1980

Walter Wallis and Marleen Wallis v. H. E. Thomas et al : Brief of Appellants

Utah Supreme Court

Ronald C. Barker; Attorney for Appellants-Defendants;
Wayne G. Petty; Attorney for Respondents-Plaintiffs;

IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER WALLIS and MARLENE WALLIS,

Plaintiffs - Respondents,

vs.

Case No. 17051

H. E. THOMAS, INTERNATIONAL EQUITIES, INC., NATIONAL FUND, INC., and AMERICAN SAVINGS & LOAN ASSOCIATION,

Defendants - Appellants.

WALTER WALLIS and MARLEEN WALLIS,

Plaintiffs - Respondents,

vs.

H. E. THOMAS, INTERNATIONAL EQUITIES, INC., NATIONAL FUND, INC., AMERICAN SAVINGS & LOAN ASSOCIATION, and GLEN JUSTICE MORTGAGE COMPANY, INC.

Defendants - Appellants.

APPELLANTS' BRIEF

Appeal from a Judgment of the District Court
Salt Lake County
Honorable G. Hal Taylor, Judge

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah 84115
Attorney for Appellants - plaintiff

WAYNE G. PETTY
600 Deseret Plaza
Salt Lake City, Utah 84111
Attorney for Respondents - plaintiffs

IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER WALLIS and MARLENE WALLIS,

Plaintiffs - Respondents,

vs. Case No. 17051

H. E. THOMAS, INTERNATIONAL EQUITIES, INC., NATIONAL FUND, INC., and AMERICAN SAVINGS & LOAN ASSOCIATION,

Defendants - Appellants.

WALTER WALLIS and MARLEEN WALLIS,

Plaintiffs - Respondents,

vs.

H. E. THOMAS, INTERNATIONAL EQUITIES, INC., NATIONAL FUND, INC., AMERICAN SAVINGS & LOAN ASSOCIATION, and GLEN JUSTICE MORTGAGE COMPANY, INC.

Defendants - Appellants.

APPELLANTS' BRIEF

Appeal from a Judgment of the District Court
Salt Lake County
Honorable G. Hal Taylor, Judge

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah 84115
Attorney for Appellants - plaintiffs

WAYNE G. PETTY
600 Deseret Plaza
Salt Lake City, Utah 84111
Attorney for Respondents - plaintiffs

TABLE OF CONTENTS

Table of Cases Cited

Table of Statutes Cited

57-11-16(1)	9. 10
57-11-17	10.
57-11-17(c)(3)	12.
57-11-21	10.

Table of Texts Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER WALLIS and MARLENE WALLIS,

Plaintiffs- Respondents,

vs

H.E. THOMAS, INTERNATIONAL EQUITIES, INC., NATIONAL FUND, INC., and AMERICAN SAVINGS & LOAN ASSOCIATION,

Defendants - Appellants,

Case No. 17051

WALTER WALLIS and MARLENE WALLIS,

Plaintiffs - Respondents,

vs

H.E. THOMAS, INTERNATIONAL EQUITIES, INC., NATIONAL FUND, INC., AMERICAN SAVINGS & LOAN ASSOCIATION, and GLEN JUSTICE MORTGAGE COMPANY, INC.

Defendants - Appellants,

APPELLANTS' BRIEF

EXPLANATION OF REFERENCE TO RECORD

Plaintiffs commenced two almost identical lawsuits (#233143 & 239555) which were then consolidated (R. A85-93;

R. B 54, 73). In numbering the record the clerk commenced with page #1 in each of the case files. To avoid confusion References (R.) to the file in case #233143 will be followed by the letter "A" and to the file in case #233555 will be followed by the letter "B" to distinguish between the two files. (For example see reference above). Reference to the trial transcript are shown as "R" only.

NATURE OF THE CASE

Judgment for alleged violation of Utah Uniform Land Sales Practices Act ("UTAH ACT") 57-11-1, UCA, 1953, erroniously held that "disposition" of four parcels from a 300 acre tract constituted the "disposition" of an "unregistered" and "unexempt" "subdivision under the Utah Act. A copy of the Utah Act is furnished as appendix "I" for the convenience of the Court.

