

1989

Joseph D. Sanders and Cheryl M. Sanders v. Martin
S. Ovard, Reva S. Ovard, Ben F. Ovard, Helen T.
Ovard and Jax Hayes Pettey v. Joseph D. Sanders,
Cheryl M. Sanders, Utah State Tax Commission,
Salt Lake County, and Insurance Company Of
North America : Brief of Appellee

Utah Court of Appeals

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Thomas N. Crowther; Parsons & Crowther; Attorney for Appellees.

Frederick N. Green; Julie V. Lund; Green & Berry; Attorneys for Appellants.

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BRIEF

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DOCKET NO. 890063-CA IN THE UTAH COURT OF APPEALS

JOSEPH D. SANDERS AND
CHERYL M. SANDERS,

Plaintiffs/Appellants,

v.

MARTIN S. OVARD, REVA S.
OVARD, BEN F. OVARD, HELEN T.
OVARD and JAX HAYES PETTEY,

Defendants/Appellees,

v.

JOSEPH D. SANDERS, CHERYL M.
SANDERS, UTAH STATE TAX
COMMISSION, SALT LAKE COUNTY,
and INSURANCE COMPANY OF
NORTH AMERICA,

Counterdefendants.

BRIEF OF THE APPELLEES

Docket No. 890063-CA

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Frank G. Noel

Argument Priority Classification 14(b)

Thomas N. Crowther
PARSONS & CROWTHER
Attorneys for Appellees
Martin S. Ovard, Reva S.
Ovard, Ben F. Ovard,
Helen T. Ovard and
Jax Hayes Pettey
455 South 300 East
Suite 300
Salt Lake City, Utah 84111

Frederick N. Green
Julie V. Lund
GREEN & BERRY
Attorneys for Appellants
Joseph D. Sanders and
Cheryl M. Sanders
528 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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CHERYL M. SANDERS,

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Thomas N. Crowther
PARSONS & CROWTHER
Attorneys for Appellees
Martin S. Ovard, Reva S.
Ovard, Ben F. Ovard,
Helen T. Ovard and
Jax Hayes Pettey
455 South 300 East
Suite 300
Salt Lake City, Utah 84111

Frederick N. Green
Julie V. Lund
GREEN & BERRY
Attorneys for Appellants
Joseph D. Sanders and
Cheryl M. Sanders
528 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

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JURISDICTION

The jurisdiction of this court is properly based upon the transfer of Civil Case No. 85-4313 by the Utah Supreme Court to this court under Rule 4A of the Rules of the Utah Court of Appeals and pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1953 as amended).

NATURE OF THE CASE

This is an appeal from a judgment entered by the Honorable Frank G. Noel on June 6, 1988 in favor of Defendants, and from an Order entered on October 26, 1988 denying Plaintiffs' Motion for a New Trial and to Amend the Pleadings to Conform to the Evidence.

ISSUES PRESENTED

1. Was Plaintiffs' reference during trial to the defenses of illegality and mistake sufficient under Rule 15 of the Utah Rules of Civil Procedure to require that the trial court's ruling denying Plaintiffs' Motion to Amend the Pleadings to Conform to the Evidence be reversed for abuse of discretion?

2. Have Plaintiffs sufficiently marshalled the evidence to require that the trial court's conclusion that there was no fraud or negligent misrepresentation by Defendants be reversed for abuse of discretion?

3. Did the trial judge abuse his discretion by viewing the property in dispute?

STATEMENT OF THE CASE

Plaintiffs are appealing the trial court's judgment awarding damages for Plaintiffs' default in payments to Defendants on a Promissory Note, and allowing Defendants to foreclose on the Trust

Deed securing such payments. The trial court subsequently denied Plaintiffs' Motion for a New Trial and to Amend the Pleadings to Conform to the Evidence. Plaintiffs have appealed this order.

In March 1979, Defendants Martin S. and Reva S. Ovard purchased two one-acre lots, a "front" lot and a "back" lot, from Layne Newman. (Trial Transcript (hereinafter "Tr.") 58, Trial Exhibits (hereinafter "Ex.") 12-D and 13-D). The transactions were executed by two separate trust deeds, each covering one acre (Tr. 222). The two lots were purchased for a total of \$58,000, or \$29,000 for each lot or acre, and were closed at separate times (Tr. 58, 206-07, 215).

