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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 : Reply Brief

Utah Court of Appeals

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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,

vs.

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

Defendants/Appellees,

vs.

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

Counterdefendants.

REPLY BRIEF

89-0063 CA

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

Argument Priority Classification 14(b)

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JUN 14 1989

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JOSEPH D. SANDERS AND)	
CHERYL M. SANDERS,)	
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Plaintiffs/Appellants,)	REPLY BRIEF
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STATEMENT OF DISPUTED AND ADDITIONAL FACTS

1. The real property in question is not a "lot". This parcel of land was a portion of a regularly subdivided lot, but did not constitute a lot in and of itself. (Trial Transcript 60, hereinafter "Tr."). The subdivision laws of the State of Utah and the Municipality of Draper reserve the designation of "lot" for those parcels of land which have been approved as a subdivision by the Municipality. § 57-5-1, et seq. Utah Code Ann. (1953, as amended). In this case, there was a 2-acre lot which had been informally divided by the Defendants into two parcels. The Defendants knew that the property had not been acknowledged, certified, approved and recorded as a subdivision when they sold the land to Plaintiffs. (Tr. 60).

2. The Plaintiffs' Motion to Amend was made at the conclusion of Plaintiffs' case and prior to the commencement of the Defendant's case.

3. The decision of the Judge to view the subject premises was made on the Court's own motion and not upon the motion of the Defendant.

4. The purchase price contemplated by the agreement of the parties was for a parcel which could be built upon, at that time, or sold, subsequently, as such. Although the Plaintiffs did not initially intend to build upon the parcel in question, they believed that the purchase price could be recouped later upon its sale as a building lot. (Tr. 156).

SUMMARY OF ARGUMENT

I. Mistake is a kindred defense to fraud and negligent

misrepresentation. These defenses share many of the same elements. The issue of mistake was therefore sufficiently tried, without objection by these Defendants, and the parties understood, particularly after the Plaintiffs' motion, that this defense would be presented. Defendants had a fair opportunity in the presentation of their case to defend and introduce evidence.

Illegality may be raised, for the first time, on appeal. In this case it was raised in Plaintiffs' Motion to Amend and for a new trial. Public policy and fairness require that the defense be applied to the facts in this case.

II. The Defendants actively deceived the Plaintiffs and concealed factual information which was material. Therefore, the Plaintiffs are relieved from the same duty of investigation which would otherwise apply.

III. It is clear from the trial judge's memorandum opinion that his view of the property, in its then current state, as opposed to the circumstances at the time of the transaction, was pivotal in his decision. Because of the changed nature of the area as well as the role the view played in the judge's decision, the view was improper.

ARGUMENT

POINT I:

PLAINTIFFS' MOTION TO AMEND TO CONFORM TO THE EVIDENCE IS PROPER.

A) The Court abused its discretion in denying Plaintiffs' Motion to Amend as to mutual mistake of fact. Plaintiffs' counsel moved to amend their Complaint at the

conclusion of the Plaintiffs' case and in so doing it was asserted that the elements of mutual mistake of fact were the same of those of negligent misrepresentation. (R. 200). The Defendants enjoyed the entire period of their defense to address mutual mistake of fact. The Defendants admit that the evidence of mistake (and illegality for that matter) "would also support the Plaintiffs' claim for fraud." (Appellee's Brief p. 7). Defendants raised no objection at the time of argument on the motion which would establish surprise, lack of fair opportunity to defend, lack of understanding of the defense, or prejudice. (R. 200-204).

The elements required to establish the mandatory requirement for granting a party's Motion to Amend are: 1) that the issue be sufficiently tried; 2) with no objection; 3) with implied or express consent; 4) with an understanding as to the nature of the evidence and defense; and 5) a fair opportunity to defend. Each of these elements are met in this case. (Cite?)

The Defendants' reliance upon Stratford v. Morgan, 689 P.2d 360 (Utah 1984) is misplaced. In that case, the plaintiffs had previously indicated to the court that they did not intend to rely upon the theory of adverse possession which they later attempted to assert. In addition, the plaintiffs had failed to establish a very material element of proof related to that claim. Those factors are not present in this case.