DISPOSITION IN LOWER COURT

The case was first tried by Judge Leary who dismissed plaintiffs' claim Under the Utah Act, their claim for rescission and awarded judgment for alleged fraud (R. B 83, R. 88-90). Judge Leary then vacated that judgment and offered a new trial after determining that he had committed reversable error (R. A 177, 184). After a second trial Judge Taylor dismissed the fraud claim without prejudice [but with prejudice if there was no appeal] (R. A 253), dismissed the

rescision claim with prejudice and awarded judgment under the Utah Act (R. A 234).

RELIEF SOUGHT ON APPEAL

An order holding that said 10 acres are not "subdivided lands" within the meaning of the Utah Act; and/or that the 10 acres are "exempt" from the Utah Act and reversing plaintiffs' judgment under the Utah Act; or that failing, for a new trial on plaintiffs' claim under the Utah Act; also holding that dismissal of the fraud claim was with prejudice and in res judicata.

STATEMENT OF FACTS

The statement of facts has been grouped under major headings as follows:

1. Alleged misrepresentations are not important to decision -

Whether or not misrepresentations or omissions were made concerning the 10 acres in Iron County exchanged to plaintiffs is unimportant since defendants acknowledge that the Iron County land was not registered as a subdivision (57-11-5, UCA, 1953) and that no public offering statement was given to plaintiffs (57-11-5 thru 57-11-10, UCA, 1953) and that under the Utah Act either of those facts would be sufficient to support plaintiffs judgment (57-11-17, UCA, 1953) if their 10 acres are "unexempt" (57-11-4, UCA, 1953) "subdivided" lands (57-11-2,

UCA, 1953) within the meaning of the Utah Act, accordingly, alleged misrepresentations are not important to the division herein.

2. The primary controlling issue in this case is whether the 10 acres exchanged to plaintiffs was part of a "subdivision" within the meaning of the Utah Act.

If the 10 acres was not part of a "subdivision" within the meaning of the Utah Act, (see discussion on pages _____ below) or if exemptions in the act applied (see discussion on pages_____below) then the lower court erred and the judgment should be reversed. It is unnecessary to discuss plaintiffs' claim that defendants misrepresented the 10 acres. However, so that the Court may more fully understand the controlling issues a brief summary of plaintiffs' allegions as to misrepresentation by defendants (which are all disputed) is furnished as a part of the statement of facts.

3. Plaintiffs accepted the 10 acres in exchange for their equity in a home that was about to be lost thru foreclosure -

Plaintiffs house was about to be sold at sheriff's sale by the second trust deed holder because plaintiffs were about six months in default in making payments on both first and second trust deeds. (R. 557, 558, 560, 561, 590, 596, 688, 708). Plaintiffs' efforts to sell their house had been unsuccessful (R. 558, 590, 591) and plaintiffs believed that

a sheriffs sale of their house was scheduled two weeks (R. 560-561). Plaintiffs answered a newspaper advertisement of defendant International Equities, Inc. ("IEI") offering to purchase homes (R. 558,). Plaintiffs and IEI entered into handwritten exchange agreement (Ex. 14-P-see appendix II) whereby IEI exchanged an unidentified said 10 acres in Iron County (R. 707) for plaintiffs' home equity (R. 565, 566, 691). That agreement was formalized by later typewritten agreement containing some minor modifications (R. 569, 570, Ex. 2-P and 30-D appendix III). Plaintiffs deeded their house to IEI (Ex. 3-P, appendix IV) in exchange IEI deeded the 10 acres to plaintiffs (Ex. 9-P-appendix V), plaintiff's were trying to salvage their credit rating to avoid a possible deficiency judgment, and lose of other security for the loan, plaintiffs attached little value to the land and felt that whatever they got was better than a foreclosure (R. 708).

4. Plaintiffs made no investigation concerning or examination of their 10 acres -

Plaintiff's were so unconcerned about the 10 acres that they didn't even look at a map (R. 606) to locate the general area where the property was located before signing the exchange agreement (appendix II) or before deeding their house to IEI (appendix IV). Plaintiffs did not inspect or visit the 10 acres (R. 721) or make independent inquiry about the property, its location, value, proximity to roads, utilities, surrounding property etc. (R. 607-616, 708-710), except to

call an aunt who worked for the state Road Commission and who made some general inquiry of other Road Commission employees. (R. 572, 573).