The lots were part of a subdivision plan of Mr. Newman encompassing five one-acre lots just north of 650 East 13800 South, Draper, Utah (Tr. 58, 61, 206). However, the subdivision plan was not approved by the City of Draper (Tr. 60). As a consequence, a variance was applied for and granted by the City of Draper so that the Ovard's could build a home on the front lot (Tr. 60-61, Ex. 7-P). The Ovard's request was accompanied by a map showing both lots (Tr. 61, Ex. 6-P). The Ovard's then built a home on the front lot, intending to live there (Tr. 64-65). Before they could move in, the Ovard's ran into financial trouble and sold the house and the front lot to a Mr. Nipco (Tr. 66). The Ovards also received money from Mr. Ovard's parents, Defendants Ben and Helen Ovard, and put Ben and Helen Ovard's name on the deed to the back acre so that they could recover their money by sale of the lot (Tr. 65-66, 216).

Mr. Nipco subsequently ran into financial troubles and sold the house and the front acre to Plaintiffs in July 1982 (Tr. 67, 151).

In April 1982, Defendants Ovard decided to list the back acre for sale with Alan Whipple, a realtor (Tr. 224). In September 1982, Plaintiffs noticed activity on the back acre and concluded that it might be sold (Tr. 152). Plaintiffs feared that someone would buy the lot, build on it, and obstruct Plaintiffs' view from and enjoyment of their property (Tr. 153). Plaintiffs did not want anyone to build on the back acre (Tr. 119-120, 185), and contacted their own realtor, Fred Hale, to discuss buying the adjoining back lot in order to prevent someone from building on it (Tr. 153, 155). Mr. Hale and Plaintiffs then prepared an offer of purchase, and Mr. Hale then presented the offer to Defendants (Tr. 120).

On September 18, 1982, Plaintiffs and Defendants entered into an Earnest Money Agreement pursuant to which Defendants agreed to sell and Plaintiffs agreed to purchase the back acre for \$26,000 (R. 201). On November 8, 1982, Plaintiffs delivered and Defendants received and recorded a Trust Deed Note (hereinafter "Note") in the amount of \$25,900, with interest only at 15% per annum payable on January 15, 1984, and \$25,900 principal, plus then accrued interest, payable on November 15, 1985 (R. 201).

Prior to closing of the sale between Plaintiffs and Defendants, Plaintiffs did not request and Defendants did not offer information concerning a variance on the property or the validity of the subdivision map (R. 202). Subsequent to the closing, Plaintiffs learned that the back lot would require a variance,

similar to the variance previously granted to Defendants, before the City of Draper would issue a building permit on the back lot (Tr. 168).

Plaintiffs' only payment to Defendants under the Note has been an interest payment of \$5000 made on March 1, 1984 (R. 202). Plaintiffs did not make the balloon payment that was due on January 15, 1985, and stated that they would not pay it (R. 202, Tr. 213). Defendants then attempted a non-judicial trust deed foreclosure, which was enjoined by Plaintiffs (R. 203).

Plaintiffs filed this fraud action in Third District Court and Defendants counterclaimed to foreclose the Trust Deed. The matter was tried on October 26 and 27, 1987 before the Honorable Frank G. Noel. During the course of the trial, Plaintiffs moved to amend their pleadings to conform to what they claimed was evidence of mutual mistake of fact (Tr. 200), which was a claim and issue not contained in Plaintiffs' Complaint (R. 2-18). The Court reserved ruling on this motion (Tr. 204). Plaintiffs did not renew this motion during the remainder of or at the end of trial.

At the close of trial, the trial Judge asked if either party objected if he went and viewed the property. Both counsel for Plaintiffs and counsel for the Defendants stated they had no objection (Tr. 264). Judge Noel then took the matter under advisement (Tr. 264).

On December 4, 1987, the court issued a memorandum opinion, finding in favor of Defendants on their counterclaim, and finding no cause of action on Plaintiffs' claim (R. 142-43). Plaintiffs

thereafter filed a Motion for New Trial and to Amend the Pleadings to Conform to the Evidence, this time to assert claims of illegality and unilateral mistake (R. 216-217, 227-229). These motions were denied (R. 256), and Plaintiffs appealed.

