statement on page 8 of Appellants' Brief that "there is no evidence in the record of any written decision from the Planning

Director or the Chief Building Inspector or any other city official prior to the decision of the Board of Adjustment . . . " is just not true.

Appellants' own exhibit 35-D contains just such written decision from the City Planning Director, Vernon F. Jorgensen. (See letter in exhibit 35-D dated August 15, 1975.) In addition, the record indicates as early as the middle of July, Respondent's manager had indication of problems on the property. (Tr. page 34, lines 6-25.) On July 20th, Respondent was advised by his manager that the city had informed him that the property was being used illegally and would have to be vacated. (Tr. page 35, lines 25-27.)

#### POINT I

ALLEGED ERROR OF COURT BELOW IN FINDING THAT DEFENDANT MADE FALSE REPRESENTATIONS, ENTITLING PLAINTIFFS TO RESCIND THEIR CONTRACT.

In its Brief, in support of its Point I, Appellant makes much verbiage concerning the allegation that "Plaintiffs have failed to establish by clear and convincing evidence" the elements of fraud. However, Appellant doesn't cite one case in support of her contention. This is, no doubt, due to the fact that in this jurisdiction, this Court has made it clear that:

The question of whether evidence is sufficient to be clear and convincing is primarily for the trial court; his finding should not be disturbed unless we must say as a matter of law that no one could reasonably find the evidence to be clear and convincing. (emphasis added) Paulson v. Coombs, 123 Utah 49, 253 P.2d 621.

This rule of law was also followed in Culley v. Culley, Utah 1965, 404 P.2d 657, 17 Utah 2d 62, when the Court reiterated:

Whether evidence is sufficient to meet necessary requirements of being clear and convincing is largely for trial court to determine because of its advantaged position.

Further, this Court has repeatedly held that it will not disturb the findings of the lower Court, except in clearly justified cases:

Supreme Court will not upset findings of trial court unless evidence clearly preponderates to the contrary. Utah 1975, Zions First National Bank v. First Security Bank of Utah, N.A., 534 P.2d 900.

Even in equity cases, trial court's findings and judgment will not be disturbed on appeal unless evidence clearly preponderates against them and a manifest injustice or inequity is wrought. (Per Crockett, J., with one judge concurring and two judges concurring in result.) Utah 1974, McCullough v. Wasserback, 518 P.2d 691, 30 Utah 2d 398.

In suit in equity, it is duty of Supreme Court to weigh facts as well as law, but Supreme Court will reverse only if evidence clearly preponderates against findings of trial court. Utah 1973, Nelson v. Nelson, 513 P.2d 1011, 30 Utah 2d 80.

Supreme Court will not disturb findings with respect to an equitable plea unless they are clearly against weight of evidence. Utah 1972, Achter v. Maw, 493 P.2d 989, 27 Utah 2d 149.

Supreme Court may review facts in equity cases but makes allowance for advantaged position of trial judge and does not disturb his findings and judgment merely because it might have viewed matter differently, unless evidence clearly preponderates against them or he has abused discretion or misapplied law. Utah 1970, Corbet v. Corbet, 472 P.2d 430, 24 Utah 2d 378.

In equitable proceeding, Supreme Court may review findings but should not disturb them unless they are clearly against weight of evidence. Utah 1969, Chevron Oil Co. v. Beaver County, 449 P.2d 989, 22 Utah 2d 143.

Supreme Court would sustain findings and determination made by trial court in equity case unless evidence clearly preponderated against them or trial court misapplied rules of law. Utah 1963, Weggeland v. Ujifusa, 384 P.2d 590, 14 Utah 2d 364.

It is also the rule of law in this jurisdiction that the findings of the trial court are presumed correct, and the burden of proving error falls upon the party alleging it.

In reviewing proceeding in equity seeking determination as to which of two mortgages takes precedence, deference is given to prerogative of trial court to make findings and judgment, and trial court is indulged with same presumptions of verity accorded in other equitable proceedings. Utah 1970, Kemp v. Zions First Nat. Bank, 470 P.2d 390, 24 Utah 2d 288.

Although action to avoid deeds is one in equity upon which reviewing court has both the prerogative and the duty to review and weigh the evidence, and to determine the facts, trial court's findings and judgment are presumed correct

and appellant has burden to show they were in error; and where the evidence is in conflict, reviewing court will not upset trial court's findings merely because reviewing court may have viewed the matter differently, but will do so only if evidence clearly preponderates against the trial court's findings and judgment. Utah 1972, Del Porto v. Nicolo, 495 P.2d 811, 27 Utah 2d 286.

Therefore, it would appear from the foregoing that unless the lower Court clearly made a serious and blatant error in its findings of fact and conclusions of law, completely unsubstantiated by the evidence or law of the case -- this Court must uphold the decision of the trial court.

Respondent respectfully submits that the evidence does substantiate the findings and decision of the trial court and an examination of it will so prove.

Respondents agree with Appellants that the requirements laid out in Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952) constitute the yardstick for measuring fraudulent misrepresentation in this jurisdiction. Therefore, let us examine them:

1 - THAT A REPRESENTATION WAS MADE CONCERNING A PRESENTLY EXISTING MATERIAL FACT, WHICH WAS FALSE.

The first evidence concerning a representation made concerning a presently existing fact appears at Tr. page 25, beginning at Line 10. (Mr. Smith is testifying.)

"He (Defendant's agent) indicated that the shops were being utilized under a 1945 nonconforming use permit and I was informed that it would be invalid if the property was vacant for a year and a day and that it was R-2 zoning which permitted a duplex which was in front of the property."

and at line 20:

"I inquired as to what uses would be permitted for the property if it were vacated in order to conform to the year and the day use permit. I was informed that it would be utilized for light manufacturing, that there were all kinds of businesses that would be interested in utilizing such a facility . . . "

and at page 26, line 1:

"We discussed use of the garage and he (Defendant's agent) indicated that it would make a good paint spray booth. They are always interested in painting cars and it was a double outside sized garage both in width and in height and in debth and would be ideal for such an operation."

and at page 28, line 29:

"No, earlier in the day we talked about the zoning which was R-2. I was informed that it was R-2 zoning which permitted the duplex."

and at page 61, line 2:

Mr. Neilson: Now, it is true is it not, that when you looked at the property on April 7, 1973, you came to the conclusion and determination from your examination of it that there had been nothing misrepresented to you by Mr. Johnson (Defendant's agent).