Plaintiffs did not determine whether the 10 acres was in the valley or mountains (R. 703, 609), the direction from Cedar City (R. 609), whether the 10 acres was west or east of the freeway (R. 710, 615), or make inquiry of realtors or others concerning the value of land in that area (R. 618). Plaintiffs' gross inattention and negligence in exercising care to protect their own interests are classic examples of unjustified alleged reliance which the Utah Supreme Court has said precludes recovery in fraud actions. See Oberg v. Sanders, 111 U. 507, 184 P.2d 229; Jardine v. Brunswick, 18 U. 2d 378, 423 P.2d 659; Lewis v. White, 2 U. 2d 101, 269 P.2d 865; Adamson v. Brockbank, 112 U. 52, 185 P.2d 264. Plaintiffs' unreasonable conduct, among other things, justifies dismissal by the Court of plaintiffs' claims (R. A-253).

5. Plaintiffs' unreasonably claim that they thought that the 10 acres in Iron County was equal in value, type and quality to the Bell Canyon Subdivision in Southeast Salt Lake County (R. 723-727, 626-633).

Plaintiffs claim at the trial that they believed they were getting improved lots in a subdivision complete with roads, white rail fences and nearby utilities in an area with growing crops which was allegedly near to Brian Head Ski Resort (R. 698, 725,566). Plaintiffs deed (appendix V) described

their 10 acres by metes and bounds plaintiffs located the property generally on a map within a few days after the exchange (R. 567-568, 571-572, 611, 615, 625-627, 694), yet plaintiffs lived in the home which they had traded to IEI for over a month after the exchange, then voluntarily moved without complaint (R. 618). They did not express dissatisfaction with their bargain for approximately six months.

6. IEI determined that plaintiffs had little or no equity in the home and exchanged the 10 acres for whatever that equity might be - (R. 790).

The IEI appraised plaintiffs' house and determined that they had little if any equity over and above the first and second mortgages (R. 769, 786 -789, 796, 802 - 805) and offered to give them the 10 acres for whatever plaintiffs' equity in their home might be (R. 790 - appendix III). Thomas denies that misrepresentations were made concerning the 10 acres in Iron County.

7. IEI made three other casual conveyances from the 300 acres in 7 years, two of which were tranfered to related corporations -

During January, 1975, (approximately 6 months preceding the exchange with plaintiffs) IEI exchanged 5 acres from the 300 acre tract for some office furniture (Ex. 7-P, R.673, 680); in April, 1975, (after IEI had losed its offices see page #16 below) IEI transfered 5 acres (without consideration) to a related corporation (R. 673, 678- 680 - Ex. 6-P) and

transferred some oil and gas rights (again without consideration) to another related corporation (R. 681, 679. - Ex. 8-P). No other transactions involving said 300 acre tract occurred thru the time of trial (R. 661), which was approximately 5 years after transaction with plaintiffs and 7 years after IEI bought the 300 acres. No parcels were advertised, offered for sale or sold to the public from that 300 acre tract (R. 686). IEI has never subdivided property or sold subdivision lots (R. 687).

As indicated above the only portions of the 300 acre tract disposed of by IEI since its 1973 purchase were the 5 acres exchanged for office furniture, 10 acres exchanged for plaintiffs' house equity and a 5 acre parcel and some oil and gas rights transferred to related corporations (R. 686).

8. IEI was not required to register under the Utah Act.

Since those transactions were not within the scope of the Utah Act, and since IEI was not in and did not intend to engage in the business of subdividing selling or offering to sell property to the public they were not required to and did not register, furnished a public offering statement or otherwise comply with the Utah Act, 57-11-1, UCA, 1953, et seq. (R. 675-676).

ARGUMENT

Point I

THE 10 ACRES in IRON COUNTY is NOT A "SUBDIVISION" OR "SUBDIVIDED LANDS" WITHIN THE MEANING OF THE UTAH ACT AND

WAS AN EXEMPT TRANSACTION.