SUMMARY OF ARGUMENT

I. The granting of leave to amend the pleadings under Rule 15(b) of the Utah Rules of Civil Procedure is within the broad discretion of the court, and should not be disturbed absent a showing of abuse of discretion. Further, Plaintiffs did not sufficiently plead the defenses of illegality or mistake. Therefore, the trial court's decision to deny Plaintiff's Motion to Amend the Pleadings to Conform to the Evidence should be upheld.

II. A trial court's findings should not be disturbed unless they are so lacking in support as to be clearly erroneous. Plaintiffs have not met their burden to marshal the evidence or to construe it in a light most favorable to the trial court. Therefore, the trial court's finding of an absence of fraud or negligent misrepresentation should not be disturbed.

III. The trial judge's viewing of the property in dispute was proper. Plaintiffs' allegation that the trial judge improperly used information gathered at the viewing is without foundation. The parties agreed to the viewing without condition. Further, the court explicitly stated that its viewing was not of primary importance to its decision. Finally, the judge's statements in regard to the viewing were based on facts in evidence, and are

further supported by evidentiary affidavits submitted in opposition to Plaintiffs' post judgment motion to amend their pleadings.

ARGUMENT

- I. THE TRIAL COURT'S DECISION TO DENY PLAINTIFF'S MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE SHOULD NOT BE DISTURBED.

When issues not formally raised in the pleadings are tried by the express or implied consent of the parties, Rule 15(b) of the Utah Rules of Civil Procedure (hereinafter "Rule 15(b)") allows the amendment of the pleadings. That the issue has been tried by the consent of the parties must be evident from the record. Colman v. Colman, 743 P.2d 782 (Utah Ct. App. 1987) (citations omitted). Further, it must "appear that the parties understood the evidence was to be aimed at the unpleaded issue." Id. at 785.

- a. The trial court's decision to deny Plaintiffs' motion was within the sound discretion of the court.

This court has stated that there is a mandatory requirement to allow a party to amend its pleadings to conform to the evidence when issues are tried by the express or implied consent of the parties. Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 509 (Utah Ct. App. 1988). However, the question of whether the issues have been sufficiently tried, and thus the ultimate decision as to whether the amendment should be allowed, remains in the sound discretion of the court. Stratford v. Morgan, 689 P.2d 360 (Utah 1984); Westley v. Farmer's Insurance Exchange, 663 P.2d 93 (Utah 1983). Implied consent to try an issue may be found where there is no objection to introduction of supporting

evidence by an opposing party and where it appears that the opposing party understood that such evidence was aimed at an unpleaded issue. In any event, the opposing party must have had a fair opportunity to defend and introduce evidence. See Colman, supra at 785.

In the present case, Plaintiffs have not shown that the denial of the Rule 15(b) motion was a clear abuse of discretion. To do so, Plaintiffs have to show that they sufficiently tried the issues of illegality and mistake. Plaintiffs cite Colman, supra, to show that they have done so. However, the issue in Colman, that of alter ego, was "fully tried," and evidence concerning "every element" was introduced without objection. Colman, supra at 785.

Any claimed evidence of illegality or unilateral mistake introduced by Plaintiffs in the instant case would also support Plaintiffs' claim of fraud. Plaintiffs' counsel even acknowledged and argued such fact with respect to mistake (Tr. 241-243).

The mere introduction of claimed evidence of mistake did not therefore place Defendants on notice that it was aimed at unpleaded issues of mistake as is required by Colman, supra. The motion of Plaintiffs' counsel at trial (Tr. 200-204) to amend their pleadings to assert mistake was the first act that could be argued to have placed Defendants on notice that Plaintiffs were asserting or relying on a claim of mistake. Defendants immediately objected to such motion (Tr. 200).

Any introduction by Plaintiffs of claimed evidence of illegality likewise supported Plaintiffs' claims of fraud and did

not place Defendants on notice that such evidence was aimed at a claim of illegality. Plaintiffs did not move to amend their pleadings to assert illegality during trial when such a motion was made as to mistake (Tr. 200-204), but such motion was made after trial and after judgment had been entered (R. 210-214, 216-217).