Mr. Smith: No, he indicated that the use permit permitted the use and that the zoning permitted the duplex.



and at page 64, line 16

Mr. Neilson: You knew at the time you bought this property that it was not zoned for commercial use; didn't you?

Mr. Smith: Yes, sir.

Mr. Neilson: And that any commercial use there would have to be in accordance with some nonconforming permit.

Mr. Smith: The use permit that Mr. Johnson (Defendant's agent) told me.

Mr. Neilson: Well, some kind of nonconforming use permit?

Mr. Smith: I was informed that that was the basis of it, yes sir.

and at page 74, line 6:

Q In your conversations with Mr. Johnson, did you discuss the use of it? (the property)

A Yes, sir, on the basis of how the property in the rear could be on the R-2 zoning which was, he indicated, permitted the duplex. At that time he indicated there was a use permit which was issued in 1945.

Q What did the use permit permit?

Mr. Nielsen: I object to that on the ground that the use permit would be the best evidence on what it provides, Your Honor.

Mr. Dodd: But that isn't the evidence. I am asking him was there any discussion on the use permit?

The Court: He may answer.

The Witness: Yes. I was primarily concerned with what would happen with the tenants who were vacant which we

indicated was the basis of having the use permit, and he indicated that there could be manufacturing use, and a multitude of activities including a paint spray booth in the garage which was ideally located for that operation. We went into the several kinds of businesses that would be able to utilize the stores and the garage should the property become vacant.

and at page 75, line 8:

(Mr. Dodd) Q. In your discussions with Mr. Barry Johnson (Appellant's Agent), did you assert how he knew about the zoning?

A No, I just asked him when he indicated that it was a duplex what was the basis of a duplex and he indicated R-2 zoning which permitted the duplex and I asked him what was the basis of the shops in back and at that time he indicated it was a conditional use permit.

In addition to the above evidence, we have the documentary exhibits 16-P and 12-P. Exhibit 16-P contains the advertisement which describes the property as "duplex with shops". It also describes a "mechanic's garage" and "two-level machine shop". Exhibit 12-P describes the property as a "duplex listing" with a "metal shop" and "garage".

Respondent respectfully points out that by placing the exhibit 16-P in the newspaper, the Defendant proclaimed to the world through her agent that the uses advertised were proper and legal uses. That as a matter of fact, there was a legal duplex on the property that could be used as such. That as a matter of fact, there was a mechanic's garage on the property which could be legally used as such and that as a matter of fact,

there was a two-level machine shop and the property could legally be used as such.

Respondent admits that the advertisement does not explicitly state that the use permit was obtained and what it permits. But implied in the language used is the assurance that the property can be used for the purposes stated in the advertisement, and legally so. This must be especially true where the advertisement is placed in a newspaper of wide circulation calculated to cross state lines.

Exhibit 12-P again shows the way in which the property was described to the profession and again must carry with it the implication that the uses of the property stated on the listing are legal and proper, or if they are not, then the seller or her agent would have the duty to disclose the same.

The testimony of Mr. Smith clearly shows that he was told that the uses on the property were legal and proper. The quotations from the evidence above clearly indicate that he was told that the then existing uses were legal and proper, that manufacturing was permitted and that the duplex was legal under the R-2 zoning.

However, the facts at the time of the statements, had the Appellant taken the bother to find out, were that the duplex was illegal and that manufacturing could not be done on the premises, nor was there a mechanic's garage which would allow spray painting. The limited commercial use

which the law allowed was for a family-operated business. (See exhibit 10-P and letters from City Planning Director in exhibit 35-D.) The duplex was illegal and the use as advertised by the Appellant and as represented to the Respondent was totally misleading and improper, and at the time the statements were made to Respondent, they were false and misleading and at the time the advertisement was placed, it was false and misleading and at the time the listing was entered and listed, it was false and misleading. Therefore, there can be no doubt that a representation was made concerning a presently existing material fact, which was false, i.e., the statements concerning the validity of commercial activity on the property and that the nonconforming use permit allowed it. Allegedly true statements were made concerning the validity of the duplex permitted by the R-2 zoning, when, in fact, the duplex had never been permitted and, in fact, was in violation of the city ordinances. The statement concerning the mechanic's garage and the permissibility of being able to use the garage as a spray paint shop, of course, was false and misleading when made.

2 - WHICH THE REPRESENTOR EITHER (a) KNEW TO BE FALSE, OR (b) MADE RECKLESSLY, KNOWING THAT HE HAD INSUFFICIENT KNOWLEDGE UPON WHICH TO BASE SUCH REPRESENTATION.

As will be seen from the transcript, the Appellant's agent who made the misleading statements did not testify at the trial, although he was in Court. (Tr. page 4, lines 7-18.) It appears that the Appellant elected not to have him testify and, therefore, there is no direct testimony as to the knowledge Appellant's agent possessed at the time the misleading statements were made. Therefore, it must be concluded either that (a) Appellant's agent did not inquire of the city as to the validity of the uses on the property and made his statements wrecklessly, not having sufficient knowledge thereof, or (b) he did inquire and knew the uses were not permitted and knew his statements to be false. In either case, it is submitted that the law would allow recovery by the Respondent and does support the decision of the trial court.

In Brassford v. Cook, 380 P.2d 907 (Colo. 1963), the court stated:

It is true that where one seeks rescission by reason of misrepresentation rather than damages, he need not prove that the seller had knowledge of the falsity of the representation or was utterly indifferent to their truth or falsity. 380 P.2d at 910.