Reliance upon Westley v. Farmer's Insurance Exchange, 663 P.2d 93 (Utah 1983) is inapplicable because the amendment of plaintiff's complaint in that case to include an allegation known by the parties one year prior would have delayed the trial.

Westley did not deal with kindred defenses whose elements were alike, and only differed in terms of remedy and relief, as in the case at bar. Rather, the amendment of that complaint would have required additional trial preparation on defendant's part and therefore would have prolonged the litigation.

B) The defense of illegality applies to this case and may be raised at any time, even subsequent to the trial.

Because of the special nature of this defense, public policy allows that it be raised subsequent to the trial, even upon appeal, and by the court if necessary. Mitchell v. American Savings and Loan Association, 593 P.2d 692, 693-694 (Ariz. Ct. App. 1979). See also Greer v. Northwestern National Insurance Company, 674 P.2d 1257 (Wash. Ct. App. 1984).

The Defendants in their brief suggest that the Plaintiffs have misconstrued the application of this defense. Furthermore, they argue that the contract at issue here is not prohibited by statute. (Defendants' Brief p. 9).

The Defendants specifically acknowledged at trial that there is a difference between a variance and a subdivision (Tr. 201). While the Defendants address the necessity of a variance in order to build on the subject property in their brief, they utterly failed to discuss the implications of an unapproved subdivision, and sales of purported "lots" thereof. (Defendants' Brief p. 16).

§ 57-5-5 Utah Code Ann. (1953, as amended) clearly prohibits the very act complained of in this case on the part of Defendants. Furthermore, that section makes it a crime to sell a

"lot" as the Defendants did herein.

"The general rule is that a contract prohibited by law is a legal and unenforceable." Williams v. Continental Life and Accident Company, 593 P.2d 708, 710 (Idaho 1979). The Williams court quoted 6A A. Corbin, Contracts § 1540 (1962) as follows:

"If a bargain is illegal, not because a performance promised under it is an illegal performance, but only because the party promising it is forbidden by statute or ordinance to do so, the prohibition is aimed at the party only and he is the only wrongdoer."

593 P.2d at 710.

This is precisely the case before the court. The Defendants knew that the property had not been legally subdivided (Tr. 60). Nevertheless, they sold the property as a subdivided lot. Utah Code Ann. § 57-5-5 clearly prohibits such an act. To ignore this defense now, or to deny the Motion to Amend to include it, would result in a severe injustice. It would perpetuate the Defendants' illegal conduct which had its inception in the sale of property to the Plaintiff.

C) The Plaintiffs have sufficiently established a case for mistake.

Applying the test found in Briggs v. Liddell, 699 P.2d 770 (Utah 1985), and set forth in Defendants' Brief at page 10, the facts introduced at trial were sufficient to establish mistake. The mistake which Plaintiffs relied upon induced them to pay nearly \$20,000 more for the property than what it was actually worth. To enforce an illegal contract which caused such expense to the Plaintiffs would be unconscionable. The mistake clearly

related to the potential development of the property which was material to the price paid by Plaintiffs. Plaintiffs would be sufficiently compensated if Defendants lost the benefit of their bargain and Plaintiffs were returned to the status quo.

Defendants argue that Plaintiffs did not use ordinary diligence in determining the status of the property based upon the trial court's finding. Judge Noel viewed the property in 1988 and decided that a reasonable person should have been alerted to access problems which should have been investigated. (R. 205-206).

The fact is, Plaintiffs lived on adjoining property when they purchased this parcel and there was no access problem at that time. In fact, Plaintiffs were motivated to purchase the property after seeing a realtor with clients who had easily accessed that parcel. Access is not the issue in any event. The issue was and is whether the parcel sold to Plaintiffs could be built upon and the mistaken belief that it could be developed in its condition as an illegally subdivided parcel of property.

The most telling fact regarding the intent of the parties as to the nature and value of the land is its purchase price. The evidence presented at trial indicates that the land, in its then current state, would have a market value of \$8,000 (Tr. 28). That is 31% of the actual purchase price, \$26,000. A lot that had been subdivided and was ready for building would have a value approximating that which was negotiated by these parties.