Because Defendants were without notice that Plaintiffs were introducing evidence aimed at mistake and illegality at the time claimed evidence of such theories and issues was introduced, any alleged trial of such issues was not with actual or implied consent of Defendants and was inadvertent. Defendants did not therefore have fair opportunity to defend. This was so, especially with respect to the motion on illegality which was not made until after trial and after formal judgment was entered. Plaintiffs have therefore not satisfied the Colman case upon which they rely.

Finally, as demonstrated in the next subsections, Plaintiffs have not sufficiently established and proven the elements of illegality and mistake and for that reason should not have been allowed to amend their pleadings.

b. Plaintiffs did not sufficiently try and introduce evidence of illegality.

Rule 8(c) of the Utah Rules of Civil Procedure requires that a party must set forth the affirmative defense of illegality. To avoid a contractual obligation by claiming illegality, an appellant must show clearly and unequivocally that the contract is illegal. Mitchell v. American Savings and Loan Association, 593 P.2d 692, 694 (Ariz. Ct. App. 1979).

Plaintiffs have not and cannot plead the defense of illegality because they have misconstrued its application. The illegality defense applies to contracts which are themselves prohibited by law or contrary to public policy. See Williams v. Continental Life and Accident Co., 593 P.2d 708 (Idaho 1979); Greer v. Northwestern National Insurance Co., 674 P.2d 1257 (Wash. Ct. App. 1984). Plaintiffs do not allege that the contract between the parties is itself prohibited by law or contrary to public policy, and in fact, there is no statute that prohibits this contract. Rather, Plaintiffs argue that if Defendants illegally divided the property into two one-acre parcels, then a contract purporting to sell one of the divided acres should not be enforced. Even if this concept embraced the defense of illegality, Plaintiffs have not sufficiently tried the defense.

In their brief, Plaintiffs point to certain sections of the Trial Transcript to support their argument that illegality was sufficiently raised at trial (Brief of Appellants, 6-9). However, there is nothing in Plaintiffs' brief or the record which state that Defendants' actions were illegal. In the first part of their brief, Plaintiffs merely allege that Defendants' division of the land is subject to land use regulations. (Brief of Appellants, 6-7; Tr. 17, 19 & 23) At the second part of their brief, Plaintiffs point to another part of the transcript where they allegedly argued illegality. (Brief of Appellants, 8-9; Tr. 175, 178-79) However, these sections of the Trial Transcript are arguments of counsel during an objection at trial. They are not evidence and cannot be

considered in determining whether Plaintiffs tried and put on evidence of illegality.

Plaintiffs also cite Utah statutes for the proposition that Defendants acted illegally. Nevertheless, the applicability of these statutes was not raised at trial. Defendants' basic premise of illegality, i.e., the illegal division of land, is unfounded, as the record clearly shows that Defendants' predecessor owner had already divided the land into two one-acre parcels when Defendants initially purchased the land (Tr. 58, 222; Ex. 12-D and 13-D).

The defense of illegality does not apply to this case. Even if this court finds that it does, Plaintiffs did not sufficiently introduce evidence of it at trial.

c. Plaintiffs did not sufficiently try and introduce evidence of mistake.

Rule 9(b) of the Utah Rules of Civil Procedure requires that "all averments of ... mistake shall be stated with particularity." The nature of mistake ultimately relied upon by Plaintiffs is unilateral mistake (R. 227-229), and their brief focuses only on the mistake of Plaintiff Joseph Sanders. The Utah Supreme Court has stated the elements that must be established under unilateral mistake:

(1) The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable.

(2) The matter as to which mistake was made must relate to a material feature of the contract.

(3) Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake.

(4) It must be possible to give relief ... without serious prejudice to the other party except the loss of his bargain. In other words, it must put him in statu [sic] quo.

Briggs v. Liddell, 699 P.2d 770, 773 (Utah 1985) (citations omitted).

Using the same analysis as the Briggs court, even if Plaintiffs' evidence is viewed favorably to them, it is still deficient as to at least one element, i.e., the exercise of ordinary diligence. Id. The trial court concluded that "Plaintiffs failed to exercise due diligence at the time of purchase to determine the status of the Property," and that "under the totality of the circumstances, a reasonable person should have been alerted that there may be access problems ... that should have been investigated." (R. 205-06). Therefore, Plaintiffs have not met their evidentiary burden of showing ordinary diligence on their part.