9. SCOPE AND PURPOSE OF UTAH ACT-

This action is based upon the Utah Uniform Land Sales Practices Act ("UTAH ACT"). The Utah Act requires a subdivision to file with a copy of the Utah Act is attached as Appendix "I". (57-11-5 thru 57-11-10, UCA, 1953,) and to obtain the approval of the Department of Budiness Regulation of a registration, public offering statement and to furnish other information before "disposition" may be made of subdivided lands." The Utah Act prohibits disposition of or offers to dispose of "subdivided lands" in Utah until after the subdivided lands are registered under the act (57-11-5(1), UCA, 1953), and unless an effective (and comprehensive - 57-11-6 and 57-11-7, UCA, 1953) current public offering statement is delivered to the purchaser and a receipt for that offering statement is obtained from him not less than 48 hours before he enters into a contract dor the purchase of subdivided lands (57-11-5(2) and (3), UCA, 1953). The statute allows injunctive relief for threatened violations (57-11-11, UCA, 1953) imposes severe criminal penalties (57-11-16, UCA, 1953) and give liberal civil remedies to the buyer of noncomplying "subdivided lands," including the right to rescind his contract within 48 hours after signing if the required offering statement is delivered to him less than 48 hours before he signed (57-11-5(2), UCA, 1953), the right to recover the consideration paid with interest and attorney fees upon tender of reconveyance if the

seller fails to register the subdivision, fails to deliver a current approved oublic offering statement, makes an untrue statement of a material fact, omits to state a material fact required to be included in the registeration statement or in the offering statement or omits to state a material fact which is necessary to make the statements made not misleading (57-11-17, UCA, 1953). The Utah Statute specifically refers (57-11-2(9), 57-11-16(1), UCA, 1953, and elsewhere therein), to a similar Federal Statute (Federal interstate Land Sales Full Disclosure Act [15 U.S.C. §1701, et seq] and require uniformity of construction with decisions of other states which have enacted similar uniform laws (57-11-21, UCA, 1953). The Utah Statute is a part of a national movement to regulate the promotion and sale of subdivided land by speculatrs. The Utah Act not intended to regulate the sale of undeveloped land which has not been and is not then intended to be "subdivided".

10. Utah Act exempts subdivisions with less than 10 units, isolated transaction, dispositions of oil and gas interests, property acquired by builders, offers which are not for gain or profit, etc.

The Federal statute as it then existed exempted subdivisions containing less than fifty (50) lots (15 U.S.C.S. §1701 (3) and §1702 (a)(1) [exemption has since been changed to twenty-five (25) lots]. The Utah Statute defines a "subdivision" as excluding property which has been or is proposed

to be divided into less than 10 lots (57-11-2(6), UCA, 1953). Other exemptions are included in the Utah Statute for single or isolated transactions (57-11-4(1)(a), UCA, 1953), for property containing certain building or where seller has a contractural obligation to construct a building within two years (57-11-4(1)(b), UCA, 1953), where the property is acquired for use in the business of constructing residential, commercial or industrial building (57-11-4(1)(c), UCA, 1953), where the transaction involves dispositions of an interest in oil, gas or minerals if those transactions are regulated as securities (57-11-4(2)(e), UCA 1953), offers which are not for gain or profit (57-11-2(2), UCA, 1953, and contains certain other exemptions.

11. Plaintiffs failed to sustain burden of proving 10 acres were "subdivision" land-

Before plaintiffs can recover under the Utah Uniform Land Sales Practices Act, 57-11-1, UCA, 1953, et seq., they must establish that the transaction wherein they acquired the 10 acres of raw ground in Iron County was a transaction covered by the Utah Act. If that land was not a "subdivision" or "Subdivided Lands" as defined by 57-11-2(6), UCA, 1953, then the statute is simply not applicable and the judgment of Judge Taylor should be vacated and set aside.

12. Construction by Federal Court of similar statute limits imposition of liability to those who meet definitions under statute -

Southampton National Bank, (CA 3rd, 1978)

584 F2d 1288 the U.S. Court of Appeals considered a claim under the Interstate Land Sales Act, 15 U.S.C.S. §1701 (4) (a similar federal statute) against a bank that had finance contracts for subdivision lots. It was claimed that the bank was an "indirect seller" or "developer" within the meaning of §1703 the act (15USES §1703). Similar provisions concerning indirect control of a subdivider as found in the Utah Act, 57-11-17 (c)(e), UCA, 1953.