In LaCourse v. Kiesel, 366 Pa. 385, 77 A.2d 877 (1951), defendants engaged a company to sell their property. Hand bills that advertised the property stated that property, as told by defendant, was zoned R-5, which permitted apartments. Plaintiff read the handbill

and decided to purchase and use as income producing property. Upon plaintiff's application for title insurance, they learned for the first time that zoning restrictions prohibited the use of the property other than as a single residence. Plaintiff sued for rescission and return of all monies paid. The court held for plaintiffs and the high court affirmed.

The court commenting on the misrepresentation stated:

Moreover, whether the selling agent or the owners knew that the representation was false has been repeatedly held in this jurisdiction to be a matter of no consequence. A vendor has no right to make such a statement of which he has no knowledge. At page 879.

In a case similar to the one at bar, involving a city code and years of precedent use, defendants were held liable for false statements even though innocently made. In Kroninger v. Anast, 116 N.W. 2d 863 (Mich. 1962), plaintiffs sued for rescission on grounds that defendant had made false representations to them that the building could be used for a seven-family apartment. The defendants had used such building as a seven-family apartment down through the years. Such use antedated the city housing code. Defendants freely admit that they represented to the plaintiffs that the property could be used as a seven-family apartment. Defendants had no reason to believe otherwise since they and their predecessors in title had used the building as a seven-family apartment down through the years without any interference by the city officials or otherwise. The local law allowed the city to stop the continued use of

the building as a seven-family apartment. The plaintiffs won the case and were allowed rescission. The court commenting upon the representations held that:

Under these circumstances, the representations of the defendant which were relied upon by the plaintiff, were false, even though innocently made. Defendants must be held responsible for their untrue statements even though made in ignorance of their falsity . . . The representations even though honestly believed by defendant made out a case of fraud warranting rescission. At page 867.

A variance of five feet concerning a street between the contract provisions and the final topographical map of New York City was the problem in Goldstein v. Stern, 224 N.Y.S.2d 816 (1962). The court held that:

If the misrepresentations were innocent a buyer may still rescind and sue to recover the consideration paid. At page 819.

In Angela Realty Corp. v. Pavasner Holding Corp., 236 N.Y.S.2d 634 (1962), there was a contract of purchase and sale of certain commercial property. Plaintiff advised defendant of their intended use of the property and inquired whether under existing ordinance such use was permitted. Defendant advised that such use was permitted. Before closing, plaintiff learned that such intended use would only be permitted as a special exception. The court held that:

Plaintiff being unable to use the premises as intended

and which facts were known to the defendants is entitled to a rescission. At page 635.

In Rosenchein v. McNally, 229 N.Y.S. 2d 187 (1962), it was held that:

Even though the representations of a material fact was innocently made by defendant and with no intent to deceive, plaintiff can still rescind and sue at law to recover the considerations paid. Page 189.

Labasin v. President Realty Holding Corp., 209 N.Y.S. 2d 496 (1960), concerned a mistake as to the rentals permissible under law concerning certain property. The court held that:

It is well established that erroneous representations, even though innocently made, may justify rescission of a consummated contract. Mistake as to a material fact may be grounds for a rescission of a contract for the sale of land, even in the absence of fraud, entitling the purchaser to rescind and recover the purchase price. At page 489.

A case which appears to be directly in point and involves a zoning problem is an older case coming from the Pennsylvania District and County Reports, Gross v. William Penn Fire Inc. Co., 51 Penn. Dist. & Co. Rpts. 296 (1944). The case involved a suit to recover a deposit, and the alleged fraud of defendant through its agent in misrepresenting that the property could be used as a tailor shop. The plaintiff, a tailor, had seen a piece of property for sale and went to defendant's real estate agent to inquire. Defendant's agent knew plaintiff was a tailor



and was looking for a location for a new tailor shop. Defendant's agent stated, "As far as I knew, there were no restrictions against a tailor shop". The agent called the owner and this was verified. Plaintiff paid the deposit, took possession, and discovered that the zoning code prohibited the use of the premises for a tailor shop. Plaintiff complained to defendant and an endeavor was made to change the zoning law; this proved unsuccessful. Plaintiff vacated the premises following arrest for violation of the zoning code. Plaintiff then sued for cancellation of the sale and return of the deposit. The court held that a principle is liable on misrepresentations of an agent, and then stated:

The modern concept of the doctrine of fraud and misrepresentation does not necessitate conscious error nor negligence on the part of the person making the representation. Page 299.

The court went on further and held that:

It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient, for though the representation may have been innocent, it would be unjust to allow one who has made false representation, even innocently, to retain the fruits of a bargain induced by such representation.

The court holding further stated:

The representation by defendant that the house could be used for a tailor shop cannot be classified as an opinion.

and

If an opinion is falsely and fraudulantly rendered by one

professing to have expert skill and special knowledge, it is legal fraud. At page 300-301.

3 - FOR THE PURPOSE OF INDUCING THE OTHER PARTY  
TO ACT UPON IT.

That Barry Johnson was a real estate agent and was Appellant's agent cannot be controverted. (Tr. page 18, line 11; and exhibit 12-P.) And that Appellant is liable for the acts and statements of her agent is beyond dispute:

A principle cannot repudiate statements made by his agent in the course of the employment, and fairly within the line of his real or apparent authority, and he is bound by the agent's material representations of fact to the same extent as if he had made them himself. Am Jur. 2d Vol 3 on Agency Section 264 at page 629.

Therefore, the statements made by Appellant's agent, inasmuch as he was also a real estate agent, and held himself out to so be (see advertisement on exhibit 16-P and exhibit 12-P), could be taken as being made by one who was an expert in the area, or at least has superior knowledge in real estate matters than the average layman.