II. THE TRIAL COURT'S DECISION THAT THERE WAS NO FRAUD OR NEGLIGENT REPRESENTATION BY DEFENDANTS SHOULD NOT BE DISTURBED.

Plaintiffs complain that the trial court did not find that false or negligent representations or opinions were made by Defendants to Plaintiffs and that Plaintiffs reasonably relied upon such representations (Appellants' Brief 11-17). Plaintiffs claim these representations or omissions concerned a zoning variance under which Plaintiffs' house was built and whether the back acre purchased by Plaintiffs from Defendants was part of an approved subdivision and therefore a lot upon which a house could be built. It is noted that although the Plaintiffs' house was built by

Defendant Sam Ovard, the house was not purchased by Plaintiffs from any of Defendants but from an interim owner named Nipco (Tr. 66-67). The trial court did not find the evidence as Plaintiffs wanted. The court, inter alia, found Plaintiffs had in their possession a copy of a subdivision map (Exhibit 15-R) showing the property in question as a lot in a subdivision (R. 202). Such map was not obtained from Defendants but was obtained from county records by the real estate agent engaged by Plaintiffs to assist them (Tr. 113-115). The trial court further found that Defendants did not represent to Plaintiffs anything concerning whether such map was approved or not approved, whether Plaintiffs' house was or was not built pursuant to a zoning variance and that Plaintiffs did not request or ask for any such information (R. 202). The trial court then concluded (and as a prerequisite must have found) that any statements or omissions relied upon by Plaintiffs were not fraudulent or negligent and that even if they were, Plaintiffs reliance on them was not justifiable (R. 205). The court further concluded, because of visible conditions of the property purchased by Plaintiffs, they should have been alerted that access problems may have existed (R. 205-206). Lack of access to a public street is what precluded the ability to build a house on the property without a zoning variance (Tr. 17-19).

Plaintiffs quarrel with the trial courts findings and lack of findings and therefore its conclusions of law and decision. In doing so, however, Plaintiffs have only reargued their version of

the facts and that their legal interpretation thereof should have been accepted by the trial court. More is required.

Rule 52(a) of the Utah Rules of Civil Procedure (hereinafter "Rule 52(a)") states: "In all actions tried upon the facts without a jury ... findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous...." (emphasis supplied) Plaintiffs have not shown that the trial court's findings of fact or lack thereof were clearly erroneous. Thus its findings should not be disturbed.

- a. Plaintiffs have not marshalled the evidence, but rather have recited only those facts that favor their side.

The Utah Supreme Court most recently addressed Rule 52(a) in In re Estate of Bartell, 105 Utah Adv. Rep. 3 (March 28, 1989). In Bartell, a widowed spouse appealed from a finding that she was not an "omitted spouse under her deceased husband's will". The court stated that under Rule 52(a), even when appealing a judge's findings of fact as opposed to a jury's findings, an "appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" Id. at 4 (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

As in Bartell, Plaintiffs in this case have

not even attempted to marshal the evidence in support of the trial court's findings, nor [have they] attempted to demonstrate that the trial court's findings are against the clear weight of the evidence, as required by Walker. Instead, [they] have essentially reargued the factual case submitted below, construing all evidence in a light

most favorable to [their] case and largely ignoring the evidence supportive of the trial court's findings.

Id.

Plaintiffs' evidentiary burden for fraud is proof by clear and convincing evidence. Secor v. Knight, 716 P.2d 790, 794 (Utah 1986). Not only have Plaintiffs failed to meet which burden, they did not marshal the evidence in an attempt to do so. As a result, this court must "rely heavily on the presumption of correctness that attends [the trial court's] findings," and affirm its judgment. Bartell, supra at 4. A reviewing court does not sit to retry cases submitted on disputed facts. Id.

Because Plaintiffs did not attempt to marshal the facts in support of the trial court's findings and show them to be clearly erroneous, Defendants, though not required to do so, have marshaled and set forth below certain of the evidence which supports the trial court's failure to find that Defendants made intentional fraudulent or negligent representations or omissions as to the zoning variance and buildable status of the property or that, in any event, Plaintiffs had relied thereon. Review of such evidence clearly shows that it supports the trial court's position on how it found and did not find the facts and that the court's position is not against the clear weight of the evidence.