The Court quoted with approval from the U.S. Supreme Court case of Ernst v. Ernst v. Hochfelder, 425 U.S. 185, 197 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976) and Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S. Ct. 1917, 44 L. Ed 2d 539, decision (at Page 1293) as follows:

> "Initially . . .the starting point in every case involving construction of a statute is the language itself". . ."The Act clearly limits the imposition of liability to those who meet the definitions of developers or agents of developers. Developers are those who directly or indirectly engage in selling efforts. Thus, since the Act provides for liability for misstatements or omissions in the statutorily required Statement of Record and Property Report or in statements made to offeres of lots in a subdivision logically the statute should be interpreted to include within its scope only those engaged in the selling effort In Paquin v. Four Seasons of Tennessee, Inc. 517 F. 2d 1105 (5th Cir. 1975), the court stated. We think that the language of [§1709 of the Act] indicates that Congress intended the developer to be liable for its own acts and those of its agents, which is the usual rule, but it did not mean to scoop up every guide or salesman . . .and make them pay unless they, too, have the authority to sell and to do so." (emphasis added)

The Court then went on to reason that the bank was not an indirect seller within the meaning of the act, as follows:

> ". . . the reference to 'indirect sellers' in the Act as defining who may be considered developers, can only be constituted as encompassing those who conduct their selling efforts through means other than direct face to face contacts with buyers as for example, through agents there i[illegible]

the language or in the legislative history of the Act that an indirect seller is other than one who is involved in some manner in the selling efforts related to a land development project." (emphasis added).

13. Legislature did not mean to "scoop up" sellers of unsubdivided lands-

In a like manner we must look to the language of the Utah Act and avoid a construction which would "scoop up" all persons who sell unimproved land which has not been "subdivided" and who at the time of the transaction, do not "propose" to "subdivide" their land within the meaning of the Utah Act. The statute was intended to prohibit and punish fraud in land subdivision development enterprises involving a substantial number of lots [limited under the Utah Act to at least 1a lots] and should be flexibly construed to effect its remedial purposes. See Nargiz v. Henlopen Developers, 380 A. 2d 1361 (Delaware) at P. 1364, and McCown v. Heidler (10th Cir. 1975) 527 F. 2d 204. The Utah Statute (57-11-2(6) UCA, 1953) defines a "subdivision" and"subdivided lands" for the purpose of that act as:

> land which is"divided" or is "proposed to be divided for the prupose of disposition into ten or more units" are offered as part of a common promotional plan of advertising and sale." (emphasis added). [see appendix I]

14. Plaintiffs' 10 acres is not part of a "subdivision" or "proposed subdivision" so Utah Act does not apply.

It is undisputed that the land was not "subdivided" (P.675-676). There is no evidence in the record which would tend to support a claim that defendants have at any time offered "ten or more units" for sale, or that any of the parcels were

conveyed . . .as part of a common promotional plan of advertising and sale within the meaning of (57-11-2(6), UCA, 1953) since there is no evidence in the record from which the Court could conclude that defendants "proposed to. . .divide" their land "for the purpose of distribution into ten or more units," plaintiffs' 10 acres are simply not part of a "subdividison" within the statutory definitions (57-11-2(6)), UCA, 1953), the statute is inapplicable and the judgment should be vacated.

15. Record contains no evidence of intent or "proposal" to "subdivide"-

Counsel for plaintiff argued at the trial (R. 852-853) that said four conveyances of land from the 300 acre that over a period of seven months was evidence that defendants "proposed" to "divide" said land into ten or more parcels for "purposes of disposition." It is difficult to understand how the four unrelated dispositions proves that IEI intended to convey additional parcels. That argument illustrates the weakness of plaintiffs' case and the absence of any evidence to support a claim that defendants were "subdividers" within the meaning of 57-11-2(5), UCA, 1953, or that defendant's land is a "subdivision" within the meaning of 57-11-2(6), UCA, 1953. There was no evidence of any "common promotional plan" involved in those conveyances, each being different in type and kind, with only two having been made to other than related corporations (R. 673, 678-681), to-wit: the conveyance to plaintiffs and the conveyance to a [illegible]

exchange for furniture (R. 673,680). The conveyance to related corporations (R. 673, 678-681, Ex 6-P & 8-P) were not "dispositions" for "gain or profit" as required by 57-11-2(1), UCA, 1953, since they were made without consideration (R. 679-680), and are expressly excluded from the scope of the Utah Act. There was no evidence of defendant advertising the property for sale (R 686). There is no evidence in the record which would tend to indicate that at the time of their exchange of the 10 acres to plaintiffs the defendants intended to dispose of any additional parcels of property from the 300 acre tract. To the contrary, the undisputed evidence shows that defendants intended to hold and have held the property for investment (R. 683).