The advertisement contained on exhibit 16-P was placed in the newspaper and was worded in such a way so as to induce potential buyers to act upon it. That the Respondent was so induced is clear in the evidence, (Tr. page 22, lines 13-29 and page 23, lines 1-20.) for it was through the advertisement that Respondent first became aware of the

property on 1131 Wilson Avenue, Salt Lake City. Pursuant to this, Respondent called Appellant's agent and received further statements concerning the property, among them the misleading ones concerning the uses permitted on the property. (Tr. page 24, lines 12-30 and page 25, lines 1-30 and page 26, lines 1-27.) Respondent was induced by this conversation to make the offer to purchase by telegram (see exhibit 17-P and 18-P), with a \$100.00 earnest money check. Several telephone conversations followed this and Respondent came to view the property on April 7, 1973. (Tr. page 28, lines 1-3) Again statements were made to him concerning the purchase and use of the property, among them some misleading ones, and based upon them, he purchased the property and took possession on June 1st. (Tr. page 28, lines 6-30; page 29, lines 1-30 and page 30, lines 1-25. See exhibits 1-P through 7-P.)

It is also clear that Appellant's agent represented to Respondent that he knew all the particulars on the property for at Tr. page 30, line 21, the following evidence was obtained:

(Mr. Dodd) Q. Was there any conversation had at this time about checking with the city.

(Mr. Smith) A. No, sir. He knew the date of the use permit, he knew what could be done with the use permit, he knew how long the property had been rented, he knew the zoning, and . . .

It was upon this assertion of knowledge, and the statements of

Appellant's agent that Respondent relied and was induced to buy the property. At. Tr. page 31, beginning at line 7, we find:

(Mr. Dodd) Q. Now as a result of your conversation with Barry Johnson, did you take any action?

(Mr. Smith) A. Yes, I relied upon what he had told me.

Mr. Nielson: I object to that if the court please; it is a conclusion about what he did, and not a factual statement.

Mr. Dodd: He is entitled to give his testimony.

The Court: The objection will be overruled.

(Mr. Smith) A. I relied upon what he had told me on the phone in several conversations before I came to Salt Lake, upon the facts that he presented to me when I visited him in his office before I saw the property, and upon the facts that he presented to me when I visited the property and again what he told me in relation to managing and selling the property at the end of the two years when the note to Mrs. Pearmain would have been paid off.

From the foregoing, there can be no doubt that the statements of Appellant's agent were made with a view to inducing Respondent to purchase the property. This was his job, his profession and his business to sell this property for Appellant.

4 - THAT THE OTHER PARTY ACTING REASONABLY AND IN IGNORANCE OF ITS FALSITY, DID IN FACT RELY UPON IT AND WAS THEREBY INDUCED TO ACT: TO HIS INJURY AND DAMAGE.

The record in this matter is clear and uncontroverted. At

Tr. page 31, lines 7-20, we find the following:

(Mr. Dodd) Q. Now as a result of your conversation with Barry Johnson, did you take any action?

(Mr. Smith) A. Yes, I relied upon what he had told me.

Mr. Nielsen: I object to that if the court please, it is a conclusion about what he did, and not a factual statement.

Mr. Dodd: He is entitled to give his testimony.

The Court: The objection will be overruled.

(Mr. Smith) A. I relied upon what he had told me on the phone in several conversations before I came to Salt Lake, upon the facts that he presented to me when I visited him in his office before I saw the property, and upon the facts that he presented to me when I visited the property . . .

And even under the cross-examination of Appellant's counsel, it became quite clear that Respondent had believed what Appellant's agent had represented to him about the property. At Tr. page 61, lines 2-28, the evidence is as follows:

(Mr. Nielson) Q. Now, it is true is it not, that when you looked at the property on April 7, 1973, you came to the conclusion and determination from your examination of it that there had been nothing represented to you by Mr. Johnson?

(Mr. Smith) A. No, he indicated that the use permit permitted the use and that the zoning permitted the duplex and that the properties were occupied.

(Mr. Nielson) Q. So that you had no complaint about anything he told you up to that time?

(Mr. Smith) A. No, sir.

(Mr. Nielson) Q. But your reason for inspecting the property was that you did not want to take his word for what he had said and you wanted personally to physically examine the property before you signed the earnest money and receipt?

(Mr. Smith) A. No, sir.

(Mr. Nielson) Q. What do you mean, no, sir? Didn't you want to examine the property and inspect it?

(Mr. Smith) A. I wanted to examine the property, but not because I didn't believe him. As I explained earlier, it is difficult over the phone to visualize what the property was like, it was difficult to visualize when it had to be painted, what we were talking about when we were talking about painting, and it is difficult to visualize the rental potential because not knowing Salt Lake and exactly where it was located when he said it was a dead end street so I came out and wanted to look the neighborhood over . . .

Therefore, the evidence of the case is that the Respondent believed the representations of Appellant's agent. The court below found that this belief, reliance and subsequent purchase by the Respondent were reasonable. (See Conclusion of Law #2 R. page 248.) The evidence of the case also substantiates this position. It is uncontroverted that the Respondent was a resident of California (Tr. page 22, line 12), had never worked in Utah (Tr. page 42, lines 22-29), had never purchased property in Utah (Tr. page 44, lines 17-24), and was not familiar with Utah law or procedures for closing purchases of real estate.

On the other hand, it is firmly established that Appellant's agent was a real estate agent (see exhibit 12-P) and so held himself out to be. This also established that he purported to know what the property could be used for and what the zoning allowed. (Tr. page 30, line 21; Tr. page 21, line 7 supra.)

It should also be born in mind that when Respondent came to inspect the property, it was on Saturday the 7th day of April. (Tr. page 28, line 6.) This Court can take judicial notice of the fact that the city offices are not open on Saturdays and would not have been available had Respondent tried to inquire concerning the uses on the property. However, this was not necessary as Respondent believed Appellant's agent and relied upon the same, and in light of the relative positions of the two, this reliance was reasonable.

If one cannot believe the advertisements placed in newspapers by real estate agents, which are later backed up by oral representations, both on the phone and during the inspection of the property, by an agent who lives in the area, holds out that he knows the property and its uses, then who can any out-of-state buyer rely on? Respondents submit that this Court should support the proposition that the real estate agent's words should be reliable and that a person relying on this to his damage is entitled to rescission.