1. Defendants predecessor owner (Mr. Newman) had a map (Exh. 15-P) which showed a division of 5 lots including the one purchased by Plaintiffs from Defendants. Mr. Newman gave Sam Ovard a copy of this map (Tr. 58).

2. Fred Hale (Plaintiffs' realtor who Plaintiffs asked to prepare with them an offer to purchase from Defendants (Tr. 112, 117, 153) obtained Exh. 15-P not from Defendants or Mr. Whipple (the listing real estate agent) but from the County Recorders office (Tr. 113-115).

3. Mr. Hale provided Exh. 15-P to Plaintiffs (Tr. 113-114, 154, 183).

4. Exh. 15-P was not an approved subdivision map (Tr. 76).

5. Defendants did not tell Plaintiffs that Exh. 15-P was a subdivision map (Tr. 183-184).

6. Plaintiffs did not claim Exh. 15-P to be a subdivision map but regarded it only as a boundary survey (Tr. 183-184), and Mr. Sanders was familiar with boundary line surveys because of his experience with them (Tr. 182).

7. Description of property on Exh. 10-P (listing card) as a private lane to tree line seclusion did not mean that someone could have a residence down the lane (Tr. 86).

8. Mr. Whipple never talked to Plaintiffs about the property (Tr. 91-92). He did talk to Mr. Hale, but he never told Plaintiffs or Mr. Hale that the lot was a buildable lot (Tr. 93).

9. Regardless of zoning, one cannot be sure in Draper City that property can be built on until you check with the City (Tr. 83-84).

10. Draper City will give one opinion one time and another opinion another time with respect to improvements on property (Tr. 94).

11. Mr. Whipple advertised the property for sale but never as a buildable lot (Tr. 98).

12. Mr. Whipple was never made aware in his dealings with Mr. Hale that Plaintiffs intended to build on the lot, if in fact they did (Tr. 99).

13. Although Sam Ovard knew a zoning variance would be required to build on the property (Tr. 214, 217, 220) he believed before and after the sale that a purchaser or Plaintiffs could obtain a variance or could get a building permit to build on the property (Tr. 71, 220). He did not have any purpose in not disclosing such facts to Plaintiffs (Tr. 214). He was not aware that Plaintiffs, as they now claim, would not have purchased the property if they had known they could not build upon it without a variance (Tr. 215).

14. Sam Ovard did not know the lane to the property did not meet access requirements for a variance (Tr. 217).

15. A closing statement signed by Plaintiffs designated the lot as "undeveloped" (Tr. 197-198), and Plaintiffs made no inquiry as to whether the lot could be developed (Tr. 198-200).

16. Plaintiffs do not know that they cannot get a building permit for the property and have never applied for one (Tr. 175).

17. Under prior land use regulations, variances were granted by Draper City for building on three other lots on the lane leading to the lot in question, and under current regulations, such variances have been granted on other lots in Draper City (Tr. 22-24).

18. Plaintiffs' purpose for purchasing the property was not to build on it themselves, but they were concerned someone else would purchase and build on it (Tr. 112-113, 119).

19. Plaintiffs did not want anyone else to build on the property (Tr. 119, 155, 185).

20. Plaintiffs did not purchase the property to build on it but purchased it in order to join it as a vacant lot with their adjacent house and to have more of an estate (Tr. 120), and horse property was of interest to Plaintiffs (Tr. 121).

21. Plaintiffs were going to put a white picket fence around the property as a place for a horse and build a "lean to" on it (Tr. 121-122).

22. Plaintiffs advised Mr. Hale they were going to use the property for horse pasture (Tr. 196).

23. Plaintiffs never told Mr. Hale, before or after the sale, that they intended to build a home on the property (Tr. 122).

24. Plaintiffs only expressed concern about being overpriced for the neighborhood by joining the vacant lot and their house together (Tr. 123-124).

25. Mr. Hale assisted Plaintiffs in arriving at a value to be paid for the property (Tr. 115), and they studied other properties to determine that joinder of the vacant lot and the house would not over price them for the neighborhood (Tr. 124-125, 186).