The Defendant relies upon Lewis v. White, 269 P.2d 865 (Utah 1954). However, in that case there had been no "active deception or concealment". Id. at 866. In this case, there was

exactly that on the part of the Defendants. Where there exists such active deception and concealment, the holding of Lewis requiring investigation by the plaintiffs does not apply.

The Defendant mistakes the fundamental fact in support of illegality which undermines not only the Defendants' conduct but the decision of the court. That fact is not the lack of access to a public street. It is not even the necessity for a variance. Rather, it is the fact that the parcel of land was represented or held out as a subdivided lot when in fact it was not. Its sale as such was illegal. Finally, the failure to inform the Plaintiffs of this fact, well known to the Defendants, was active deception and concealment.

POINT II:

WHILE THE DECISION TO VIEW THE PROPERTY WAS APPROPRIATE, THE USE OF THE VIEW IN THE COURT'S DECISION WAS NOT PROPER.

The Defendants rely primarily upon Thomas v. National State Bank, 628 P.2d 188 (Colo. Ct. App. 1981) for the proposition that the view was appropriate. In Thomas the defendant moved for and requested the view. Additionally, there was no suggestion in that case that the area being viewed had changed, as there is in this case.

A view, in and of itself, is not inappropriate. However, for the reasons set forth in the Plaintiffs' brief, it must be shown that the premises to be viewed are substantially the same at the time of the view as when the claim arose. Likewise, it must be established that the inspection will be fair to all parties.

Lastly, the view should not be the source of independent evidence. Rather, it is used to clarify and harmonize.

The Judge's Memorandum Decision in this case indicates that the view of the property was of such a vital and pivotal importance that it must be construed as extrinsic evidence which was used to corroborate and/or discredit the testimony of witnesses, which is inappropriate (See cases cited in Plaintiffs' brief). At least, the parties should have been afforded an opportunity to establish the difference between the state of the premises at the time of the trial, and at the time of the transaction.

CONCLUSION

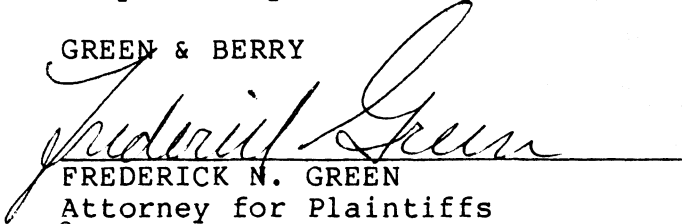
The ruling of the trial court should be reversed and remanded for a new trial on the merits for three reasons. First, the trial court erred in refusing to allow Plaintiffs to amend their Complaint to conform to the evidence presented at trial. Second, there was sufficient evidence to support a finding of fraud and/or negligent misrepresentation on the part of the Defendants. Finally, the Judge improperly relied upon his view of the property in his finding in favor of the Defendants.

For these reasons, Plaintiffs should prevail in their appeal of this matter.

DATED this 13 day of June, 1989.

Respectfully Submitted,

GREEN & BERRY

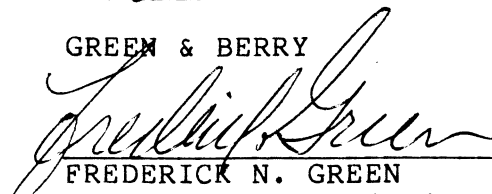

FREDERICK N. GREEN
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

COMES NOW Frederick N. Green, attorney for the Plaintiffs in the above-entitled action, and hereby certifies that he has served Thomas N. Crowther with four (4) copies of the Plaintiffs' Reply Brief by mailing true and correct copies thereof to Thomas N. Crowther of the firm of Parsons & Crowther, attorneys for Defendants, at 455 South 300 East, Suite 300, Salt Lake City, Utah, 84111, on this 13 day of June, 1989.

DATED this 13 day of June, 1989

GREEN & BERRY


FREDERICK N. GREEN
Attorney for Plaintiffs