That the Respondents were damaged is uncontroverted in the evidence. (Tr. page 40, lines 8-30; page 41, lines 1-30; page 42, lines 1-3; also exhibits 22-P and 23-P.)

From the foregoing, Respondents have amply demonstrated that all of the "essential elements" of fraudulent misrepresentation have been met under the guidelines of this Court in Pace v. Parrish, (supra).

For further argument in support of his Point I, Appellant states that because the decision of the Board of Adjustment denying the uses came after the representations made by Appellant's agent, this renders his statements true at the time they were made. That this is a fallacious argument can be seen from the face of it. The illegal uses did not commence when the Respondent took possession of the property; but were in existence at the time Appellant's agent was selling the property to the Respondent. They were in existence at the time when the advertisement was placed and at all times thereafter. Respondent did not change the use of the property and was using it for the purposes allegedly permissible under the representations made by Appellant's agent. However, the City of Salt Lake had never, at any time in its determination on this property, stated that it could be used for "light manufacturing", a "mechanic's garage", a "two-level



machine shop" for the manufacture of anything, nor had they ever approved the home on the property to be used as a "duplex". This is what the situation was at the time the Appellant's agent was making the representations in quotes above.

Defendants argue at page 10, point #5, of their Biref, that statements concerning domestic law are expressions of opinion on which no action in fraud will lie. Respondents concede that such a general law does exist, but that there are a multitude of exceptions to this general rule and that in the case at bar, the statements made were not statements of law, but statements of fact. Referring to the same section of Am. Jur. as used in Defendant's Brief, 37 Am. Jur. 2d, Fraud & Deceit, Section 73, page 115 (2d Ed. 1968), we find the following:

The American Law Institute takes the position that one who fraudulently makes a misrepresentation of the law for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable for the harm caused by justifiable reliance thereon; that a statement of law may have the effect of a statement of fact or of opinion; and that if a representation as to a matter of law in a business transaction is a representation of fact or a representation of opinion as to the legal consequences of facts known to the maker and the recipient or assumed by both to exist, the recipient is justified in relying upon the former as though it were a representation of any other fact, and upon the latter as though it were a representation of any other opinion. It is

said that the better view now is that a fraudulent misrepresentation of law will at least justify rescission.

(Restatement of Torts 525, 545 is in Accord)

In the case of Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947) relied upon by the Defendant, it was held:

In the situation confronting us we have other circumstances and conditions. We need not go into these, as the representation here was one of fact (at page 276, col. 1)

The case dealt with a misrepresentation of fact, and not of law. However, in passing, this Court did acknowledge the existence of the general rule by saying that:

That case (Ackerman v. Bramwell Investment Co., 80 Utah 52, 12 P.2d 623, 626) holds as quoted by counsel "the general rule is that misrepresentations of law or of the legal effects of contracts and writings does not constitute remedial fraud." There is also, however, the following statement which must be given weight. "There are exceptions to the rule, or rather circumstances or conditions rendering it inapplicable . . . (Page 276, col. 1)

In Bobak v. Mackey, 236 P.2d 626 (Calif. 1951), plaintiff informed defendant that he was looking for a piece of property suitable for dwelling and with separate facilities wherein he could also carry on a small manufacturing business. Defendant falsely represented to plaintiff concerning the property purchased that: (1) plaintiff could lawfully carry

carry on his manufacturing business on the premises, and (2) that the property was zoned for light manufacturing, including plaintiff's business. Whereas, the property was zoned such that no manufacturing was allowed at all. The plaintiff relied on such misrepresentations of the defendant. The court comments upon what is a representation of law and of fact and says:

Appellant contends that the misrepresentation charged against him in the complaint . . . are at most representations of law and not of fact, and hence no cause of action was stated . . . For reasons stated we see no merit in the contention.

Continuing, the court stated:

The representation was not a mere representation of law, i.e., the classification made by the law, but of the fact that the property lay within a zone of a particular character, that is which the law had characterized as R-3 rather than C-2. Manifestly, the representation was of fact and not merely one of law. 263 P.2d at 627.

In Greene v. Humphrey, 274 P.2d 535 (Okla. 1954), the statement that the person held "a one-year lease" was held to be a statement of fact and not of law.

In Gould v. Escondido Valley Poultry Ass'n., 133 P.2d 448 (Calif. 1943), the statement concerning the depth of top soil was a material statement of fact and not "puffing" or "opinions".

In Judson v. Peoples Bank & Trust Co., 134 A.2d 761 (N.J. 1957), the court held that:

Although ordinarily expressions of opinion may not be relied upon, the rule is otherwise where the opinion is given by one who has succeeded in securing the confidence of the victim, or holds himself out as having special knowledge of the matter, or purports to be disinterested.

In Rusch v. Walde, 232 N.W. 875 (Wisc. 1930), the court stated that:

It is not universally true that a misrepresentation of the law is not binding upon the party who makes it. Where one who has had superior means of information, professes a knowledge of the law, and thereby obtains an unconscionable advantage over another who is ignorant and has not been in the situation to become informed, the injured party is entitled to relief as well as if the misrepresentation had been concerning a matter of fact. At page 876.

The argument on pages 11 through 17 of Appellant's Brief is simply argument to try and get this Court to reverse the decision of the Board of Adjustments of Salt Lake City. Respondent respectfully suggests that that issue is not before this Court; Appellant tried the same argument to the Court below without success. However, in the event this Court decides to follow Appellant's argument, it should be pointed out:

(A) Appellant claims because the property had been used by an absentee owner for 25 years in violation of the use permit, that this made the uses proper and conforming. (See page 12 of Appellants' Brief.) The law does not support this proposition. (See Gross v. William Penn.

Fire Ins., and Kroninger v. Anast, supra.) Common sense and equity don't support it either. Doing a wrong for 25 years doesn't make it right.