26. Neither Defendants nor Mr. Whipple had anything to do with Plaintiffs' conclusion they could get their money out of the house and lot joined together (Tr. 186).

27. It was Mr. Hale's normal practice to explain the purpose that a buyer client has for purchasing property, but he does not recall disclosing to Defendants that Plaintiffs were concerned that someone else would build on the property. He only disclosed that Plaintiffs wanted to purchase the property for horse pasture (Tr. 129-130).

28. Plaintiffs relied on the fact that two other homes were being built to the right and left of their house for their conclusion that the property was a buildable lot. Such other houses were owned by persons other than Defendants. Defendants had nothing to do with the building of such other houses, and Plaintiffs did not rely on Defendants for Plaintiffs' conclusion based on such other houses (Tr. 191-192).

29. Plaintiffs did not recall even Mr. Hale telling them the property was a buildable lot (Tr. 195-196).

30. In addition to Defendants Sam Ovard, Defendants Ben Ovard, Helen Ovard and Reva Ovard did not have conversations with Plaintiffs, they did not represent that the property could be built upon, they were not aware that Plaintiffs believed the property was a buildable lot or that Plaintiffs would not have purchased the property if they had known the property was not buildable (Tr. 229-231, 237-238).

b. Lack of reasonable investigation.

Plaintiffs introduced no evidence that they performed any investigation to confirm their conclusion that the property was a buildable lot. Reasonable investigation on their part is required

under the circumstances in order to support reasonable reliance by Plaintiffs'.

In Lewis v. White, 269 P.2d 865 (Utah 1954), the Supreme Court considered the issue of fraud in the sale and purchase of a motel. The buyers contended that the sellers had made false representations as to insulation, sewage disposal, and income generated by the motel. The court said, "No matter how naive or inexperienced the [buyers] were, they could not close their eyes and accept unquestioningly any representations made to them. It was their duty to make such investigation and inquiry as reasonable care under the circumstances would dictate." Id. at 866.

In Pace v. Parrish, 247 P.2d 273 (Utah 1952), plaintiffs brought an action for fraud in connection with sale of farm land to them. The basis for the claim was that part of the land was not of the same quality as the rest of the land, as had been represented. The defective land had not been cultivated or broken up and was obviously rocky. The Supreme Court held as a matter of law that the plaintiffs had not used reasonable care and diligence. The condition of the land had placed them on inquiry notice of its condition, and the most casual of inspections, stated the court, would have shown it was not good for cultivation. The court so ruled notwithstanding that when walking the property one of the plaintiffs had stated that he would break up the uncultivated land, and the defendant seller had thought "maybe you will and maybe you won't," but said nothing. Id. at 275.

There was no fiduciary obligation in this case between the Defendants as sellers and the Plaintiffs as buyers. See Secor, supra at 795 (quoting Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980)). The trial court in this case found that, regardless of the relationship of the parties, Defendants did not make fraudulent or negligent misrepresentations and, even if they did, Plaintiffs could not reasonably rely on the misrepresentations because they had failed to exercise due diligence in determining the true status of the property (R. 205). Specifically, the trial court found that due to the location and appearance of the property and the road leading to and from the property, a reasonable person would have inquired as to access problems (R. 205-206). Because of these circumstances, and because the Plaintiffs have failed to marshal the evidence or show clear abuse by the lower court, its judgment should not be disturbed.

III. THE TRIAL COURT'S VIEWING OF THE PROPERTY IN DISPUTE WAS PROPER.

Plaintiffs contend that the trial judge erred in viewing the property in dispute because, in doing so, he relied on extrinsic evidence gathered at the viewing to find in favor of Defendants. Plaintiffs' contention is based on conjecture and speculation and is without merit, as they have read misguided and unsupported interpretations into the trial judge's conclusions of law.