16. Abandoned prior investigation into possibility of subdividing does not convert investment land into a "subdivision" or "proposed subdivision"-

When defendant purchased the property in 1973 it investigated the feasibility of subdividing the property and selling recreational lots with dirt roads and without utilities (R. 781, 782, 820). IEI then had an employee who had prior experience with another employee in subdividing and selling such property (R. 781-782) who in connection with his feasibility investigation employed an engineer who drew a preliminary subdivision plat (R. 683, 782-782, 806) and for an attorney to investigate possible registeration of the property under the Utah and/or Federal Acts (R. 781-782).

About February, 1974, after that preliminary investigation, IEI determined that there was too much red tape involved (R. 686, 782), that the timing was not right (R. 790) and abandoned the project, cancelled the office lease, closed the business office, sold the furniture, (R. 686) discharged the employees (including the employee with experience in subdividing) discontinued that proposed business, move the remaining typewriter and desk to Mr. Thomas' home, and decided to hold the land for investment purposes (R. 781-783).

From the date of purchase in 1973 until abandoment of the project in February, 1974, it might have been agreed that the 300 acres "land which is . . .proposed to be divided for the purpose of disposition into ten or more units" within the meaning of 57-11-2(6), UCA, 1953. Had the sale to plaintiffs occurred during that period it might have been a sale within the scope of the act. However the undisputed evidence showed that the investigation of the possibility of subdividing was abandoned before it reached the status of a proposed offering and long before it reached the state of actually subdividing, selling lots or offering lots for sale the term "proposed" refers to existing proposals or plans and not to past abandoned plans or projects. Once investigation of a potential project subdividing the 300 acre tract was abandoned (in February, 1974) it was no longer a "proposed" subdivision (assuming but not agreeing that it would qualify as a "proposed subdivision" during that period) but was simply an investment. The dis-

position of small parcels in a casual manner from land held as an investment is not regulated by either the Federal or Utah Acts. Once investigation concerning the possible subdivision project was abandoned it was no more a "proposed" project than had no such subdividing investigation ever been made.

17. Meaning of "proposed to be divided" -

As indicated above, it is undisputed that IEI did not "subdivide" its property. Unless it "proposed" to "divide" its land within the meaning of 57-11-2(6), UCA, 1953, the 10 acres is not a "subdivision" within the meaning of 57-11-2(6), UCA, 1953, and the statute does not apply to plaintiffs. Black's Law Dictionary, Revised Fourth Edition and cases there cited define "Propose" as "an offer; something proffered," and as "signification by one person to another of his willingness to enter into a contract on the terms specified in the offer." By adding the letters "ed" to propose we convert it into the past tense "proposed" which signifies that a specific determination has in fact been made to (sub)divide the land. The balance of the phrase "for the purpose of disposition into ten or more units" further qualifies the meaning to require a continuation of a prior decision (there had been no such decision) to divide the property into 10 or more units for the purpose of disposition. Accordingly, if there had been a decision to subdivide for purposes of disposition into 10 or more units (which there was not) once those plans are abandoned there is no longer a "proposed" subdivision.

18. Other exemptions available to IEI -

Even if the 10 acres had been part of an actual or proposed subdivision (which it was not as demonstrated above), still plaintiffs would not be entitled to recover against defendants because of specific exemptions in the statute, including the following:

(a) The two conveyances to related corporations were not "for gain or profit" within the meaning of the exemption from the Utah Acted in 57-11-2(2), UCA, 1953, (R. 686).

(b) The transaction with plaintiffs was a "single or isolated transaction" for the plaintiffs "own account" within the meaning of the exemption from the Utah Act in 57-11-4(1)(a), UCA, 1953.