(B) The Appellant makes references to comments of the trial court on the decision of the Board of Adjustments' decision. Respondents respectfully point out that these are only comments and asides of the Judge and only represent dictum. They are nowhere found in the trial court's Findings of Fact and Conclusions of Law. Therefore, they carry no weight at all. In addition, the trial court clearly refused to follow Appellant's Red Herring, and said in response to the question as to whether it could rule on the Board of Adjustments decision, "No, I can't make it because I have very incomplete facts." (Tr. page 135, lines 7-8.)

## POINT II

### ALLEGED DUTY OF PLAINTIFFS TO INQUIRE AS TO USE BEFORE PURCHASE.

Respondent admits that he was told by Appellant's agent that the property was being used under a nonconforming use permit and that the duplex was there pursuant to R-2 zoning which permitted the duplex. Respondent also admits that he is employed in City Management; but the evidence doesn't show that he knew any more about zoning and use permits than an average man would know. He had never studied it in school. (Tr. page 43, lines 14-24.) However, he was generally aware "that if a

particular area was zoned for one use that it couldn't be used for another purpose unless there was some kind of variance granted". (Tr. page 44, lines 4-6.) The average man on the street knows that. He knew that "certain sections of the city were zoned for residential purposes as compared to commercial and other purposes". (Tr. page 43, line 30; page 44, lines 1-2.) The average man on the street knows that. In fact, there is no evidence before this court that Respondent had any better knowledge about zoning or use permits in Utah than the average man. Indeed, the evidence denies the argument put forth by Appellants at page 18 of their Brief that Respondent had a familiarity and special knowledge of the public records and/or zoning. Beginning at Tr. page 73, line 23, we find the following:

(Mr. Dodd) Q. Mr. Smith, has your occupation ever dealt with zoning?

A. No, sir.

Q. Has it ever dealt with use permits?

A. No, sir.

Q. Has it ever dealt with variances?

A. No, sir.

In addition to having no special knowledge of zoning, use permits and/or variances, Respondent had never before purchased property in Utah. (Tr. page 74, lines 4-5.) And even if Respondent had some general knowledge about use permits in California, it would not have given him

any special knowledge about the use permit on Wilson Avenue in Salt Lake City, Utah. When the facts are compared and equity is applied, it becomes obvious that Appellant had the duty of discovering and disclosing the city's position on the property purchased. The facts are as follows:

<u>Respondent</u>	<u>Appellant</u>
1. Out of town	In town resident
2. Not in real estate business	Bona-fide Real Estate Agent; lived in town
3. Came to town on Saturday, no city offices open	City offices available anytime during day
4. Saw advertisement in newspaper with representations	Placed advertisement in newspaper with representations
5. Was told that existing uses and others were permitted	Told buyer that existing uses were permitted

From the foregoing, it is obvious that Appellant's agent had the best opportunity and indeed, duty, to ascertain the true permissible uses of the property, before placing the advertisement in the paper and before making representations to Respondent. That he did not was wreckless, and with complete disregard to the rights of Respondent.

The claim by Appellant that Respondent had a duty to check the local law is not founded in the law. In fact, the law indicates that one in a supervisor position, such as Appellant's agent, had the duty to ascertain the facts.

In Barder v. McClung, 209 P.2d 808 (Calif. 1949), plaintiffs sued for damages based on fraud in the purchase in 1946 of a residence with a detached garage containing a dwelling unit, which unit was being maintained and used in violation of zoning ordinances. Defendants represented that property was improved with two dwelling units, and that plaintiffs could occupy one of them as their own and lease the other unit. In 1943, defendants altered the residence knowing it was in violation of the zoning ordinances. Concerning duty to inquire, the court held that:

An independent investigation or an examination of property does not preclude reliance on representation where the falsity of the statement is not apparent from an inspection, or the person making the representation has a superior knowledge, or the party relying thereon is not competent to judge the facts without expert assistance. At page 811.

The court also held that:

Neither can it be said the plaintiff was bound by constructive notice of the zoning ordinances. At page 811.

The court in Blackman v. Howes, 185 P.2d 1019 (Calif. 1947), held that one is justified in relying if they do in fact rely, and this is not destroyed because means or knowledge were opened to them.

The court in Mulkey v. Morris, 313 P.2d 494 (Okla. 1957), held that:

One who relies upon a false, material representation is not precluded from recovering damage for his



detriment, because of the fact that he did not investigate the veracity of the representation. At page 500.

Plaintiff in Hardin v. Hill, 423 P.2d 309 (Mont. 1967), was allowed to recover because of defendant's misrepresentation. The court held that the misrepresentation "was entitled to constitute fraud, even though purchasers co-authored the defect by lack of investigation".

The court in Sult v. Bolenback, 327 P.2d 1023 (Ariz. 1958), held that "where only a partial investigation is made, and a party relies in part upon the representations and is deceived by such representations, the action (for rescission) may be maintained". The court in Lanning v. Sprague, 227 P.2d 347 (Idaho 1951), held that:

Plaintiff's right to recover damages cannot be defeated by showing that plaintiffs by making an independent investigation could have ascertained the falsity of the representations. At page 350.

In Spencer v. Nelson, 238 P.2d 169 (Calif. 1952), the court held:

It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with the discovery in the advance of actual knowledge on his part. At page 178.

The court in Richard v. Baker, 297 P.2d 674 (Calif. 1956), held that plaintiff had no good reason to doubt the veracity of defendant or their agent, that they did not independently check the size of the lot, nor were they required to do so. They were entitled to rely upon the representations made.

In Stevens v. Marco, 305 P.2d 669 (Calif. 1956), the court held that:

Furthermore, where one is justified in relying, and does in fact rely, upon false representations, his right of action is not destroyed merely because opportunities for examination or means of knowledge were opened to him where no legal duty devolved upon him to employ such means of knowledge. At page 682.

In Regus v. Schartkoff, 319 P.2d 721 (Calif. 1957), the court held:

Where fraud is involved, public record are not constructive notice of the true facts to the defendant party. At page 726.