A decision by the court to view the property in a dispute rests within the sound discretion of the court. O'Connor v. Dory Corp., 381 A.2d 559 (Conn. 1977). The purpose of such a viewing

"is to assist in interpreting and resolving differences in evidence," rather than to supply evidence totally lacking. Weber Basin Water Conservancy District v. Moore, 272 P.2d 176, 177 (Utah 1954). At trial in this case conflicting evidence was presented as to whether a cul-de-sac existed at the time Plaintiffs purchased the property in dispute (Tr. 62, 172). Plaintiffs allege that there was no cul-de-sac at that time, and that the conditions of the property have changed dramatically since that time, thereby misleading the trial judge at his viewing. However, the Affidavits of neighboring residents submitted by Defendants state that the area is virtually identical now to what it was at the time Plaintiffs purchased the property (R. 238-39, 242-44). The only changes have been the installation of a cement gutter around the cul-de-sac, not to define the cul-de-sac but to control water run-off; the planting of shrubs and plants on private property near the cul-de-sac; and the installation of a cement wall on the front of private property which adjoins the cul-de-sac (R. 239, 243-44). None of these changes have caused the property to change dramatically in appearance.

After viewing the property at the conclusion of the trial, the trial court stated in its Memorandum Opinion that:

after having viewed the property, that due to the location of the property, the road leading from the main paved road ending in what appears to be somewhat of a cal-de-sac [sic], and under the totality of the circumstances, a reasonable person should have been alerted that there may be access problems associated with the back parcel that should be investigated.

(R. 142-43, 205-06). Plaintiffs have not shown that any of these factors considered by the trial judge did not exist at the time they purchased the property in question.

The Colorado Court of Appeals has dealt with this issue in a similar case. In Thomas v. National State Bank, 628 P.2d 188 (Colo. Ct. App. 1981), there was a dispute as to whether a house had been negligently constructed. Defendants contended that the trial court had erred in allegedly basing one of its findings in part on its viewing of the premises. The trial court had announced at the end of trial that it wished to view the property and received no objection from counsel. In finding for the plaintiff, the trial court stated, "This [the finding for the Plaintiff] is apparent both from the topographical map [introduced into evidence by defendants] and from a view of the premises which the court made" Id. at 190 (quoting trial court). The court of appeals stated that under these circumstances, defendants' argument was without merit. Id. (citations omitted).

Defendants are merely speculating when they allege that the trial court relied heavily on his viewing. The trial court in fact dispelled that notion in its Order Denying Motions for New Trial and to Amend the Pleadings to Conform to the Evidence, when it stated that its viewing of the property in question was not of primary importance to its decision (R. 255-256). Even if it did put some reliance on the viewing, its reliance was proper, as it was only to assist in resolving differences in the evidence already presented.

Finally, the trial court's viewing of the property was agreed to by both Plaintiffs and Defendants (Tr. 264). After such agreement and failure to object to the viewing prior to its occurrence and after being given the opportunity by the trial court to object, Plaintiffs' later objection is precluded and without merit.

IV. ATTORNEY'S FEES AND COSTS

The promissory note sued upon by Defendants provides for attorney's fees to Defendants upon default by Plaintiffs in payment of the same (Exh. 2-P). Defendants should therefore be awarded attorney's fees and costs on this appeal, with the amount thereof to be determined by the trial court upon remand for that purpose.

CONCLUSION

The trial court's judgment should be affirmed for three reasons. First, the trial court's refusal to allow Plaintiffs to amend their pleadings to conform to the evidence was within the court's discretion, as Plaintiffs did not sufficiently try illegality or mistake. Second, the trial court's finding for Defendants on the question of fraud was within the court's discretion and was not clearly erroneous, and Plaintiffs have failed to marshal the evidence to show otherwise and that they conducted reasonable investigation on their own. Finally, the trial court's viewing of the property in dispute was proper, and its subsequent decision was based on evidence in the record. Defendants should be awarded attorney's fees and costs on appeal and this matter

should be remanded to the trial court to determine the amount thereof.

DATED May 15, 1989.

Respectfully Submitted,

PARSONS & CROWTHER

By Thomas N. Crowther
Thomas N. Crowther
Attorneys for Appellees

CERTIFICATE OF SERVICE

Four copies of the foregoing Brief of Appellees were served upon Plaintiffs by causing a copy of the same to be mailed, postage prepaid, to Plaintiffs' attorney, Frederick N. Green, at 528 Newhouse Building, 10 Exchange Place, Salt Lake City, Utah 84111 this 15th day of May, 1989.

Thomas N. Crowther
Thomas N. Crowther