(c) Plaintiffs testified that they acquired the property for purposes of constructing homes as a business (R. 625, 841, which is a transaction which is specifically exempt from the Utah Act as provided in 57-11-4(1)(c), UCA, 1953.

(d) The disposition of oil and gas interests (Ex. 8-P, R. 681) [to a related corporation as mentioned above] is exempt from the Utah Act as provided in 57-11-4(e), UCA, 1953. Exempt transactions cannot be used to prove violation of or intent to violate the Utah Act since the "division" or "proposal to divide" would necessarily require subdividing in non-exempt transactions.

POINT II

THE COURT ERRED IN DISMISSING THE FRAUD CLAIMS "WITHOUT PREJUDICE" IN THE EVENT THAT DEFENDANTS APPEALED.

After trial where plaintiffs' fraud claims were fully litigated the Court first dismissed the fraud count (second claim for relief - R A 7-9) without prejudice (R. A 222, 234) and later amended the judgment of dismissal to provide (R. A 254, ¶5) as follows:

> ". . .Plaintiffs' Second Cause of Action is hereby dismissed with prejudice if no appeal is taken from this judgment, and dismissed without prejudice if an appeal is taken from this judgment."

In Matthews v. Matthews, 102 U. 428, 132 P.2d 111 The Court stated the reason for the res judicata rule as follows:

> The foundation principle upon which the doctrine of "res judicata" rests is that parties ought not to be permitted to litigate the same issue more than once, and, that when a right or fact has been judicially determined by a court of competent jurisdiction, or an opportunity for such trial has been given, the judgment of the court, so long as it remains unreversed, should be conclusive upon the parties and those in privity with them. (emphasis added)

To dismiss a claim "without prejudice" after a trial flies in the teeth of the principal of res judicata and is beyond the power of the Court. Either plaintiffs proved their case or they did not. If it is to be dismissed the dismissal must be with prejudice. To attempt to prevent defendants from taking an appeal by this type of conditional judgment is contrary to the letter and spirit of Art. VIII, §9 of the Utah Constitution which gives a right of appeal to the Supreme Court from all final judgments of the District Court. Under the judgment as rendered it would not become final until the time for appeal had expired. The judgment of the District Court should be amended to provide that the dismissal of the second cause of action (fraud count) is with prejudice.

CONCLUSION

The 300 acre tract owned by IEI was not "subdivided" nor "proposed to be divided for the purpose of disposition into ten or more units" [only 4 parcels were conveyed] and the 10 acres acquired by plaintiffs was not "offered as a part of a common promotional plan of advertising and sale" within the meaning of 57-11-2(6), UCA, 1953, and accordingly was not "subdivided lands" which was covered by the Utah Act. Had IEI's land been covered by the act (which it was not) the transaction involved in this lawsuit would have been exempt as an "isolated transaction", since two of the three other conveyances were transferd to related corporations which were "not for gain or profit" within the meaning of 57-11-2(2), UCA, 1953, and one of those conveyances was of gas and oil rights which was also exempt under 57-11-4(2)(e), UCA, 1953. The only other transaction was an unrelated exchange of 5 acres for furniture which was remote in time.

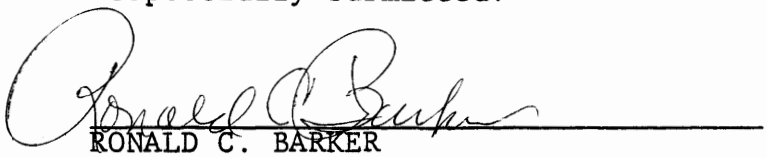
The Utah Act simply does not apply under the facts which required that the judgment be vacated and set aside.

The Court's attempt to dismiss the second claim "without prejudice" after trial is in error. The Court should correct

the dismissal to state that it was with prejudice.

DATED this 28th day of August, 1980.

Respectfully submitted.



RONALD C. BARKER
Attorney for Defendants-Appellants
2870 South State Street
Salt Lake City, Utah 84115

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered a copy of the foregoing to Wayne G. Petty, Attorney for Respondants - Plaintiffs, 600 Deseret Plaza, Salt Lake City, Utah 84111, this 28th day of August, 1980.

Ronald C. Barker