In Carrel v. Lux, 420 P.2d 564 (Arizona 1966), the court held that:

Representations such as that may be said to have been calculated to lull the buyers of the property into the belief that they were true and to cause them to refrain from making a more extensive investigation. In such a situation, the buyer should not be prevented from recovering by a failure to investigate. At page 570.

In Fox v. Wilson, 507 P.2d 252 (Kan. 1973), the court held that it was no defense to claims of vendor's misrepresentation of facts concerning ranch property that the purchaser should have inspected the entire property before they purchased and should not have relied upon the representation.

In Investors Equity Exchange, Inc., v. Whitely, 524 P.2d 1211

(Ore. 1974), the court held that the defendant should not be allowed to avoid the obvious misrepresentations by stating that plaintiff should have found out they were not telling the truth. Moreover, the plaintiff relied on defendant's statements and did not conduct any independent investigation.

In Boonstra v. Stevens-Norton, Inc., 393 P.2d 287 (Wash. 1964), the court held that:

Where misrepresentation actually deceived and misled a party, and here they did, it is immaterial that proper investigation would reveal the truth. At page 290.

The court in LaCourse (Supra) held that:

So also we have repeatedly held there is no obligation on the part of the purchasers to examine public records before purchase. The material misrepresentation of an existing fact confers on the party who relies on it the right or not, especially where as here they had means of knowledge from which they were bound to ascertain the truth before making the representations. At page 880.

Stallard v. Adams, 228 S.W.2d 430 (Kentucky 1950), concerned a suit for rescission based on fraudulent representation in a land contract. Defendant Stallard represented to plaintiff that a certain lot contained no restrictions as to use of such lot for the sale of beer. There was, however, restrictions limiting the lot to residential purposes. Plaintiff sued and won and the court held that:

The fact that appellees could have gone to the records and learned what were their restrictions concerning this property does not prevent them from prosecuting this action against appellants for deceit by reason of the misrepresentations Stallard knowingly made to Adams relative thereto, where Adams was ignorant of what the restrictions were. At page 432.

DiCarlo v. Pacanias, 164 F. Supp 841 (E.D. La. 1958) aff'd, 266 F.2d 656 (5th Cir. 1959), involved a suit by purchasers against realtors and vendors. The zoning ordinances permitted only a two-apartment structure, and defendants represented that three apartments were allowed. The court held that:

There was no duty on the part of plaintiff to inquire as to the zoning classification of the premises. They had a right to rely on the warranty of the vendor and the realtors. At page 843.

In Judson (Supra), the court held that:

At any rate, one who perpetrates a fraud may not urge that his victim should have been more circumspect or astute. At page 766.

Further, in Barder v. McClung (Supra), the court held:

Purpose of the recording acts is to afford protection not to those who make fraudulent representations, but to bona-fide purchasers for value.

Therefore, Appellant cannot hide behind the fiction that Respondent should have checked out the law, and had a duty to do so, which not being done, now precludes him from recovery. This is especially true where the evidence clearly shows that Appellant herself did not do so when she

purchased the property and thus, by her own actions, perpetrated the illegal uses on the property. (Tr. page 17, lines 14 and 18; page 113 and 114; page 21, lines 18-22.) Thus, Appellant would urge this court to place upon Respondent a stricter standard of care than she herself exercised at her time of purchase, or that her agent exercised at the time of his sale. In either case, had the Appellant inquired of the city as to the permissible uses, this case would not have occurred.

In the single case relied upon by Appellants, i.e., Scott v. Wilson, 15 Ill. App.2d 456, 146 N.E.2d 397 (1957), the court there held that the actions of the seller were representations of law. Also, it held that the purchaser had equal opportunity to avail himself of the local law, and, therefore, should have done so. There are no findings in the case as to whether or not the seller worked through a real estate agent, or whether the purchaser was from out of town. The inference is that the two parties to that case were on equal ground, and that the seller only made statements concerning the law. Thus, the case is distinguishable and based on a different set of facts. It is interesting to note that the Scott (Supra) case held:

Equity will afford relief on ground of fraud and misrepresentation only where parties do not have equal knowledge or means of knowledge of facts represented. At page 398.

Hence, the inference in the Scott case, (Supra) was that there was equality between the parties with regard to knowledge and assessability to knowledge. This, of course, is not true in the case at bar where the purchaser is not a real estate agent, does not live in Utah, has not purchased property in Utah before, and does not have ready access to the city ordinances for review; especially where all of the foregoing is known to the seller, and the seller holds himself out as one who knows what the facts are.

In addition to the foregoing, the statements made in the case at bar were statements of fact, not of law, and under the case law enumerated above, the lower court was correct in so finding. The statement that a property may be used in such a fashion or be put to such a use is a statement of fact and not of law, as the cases, supra, already brought to this court's attention have demonstrated.

Further, in the Scott case, supra, there were no actual statements made by the seller, but merely conduct, i.e., they were renting a basement apartment. This, that court found to be insufficient evidence to prove fraud. How different in the case at bar where affirmative statements of fact, and alleged knowledge of the seller were made.

Therefore, the Respondents respectfully maintain that the duty to find out the correct uses of the property was upon the seller through

her agent. The law so holds, the equity of this case so holds and the superior position of the Appellant's agent to the information plus his experience as a real estate agent would so hold. And if this court is not willing to impose such a duty upon the seller through her agent, then at least it should be his duty that he not make statements wrecklessly, when he has not true knowledge of them.

### POINT III

#### ALLEGED WAIVER OF PLAINTIFF'S RIGHT TO RESCIND AND ALLEGED RATIFICATION OF ANY WRONG BY DEFENDANT.

Appellants cite no case or statutory authority whatsoever for this point. They have mistaken the rule that one must exhaust one's administrative remedies before resort to the courts. This is not the case at bar. This case does not involve Respondent's attempt through court to reverse the decision of the Board of Adjustment. This case is simply a suit against Appellants for misrepresentation and rescission of the contract. Even though Appellants have been mistaken there is some case authority and it goes against them.

In Dolan v. DeCapua, 80 A.2d 655 (N.J. 1951), the court held:

The court rule requiring exhaustion of remedies before issuance of prerogative writs was not applicable to proceedings to review grant of permit for erection of garage contrary to zoning ordinances, where appeal to Board of Adjustment had been taken and dismissed. At page 656.

In Peninsula Corp. v. Planning and Zoning Commission of the Town of New Fairfield, 183 A.2d 271 (Con. 1962), plaintiff sold lots to individuals, who were denied building permits because defendant claimed that plaintiff had not filed a map of its property as a subdivision. Plaintiff sued for a declaratory judgment whether its property was a subdivision. The lower court stated that plaintiff was not entitled to seek a declaratory judgment whether its property was a subdivision. The lower court stated that plaintiff was not entitled to seek declaratory judgment "until it had appealed the action of the zoning and planning board to the zoning board of appeals and said board had acted and when its plaintiff's rights had thus become complete and final". The Supreme Court of Connecticut held otherwise and stated:

A trial court, in its conclusion, holds that an application has to be filed by the plaintiff with the planning commission to determine whether the property is a subdivision and that the matter must be decided by the planning commission before the plaintiff can have recourse to the courts. We find no such requirement in the statutes. At page 272. (Emphasis added)

The court went on and held that the property owner was not required to file with the planning and zoning commission of the town an application to determine whether property was subdivided before seeking determination of that issue by the courts.

In Scoville v. Ronalter, 291 A.2d 222 (Con. 1971), the court held that:



It is one of the claims of defendants that the plaintiffs are not entitled to judgment because they failed to pursue statutory right of appeal to the Bristle zoning board of appeals. We cannot say that under the particular and unusual circumstances of this case that the plaintiffs as a matter of law were precluded from taking the action they did. At page 226.

In Wiercioch v. Village of Niles, 189 N.E.2d 278 (Ill. 1963), there was an action to declare invalid a municipal dwelling zoning ordinance as applied to the lots surrounded on all sides by streets. The court held that:

Defendant contends that plaintiffs were barred because they failed to exhaust their administrative remedies. We do not think the rule requiring first resort to administrative remedies goes as far as defendant urges. The reason for the rule is to give the municipal authorities an opportunity to correct invalid regulations before becoming involved in litigation. At page 280.

In O'mara v. City of Newark, 48 Cal Rptr. 208 (1966), the court held that:

Thus, when an owner claims that he has a right to an existing nonconforming use, he is not required to apply for a variance or use permit before resorting to the course for relief from an attempted termination of such nonconforming use. At page 211.

From the foregoing, it can be seen that Respondent had no duty at law or equity to seek the determination of the Board of Adjustment prior to bringing his action. That he did so, in an effort to uphold and

determine the validity of his contract with Appellant cannot be used against him, as Appellants try to argue. To so hold would deter any person with a similar problem from seeking self-help measures to resolve problems without going to the courts.

Respondent finds no law to support the proposition that because he sought the solution of his dilemma through the Board of Equalization first, he was thereby precluded from recourse to the courts. The language of the court below relied upon by Appellant is, of course, dictum and is not found in the court's Findings; therefore, has no weight in law.

Appellant argues that we should have appealed the Board of Adjustment decision to the courts, and that this was our exclusive remedy. However, Appellants do not state why this is the Respondent's exclusive remedy and particular burden. The facts indicate that the Appellant still owns an interest in the property. (See exhibits 26-D; 7-P; 6-P; 5-P; 4-P; 3-P; 2-P; and 1-P.) She had notice of the hearing before the Board of Adjustments and wrote a letter to them as she could not attend. (See page 2 of exhibit 10-P.) Hence, Appellant was equally bound by the decision of the Board of Adjustments. Why isn't it just as much incumbent upon the Appellant to appeal the decision of the Board as the Respondent? In fact, Respondent represents to this Court that the equitable solution to this matter is to allow the Appellant to bring her

case to the courts if she wishes. But, we cannot hear her case now.

In Elder v. Clawson, 14 Utah 2d 379 384 P.2d 802 at page 804, this court held:

The fact that the Elders indicated an intention to try to make good on the contract immediately after learning the facts, under these circumstances, does not preclude them from changing their minds and rescinding the contract shortly thereafter. Nor does the fact that the Clawsons sold their contract and one of the houses which they received thereon prevent a rescission and recovery.

This case, of course, involved the sale of land which Elders were allowed to rescind because sellers had not advised them of a quarantine on the property. Sellers had said there were weeds, but not a quarantine. Note that this court did not hold that because sellers mentioned there were weeds that purchaser was put on notice and should have found out about the quarantine. However, the important rule of law is, of course, that this Court will allow a party time to try and make the bargain go -- as Respondent tried to do in the case at bar.

Thus, the Respondent cannot be barred from seeking a judicial remedy, where his administrative attempts to make his bargain go have failed.

#### CONCLUSION

The Respondent wishes to reiterate certain points which the

evidence and law of this case make clear:

1 - The trial court, which is in the best position to judge the evidence, found for the Respondent.

2 - The decision of the trial court will not be overturned unless its decision is clearly not supported by the evidence and blatant error has been committed.

3 - Appellant has failed to establish any such grounds for error and reversal.

4 - This Court cannot hear or retry the decision of the Board of Adjustment of Salt Lake City which is what Appellants want the Court to do.


5 - There were misrepresentations made concerning the permitted uses of the property which were false when made.

6 - These were made by Appellant's agent and, therefore, Appellant is bound by them.

7 - Respondent was induced to act and reasonably relied upon them to his damage.

8 - Therefore, the decision of the trial court must be affirmed.

Respectfully submitted,

  
Graham Dodd  
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 1975,  
I served two copies each of the foregoing brief by delivering same  
to Arthur N. Nielson and Randall L. Romrell, of Nielson, Conder,  
Henroid & Gottfredson, attorneys for Appellants, 410 Newhouse Build-  
ing, Salt Lake City, Utah 84111.

